WAR AND THE VANISHING BATTLEFIELD

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These days, the battlefield hardly seems to be a term of art in international humanitarian law discourse. The laws of war are about conflicts, international or non-international, and hostilities or zones of combat. It is customary to contrast the conventional war of yesterday that occurred in relatively neatly delineated spaces with today's complex,[1] asymmetrical,[2] or even post-modern[3] wars that do not depend on the classical battlefield. Certainly, the idea of disciplined armies meeting in a rural setting at dawn to fight each other off belongs to distant memories.

This article will suggest that the application of the laws of war nonetheless remains more haunted by the idea of the battlefield than is commonly acknowledged, and that the concept provides a crucial variable to understand the law's evolution. Indeed, it will contend that the "battlefield" continues to serve a strong role in assessing why, when and how international humanitarian law applies (or does not). In turn, the destructuring of the concept of the battlefield has had a strong impact on the very possibility of the laws of war, and of war itself. These issues have not escaped the attention of some international lawyers

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[1] *See generally* Kirk Mensch & Tim Rahschulte, *Military Leader Development and Autonomous Learning: Responding to the Growing Complexity of Warfare*, 19 HUM. RESOURCE DEV. Q. 263 (2008).

[2] *See generally* David L. Grange, *Asymmetric Warfare: Old Method, New Concern, in* NATIONAL STRATEGY FORUM REVIEW 1-5 (2000); Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict–a Tentative Conceptualization*, 91 INT'L REV. OF THE RED CROSS 95 (2009); Andrew Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, WORLD POLITICS: A Q. J. OF INT'L REL. 175 (1975); Michael Mazarr, *The Folly of "Asymmetric War,"* 31 WASH. Q. 33 (2008).

[3] *See* John Kiszely, POST-MODERN CHALLENGES FOR MODERN WARRIORS, DEFENSE ACAD. OF THE U.K.: THE SHRIVENHAM PAPERS – NO. 5 (Dec. 2007), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA510767; Dr. Steven Metz, ARMED CONFLICT IN THE 21ST CENTURY: THE INFORMATION REVOLUTION AND POST-MODERN WARFARE, U.S. ARMY WAR COLLEGE (Mar. 2000), *available at* http://www.au.af.mil/au/awc/awcgate/ssi/metz_info_rev.pdf.

but they have tended to be seen mostly through the prism of the most recent developments, notably the "War on Terror."[4] This article will suggest that the definition of the battlefield has always been central to the genesis and evolution of the laws of war, and that the idea of the battlefield captures more of what constitutes war as an activity than many other indicators.

Defining the battlefield in war is not only a question of militarily deciding where actual battle will occur, nor is it merely a theoretical or doctrinal exercise. Behind these efforts lies a more fundamental struggle to define what constitutes a *legitimate* battlefield and, with it, legitimate forms of war. During the era of colonization, for example, it became crucial to defining colonial wars that, because they occurred outside any conventional battlefield, colonizers could not be expected to abide by ordinary laws of war.[5] Movements of national liberation managed to obtain the recognition of armed attacks that often occurred far from the classical battlefield, even as some countries sought to deny them a status because of their shunning of conventional military operations. Contentiously, the Bush administration decided after September 11, 2011 (9/11) that the "War on terror's" battlefield was the entire world, a move that has been resisted as too simplistic and dangerous.[6] The International Committee of the Red Cross (ICRC) and other interested humanitarian parties have a complex role in both seeking to uphold a certain idea of the battlefield as a normative space, and seeking to adapt to changes that are being decided by actors on the ground.

In order to show how the fortunes of the idea of the battlefield affect the evolution of war, this article will highlight the origins of the idea and its connection to a view of warfare as a specific form of armed violence. Part I analyzes the role that the idea of the battlefield serves in the laws of war and, symmetrically, the role that the laws of war have in maintaining a certain fiction of the battlefield. In Part II, the article attempts to show some of the ways in which the regulatory role of the battlefield has been increasingly challenged. The Article concludes that the death of the battlefield significantly complicates the waging of war and may well herald the end of the laws of war as a way to regulate violence.

I. The Social Construction of the Battlefield

The concept of the battlefield has long structured the understanding of war. A battlefield is typically an area, limited in space and time, upon which a battle occurs. The battlefield may be created by the chance encounter of enemy troops, but it may also be agreed upon by opposite armies. The battlefield is not a clearly defined space, not even in the most traditional of battles. It is "an imagi-

[4] *See* Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965.

[5] Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,' in* INTERNATIONAL LAW AND ITS OTHERS 265-317 (2006).

[6] *See generally* HELEN DUFFY, THE" WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW (2005); Frédéric Mégret, *"War"? Legal Semantics and the Move to Violence*, 13 EUR. J. OF INT'L L. 361 (2002).

nary arena in which the bounds are seen to be the edges of the territory occupied by the two armies during the course of the fight."[7] But it is space nonetheless, one that has a core and a periphery and whose existence is premised on the ability to distinguish between what occurs within it and what is beyond it. For that space to have any meaning, however, it must be inscribed in a series of understandings about its purpose and its rules. The battlefield is, in other words, as much an *idea* as it is a space, and only when one understands the assumptions underlying the *idea* of the battlefield can one understand how the battlefield today has come under threat.

A. Origin and Purpose of the Battlefield

The battlefield has, of course, the utmost *military* significance. Battles are won not only by performance on the battlefield but also by the ability to define the battlefield and draw one's enemy to it. The battlefield, then, is also a goal for military domination. There is a rich military literature on how to control it. As one author puts it, "the soldiers themselves regard the battlefield as limited, a tangible area for which they can fight and of which they can take possession. Soldiers will treat some geographical feature as the limit which, when reached, marks the end of the battle."[8] The battlefield also has a rich symbolic allure, and is a central focus of war narratives. In the time that two armies encounter each other in the battlefield, that space "will assume the character of a sacred spot."[9] Former battlefields are often revered and take on an almost mystical value.

Aside from its sheer strategic and tactical value for the military, one could say that the battlefield more fundamentally structures what it means to do battle. The battlefield as such does not exist, in that it is like any other field except for a particular form of social activity that occurs or has occurred upon it. It is part of a sophisticated construction of reality that allows us to understand certain armed encounters as battles, themselves part of a larger thing called war. Calling an area a battlefield implies that one understands what occurred on it as part of that intellectual heritage, an intellectual heritage that, throughout the Middle Ages and beyond, saw the modern concept of war emerge. According to that concept, war is the use of violence for *public* purposes, typically involving more or less organized armies under responsible command. War is, therefore, typically not a chaotic or random violence of all against all but a contest of sovereign might. In that respect, war is imagined as both potentially extremely violent (the clash of armies in the field) yet strangely circumscribed to the battlefield.

The battlefield thus stands as a deeply social marker of war's limitation. There is more than a passing analogy between the battlefield and the fields on which sports are played. The sports field is a confined area within which a highly specialized activity occurs that will, in some cases, involve violent physical contact that would be prohibited if it occurred outside the field. In a paradox-

[7] JAMES MCRANDLE, THE ANTIQUE DRUMS OF WAR 39 (1994).

[8] *Id.* at 140.

[9] *Id.*

ical way, the battlefield is created by the "agreement " of both parties to engage something like a battle (if that fundamental implicit agreement is lacking then arguably, as we will see, the idea of a battlefield crumbles).[10] The battle occurs at the point where there is a mutual, even grudging, willingness to fight (otherwise flight or surrender prevent the battle from taking place at all). Although there may be considerable enmity between forces facing each other in battle, what characterizes battle historically is a shared understanding that there is such a thing as a battlefield, and that fighting should be conducted on, not beyond it. The battlefield circumscribes a space of exceptionality within which a highly unusual activity can take place and be recognizable as such to its participants. As Khan notes, "The concept of the battlefield provides logistical and psychological constraints on the scope of war."[11]

Arguably, though the constraints are not only logistical and psychological, they are also specifically *normative.* The battlefield is also, more deeply, a normative space, one that shapes the activities that are conducted within it and stands for a certain set of values. "Increasingly," as David Kennedy puts it, "defining the battlefield is not only a matter of deployed force - but it is also a rhetorical and legal claim"[12] - one would be tempted to say that it has always been that. From a normative point of view, the battlefield is the site of exceptional norms. It is the place where killing other human beings – normally a tremendous taboo – becomes legal under both domestic and international law. The battlefield, then, is constructed by a certain understanding of what rules apply within it. This understanding is crucial to the distinction of war from other forms of violence. One of the challenges in the Middle Ages was that "civil life and battle strife had to function simultaneously."[13] As a result, "*jus in bello* instituted parameters and facilitated this simultaneity by confining fighting to the battlefield."[14] Thanks to the idea of the battlefield, "the distinction between the battlefield and civilian neighborhoods is at least theoretically maintainable" and "symmetric warfare with its identifiable battlefields in terms of space and duration did allow, at least in theory, a relatively clear separation of military and political necessities and objectives in the actual conduct of warfare."[15]

Thus, the battlefield also underscores the normative exceptionality of war, and even its limited desirability. David Kennedy, for example, emphasizes that "for the military, defining the battlefield may still define the privilege to kill."[16] Con-

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[10] If that fundamental implicit agreement is lacking then arguably, as we will see, the idea of a battlefield crumbles.

