



## Drone attacks and the killing of Anwar al-Awlaqi: legal issues

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Anwar al-Awlaqi, a dual US-Yemeni citizen described as the “leader of external operations for Al-Qaeda in the Arabian Peninsula”, was killed by a US drone attack in Yemen on 30 September 2011. Whether this was legal under international or US law is a matter of considerable debate.

The main arguments in favour of the legality of the killing of Anwar al-Awlaqi are that:

- Al-Awlaqi was taking a direct part in hostilities against the US and therefore could lawfully be targeted under International Humanitarian Law (IHL).
- The US was allowed to use force in Yemen because Yemen had consented.
- Or, alternatively, it was a lawful act of self-defence because Yemen was unwilling or unable to prevent future attacks on the US.
- Al-Awlaqi’s human rights were not breached because he was not within the US’s jurisdiction.
- Al-Awlaqi’s constitutional rights to due process were met.

The main arguments against its legality are that:

- The US is not engaged in an armed conflict in Yemen, where the killing took place, so IHL did not apply.
- It did not meet the requisite conditions to be lawful self-defence.
- It was an extrajudicial killing that breached international human rights law.
- Al-Awlaqi’s constitutional rights to due process were not met.

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## 1 Background

Anwar al-Awlaqi (or Aulaqi or Awlaki), a dual US-Yemeni citizen, was killed by a US drone attack in Yemen on 30 September 2011. His death was first reported by the Yemeni Foreign Press Office and subsequently confirmed by US officials and US President Barack Obama. Another US citizen, Samir Khan, was killed in the same attack.

President Obama described al-Awlaqi as the “leader of external operations for Al-Qaeda in the Arabian Peninsula” (AQAP). Al-Awlaqi is often wrongly credited as the leader of AQAP.<sup>1</sup> He is said to have inspired or directed at least four plots within the US, including the failed underwear bomb plot in Detroit.

Al-Awlaqi had been a primary target of the US government for several years, with *The New York Times* reporting in April 2010 that the US government had added his name to a targeted killing list – an allegation that was not denied.<sup>2</sup>

The US Justice Department apparently drew up a memo in 2010 concluding that the targeting of al-Awlaqi was lawful, but have refused to make this public.<sup>3</sup> Details of the memo were published on the front page of the *New York Times* on 8 October 2011.<sup>4</sup>

## 2 International humanitarian law

The rules on targeting are set out in international humanitarian law (IHL), a body of law that governs the conduct of parties to an armed conflict. For the rules to apply in this case, one would need to determine: (1) whether the US is in armed conflict; (2) if so, whether the geographical scope of that conflict included Yemen; and (3) whether al-Awlaqi was a legitimate target. A further question is whether the CIA or the US armed forces carried out the attack.

### Was the attack part of an armed conflict?

There is no treaty law providing a definition of ‘armed conflict’ and contemporary international law does not require a declaration of war for IHL to apply. The most authoritative guidance, and one that is now regarded as declaratory of international law, is that:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups within a State.<sup>5</sup>

Armed conflicts are categorised under international law as either international armed conflicts (IACs) or non-international armed conflicts (NIACs), and are distinguished on that basis of the parties to the conflict. It is important to keep this distinction in mind, because different rules apply depending on the type of conflict under consideration.

- IACs are those between two or more states.<sup>6</sup> Some authorities consider that the duration or intensity of the violence are not relevant criteria for determining the existence of an

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<sup>1</sup> “AQAP after Awlaqi”, *Jane's Terrorism and Security Monitor*, 7 October 2011

<sup>2</sup> “JTIC Briefing: Implications of the death of Awlaqi – Update”, Jane's Terrorism and Insurgency Centre, 3 October 2011

<sup>3</sup> See Jack Goldsmith, “Release the al-Awlaqi OLC opinion, Or Its Reasoning”, *Lawfare*, 3 October 2011

<sup>4</sup> Charlie Savage, “Secret U.S. Memo Made Legal Case to Kill a Citizen”, *New York Times*, 8 October 2011

<sup>5</sup> *Prosecutor v Tadić* (1996) 105 ILR 419, 488

<sup>6</sup> or between a state and a national liberation movement provided the requisite conditions have been fulfilled: 1949 Geneva Conventions Additional Protocol I, articles 1(4) and 96 (3)

IAC.<sup>7</sup> Others argue that a certain level of violence is required for a situation to be classified as an IAC.<sup>8</sup> The UK Ministry of Defence suggests that whether any particular situation crosses the threshold so as to become an armed conflict will depend on all the surrounding circumstances.<sup>9</sup>

- NIACs involve hostilities between a state and an organised non-state armed group (the non-state party), or between such groups themselves. For IHL to apply, two elements must be satisfied:
  1. the parties involved must demonstrate a certain level of organisation, and
  2. the violence must reach a certain level of intensity.<sup>10</sup>
- Situations of violence that do not meet these criteria are governed by domestic law informed by human rights law, which is usually more restrictive than IHL.

A crucial legal difference between IACs and NIACs is that there is no 'combatant' or 'POW' status in NIAC.

Although some experts suggest that the 'transnational' or 'extraterritorial' conflicts between states and non-state actors such as terrorist groups test these definitions, the International Committee of the Red Cross (ICRC) argues that NIACs can involve an 'extraterritorial' element as long as any states involved are not on opposing sides. In its view, "There does not appear to be, in practice, any current situation of armed violence between organised parties that would not be encompassed by one of the two classifications".<sup>11</sup>

The US position is that it is in an "armed conflict with Al-Qaeda, as well as the Taliban and associated forces".<sup>12</sup> In other words, it is engaged in NIACs with these organised armed groups.

An opposing view is that the conflict with al-Qaeda is "too diffuse and sporadic to satisfy the necessary factual intensity of conflict".<sup>13</sup> In other words, the two-fold test that determines the existence of an NIAC are not satisfied, so IHL does not apply.

The ICRC does not consider that a conflict of global dimensions is or has been taking place between al-Qaeda (and its associated groups) and the US. It prefers to take a case-by-case approach to classifying particular violent situations in the fight against terrorism:

Since the horrific attacks of September 11<sup>th</sup> 2001 the ICRC has referred to a multifaceted "fight against terrorism". This effort involves a variety of counter-terrorism measures on a spectrum that starts with nonviolent responses – such as intelligence gathering, financial sanctions, judicial cooperation and others – and includes the use of force at the other end. As regards the latter, the ICRC has taken a case by case

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<sup>7</sup> International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts – Report*, October 2011, p7

<sup>8</sup> International Law Association, *Use of Force Committee, Final Report on The Meaning of Armed Conflict in International Law*, August 2010

<sup>9</sup> Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004 edition, para 3.3.1

<sup>10</sup> See International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts – Report*, October 2011, p8

<sup>11</sup> International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts – Report*, October 2011, p8

<sup>12</sup> Harold Koh, US Legal Adviser, *The Obama Administration and International Law*, 25 March 2010

<sup>13</sup> See APV Rogers and Dominic McGoldrick, "Assassination and targeted killing – the killing of Osama bin Laden", *International and Comparative Law Quarterly* vol 60, July 2011, pp778-788 at 779

approach to legally analyzing and classifying the various situations of violence that have occurred in the fight against terrorism. Some situations have been classified as an IAC, other contexts have been deemed to be NIACs, while various acts of terrorism taking place in the world have been assessed as being outside any armed conflict. It should be borne in mind that IHL rules governing the use of force and detention for security reasons are less restrictive than the rules applicable outside of armed conflicts governed by other bodies of law. As noted in the ICRC's report on IHL and the Challenges of Contemporary Armed Conflicts submitted to the International Conference in 2007, it is believed to be inappropriate and unnecessary to apply IHL to situations that do not amount to armed conflict.<sup>14</sup>

It goes on to assert that the distinction between armed conflict and anti-terrorism measures are important and should be maintained:

There are several important distinctions between the legal frameworks governing armed conflict and terrorism, based primarily on the different reality that each seeks to govern. The main divergence is that, in legal terms, armed conflict is a situation in which certain acts of violence are allowed (lawful) and others prohibited (unlawful), while *any* act of violence designated as terrorist is always unlawful. As already mentioned, the ultimate aim of armed conflict is to prevail over the enemy's armed forces. For this reason, the parties are permitted, or at least are not prohibited from, attacking each other's military objectives. Violence directed at those targets is not prohibited as a matter of IHL, regardless of whether it is inflicted by a state or a non-state party. Acts of violence against civilians and civilian objects are, by contrast, unlawful because one of the main purposes of IHL is to spare civilians, as well as civilian objects, from the effects of hostilities. IHL thus regulates both lawful and unlawful acts of violence and is the only body of international law that takes such a two-pronged approach.

There is no similar dichotomy in the international norms governing acts of terrorism. The defining feature of any act legally classified as "terrorist" under either international or domestic law is that it is always penalized as criminal: no act of violence legally designated "terrorist" is, or can be, exempt from prosecution. [...]

The legal regimes governing armed conflict and terrorism also differ in that only IHL is based on the notion of equality of rights and obligations of the parties to an armed conflict (by way of reminder, equality of rights and obligations under IHL does not mean that such equality exists between the parties to a NIAC under domestic law). Thus, any party to an armed conflict is equally prohibited from directly attacking enemy civilians, but is not prohibited from attacking the adversary's military objectives. The same principle obviously does not apply to acts of terrorism.