[11] LIAQUAT ALI KHAN, A THEORY OF INTERNATIONAL TERRORISM: UNDERSTANDING ISLAMIC MILITANCY 274 (2006).

[12] David Kennedy, *Modern War and Modern Law*, 12 INT'L LEGAL THEORY 55, 74 (2006).

[13] Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violation of International Humanitarian Law, in* SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 263, 266 (Kluwer Law Int'l, vol 1., 2000).

[14] *Id.*

[15] Robin Geiß, *Asymmetric Conflict Structures*, 88 INT'L REV. OF THE RED CROSS 757, 770 (2006).

[16] DAVID KENNEDY, OF WAR AND LAW 121 (2006).

versely, "humanitarians . . . want to define the not-battlefield to open a space for humanitarian law."[17] War should be *confined* to the battlefield, as allowing it to spill beyond that zone is to make societies run a considerable risk. As Lawrence Keeley notes:

> [L]et us put war in its place.. . . there can be no dispute that peaceful activities, arts, and ideas are by far more crucial and more common even in the most bellicose societies. Even when the most violent scenes are unfolding on some battlefield or raided village, all around the arena of combat, often at no great distance, children are being conceived and born, crops and herds attended, fish caught, animals hunted, meals prepared, tools made or mended, and thousands of other prosaic, peaceful activities pursued that are necessary to sustain life or serve other human needs. No society can sustain itself purely on the proceeds of war.[18]

The battlefield thus stands for this peculiar ideal that, whilst war may and will rage, what distinguishes it from random violence is the fact that it unfolds in discreet spaces insulated from the rest of society, confining military violence to a confrontation between specialized forces whose operation should minimally disrupt surrounding life.

B. The Role of the Laws of War

Within this construction of war through the battlefield, the laws of war have always played a preeminent role. Indeed, contrary to a vision of war as pure violence, the laws of war, through a concept such as the battlefield, suggest a vision of highly regulated and social violence. In their contemporary variant, which emerges in the late 19th Century, they inherit a certain concept of what war is that is deeply structured by notions of what armies do. Indeed, it is no wonder that the origin of the contemporary laws of war is generally dated to Henry Dunan's stumbling onto the very classic battlefield of Solferino.[19] This original incident has a very central role in the dramaturgy of international humanitarian law. Even today, "conventional warfare" is referred to routinely by experts in relation to the sort of conflict that unfolds on a battlefield.[20]

In that respect, the laws of war do not merely seek to regulate the battlefield. They are also part of its symbolic maintenance and even construction as a particular space defined by the norms that apply to it. In other words, the battlefield does not predate norms on warfare; rather it has always been subtly coterminous with them. The laws of war are, therefore, a crucial foundation for understanding

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[17] *Id.*

[18] LAWRENCE KEELEY, WAR BEFORE CIVILIZATION 178 (1997).

[19] *See generally* HENRY DUNANT, UN SOUVENIR DE SOLFERINO (1980).

[20] Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82, Portions of the Transcript of Expert Witness Testimony (Oct. 19, 2007) (Case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/boskoski_tarculovski/trans/en/071019IT.htm. For example, in expert testimony given to the ICTY, Mr. Bezruchenko highlights conventional warfare as "the type of warfare which is common for two opposed armies clashed in the field. The classical example of such warfare would be the First World War or Second World War." *Id.*

the evolution of the battlefield and, conversely, the evolution of the battlefield is a key way in which the evolution of the laws of war can be understood. In fact, such is the association between the laws of war and the battlefield that *jus in bello* is sometimes referred to as "battlefield law."[21] It is important to note, in that respect, that the laws of war are quite plastic and adaptable. The battlefield in question may not be a classical battlefield (i.e. literally a field) and indeed often will not be. It may break into all kinds of smaller battlefields, only loosely connected to each other. However, it is a *paradigmatic* field in the sense of a space within which fighting can operate legitimately and beyond which it will be hard to meet conditions for respect of the laws of war.

This translates into a number of explicit references in relevant laws of war instruments. For example, article 14 of the Hague Convention IV speaks of the function of the inquiry office as "to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle."[22] The First Geneva Convention anticipates the arrangement of armistices or suspension of fire "to permit the removal, exchange and transport of the wounded left on the battlefield"[23] or "from a besieged or encircled area."[24] The First Protocol to the Geneva Conventions (Protocol I) speaks of the need for parties to the conflict to "endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas."[25] Implicit in such references is that the battlefield is the typical locus for organized armed violence to have occurred.

Apart from such explicit references to the battlefield, one also finds implicit references to some sort of contact point or front between opposite armies that is quite reminiscent of the idea of the battlefield and shows, if nothing else, the power of the metaphor for the genesis of the laws of war. For example, the Third Geneva Convention speaks of "the combat zone" drawing dangerously close to a camp and possibly requiring prisoners' transfer.[26] Article 29 of the Hague Convention anticipates that "[a] person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the *zone of operations* of a belligerent, with the intention of communicating it to the hostile party."[27] According to the Draft Agreement Relating to Hospital Zones and Localities, hospitals "shall not be situated in areas which, according to every probability, may become important for the conduct of the

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[21] *See generally* A.P.V. ROGERS, LAW ON THE BATTLEFIELD (2d ed. 2004).

[22] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 14, October 18, 1907, 187 C.T.S. 227 [hereinafter Hague IV].

[23] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 15, para. 2, Oct. 21, 1950, 75 U.N.T.S. 31 [hereinafter GC1].

[24] *Id.* art. 15, para 3.

[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 33.4, June 8, 1978, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[26] Convention (III) relative to the Treatment of Prisoners of War art. 47(2), Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC3].

[27] Hague IV, *supra* note 22, art. 29.

war."[28] Protocol I art 26.1 also speaks of "the contact zone" for the purposes of regulating the protection of medical aircrafts.[29] In other words, the laws of war have a keen sense of the geography of war and of combat occurring in certain areas because of the movement of armies. The commentators to Protocol I also characteristically argue in defense of the Red Cross emblem as "allow[ing] its bearers to venture onto the battlefield to carry out their humanitarian task."[30]

Perhaps even more importantly than these lateral references to the idea of the battlefield, is the fact that the laws of war would seem to be more generally premised on the existence of war, if only because their application would be greatly facilitated if wars were indeed, as was the case traditionally, fought on battlefields. In turn, the laws of war help maintain the centrality of the idea of the battlefield to what waging war entails. One might go as far as to describe the laws of war as the normative project whose goal it is to make sure that the battlefield, or something as close as possible to it, remains a central notion to the pursuit of warfare. Within the battlefield, the law has a much higher tolerance for certain forms of violence. For example, the official commentary to Protocol I notes a "widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed" by article 35 of the Protocol.[31] Conversely, damage caused entirely beyond the battlefield will be much less tolerated and the object of humanitarian condemnations.

There is no obligation to fight war on a battlefield in the Geneva Conventions or the Hague Regulations as such, in the sense that there is no provision stipulating that "all fighting should occur on a battlefield." At the same time, it is also very clear that there is a strong preference for combat occurring on something like a battlefield. That preference is expressed, first, in an old chivalrous preference for open and frontal warfare that is characteristic of the battlefield ethos. Open and frontal warfare does not mean that armies should simply march in straight lines shooting at each other, and the exigencies of modern warfare have long allowed for both fluidity of maneuvers and camouflage. What it does mean, however, is that the laws of war frown upon various forms of treachery that involve deceiving the enemy about one's quality as a combatant (for example by dressing up as a civilian) or as an enemy (for example by dressing up with the uniform of enemy forces). Although not per se illegal under international law, there has long been an understanding that spies or *franc tireurs* who fail to appropriately identify themselves may be unprivileged and be the object of relatively strong forms of punishment (including the death penalty), no doubt because of the dangers they raise both against the particular party against which their action is directed and the structuring idea of the battlefield.[32]

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[28] Convention (IV) relative to the Protection of Civilian Persons in Time of War. annex 1, art. 4(d), August 12, 1949, 75 U.N.T.S. 287 [hereinafter CG4].

[29] See Protocol I, supra note 25, art. 26.1.

[30] YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 450 (1987).

[31] *Id.* at 417.

[32] *See generally* Richard R. Baxter, *So-Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs*, 28 BRITISH Y.B. OF INT'L L. 323 (1951).