A crucial reason for not legally conflating armed conflict and acts of terrorism is that the legal framework governing armed conflict already prohibits the great majority of acts that would be designated as 'terrorist' if they were committed in peacetime. IHL both: i) prohibits, as war crimes, specific acts of terrorism perpetrated in armed conflict, and ii) prohibits, as war crimes, a range of other acts that would commonly be deemed 'terrorist' if committed outside armed conflict.<sup>15</sup>

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<sup>14</sup> International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts – Report*, October 2011, p10

<sup>15</sup> International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts – Report*, October 2011, pp48-49

## Does IHL apply to US actions in Yemen?

Even if it is accepted that there is an ongoing armed conflict between the US and al-Qaeda, a major question that divides experts is the geographical reach of IHL. Does IHL apply only to 'theatres of conflict' or 'active battlefields' – terms that do not have an agreed definition – or does it follow the members of the group involved in the armed conflict?

Some experts are of the view that, although the US is not 'at war' with Yemen, Yemen could be considered an 'active' or 'hot' battlefield'.<sup>16</sup>

The US view is that IHL governs the 'hostilities' between its forces and those of an organised non-state armed group – in this case, al-Qaeda – irrespective of location. As Ashley Deeks comments:

Perhaps the most controversial aspect of this position is the U.S. argument that this conflict can and does extend beyond the "hot battlefield" of Afghanistan to wherever members of al Qaeda are found. For the United States (and others that adopt this position), once a state is in an armed conflict with a non-state armed group, that conflict follows the members of that group wherever they go, as long as the group's members continue to engage in hostilities against that state (either on the "hot battlefield" or from their new location).<sup>17</sup>

In this view, al-Awlaqi was targetable wherever he went. Being in Yemen rather than, say, Afghanistan did not offer him protection.

Others, including the ICRC, consider that armed conflicts have geographic limits as a matter of international law, and that the existence of an armed conflict is determined by the facts on the ground in the state in question:

Pursuant to other views, which the ICRC shares, the notion that a person "carries" a NIAC with him to the territory of a non-belligerent state should not be accepted. It would have the effect of potentially expanding the application of rules on the conduct of hostilities to multiple states according to a person's movements around the world as long as he is directly participating in hostilities in relation to a specific NIAC. In addition to possible *ius ad bellum* [lawfulness of the use of force by states] issues that this scenario would raise there are others, such as the consequences that would be borne by civilians or civilian objects in the non-belligerent state(s). The proposition that harm or damage could lawfully be inflicted on them in operation of the IHL principle of proportionality because an individual sought by another state is in their midst (the result of a "nexus" approach), would in effect mean recognition of the concept of a "global battlefield". It is thus believed that if and when the requisite *ius ad bellum* [laws of armed conflict or IHL] test is satisfied, the lawfulness of the use of force against a particular individual in the territory of a non-belligerent state would be subject to assessment pursuant to the rules on law enforcement (see also below).

In the *Congo v Uganda* case,<sup>18</sup> the International Court of Justice (ICJ) found that where armed force cannot be attributed to a state, there is no right of self-defence against that state. Uganda's use of force on the territory of the Democratic Republic of Congo (DRC) was

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<sup>16</sup> See Ashley S. Deeks, "[Pakistan's Sovereignty and the Killing of Osama Bin Laden](#)", *ASIL Insights* Volume 15 Issue 11, 5 May 2011

<sup>17</sup> Ashley S. Deeks, "[Pakistan's Sovereignty and the Killing of Osama Bin Laden](#)", *ASIL Insights* Volume 15 Issue 11, 5 May 2011. See also Kenneth Anderson, "[Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a 'Legal Geography of War'](#)", 26 April 2011, in Peter Berkowitz, ed, *Future Challenges in National Security and Law*, WCL Research Paper No. 2011-16

<sup>18</sup> [Armed Activities on the Territory of the Congo \(Democratic Republic of Congo v. Uganda\)](#) 2005 ICJ 301, 19 December 2005

therefore unlawful, even though according to Uganda its aim was to halt the cross-border incursions by armed groups based in the DRC. In reaching this conclusion, the Court found that because DRC did not control the armed groups on its territory, it was not legally responsible for their conduct; it therefore followed that the DRC's failure to take action against the groups did not justify Uganda's use of force in self-defence in the DRC's territory.