The importance of the notion of the battlefield to the operation of the laws of war can also be seen in the reliance on and natural affinity with a cardinal concept in the laws of war – the principle of distinction.[33] The essence of the principle of distinction is that parties to an armed conflict should distinguish between combatants and non-combatants. For the principle of distinction to be operational, an obvious way to facilitate distinction is by distinguishing areas where combat occurs from areas where combat shall not occur, ensuring that combatants fight in the former and that non-combatants are in the safety of the latter. This illustrates the importance of the battlefield as a humanitarian construct, namely as a place where fighting occurs to the exclusion, ideally, of any non-combatant presence.[34]

In that respect, the laws of war devote much attention to creating conditions for the separation of the battlefield from the non-battlefield, recreating a battlefield less by direct designation than by the negative. In effect, what humanitarians seek to do is constantly highlight areas that are off limits from battle, even if these areas change often and fluidly. Military objectives, for example, should not be located "within or near densely populated areas"[35] or "in the vicinity of the works or installations containing dangerous forces."[36] Medical establishments and units should be "as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety."[37] Furthermore, when fighting breaks out, "[t]he Parties to the conflict shall, to the maximum extent feasible . . . endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives."[38] They may also "remove children temporarily from the area in which hostilities

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[33] *See generally* Frits Kalshoven, *Civilian Immunity and the Principle of Distinction*, 31 AM. U. L. REV. 855 (1982); Stefan Oeter, *Comment: Is the Principle of Distinction Outdated?, in* INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 53-57 (Wolff Heinstchel von Heinegg & Volker Epping eds., 2007); ESBJORN ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT: SOME ASPECTS OF THE PRINCIPLE OF DISTINCTION AND RELATED PROBLEMS 53-63 (1979); Jann K. Kleffner, *From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Conflicts One Hundred Years After the Second Hague Conference*, 54 NETH. INT'L L. REV. 315 (2007); Mark Maxwell & Richard Meyer, *The Principle of Distinction: Probing the Limits of its Customariness*, ARMY L. 1 (March 2007), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/03-2007.pdf; Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT'L LAW. 733 (2005); Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT'L L. & POL'Y 241 (2007); Michael Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction* (Nov. 2003) (working paper for the International Humanitarian Research Initiative), *available at* http://ihl.ihlresearch.org/_data/n_0002/resources/live/briefing3296.pdf; Asa Kasher, *The Principle of Distinction*, 6 J. OF MILITARY ETHICS 152 (2007); Horace Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 A.F. ACAD. J. LEGAL STUD. 35 (1997); Michael Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L. J. 143 (1999).

[34] Rosa E Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 706 (2004) (arguing that "the Hague and Geneva Conventions presuppose a clear distinction between front lines and battlefields, on the one hand, and civilian areas, on the other; and a correspondingly clear distinction between combatants and noncombatant.").

[35] Protocol I, *supra* note 25, art 58.

[36] *Id.* art 56.5.

[37] CG1, *supra* note 23, art. 19; *see also* Protocol I, *supra* note 25, art. 12.4 .

[38] Protocol I, *supra* note 25, art. 58.

are taking place to a safer area within the country."[39] Prisoners of war must be evacuated "to camps situated in an area far enough from the combat zone for them to be out of danger."[40] Article 19 of the Third Geneva Convention also speaks of a "danger zone" in which Prisoners of War (POW) who would be at greater risk of being evacuated can be "temporarily kept back."[41] Similarly, "[t]he Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand,"[42] and "[t]he Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war."[43]

In addition, upon the outbreak and during the course of hostilities, the parties concerned may agree on mutual recognition of hospital zones[44] and "safety zones and localities so organized as to protect from the effects of war".[45] The affectation of such zones shall not be changed by activities contrary to their status.[46] The Fourth Geneva Convention also anticipates the creation of "neutralized zones" which are "intended to shelter (protected persons) from the effects of war" in "the regions where fighting is taking place."[47] Protocol I also anticipates the possibility of non-defended localities, which should be visibly marked by signs "agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways."[48] There is, in addition, the possibility of placing "a limited number of refuges" under special protection to "shelter movable cultural property in the event of armed conflict, of centers containing monuments and other immovable cultural property of very great importance," if they "(a) are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, [and] (b) are not used for military purposes."[49]

Moreover, there are certain territories whose affectations can *a priori* not change because they are the place of residence of civilians, except for some compelling reason. For example, according to Protocol II "[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict"[50]

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39 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. art. 4, ¶ 3(e) [herinafter Protocol II].

40 GC3, *supra* note 26, art. 19.

41 *Id.*

42 GC4, *supra* note 28, art. 49, ¶ 5.

43 *Id.* art. 83.

44 *Id.* art. 14.

45 *Id.*

46 GC1, supra note 23, annex 1, art. 2 (stating, "No persons residing, in whatever capacity, in a hospital zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.").

47 GC4, *supra* note 28, art. 15.

48 Protocol I, *supra* note 25, art. 59, ¶ 6 ; *see also id.* art. 60, ¶ 5 (Demilitarized zones).

49 Convention for the Protection of Cultural Property in the Event of Armed Conflict art 8.1, May 14, 1954, 249 U.N.T.S. 216.

50 Protocol II, *supra* note 39, art. 17.2.

unless for their own security.[51] In occupied territories, the Fourth Geneva Convention provides that "the Occupying Power may undertake total or partial evacuation of a given area," but only "if the security of the population or imperative military reasons so demand."[52] Finally, certain operational requirements, particularly those relating to identification, are closely related to one being in a battlefield type zone. For example, the Fourth Geneva Convention anticipates that "in zones of military operations, [Persons regularly and solely engaged in the operation and administration of civilian hospitals] shall be recognizable by means of an identity card certifying their status."[53] Similarly, Protocol 1 article 18.3 anticipates that protected personnel should be made recognizable "in areas where fighting is taking place or is likely to take place."[54] These areas are defined as "area[s] where the armed forces of the adverse Parties actually engaged in combat, and those directly supporting them, are located."[55]

In other words, the general intent of key humanitarian instruments is to constantly evacuate non-combatants from a hypnotized battlefield that has the potential to put them in harm's way. In addition to greatly facilitating and being the best expression of the principle of distinction, the idea of the battlefield probably also has a role in the operation of the cardinal principle of proportionality. According to Protocol I, targeting civilians is illegal, however the protocol recognizes that attacks in some areas may kill civilians collaterally. In such cases, the only sort of attack that is illegal is one "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[56] Such attacks are even considered war crimes and fall within the International Criminal Court's jurisdiction.[57] However, the standard of excessiveness is notoriously difficult to evaluate. The notion of a "concrete and direct military advantage"[58] points to something that is most likely evaluated on the battlefield.

The battlefield is far from having disappeared from the laws of war. Rather, it lives on as an idea and a normative ideal, even as its reality may otherwise be challenged. Some of the psychological, military, and legal determinants of a battlefield, therefore, include: a certain commitment to the laws of war on both sides of a conflict; a willingness to and a preference for conducting fighting on something like a battlefield (at least understood paradigmatically); a degree of communication between parties as to what might be legitimately considered a

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[51] *Id.* art. 17.1.

[52] GC4, *supra* note 28, art. 49.

[53] *Id.* art. 20.

[54] Protocol I, *supra* note 25, art. 18.3.

[55] This was the definition given by a mixed group at the diplomatic conference that led to the adoption of Protocol I quoted in SANDOZ ET. AL., *supra* note , at 620.

[56] Protocol I, *supra* note 25, art. 51.

[57] Rome Statute of the International Criminal Court, art. 5,8, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

[58] Protocol I, *supra* note 25, art. 51.

battlefield (for example, through communication via an intermediary about protected areas, etc); and a fundamental commitment that for the idea of a battlefield to mean anything at all, then the entire theatre of war cannot be equated with it (if everything is a battlefield, then nothing is).

II. The Deconstruction of the Battlefield

Despite the laws of war's best efforts to maintain a certain idea of the battlefield as a constant, those whose aim it is to fundamentally alter the conditions of warfare have repeatedly assailed the notion. The deconstruction of the battlefield is, in fact, well under way, and already in the late 1980s the commentators to Protocol I noted that "[i]n modern armed conflicts hostilities are more continuous, flaring up in varying degrees and moving from place to place; it would often be difficult to determine where exactly the battlefield is in place and in time."[59] In fact, as will be seen, the challenge to the idea of the battlefield has gone much farther than simply a challenge to the *geography* of battle, and is instead very much to the idea of the battlefield as a normative and regulatory concept.

Central to the challenge of the battlefield as a more or less level playing field is the decline of a key idea in the regulation of war, that of reciprocity. The idea of the battlefield depends on shared understandings over and above enmity that the other party will wage war according to the loose, but nonetheless guiding, model of war. That reciprocity can be contradicted on the short term, but it can never disappear entirely or war descends into random violence or crime. In other words, it will be very hard for a party to a war to cling to a notion of battlefield if the other does not. This is because of the perception that the party that does away with some of the constraints of the battlefield obtains an undue advantage, but also quite simply because if one party decides to ignore the battlefield and the other continues to treat it as operative, they will not be engaging in a common, mutually compatible activity. Hence, throughout the subsections that follow it is important to note that every deconstruction of the battlefield by one party is accompanied by a similar move to further deconstruct the battlefield by the other party, as the common vocabulary provided by the idea broke down.

A. Technological Developments

First and foremost, technologies of war have drastically changed the nature and scope of the battlefield. Even as a relatively fixed physical space, the battlefield has gradually extended because of the range of weapons. Whether bows or archbows were used, for example, could make a considerable difference on the breadth of the battlefield. But it was the invention of firepower that, from the 1800s onward, "help[ed] transform the very concept of the battlefield."[60] By 1863, Antoine Chassepot had designed a musket with a reach of 600 meters, although limitations on the human eye seem to have acted as a greater limit on

[59] SANDOZ ET AL., *supra* note , at 1414.