### **Was al-Awlaqi a legitimate target?**

One of the fundamental tenets of IHL is the principle of distinction between combatants and civilians.<sup>19</sup> The aim of this principle is to ensure, as far as possible, that conflict is waged only between combatants of the belligerent parties. It follows that enemy combatants and military objectives are lawful targets: the former may be killed and the latter destroyed. By contrast, civilians and civilian objects may not be targeted. Nor may civilians participate actively in the fighting. If they do, they lose their civilian status and may be lawfully targeted.<sup>20</sup>

Although assassinations are generally considered to be prohibited in times of both war and peace,<sup>21</sup> the conduct that amounts to assassination differs in the two cases. In the context of IHL, the prohibited conduct involves the targeted killing of an individual by perfidious (treacherous) means. In peacetime, the element of perfidy is absent. According to the UK's *Manual of the Law of Armed Conflict*:

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, but the following rules would be applicable in such a case:

- a. attacks may not be directed against civilians, see paragraph 5.3;
- b. attacks must be limited to military objectives, including enemy combatants, see paragraph 5.4;
- c. only combatants have the right to participate directly in hostilities;
- d. enemy combatants may not be killed by resort to perfidy, see paragraph 5.9.<sup>22</sup>

The ICRC's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* sets out its view on who may be legitimate targeted in an armed conflict. The guidance distinguishes between:

- members of organised armed forces or groups, the latter defined as persons whose continuous function is to conduct hostilities on behalf of a party to an armed conflict; and
- civilians, that is people who do not directly take part in hostilities, or who do so on a merely spontaneous, sporadic or unorganised basis

In NIAC, the decisive criterion for individual membership in an organised armed group is whether a person performs a continuous combat function for the group. As long as the

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<sup>19</sup> Other fundamental principles governing the parties to an armed conflict include military necessity, humanity and proportionality: Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004 edition

<sup>20</sup> Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004 edition, para 2.5.2

<sup>21</sup> Although see L Green, *The Contemporary Law of Armed Conflict*, 3<sup>rd</sup> edition, 2008, p169, for arguments that assassination is contrary to the customary law of armed conflict.

<sup>22</sup> Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004 edition, para 5.13

person continues to do so, he or she stops being a civilian and loses protection against direct attack.

The US view is that al-Awlaqi's operational leadership of AQAP was such that he had assumed a continuous combat function as a member of an organised armed group of a party to an armed conflict, and therefore could be targeted with lethal force.

Even where IHL applies, it does not preclude the option of arrest, apprehension and prosecution.<sup>23</sup>

### **Did the CIA carry out the attack?**

Although the US government has neither confirmed nor denied the practice, there have been widespread reports of the role of the CIA – which is a civilian organisation – in conducting targeted attacks using drones in Yemen, Pakistan and Somalia.<sup>24</sup>

IHL does not prohibit the CIA from conducting targeting operations. And while members of the CIA who take a direct part in hostilities lose their civilian protected status, the practical implications in this particular situation are limited.

Nevertheless, there are legal and policy implications of a state authorising a civilian organisation to take a direct part in hostilities. For instance, they – as with members of the US armed forces – are potentially liable to criminal prosecution under the laws of the territorial state, particularly if they have killed or injured civilians. Other issues of concern include: whether targeting decisions by the CIA are being taken in compliance with IHL; and the apparent lack of transparency and accountability.<sup>25</sup>

## **3 Legal avenues for using force**

The US would lawfully be permitted to use force in Yemen only in three circumstances:

- Yemen consented; or
- the UN Security Council authorised it; or
- the US was acting in self-defence against *either*
  - (i) al-Qaeda (and the link between AQAP and al-Qaeda is such that the authority derived from the attacks of 11 September 2001) *or*
  - (ii) AQAP (if there is adequate evidence to show that AQAP was responsible for an 'armed attack' against the US)

and Yemen was 'unwilling or unable' to suppress the threat to the US unilaterally.<sup>26</sup>

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<sup>23</sup> Kenneth Anderson, "[Anwar Al-Awlaqi Killed in Drone Strike in Yemen](#)", *Opinio Juris*, 30 September 2011

<sup>24</sup> See Mary Ellen O'Connell, [International Law and the Use of Drones](#), Chatham House International Law Discussion Group Summary, October 2010, p2

<sup>25</sup> See Michael N. Schmitt, [International Law and the Use of Drones](#), Chatham House International Law Discussion Group Summary, October 2010, p8

<sup>26</sup> See for example Ian Brownlie, "International Law and the Activities of Armed Bands", 7 *International and Comparative Law Quarterly* 712, 732 (1958); Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010); Harold Koh, US Legal Adviser, "[The Obama Administration and International Law](#): Keynote Address at the American Society of International Law 104th Annual Meeting", 25 March 2010.

### 3.1 Consent

It is unclear whether Yemen knew of or consented to the attack before it happened. Some commentators have argued that the speed with which Yemen divulged information about the attack (it was announced in a Yemeni Foreign Press Office announcement at 5:30am on 30 September 2011)<sup>27</sup> suggested at least a channel of communication, but both Yemen and the US have been reluctant to comment.