[60] DAVID GATES, WARFARE IN THE NINETEENTH CENTURY 2 (2001).

the scope of the effective reach of volleys.[61] With the increasing reach of weapons, fewer and fewer men were necessary to hold a mile-long battlefront – an estimated 20,000 between 1700 and 1850 at a time of smoothbore guns, to 12,000 by 1870, to as little as 1,500 by 1917 with the introduction of the magazine fed-rifle.[62] Moreover, logistical improvements made it possible to transport ever-growing numbers of troops to the battlefield at greater speeds and for greater durations. As David Gates puts it, "once apt, this term [battlefield] became something of a misnomer as improvements in the reach of weaponry and increases in the size of fighting units led to engagements being fought over ever larger tracts of territory."[63] For example, at the battle of Leipzig, 2,070 guns and 520,000 soldiers were present along a front that extended for up to 42 kilometers.[64]

The nineteenth century probably witnessed the last true battles. The First World War (WWI) retained unity of space but trench warfare prolonged combat in a zone far beyond what would normally have been considered a battlefield. Effectively, battlefield and theater of war merged so that, for example, although World War I remains famous for particular battles – the *Somme*, *Ypres* or *Verdun* – these battles really combined seamlessly over a front that extended over hundreds of miles. The outset of maneuver warfare, a strategy based on disruption and movement, has made battlefields even more dislocated, even though it can still be argued that war occurs in a series of localized battlefields.

The industrial revolution was crucial to some of the most spectacular changes in the history of warfare. In fact, according to Martin Shaw, the very idea of battlefield betrays its indebtedness to agrarian societies:

> [A]s long as there has been a war, any physical arena of human activity could become a place of battle. But only in modern and late-modern war has the idea of the battlefield been transformed into one of *complex, multiple, overlapping spaces of violence*. The modern revolution in slaughter took the new technologies of production, transport, and communications and turned them into means of killing. By the same token, it took the ever-ramifying social and physical spaces of industrial societies and made battlefields of them.[65]

The advent of the airplane provided an even greater blow to the limiting virtues of the battlefield as a concept. Although initially concentrated around the battlefield, air forces, particularly sophisticated bombers, increasingly made forays beyond enemy lines and extended the battlefield well behind enemy lines. Suddenly, huge areas of the opposing state's territory became accessible to a

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[61] Id. at 77.

[62] PATRICK O'SULLIVAN, TERRAIN AND TACTICS 114 (1991).

[63] GATES, supra note 60 at 2.

[64] *Id.* at 33.

[65] MARTIN SHAW, WAR AND GENOCIDE: ORGANIZED KILLING IN MODERN SOCIETY 130 (2003) (emphasis in original).

state's air force. As Hans-Peter Gasser, former Senior Legal Adviser at the ICRC, put it:

> The concept of the battlefield contains the idea of geographic limitation. Civilians in the area were often able to move away or flee (or even watch the fighting from the surrounding hills. . .). The advent of the airplane fundamentally altered the nature of warfare and brought in its wake a vast potential for destruction to the civilian population.[66]

The battlefield is thus a space in constant expansion as a result of the combination of all of these developments,[67] though arguably not to the point of breaking apart.

B. Total and Nuclear war

Few developments in the history of war have affected the notion of the battlefield more than the rise of total war, understood as an armed conflict that mobilizes all of its participants' resources, including their population.[68] Whether because of technological limitations or a lingering attachment to the idea of respecting certain bonds, wars up to the middle of the 20th Century had resisted the idea that the battlefield could extend to the entire territory of an enemy. It was not technological developments (such as long range bombers) alone that made total war possible, but the general erosion of the idea that the battlefield should be the exclusive locus of war and a determination that an entire country's infrastructure and even population became valid targets in war. From the London blitz to the battle of Stalingrad and the bombing of Dresden, both Axis and Allied powers of the Second World War (WWII) made sure that the war was brought to major urban centres. As a result, the battlefield extended far beyond traditional areas devoted to the practice of war to cover entire swaths of enemy territory. Moreover, these territories were often only loosely connected to battle as such, and were targeted because of the presence of supporting industries or of populations whose morale was vulnerable to bombing.

In addition to tactics of total war, war also became global in a different sense in that it gradually and remarkably quickly extended to the entire planet through the interconnectedness of Empires and their colonial dependencies, airspaces and oceans. It is thus no surprise that the White House broadcast following Pearl

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66 Thomas M. McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 65 (2002) (quoting HANS-PETER GASSER, INTERNATIONAL HUMANITARIAN LAW 61 (1993)).

67 O'SULLIVAN, *supra* note 62, at 117 (pointing out that "The dispersal and velocity of mechanized warfare with radio communications and airborne firepower has greatly expanded the battlefield in time and space. Set piece battles fought between sunup and sundown are a thing of the past. The prospect now is of a sprawling zone of continuing, sporadic firefights, which erupt day or night over a period of a week or more. The maneuvering of formations in broad sweeps to outflank the enemy has become a matter of strategy rather than tactics. The battle zone is too big for one person to keep an eye on what is going on and to direct the action from a lofty viewpoint.").

68 *See generally* DAVID A BELL, THE FIRST TOTAL WAR: NAPOLEON'S EUROPE AND THE BIRTH OF WARFARE AS WE KNOW IT (2007); RAYMOND ARON, THE CENTURY OF TOTAL WAR (1985); PETER CALVOCORESSI & GUY WINT, TOTAL WAR: THE STORY OF WORLD WAR II (1972); YASUSHI YAMANOUCHI, J. VICTOR KOSCHMANN & RYUICHI NARITA, TOTAL WAR AND 'MODERNIZATION' (1998).

Harbor specifically alluded to transformation of the notion of the battlefield, pointing out:

> [t]he course that Japan has followed for the past 10 years in Asia has paralleled the course of Hitler and Mussolini in Europe and Africa. Today, it has become far more than a parallel. It is collaboration so well calculated that all the continents of the world, and all the oceans, are now considered by the Axis strategists as one gigantic battlefield.[69]

Of course, the Allies answered in kind, contributing to the further entrenchment of WWII's worldwide character.

However, even more than the idea of total war, the development of nuclear weapons has, to a considerable degree, helped blur the notion of the battlefield. Nuclear weapons represent both a momentous technical development and a pragmatic conceptual change in the nature of war. This shift was evident at Hiroshima and Nagasaki, where the attacks concretely and metaphorically annihilated the battlefield by sending the message that no place was safe from war, and that the new weapons could, in one great big flash, abolish any distinction between combatants and non-combatants. Nuclear weapons are in that respect not just quantitatively but qualitatively different from all other weapons because their use is, by definition, premised on the total breakdown of the battlefield. The trend has if anything been reinforced since WWII with Cold War nuclear scenarios that anticipated deterrence based on a threat of assured destruction if attacked. Nuclear war has generally turned "existing social spaces into fields of death" so that, for example, "[n]early every sizeable urban area in the northern hemisphere was a planned target of nuclear missile attack. . ..The battlefield was everywhere; everywhere was the battlefield."[70] Although the International Court of Justice, in its Advisory Opinion of July 8, 1996, was not insensitive to the idea that nuclear weapons might still conceivably be used in a tactical way as "battlefield" weapons, the Court left little doubt that the use of nuclear weapons would be inherently incapable of distinction and proportionality when asked for an advisory opinion on the legality of their use.[71]

Interestingly, one of the less discussed ramifications of all-out nuclear warfare is the impact it would have on third party states through the propagation of nuclear residue, thus effectively considerably expanding the effective range of the battlefield (or at least some of its consequences) to third party states. The majority in the advisory opinion acknowledged that "[t]he radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area,"[72] which obviously extends beyond the battlefield. Nauru, in its submission to the Court, noted that "[n]uclear weapons for

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[69] Franklin D. Roosevelt, President of the United States, War with Japan, Radio Address by the President of the United States Broadcast from the White House on Tuesday, Dec. 9, 1941, *in* S. Doc. No. 148, at 23 (1941).

[70] SHAW, *supra* note , at 134.

[71] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 92 (July 8).

[72] *Id.* at ¶ 35.

which the status of legality is claimed should not damage or pollute neutral territory."[73] Judge Shahabuddeen made much of this dimension in his dissenting opinion noting that collateral damage to a neutral country through the use of nuclear weapons "would have had the consequence of physically violating the territory of the neutral State."[74] In other words, states were faulted in advance because the use of nuclear weapons that would in a sense make it impossible for belligerents to, as it were, keep the battlefield to themselves.

C. Guerilla, People's War, and Counter-Insurgency

One of the consequences of accepting battle on a battlefield was that traditionally, apart from the exigencies of camouflage, belligerents were keen to distinguish themselves from enemy troops. At least, the fact that belligerents did distinguish themselves made the notion of a battlefield much easier to conceptualize – the battlefield was that area where men in uniform fought each other as part of organized armies.

For reasons that are too long to describe here in any detail, weaker parties in war, notably in the context of anti-colonial struggles, have long felt that the openness of engagement characteristic of the battlefield did not play in their favor. Instead, they developed tactics that would draw the enemy away from the conventional battlefield, where the enemy's advantage was overwhelming, and engage the enemy in unorthodox areas. Guerilla warfare can thus be described as a type of warfare that is based on a refusal of the conventional battlefield, and the propensity of combatants to retreat and hide amongst civilians in between phases of combat. It is typically a warfare of the weak causing "the world's great powers [to discover] one-by-one how limited their military supremacy [is] in the face of [a] particular form of warfare, *which has neither a front nor a battlefield.*"[75] The result is that the battlefield concept either becomes inoperative or so wide as to encompass virtually any area including areas where the guerillas mingle with civilians.

Guerilla warfare's corrosive effect on the notion of the battlefield is often replicated by troops involved in anti-guerilla or anti-insurgency warfare, precipitating a further deterioration of the idea's ability to regulate war. Anti-insurgency troops tend to redefine the battlefield in the broadest way to include the entire territory within which a guerilla conceivably operates, thus making the notion of the battlefield, as a distinctive concept, useless. Yet, there is perhaps nothing worse for the validity of the laws of war than the reality that there is never any respite and that any area could become a locus of engagement within seconds. Guerilla and counter-insurgency warfare also have implications for the status of

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[73] Letter from Jerome B. Elkind, Counsel Appointed by Nauru, to the I.C.J (June 15, 1995), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4 (responding to the legality of the use by a state of nuclear weapons in armed conflict).

[74] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting opinion of Judge Shahabuddeen, 1996 I.C.J. 375 at 389, *available at* http://www.icj-cij.org/docket/files/95/7519.pdf.

[75] Pierre Pahlavi, *Political Warfare is a Double-Edged Sword: The Rise and Fall of the French Counter-Insurgency in Algeria*, CAN. MIL. J., at 53 (Winter 2007-2008) (emphasis added).

civilian populations. Battles not only occur within zones populated by civilians; civilians, in fact, often become the battlefield and the object of conquest from both parties. Hence, in insurgency warfare, "the war effort targets the entire population, whose conquest constitutes a higher aim than taking possession of a territory or dominating a battlefield."[76]

In turn, civilians may be tempted to join the war effort on either side, further reinforcing the complete deconstruction of the battlefield. One of the factors that made it traditionally possible to distinguish between the battlefields and beyond was that civilians would not be present. In other words, non-combatants were relatively content to leave the battlefield to combatants, thus reinforcing a sense of its purity and exclusivity. As a result, and even though the civilian population might be sympathetic to combatant forces and help them beyond the battlefield, both parties were inclined to respect the fact that civilian areas did not thus become part of the battlefield. As the ICRC put it:

> Throughout history, the civilian population has always contributed to the general war effort of parties to armed conflicts, for example through the production and supply of weapons, equipment, food, and shelter, or through economic, administrative, and political support. However, such [civilian] activities typically remained distant from the battlefield and, traditionally, only a small minority of civilians became involved in the conduct of military operations.[77]

Conditions fundamentally change, however, from the moment that civilians are seen as in effect supporting one side in battle, even though combatants are the ones who brought combat to the civilians. In lieu of civilians kept safely at bay, "[a] continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations."[78]

III. Crimes Against Humanity and the Breakdown of War

Another way of looking at the breakdown of the battlefield is through attempts by certain belligerents to break entirely from the mold of battle by systematically targeting and exterminating civilian populations. As is well known, this has long been a characteristic of modern warfare, perhaps most notoriously with the operation of the *Eisatzgruppen* in the eastern front during WWII – troops that followed the advance of the *Wermacht*, but whose own "battlefield" really consisted

[76] *Id.* at 54; *see also* Interview by Toni Pfanner with General Sir Rupert Smith, *in* 88 INT'L REV. RED CROSS 719, 720 (Dec. 2006) (explaining that "in wars amongst the people, the people are part of the terrain of your battlefield.").

[77] *Id.* at 720.

[78] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 993 (2008).

in the summary execution and massacre of countless civilians.[79] Various groups since, from Bosno-Serb militias to the Rwandan Interahamwe, have shown their propensity to spend much more time in civilian areas than on military frontlines. In effect, so-called combatants desert the battlefield and, instead, deliberately bring war where it was meant to have been excluded. As opposed to what might be described as "bringing civilians to the battlefield," this might be known as the phenomenon of "bringing the battlefield to civilians."

For war to occur and even for war crimes to be committed, there must be an activity recognizable as war. The markers of hostilities and combat are relatively numerous, but few suffice in isolation. For example, the fact that individuals engaging in violence wear what appear to be military uniforms is not sufficient in itself to characterize the existence of hostilities for the purposes of the laws of war. They could just as well be criminals, or members of a gang who enjoy military paraphernalia. Similarly, hierarchy and discipline do not by themselves characterize fighting forces because discipline is not only present in legitimate military operations. Thus, while their existence in rigid form may be a strong suggestion of a military-type organization, it is not conclusive of one (for the sake of illustration, Al-Qaeda is probably a disciplined and hierarchic organization yet not one that can easily be described as being involved in warfare). The battlefield, understood broadly, is quite characteristic of the activity known as war because it tends to be the place where many of the markers of war coincide, and its existence manifests willingness for direct combat between troops.

The situation is quite different where the object of a campaign is not to dominate the battlefield but to destroy a civilian population. In that respect, it would occur to no one to describe *Srebrenica* as a "battle" or Auschwitz as a "battlefield." The "camp" is fundamentally different from the "battlefield" in that the camp does not contain opposing military parties engaged in an open contest for domination of a space. The camp guards may wear military uniforms but they are only pseudo-military engaged in an activity, the destruction of a civilian population, that bears no relationship to war, even though it may profit from it. The "camp" therefore stands as the ultimate negation of the "battlefield" because it fundamentally abdicates the ideal of fighting in areas removed from civilians, and is instead busy rounding up civilians far beyond the battlefield (if there is a battlefield at all) for the purpose of exterminating them.

IV. Terrorism, Anti-terrorism and the War on Terror

It has become almost a cliché of post-9/11 analysis to say that 9/11 has fundamentally transformed the practice of war, and deeply challenged the laws of war. Perhaps slightly less noticed is the extent to which these changes are a result of deep challenges to the very idea of a battlefield. Early on, however, commentators had noted Al-Qaeda's "commitment to [a cause that] redefines the concept of

[79] *See generally* Norman M. Naimark, *War and Genocide on the Eastern Front, 1941-1945*, 16 COM-TEMP. EUR. HIST. 259 (2007).

the battlefield, at once globalising and deterritorialising it."[80] Commentators, especially in the immediate wake of 9/11, were prompt to point out how aware they were of the new character of the war then unfolding, particularly as it related to territory. For example, Ari Fleisher stated, "that's, again, why I indicated when the President talks about the new type of threat, 21st century war on terrorism, all planning accounts for that, all planning knows that this is not just an old-fashioned battle on a battlefield with tanks and sand."[81] Or as another commentator put it:

> [T]he concept of the battlefield, so central to the way in which Clausewitz understood warfare, has dissolved. The 9/11 attacks, for instance, demonstrated that today's battlegrounds might be Western cities while the US-led 'War on Terror'. . .conceives of the battlefield as literally spanning the entire globe.[82]

Yet, post-9/11 developments have been more complex than this simple before/after opposition suggests. The War on Terror, in fact, has been a complex and sometimes bizarre mixture of real battlefields (some of the traditional battles that occurred in Afghanistan and Iraq), unorthodox battlefields (e.g. fights waged by special forces in the territory of foreign countries outside an all-out invasion), and not-battlefield-at-all type violence (drone attacks on suspected terrorists). Matters are complicated by the fact that the invocation of the battlefield has been used somewhat opportunistically as a familiar trope reinforcing the sense that an actual war is going on, thus legitimizing the use of force in certain contexts (if a battle is occurring on some sort of battlefield, then the privilege of belligerency applies and violence is licensed). Yet, the existence of a battlefield has been denied when the strictures of the laws of war threatened to curtail states' freedom of action. This was most spectacularly illustrated in Guantanamo, a camp that held "unlawful combatants" caught on the various "battlefields" of the War on Terror, who were sufficiently like combatants to be held without trial, but not sufficiently so to be granted POW status.

Nonetheless, there is no doubt that a deliberate attempt to manipulate what constitutes the battlefield and to transcend it in ways that liberate rather than constrain violence has been at the heart of the response to the terror attacks of 9/11. Some of the developments highlighted in the previous subsections can now help us better contextualize just how radical the War on Terror's impact on the structuring concepts of the laws of war is. The War on Terror essentially combines all the deconstructing effects that have taken their toll on the idea of the battlefield in the 20th Century, to the point of making it barely recognizable.

The starting point here is terrorism itself as a species of asymmetrical violence. For the guerilla, the issue was to transform the battlefield into a series of

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[80] Jason Ralph, *War as an Institution of International Hierarchy: Carl Schmitt's Theory of the Partisan and Contemporary US Practice*, 39 MILLENNIUM J. INT'L STUD. 279, 281 (2010).

[81] Press briefing by Ari Fleischer, September 11, 2011: Attack on America (Sept. 15, 2001, 12:35 PM), *available at* http://avalon.law.yale.edu/sept11/press_sec_004.asp.