Diplomatic cables obtained by WikiLeaks suggested that Yemen's president had secretly granted the US permission to fire missiles on Yemeni soil:

In a 2009 meeting with John O. Brennan, President Obama's top counterterrorism adviser, Mr. Saleh offered an unusual bargain. He "insisted that Yemen's national territory is available for unilateral CT operations by the U.S." — but with a catch. If there were to be an attack on a Western target, Mr. Saleh said, it would not be his fault.

"I have given you an open door on terrorism," he said, "so I am not responsible."

In fact, despite such rhetoric, Mr. Saleh has imposed strict limits over American operations in his country, even as he has helped disguise them as his own.

When the first two American missile strikes against Qaeda camps in Yemen took place in December 2009, Mr. Saleh publicly claimed that they were Yemeni strikes to avert any anti-American backlash. Gen. David H. Petraeus flew to Yemen to thank the president, who promised to keep up the ruse. "We'll continue saying the bombs are ours, not yours," Mr. Saleh said, according to a cable.<sup>28</sup>

### 3.2 UN authorisation

There is no specific Security Council Resolution expressly authorising the use of force against al-Awlaqi, AQAP or al-Qaeda generally. Nevertheless, the Security Council has taken various measures in respect of al-Qaeda under the authority of Chapter VII of the UN Charter. Since 1999 it has adopted a series of resolutions that created a sanctions regime in respect of al-Qaeda, requiring states to freeze assets, introduce travel bans and comply with designated arms embargoes. The list of individuals and entities associated with al-Qaeda to which the sanctions regime applies included al-Awlaqi from 20 July 2010.<sup>29</sup>

[Resolution 1373 \(2001\)](#), passed just days after the 11 September attacks, calls on states to "take the necessary steps to prevent the commission of terrorist acts".<sup>30</sup> This phrase is capable of wide interpretation, but it also requires states to ensure that terrorists are "brought to justice",<sup>31</sup> and stresses the need to comply with the UN Charter when combating terrorism,<sup>32</sup> which includes complying with the general prohibition on the use of force and its limited exceptions.<sup>33</sup> The Security Council has in subsequent resolutions reaffirmed the

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<sup>27</sup> David Ignatius, "[The killing of Anwar al-Awlaqi: The White House's drone attack policy](#)", *Washington Post*, 30 September 2011

<sup>28</sup> "[Yemen Sets Terms of a War on Al Qaeda](#)", *New York Times*, 4 December 2010

<sup>29</sup> Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, [The List established and maintained by the 1267 Committee with respect to individuals, groups, undertakings and other entities associated with Al-Qaida](#), last updated 30 November 2011 (see entry QI.A.283.10, p8)

<sup>30</sup> Operative para 2(b)

<sup>31</sup> Operative para 2(e)

<sup>32</sup> Preamble, para 5

<sup>33</sup> [UN Charter article 2\(4\)](#)

need to combat international terrorism in accordance with the UN Charter and international law, including international human rights law and IHL.

### 3.3 Self defence

There is widespread agreement among states that the attacks by al-Qaeda on 11 September 2001 constituted an 'armed attack' that in principle allowed the US to use force in self-defence.<sup>34</sup>

Security Council resolution 1368, adopted on 12 September 2001, and Resolution 1373, adopted two weeks later, both reaffirmed the inherent right of states to individual or collective self-defence. Self-defence, codified in [Article 51 of the UN Charter](#), is one of the few accepted exceptions to international law's general prohibition on the use of force. Force used in self-defence must comply with the rules of IHL, and is also subject to the principles of necessity and proportionality.<sup>35</sup>

#### Armed attack

However, experts continue to divide over whether states may lawfully resort to force in self-defence under Article 51 if the 'armed attack' was not carried out *by or on behalf of a state* – which is still the legal test applied by the International Court of Justice.<sup>36</sup> This has triggered calls for the 'armed attack' test to be adapted for a world where 'non-state actors' regularly launch attacks against states, often from external bases.<sup>37</sup>

#### Anticipatory or pre-emptive self-defence

The US has also invoked a right to anticipatory or even pre-emptive self-defence.<sup>38</sup>

Although Article 51 does not expressly provide for anticipatory self-defence, state practice suggests that under customary international law, a state threatened with an *imminent* armed attack may be entitled to take appropriate anticipatory measures to repel such a threat. These measures remain subject to the principles of necessity and proportionality which constrain the use of force.<sup>39</sup>

However, there is widespread agreement that the right to use force in self-defence does not extend to non-imminent threats.<sup>40</sup>