[82] SECURITY STUDIES: AN INTRODUCTION 154 (Paul D. Williams, ed., 2008).

skirmishes and ambushes rather than line battles in order to conquer the hearts and minds of the population. In such a situation, the notion of a battlefield retained a residual role as an indicator that some sort of struggle against an enemy was involved. Terrorism takes the destruction of the battlefield one step further. More than ambushes and skirmishes, it targets civilians; more than trying to conquer hearts and minds, it is bent on terrorizing them.[83] Although terrorism can be used to achieve territorial aims (for example, the liberation of a country) its territorial ambitions are secondary. Terrorists most of the time do not aim to control territory in the way an army would; if anything terrorist's territorial ambitions aim to increase the costs for the other party of holding on to territory. In some cases, terrorism loses any territorial connection so that it becomes as much a fight against a certain vision of society, making the idea of the battlefield even less relevant. Terrorism is perhaps the ultimate refusal of the battlefield, a commitment to bring violence when and where one pleases, unbound by any requirement that it unfold in a particular space and be constrained by particular norms.

Perhaps the most evident legacy of the 9/11 attacks and their aftermath is the truly global character of events, which was made possible by the downgrading of the importance of the idea of a battlefield and the rise of concepts of uncertain legal pedigree such as the "zone of combat." Global terrorism typically transports violence across borders and brings it where it is least expected, far beyond the confines of any conceivable battlefield. However, it is not only "transnational terrorists" who fundamentally change the nature of the battlefield, but also the states that chose to follow them on that terrain, effectively fighting "a war" as if it unfolded on a "global battlefield." From the outset, the perception was that the limits of the battlefield had been fundamentally redrawn. As Congressman Toricelli put it, "I regret that the front lines of this new struggle have formed through the communities I represent in northern New Jersey and our neighbors in New York City. . .*[T]he battlefield of this new war was Manhattan and Jersey City and Fort Lee and Queens. We are all soldiers.*"[84] This sort of statement showed a remarkable and perhaps discomforting ability to internalize terrorists' ambition to bring the battlefield home - to the heart of civilian life. But, if the battlefield could be Manhattan, then it could also be Baghdad or Waziristan; and if the battlefield was everywhere, then it really was nowhere in particular. As Ali Khan stated:

> The War on Terror has no traditional battlefields, and therefore, even theoretical civil/military distinctions make little sense. Since terrorists are not traditional soldiers but civilians fighting a professional army, they operate from civilian neighborhoods. This forces a professional army to consider an entire country as a seamless battlefield. In fact, since Muslim

[83] News briefing, Donald Rumsfeld Secretary of Defense (Sept. 27, 2001), *available at* http://avalon.law.yale.edu/sept11/dod_brief15.asp (stating that "[t]hese assaults have brought the battlefield home to us.").

[84] *September 11, 2001: Attack on America: Hearings on SJ. Res. 22 Before Senate and House of Representatives,* 107th Cong. (Sept. 12, 2001), *available at* http://avalon.law.yale.edu/sept11/senate_proc_091201.asp (emphasis added).

> militants live in almost all countries of the world, the US War on Terror has turned the entire earth into one large global battlefield.[85]

The notion of a global battlefield (the "war everywhere" model)[86] is a manifestation of the terminal decadence of the term. If the concept describes the whole world, then it quickly loses much of its ability to limit violence to a particular space by outlining where combat can and cannot occur. Ironically, the notion of a "global battlefield" is an implicit disavowal of the very notion on which it purports to rely.

The absence of a battlefield also confirms the breakdown of the frontier between war and crime previously highlighted in the context of the commission of crimes against humanity and the replacement of the battlefield by the camp. This is, of course, very true of terrorism itself, which is better understood as a particular mode of criminality rather than a new mode of fighting wars, even though it may occasionally loosely borrow from the register of war and adopt some sort of military posturing (for example, the brandished AK47, targeting the CIA). It is perhaps terrorism that has most clearly refused to acknowledge the concept of a battlefield by refusing to recognize that there is a fundamental difference for the purposes of struggle between military and civilian targets, and engaging in illegal and criminal behavior.

This is also true of the response to terrorism, which has implicitly accepted the model terrorists set, and not always been free of the commission of crimes. The response has fundamentally hesitated between a traditional war-waging model, a police enforcement model, and one that is a curious mix of both models with strong elements of secrecy, stealth and crime. The invasion and occupation of Iraq and Afghanistan are examples of almost traditional warfare, yet in retrospect their link to fighting terrorism was either artificial (Iraq) or very partial (Afghanistan). Some of what has gone on in the name of the War on Terror is characteristic of police work (the arrest, detention, transfer, and trial of a very suspected terrorists). Yet, much of what has occurred has fallen somewhere in the middle of war waging and police enforcement, and in some cases outside either. The refusal to grant full combatant status to suspected terrorists, even if they were apprehended in what for all intents and purposes resembled a traditional battlefield (they are often referred to as "battlefield detainees"), reflects the fact that adherence to terrorist tactics was seen as trumping terrorists' occasional participation in straightforward combat operations.

But it is perhaps the commission of crimes by those engaged in the War on Terror that has been most characteristic of the dangers of fighting a war without a notion of battlefield. The detention of individuals suspected of being security threats without trial and (for a long time at least) outside the safeguards of the judiciary, or the use of torture in military detention centres such as Abu Ghraib, in violation of both the standards of police work and the waging of war, show how the utter disappearance of the battlefield leaves us with very few criteria to

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[85] LIAQUAT ALI KHAN, *supra* note 11.

[86] *See genreally* Brooks, *supra* note ; Derek Gregory, *The everywhere war*, 177 THE GEOGRAPHICAL J. 238 (2011).

determine what sort of activity is going on and, accordingly, what its proper limitations should be. The fact that these occurrences were at times more central to what the military was involved in than actual combat operations further suggests that, with the loosening of the strictures of the battlefield, it is the entire meaning of what it means to wage war that is being lost.

Finally, terrorism and the War on Terror are not without their own technological developments that further corrode the idea of the battlefield. In a way, one could describe terrorists' 9/11 attacks as the refinement of a particular terrorist technology – that of the suicide bomber mixed with the plane hijacker. Both are technologies that are designed to bring the war to the heart of civilian areas and, therefore, violently in contradiction with the idea of a battlefield. In the anti-terrorism camp, the emergence of technologies of targeted killings, including the use of unmanned drones, has had the effect of potentially bringing the battlefield to any location in the world in novel and radical ways that defy the traditional idea of the battlefield. Most targets of drone attacks will never know that they were targets and will be hit in a variety of locations (roads, homes, offices), which bear little relation to a battlefield, if only because there is less a battle than an instant flash annihilating the enemy, leaving no chance of flight or surrender.

This makes it possible that force will be used in situations far removed from what the laws of war anticipated. As a result, an effort to reassert the relevance of the concept of battlefield is starting to be heard. For example, the Human Rights Watch position on targeted killings is that "its use can be legally justified so long as it is limited to situations involving a combatant on a genuine battlefield or its equivalent beyond the reach of law enforcement, or in a law enforcement situation when the threat to life is imminent and there is no alternative."[87] But as Tom Malinowki, the Washington HRW Director goes on to point out:

> "the administration. . .has not laid out a clear legal rationale for drone strikes in Yemen or anywhere else. It has not explained what if any limits exist on the president's ability to order targeted killings. Who can be targeted? *Can strikes be launched anywhere on a global battlefield*, or only in ungoverned areas where arrest is impossible?"[88]

Similarly, an American Civil Liberties Union (ACLU) letter to president Obama on the targeted killing issue becomes an opportunity to deplore the dangerous disappearance of the battlefield:

> The program that you have reportedly authorized appears to envision the use of lethal force not just on the battlefield in Iraq, Afghanistan, or even the Pakistani border regions, but anywhere in the world, including against individuals who may not constitute lawful targets. The entire world is not a war zone, and wartime tactics that may be permitted on the battlefields in Afghanistan and Iraq cannot be deployed anywhere in the world where a terrorism suspect happens to be located. Your administration has es-

[87] Benjamin Wittes, *Human Rights Watch Responds*, LAWFARE, http://www.lawfareblog.com/2010/10/human-rights-watch-responds (Oct. 26, 2010, 8:51 PM).

[88] *Id.* (emphasis added).

> chewed the rhetoric of the "Global War on Terror." You should now disavow the sweeping legal theory that underlies that slogan.[89]

Both global terrorism and the War on Terror have tended to push the boundaries of what constitutes the battlefield further than any previous developments, in a way that may make the battlefield virtually unrecognizable, and essentially licenses large amounts of violence unrestrained by even a loose sense of geographic and temporal limitation. This new "unrestricted warfare"[90] bears little relation to the sort of violence that the laws of war contemplated from the late nineteenth to the late twentieth century.

V. Conclusion: The End of War?

In essence, all of the major developments in warfare that have been outlined in this article have gone towards the elimination of the battlefield as a recognizable and thus legally regulated space. These developments do not only coexist, they tend to snowball, so that an idea such as those underlying the War on Terror would have been impossible without a series of developments in the 20th century that have loosened the bonds of the battlefield and therefore what is permissible in war.

The ICRC has seen the potential for the disintegration of the laws of war that lies in the deconstruction of the battlefield for a long time, although the events of the last decade have put the risk in ever-starker focus. The challenge is a complex one because of some of the ambiguity of humanitarian goals in changing times. On the one hand, humanitarians have been tempted to extend the scope of the battlefield to make sure that as much violence as possible falls under its constraints. For example, the broad territorial applicability of the laws of war is emphasized so that "[e]ven if substantial clashes were not occurring in the [specific region] at the time and place the crimes were allegedly committed. . .international humanitarian law applies. "[91] As the International Criminal Tribunal for the Former-Yugoslavia (ICTY) put it:

> There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the

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[89] Press Release, ACLU, ACLU Letter Urges President Obama to Reject Targeted Killings Outside Conflict Zones (April 28, 2010), *available at* http://www.aclu.org/human-rights-national-security/aclu-letter-urges-president-obama-reject-targeted-killings-outside-co; *see also* Letter from Kenneth Roth, Exec. Director of Human RightsWatch, to President Obama on targeted killings and drones (July 12, 2010), *available at* http://www.hrw.org/sites/default/files/related_material/Letter%20to%20President%20Obama%20-%20Targeted%20Killings%20(1).pdf (stating, "While the United States is a party to armed conflicts in Afghanistan and Iraq and could become a party to armed conflicts elsewhere, the notion that the entire world is automatically by extension a battleground in which the laws of war are applicable is contrary to international law.").

[90] *See generally* QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE (People's Liberation Army Literature and Arts Publishing House 1999)(original in Chinese).

[91] Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Order on the Prosecution Motion for Leave to Participate in the Present Appeal, ¶ 32 (Feb. 26, 2001) (case before the Int'l Crim. Trib. for the Former Yugoslavia) *available at* http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf.

> case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. [T]he requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.[92]

International criminal tribunals have also resisted narrowing the scope of individual criminal responsibility to occurrences on the battlefield.[93] According to the ICTY, crimes need not "all be committed in the precise geographical region where an armed conflict is taking place at a given moment."[94] Rather than presence on a hypothetical battlefield, the laws of war have developed a more sophisticated and fluid concept of "participation in hostilities."[95] The fact that this notion has become so controversial and yet central to the application of the laws of war reflects the continued uncertainty left open by the waning of the battlefield. In effect, the growing prominence of the notion of "participation in hostilities" replaces the predominantly spacio-temporal framework of analysis of the laws of war (who is where) by a functional-personal one (who is doing what).

On the other hand, some advocates of the laws of war have sought to restrict the scope of who is a combatant by appealing to the notion of the battlefield.[96] It

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92 Prosecutor v. Kunaric, Kovac, & Vokovic, Case No. IT-96-23 & 23/1-A, Judgment, ¶ 57 (June 12, 2002) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf; *see also* Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment, ¶ 25 (Nov. 29, 2002) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf ("The requirement that the acts of the accused be closely related to the armed conflict does not require that the offence be committed whilst fighting is actually taking place, or at the scene of combat." In that case, even though the appellant argued that there was no armed conflict in the municipality where he found himself, his acts were nonetheless "closely related to the armed conflict" since the Accused was "closely associated with Serb paramilitaries, his acts were all committed in furtherance of the armed conflict, and he acted under the guise of the armed conflict.").

93 Prosecutor v. Brdjanin, Case No. IT-99-36, Judgment, ¶ 123 (Sept. 1, 2004) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf ("In linking the offences to the armed conflict, it is not necessary to establish that actual combat activities occurred in the area where the crimes are alleged to have occurred."); *see also* Prosecutor v.Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/tadic/acdec/en/51002.htm; Prosecutor v. Simic, Tadic, & Zaric, Case No. IT-95-9-T, Judgment, ¶ 105 (Oct. 17, 2003) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/simic/tjug/en/sim-tj031017e.pdf.

94 Prosecutor v. Blaskic, Case No. IT-95-14, Judgement, inc. Declaration of Judge Shahabuddeen, ¶ 69 (March 3, 2000) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf.

95 Melzer, *supra* note .

96 Mary Ellen O'Connell is probably the author who has most consistently expressed skepticism about the possibility of targeting individuals far from the battlefield via drone attacks. *See generally* Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. OF NAT'L SEC. L. & POL'Y 343 (2010).

may be that the concept of participation in hostilities multiplies and diversifies the battlefields, tracking actual armed clashes as closely as possible, but this does not and should not mean that the battlefield becomes literally all encompassing. Even though actual presence on the battlefield is not required, for example, a core requirement of "war crimes" (which are more generally a good indicator of what counts as war-related activity) is that they have some "nexus" to an armed conflict.[97] In fact, according to the ICTY, it must be "that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."[98] In practice, this will cover crimes committed outside actual battle zones but that nonetheless display a strong element of connection to them. From a purely evidentiary point of view, presence on or proximity to the battlefield is a significant indicator that a commander knew what was happening on it; conversely suggesting that one was a long distance from the site of combat will undermine the view that one was participating in hostilities.[99] In addition, there is great reluctance to extend participation in hostilities to "civilians" who are no longer engaging in combat, or even military forces that are not on active duty. The fear here is that these individuals will attract military responses when returning to their civilian quarters that will make it very difficult to maintain the distinction principle.

Crucially, the ICRC defines direct participation in hostilities as the carrying out acts "which aim to support one party to the conflict by directly causing harm to another party, either directly inflicting death, injury or destruction, or by directly harming the enemy's military operations or capacity."[100] Implicit in such a vision is an activity that is likely to involve engagement at the level of some sort

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[97] Brdjanin, *supra* note 93; Melzer, *supra* note , ¶ 123; Kordic & Cerkez, *supra* note 91, at ¶¶ 32, 69; Prosecutor v. Limaj, Bala, & Misliu, Case No. IT-03-66-T, Judgment ¶ 91 (Nov. 30, 2005) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf; Prosecutor v. Halilovic, Case No. IT-01-48, Judgment, ¶ 28 (Nov. 16, 2005) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/halilovic/tjug/en/tcj051116e.pdf.

[98] Brdjanin, *supra* note 93, at ¶¶ 123, 128; Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, ¶ 536 (Jan. 17, 2005) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf; Prosecutor v. Halilovic, Case No. IT-01-48, Judgment, ¶ 29 (Nov. 16, 2005) (case before the Int'l Crim. Trib. for the Former Yugoslavia).

[99] Prosecutor v. Galic, Case No. IT-98-29, Judgment, ¶¶ 613, 659-663 (Dec. 5, 2003) (case before the Int'l Crim. Trib. for the Former Yugoslavia), *available at* http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf) ("General Galic was present on the battlefield of Sarajevo throughout the Indictment Period [from around 10 September 1992 to 10 August 1994], in close proximity to the confrontation lines, which remained relatively static, and he actively monitored the situation in Sarajevo. General Galic was perfectly cognisant of the situation in the battlefield of Sarajevo.").

[100] *Direct participation in hostilities: questions & answers*, ICRC RESOURCE CTR. (Feb. 6, 2009), http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm. An attempt to reassert the geography of the laws of war is also implicit in one of the examples given by the ICRC of what distinguishes direct and indirect participation in hostilities: "the delivery by a civilian truck driver of ammunition to a shooting position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and would therefore constitute direct participation in hostilities. However, transporting ammunition from a factory to a port far from a conflict zone is too incidental to the use of that ammunition in specific military operations to be considered as 'directly' causing harm." *Id.*

of contact zone, if not quite the battlefield.[101] In other words, even as the ICRC seeks to adapt to a very changing battlefield, it is drawn back to basic geographic markers to assess what constitutes the activity of participating in hostilities.

None of these hesitations should appear surprising. They merely reflect the difficulty of the law to adapt to rapidly changing circumstances. For those seeking to uphold a concept of humanitarianism in the midst of war such as the ICRC, the dilemma is a complex one. If one accompanies the changes too fast and too willingly by, for example, agreeing to the most expansive concept of the battlefield, there is a very real risk of destroying one of the conceptual linchpins of the laws of war. If radical change is assumed too willingly and the battlefield pronounced dead as a concept, the laws of war risk sacrificing their regulatory and constraining potential and have very little to offer in exchange. They will be seen to give in and, in the process, fundamentally contribute to the deterritorialization of international law and the end of war as we know it for the benefit of something that may well be even more horrendous. On the other hand, if humanitarians accompany the changes too slowly by clinging to a rigid, territorially demarcated concept of the battlefield, chances are that much violence will occur beyond the realm of the laws of war altogether. The laws of war will also be condemned to irrelevance, having failed to adapt to the times. At best, they will be in the strange situation of regulating something that no longer really exists, and having only a weak claim to regulate what has replaced it.

It is in this context that more and more calls are being heard to either dispense with or substantially reform the laws of war, either allowing unlimited violence in the name of worthy causes (e.g., the need to protect oneself from apocalyptic terrorism), or upgrading the protections provided by the laws of war by resorting to, for example, international human rights. If the battlefield does disappear entirely, then one may indeed wonder what the relevance is of a law that was largely created with its presence in mind, and is now confronted with endlessly varied forms of violence that do not conform to any pre-ordained model. With the idea of the battlefield gone, even in its most rarefied, paradigmatic form, it is much of the heritage of the laws of war and the idea of war that is in the process of vanishing, and with it the possibility of both as regulatory ideas.