Thus, it has been suggested that "a forceful action to disrupt a terrorist act being prepared in another state might, depending upon the circumstances, be legitimate; force to attack a person who may in the future contemplate such activity is not".<sup>41</sup>

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<sup>34</sup> See [The legal basis for the invasion of Afghanistan](#), Library Standard Note SN/IA/5340, 26 February 2010

<sup>35</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US), 1986 ICJ 14, 194. See Christine Gray, *International Law and the Use of Force*, 3<sup>rd</sup> edition, 2008, pp203-7

<sup>36</sup> See Karl Zemanek, "[Armed Attack](#)", *Max Planck Encyclopedia of Public International Law*, last updated April 2009 (accessed 11 May 2011)

<sup>37</sup> See Ashley S. Deeks, "[Pakistan's Sovereignty and the Killing of Osama Bin Laden](#)", *ASIL Insights* Volume 15, Issue 11, 5 May 2011; Christine Gray, *International Law and the Use of Force*, 3<sup>rd</sup> edition, 2008, ch5

<sup>38</sup> See David Yost, "NATO and the anticipatory use of force", *International Affairs* 83: 1 (2007) 39-68; Christine Gray, *International Law and the Use of Force*, 3<sup>rd</sup> edition, 2008, pp208-217

<sup>39</sup> See Rebecca Wallace and Olga Martin-Ortega, *International Law*, 6<sup>th</sup> edition, 2009, pp297-8

<sup>40</sup> Christine Gray, *International Law and the Use of Force*, 3<sup>rd</sup> edition, 2008, pp212; Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, pp4-5 and pp8-9

<sup>41</sup> Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, p9

## Necessity and proportionality

The requirement of necessity means that force can be used in self-defence only to ensure that the armed attack (or imminent threat) is stopped.<sup>42</sup> In the *Nicaragua*<sup>43</sup> and *Nuclear Weapons*<sup>44</sup> decisions, the International Court of Justice (ICJ) held that even following a significant attack, there is no right to use force in self-defence if the use of force is not necessary to prevent ongoing or future attacks. There must be no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack.<sup>45</sup>

There is a general consensus that the force used in self-defence must be proportionate. This requires that the level of force used is not greater than that necessary to end the attack or remove the threat.<sup>46</sup> The UK Attorney General stated in the House of Lords on 21 April 2004 that “the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat”.<sup>47</sup>

## ‘Unwilling or unable’

There is an argument that a state can act in self-defence against non-state actors based on the territory of another state if the territorial state is ‘unwilling or unable’ to prevent the non-state actor’s attacks. International law gives little guidance about what the ‘unwilling or unable’ test requires. Ashley Deeks suggests a few principles that can be ascertained from state practice:

The principles might include requirements that the acting state: (1) ask the territorial state to address the threat and provide adequate time for the latter to respond; (2) reasonably assess the territorial state’s control and capacity in the region from which the threat is emanating; (3) reasonably assess the territorial state’s proposed means to suppress the threat; and (4) evaluate its own prior interactions with the territorial state. However, an important exception to the requirement that the acting state request that the territorial state act arises where the acting state has strong reasons to believe that the territorial state is colluding with the non-state actor, or where asking the territorial state to take steps to suppress the threat might lead the territorial state to tip off the non-state actor before the acting state can undertake its mission.<sup>48</sup>

In this context, the requirement of ‘imminence’ means that action in self-defence by another state may not be taken save for the most compelling emergency.<sup>49</sup>

An alternative argument is that acts of self-defence against non-state actors do not require the consent of the state where they take place, because they are not an attack on or against its territory.<sup>50</sup> However, this view is not yet clearly established in international law.

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<sup>42</sup> See Christine Gray, *International Law and the Use of Force*, 3<sup>rd</sup> edition, 2008, pp203-7

<sup>43</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v US)*, 1986 ICJ 14, 27 June 1986

<sup>44</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226, 245 para 41, 8 July 1996

<sup>45</sup> Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States In Self-Defence*, Chatham House Working Paper, October 2005, pp7-8

<sup>46</sup> Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States In Self-Defence*, Chatham House Working Paper, October 2005

<sup>47</sup> HL Deb 21 April 2004 c371

<sup>48</sup> Ashley S. Deeks, “Pakistan’s Sovereignty and the Killing of Osama Bin Laden”, *ASIL Insights* Volume 15 Issue 11, 5 May 2011

<sup>49</sup> Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States In Self-Defence*, Chatham House Working Paper, October 2005, p13

<sup>50</sup> See Jordan J Paust, “Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan”, *Journal of Transnational Law & Policy*, Vol 19 No 2, 2010, p 237

## 4 Are drone attacks a special case?

Attacks by armed drones (unmanned aerial vehicles) are governed by the laws appropriate to the situation (regardless of who operates them).

In situations that do not amount to armed conflict, the domestic law of the territorial state and human rights laws apply. The missiles and bombs carried by drones are not the type of weaponry permitted by international human rights law in law enforcement operations.<sup>51</sup>

In armed conflict (including in situations of self-defence), there is “no doubt” that the normal laws of IHL apply to the use of drones.<sup>52</sup> This means that their use is governed by rules on military objectives, precautions in attack, proportionality, perfidy and persons *hors de combat*.<sup>53</sup>

The main incentives for using drones for armed attacks are that they can be very precise, thus minimising the risk of civilian casualties, and that they do not expose the operators to attack.

On the other hand, because they are operated remotely, concerns have been raised that this might increase the opportunities for attacking an adversary and thus put civilians at greater risk of incidental harm.<sup>54</sup> The ICRC has identified some specific risks associated with this type of weaponry:

Studies have shown that disconnecting a person, especially by means of distance (be it physical or emotional) from a potential adversary makes targeting easier and abuses more likely. It has also been noted that challenges to the responsible operation of such a system include the limited capacity of an operator to process a large volume of data, including contradictory data at a given time (“information overload”), and the supervision of more than one such system at a time, leading to questions about the operator’s ability to fully comply with the relevant rules of IHL in those circumstances.<sup>55</sup>

Human rights advocates have grown increasingly uncomfortable with drone attacks. In October 2011, the UN rapporteur for summary executions and extrajudicial killings, Christof Heyns, described as “highly problematic” their use in territories where there is no recognised armed conflict taking place:

Turning to the issue of targeted killing, the Special Rapporteur said 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. While these operations may be designed to hit a particular target, civilian casualties remain, and it is used on such a large scale that it can hardly be described as targeted.

“The use of such methods by some States to eliminate opponents in countries around the world raises the question why other States should not engage in the same

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<sup>51</sup> ME O’Connell, “[The International Law of Drones](#)”, *ASIL Insight*, vol 14 issue 37, 12 November 2010

<sup>52</sup> International Committee of the Red Cross, [International Humanitarian Law and the challenges of contemporary armed conflicts – Report](#), October 2011, p36

<sup>53</sup> APV Rogers and Dominic McGoldrick, “Assassination and targeted killing – the killing of Osama bin Laden”, *International and Comparative Law Quarterly* vol 60, July 2011, pp778-788 at 781

<sup>54</sup> International Committee of the Red Cross, [International Humanitarian Law and the challenges of contemporary armed conflicts – Report](#), October 2011, p39

<sup>55</sup> International Committee of the Red Cross, [International Humanitarian Law and the challenges of contemporary armed conflicts – Report](#), October 2011, p39

practices. The danger is one of a global war without borders, in which no-one is safe," Heyns said.<sup>56</sup>

His predecessor had said that drone strikes may be legal in some circumstances, but in others they may violate international human rights law.<sup>57</sup>

John Bellinger, the Legal Adviser at the US State Department during the Bush administration, suggests that the US should seek greater international support for its position on drones:

Even if Obama administration officials are satisfied that drone strikes comply with domestic and international law, they would still be wise to try to build a broader international consensus. The administration should provide more information about the strict limits it applies to targeting and about who has been targeted. One of the mistakes the Bush administration made in its first term was adopting novel counterterrorism policies without attempting to explain and secure international support for them.<sup>58</sup>

Other governments have not publicly supported or opposed US policy on using drones for armed attack.

## 5 Would human rights law apply?

International human rights law (IHRL) is normally considered to apply to everyone under the effective control of the acting state.

The UN Human Rights Committee states that the rights in the 1996 International Covenant on Civil and Political Rights (ICCPR) must be available to anyone "within the power or effective control" of a state party, even in situations of armed conflict.<sup>59</sup> Accordingly one would need to determine whether or not al-Awlaqi could be considered to be in the power or effective control of the US whilst he was in Yemen.

The US, however, takes the view that IHRL, including the ICCPR, does not bind the US extraterritorially. In other words, it does not apply to US actions abroad, particularly in situations of armed conflict when, in any event, IHL applies.

The ICRC considers that the two regimes are complementary, but recognises that there are situations where they would produce different outcomes.<sup>60</sup> For example, IHRL provides that "the intentional use of lethal force may not exceed what is strictly or absolutely necessary to protect life".<sup>61</sup> In contrast, since the use of lethal force is inherent to armed conflict, IHL permits parties to attack each others' military objectives and enemy personnel. What is prohibited in IHL is intentionally directing attacks against civilians and civilian objects.

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<sup>56</sup> "UN human rights expert challenges 'targeted killing' policies", *Office of the High Commissioner for Human Rights*, 20 October 2011

<sup>57</sup> "Study on targeted killings", addendum to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6, 28 May 2010, paras 79-86

<sup>58</sup> John Bellinger, "Will drone strikes become Obama's Guantanamo?", *Washington Post*, 2 October 2011

<sup>59</sup> UN Human Rights Committee GC 31, 2004, para 10

<sup>60</sup> International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts – Report*, October 2011

<sup>61</sup> International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts – Report*, October 2011, p19. See also *International Covenant on Civil and Political Rights*, Article 6(1)

US human rights groups were quick to condemn al-Awlaqi's killing on the basis that it was an arbitrary killing and therefore violated IHRL.<sup>62</sup> This criticism is based on the view that there is no armed conflict in Yemen, so IHRL rather than IHL governs US operations there.

## 6 Specific aspects of US law

### Is assassination prohibited?

US Executive Order 12333 prohibits assassination:

No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination.<sup>63</sup>

But Harold Koh, the US State Department Legal Adviser, has argued that the Order does not apply in armed conflict or self-defence situations:

Some have argued that our targeting practices violate domestic law, in particular, the long-standing domestic ban on assassinations. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination”.<sup>64</sup>

### Who can carry out such killings?

The US's September 2001 *Authorization to Use Military Force Act*<sup>65</sup> empowered the President to authorise “all necessary and appropriate force” against nations, organisations or persons who planned, committed or aided the September 11 attacks.

US domestic law provides authority for the President to direct either the US military, or the CIA, or both acting together, to undertake the use of force abroad.

### Due process

US citizens have certain constitutional rights wherever they are in the world. These include the Fourth Amendment right to be free from unreasonable seizure and the Fifth Amendment right not to be deprived of life without due process.

The American Civil Liberties Union has questioned the legality of al-Awlaqi's killing. In doing so, it issued a [statement](#) raising the issue of due process under US law:

The targeted killing program violates both US and international law. As we've seen today, this is a program under which American citizens far from any battlefield can be executed by their own government without judicial process, and on the basis of standards and evidence that are kept secret not just from the public but from the courts. The government's authority to use lethal force against its own citizens should be limited to circumstances in which the threat to life is concrete, specific, and imminent. It is a mistake to invest the President — any President — with the unreviewable power to kill any American whom he deems to present a threat to the country.

Although the US government appears to have accepted that a US citizen deemed to be a targetable participant in a terrorist group in an armed conflict can have some due process

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<sup>62</sup> Article 6(1) ICCPR states “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

<sup>63</sup> [United States Intelligence Activities](#), EO 12333, 4 December 1981, as amended, para 2.11

<sup>64</sup> HH Koh, US Legal Adviser, [The Obama Administration and International Law](#), 25 March 2010

<sup>65</sup> AUMF, P.L. 107-40

rights outside the US, it does not seem to consider that these rights require the US to attempt to arrest him or to warn him before using lethal force.<sup>66</sup>

John Bellinger suggests that the constitutional requirements were met in al-Awlaqi's case:

Some human rights groups have asserted that due process requires prior judicial review before killing an American, but it is unlikely that the Constitution requires judicial involvement in the case of a U.S. citizen engaged in terrorist activity outside this country. Administration lawyers undoubtedly reviewed the targeting of Awlaki even more carefully than of a non-American, and the Justice Department reportedly prepared an opinion concluding that his killing would comply with domestic and international law. This is likely to be considered sufficient due process under US constitutional standards.<sup>67</sup>

### **Challenging targeting in the domestic courts**

In December 2010 a US judge dismissed an attempt to secure an injunction against the US government for targeting al-Awlaqi.<sup>68</sup>

The complaint alleged that both the US Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats.

The claim was rejected on the grounds that it involved a non-justiciable political question. The US government's unilateral decision to kill a US citizen overseas was "constitutionally committed to the political branches" and therefore judicially unreviewable..

This decision may preclude any US citizen from ever being able to challenge the legality of being the subject of a targeted killing by the US executive branch.

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<sup>66</sup> Robert Chesney, "[Al-Awlaqi as an Operational Leader Located In a Place Where Capture Was Not Possible](#)", *Lawfare*, 30 September 2011

<sup>67</sup> John Bellinger, "[Will drone strikes become Obama's Guantanamo?](#)", *Washington Post*, 2 October 2011

<sup>68</sup> [NASSER AL-AULAQI, on his own behalf and as next friend of Anwar Al-Aulaqi, Plaintiff, v BARACK H. OBAMA, in his official capacity as President of the United States; ROBERT M. GATES, in his official capacity as Secretary of Defense; and LEON E. PANETTA, in his official capacity as Director of the Central Intelligence Agency, Defendants](#), Civil Action No 10-1469 (JDB)

## 7 Further reading

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