[101] Melzer, *supra* note 78, at 1023 and 1024.

EDITOR'S NOTE ON THE TARGETED KILLING OF ANWAR AL-AULAQI

On September 30, 2011, an American drone aircraft patrolling in Yemen fired on a truck carrying Anwar al-Aulaqi, an American-born Muslim cleric who was a leading figure of Al-Qaeda in Yemen. Al-Aulaqi's death was controversial because the drone strike carried out President Barack Obama's 2010 authorization of a targeted kill on that target.

The use of targeted killing of American citizens abroad is a controversial topic. The idea that an American citizen can be targeted and executed without a judicial proceeding has both supporters and opponents.

Using the al-Aulaqi authorized targeting as a backdrop, the 2011 Loyola University Chicago International Law Symposium hosted a debate regarding the legality and morality of targeted killings. The following two articles, written by Professors Lesley Wexler and Michael Lewis, who both participated in the debate at the Symposium, represent two opposing sides, each making an argument as to why targeted killings should or should not be used by American authorities.

Additionally, it should be noted that the debate and the subsequent articles were written prior to the carrying out of the targeted killing of al-Aulaqi. While the authors were given an opportunity to update to an extent, they were not able to completely rewrite the article based on current events.

Matthew Levitt
Editor-in-Chief

LITIGATING THE LONG WAR ON TERROR: THE ROLE OF *AL-AULAQI V. OBAMA*

Lesley Wexler†

"This is a unique and extraordinary case."[1]

I. Introduction

In early 2010, the Obama administration is believed to have placed Muslim cleric Anwar al-Aulaqi (also known as Anwar al-Alwaki)[2] on a Central Intelligence Agency (CIA) list of terrorists approved for targeted killing.[3] While President Bush and President Obama have seemingly authorized many drone strikes to target individuals in Pakistan, Afghanistan, and Yemen,[4] conventional wisdom suggests al-Aulaqi is the first American citizen to make an appearance on this list.[5] After several failed attempts,[6] the C.I.A.,[7] in conjunction with a U.S.

† Professor and Thomas Mengler Faculty Scholar, University of Illinois College of Law. Thanks to Dan Shalmon, Chris McIntosh, and Jenna Jordan for thoughtful comments.

[1] Al-Aulaqi v. Obama, 727 F.Supp.2d. 1, 8 (D.D.C. 2010) (opinion of Judge John Bates dismissing the case).

[2] Commentators differ on the translation of al-Aulaqi's name. For consistency's sake, this article will employ the same spelling that the al-Aulaqi family used in filing the litigation.

[3] *See* Al-Aulaqi, 727 F.Supp.2d. at 11; *see also* Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2011, http://www.nytimes.com/2010/04/07/ world/middleeast/ 07yemen.html; Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/ AR2010012604239.html.

[4] Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War,' in* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW 1, 1-2 (Peter Berkowitz ed., 2011), *available at* http://ssrn.com/abstract=1824783.

[5] Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. TIMES, Jan. 31, 2000, http://articles.latimes. com/2010/jan/31/world/la-fg-cia-awlaki31-2010jan31.

[6] Todd Eastham, *Anwar al-Awlaki Targeted in U.S. Military Attack in Yemen*, CHRISTIAN SCI. MONITOR, May 7, 2011, http://csmonitor.com./World/Latest-News-Wires/2011/0507/Anwar-al-Awlaki-targeted-in-US-military-attack-in-Yemen (describing a failed May 5, 2011 attempt); Mark Mazzetti, *Drone Strike in Yemen Was Aimed at Awlaki*, N.Y. TIMES, May 7, 2011, http://www.nytimes.com/2011/

counterterrorism unit,[8] used a drone attack to successfully strike and kill Anwar al-Aulaqi on September 30, 2011.[9]

Why did the government choose to target Anwar al-Aulaqi? Some terrorism experts, like Bruce Hoffman, suggest that al-Aulaqi played a key operational role in terrorist activities against the United States.[10] Alleged activities that might place al-Aulaqi within that criteria include a role in facilitating terrorist training camps or planning terrorist attacks for al-Qaeda in the Arabian Peninsula (AQAP)[11] as well as conspiring with Rajib Karim to blow up a U.S. bound plane.[12] That said, other scholars note the public evidence directly linking al-Aulaqi to al-Qaeda operations "is slim."[13] The government has thus far been reluctant to disclose much information demonstrating these links, citing concerns about intelligence gathering.[14] This reluctance to provide evidentiary support or even a public justification has led many civil libertarians to fear that the government may have instead listed him for pure speech acts or for other reasons insufficient to target an individual under domestic or international law.[15]

05/07/world/middleeast/07yemen.html (noting continued targeting efforts after the May 5, 2011 attempt); Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *CIA Strike Kills U.S. Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html (identifying several failed strikes and an aborted attempt by Yemen's counterterrorism commandos to force a Yemeni village to hand over al-Aulaqi).

7 The C.I.A. located al-Aulaqi after detaining and questioning one of his couriers. Colin Freeman et. al, *Strike on Voice of al-Qaeda Came after Clues from Courier*, SUNDAY TELEGRAPH, Oct. 2, 2011, http://www.highbeam.com/doc/1P2-29771717.html (commenting on how Yemeni cooperation provided some of the information needed to carry out the strike). Laura Kasinof, *Yemen Notes Its Own Role in U.S. Attack on Militant*, N.Y. TIMES, Oct. 2, 2011, http://www.nytimes.com/2011/10/02/world/middleeast/yemen-notes-its-own-role-in-us-attack-on-militant.html.

8 Apparently, the CIA controlled both the aircraft and the decisions to fire. Greg Miller, *Joint Strike Is Latest Example of CIA-Military Convergence*, WASH. POST, Oct. 1, 2011, http://www.washingtonpost.com/world/national-security/strike-on-aulaqi-demonstrates-collaboration-between-cia-and-military/2011/09/30/gIQAD8xHBL_story.html.

9 In so doing, the United States also killed Samir Khan, a naturalized American citizen who authored and produced the online terrorist magazine Inspire. As he was not the target of the attack, but merely collateral damage, his death does not raise the same legal questions. It is believed that Samir Khan was never on the kill list. Mazzetti, Schmitt & Worth, *CIA Strike Kills U.S. Born Militant in a Car in Yemen*, *supra* note 6.

10 Shaun Waterman, *Al-Awlaki's Killing Seen as Major Blow*, WASH. TIMES, Oct. 3, 2011, http://www.washingtontimes.com/news/2011/oct/2/al-awlakis-killing-seen-as-major-blow/?page=all.

11 *See generally* Sarah Phillips, *Al-Qaeda and the Struggle for Yemen*, 53 SURVIVAL 95 (2011) (describing the nature of al-Qaeda in the Arabian Peninsula).

12 *Britain: Former Airline Employer Gets 30 Years in Terrorism Case*, N.Y. TIMES, Mar. 19, 2011, http://www.nytimes.com/2011/03/19/world/europe/19briefs-ART-Britain.html.

13 Carol J. Williams, *CIA Drone Strike Raises Debate*, CHICAGO TRIB., Oct. 2, 2011, http://mobile.chicagotribune.com/p.p?a=rp&m=b&postId=930941&curAbsIndex=3&resultsUrl=DID%3D6%26DFCL%3D1000%26DSB%3Drank%2523desc%26DBFQ%3DuserId%253A54%26DFC%3Dcat1%252Ccat2%252Ccat3%26DL.w%3D%26DL.d%3D10%26DQ%3DsectionId%253A6957%26DPS%3D0%26DPL%3D3 (citing Micah Zenko, a Council on Foreign Relations fellow).

14 *Id.*

15 These other alleged activities that may have landed Anwar al-Aulaqi on the lists include: his connections to two September 11, 2001 planners; Nawaf Al-Hazmi and Khalid Almindhar; a previous arrest by Yemeni authorities for being part of an al Qaeda plot to kidnap a U.S. military attaché; the inclusion of his name on a list of prisoners that al Qaeda affiliates sought to be released in Yemen; his communications with Somalian terrorist group al-Shabaab praising their use of violence; a message urg-

The government's decision to list an American citizen raises an important series of questions. At the time the government allegedly placed Anwar al-Aulaqi on a kill list, remarkably little was known about the procedures for listing and reviewing placements of individuals. How and under what authority did the government target Anwar al-Aulaqi? What legal standards guide the decision to list? Who makes the initial decisions about listing? What evidentiary standards do they use to determine if the legal standards are satisfied? Who reviews the determinations and how frequently? What opportunity, if any, exists for the listing individual to challenge his placement? Does the executive possess sole discretion on these decisions or is it subject to Congressional or judicial oversight?

After al-Aulaqi's father learned of his son's predicament, he contacted the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) to file suit on his son's behalf and to find out the answers to the questions raised above.[16] While international law scholars have been debating the general permissibility of drone strikes,[17] the specific targeting of Anwar al-Aulaqi raises an additional set of legal questions, as he is an American citizen. Writ large, the pressing issue is whether the executive branch possesses unreviewable authority to order the targeted killing of an American that the President deems to be a threat to the nation. This legal problem also implicitly raises the underlying policy question of whether such targeting is an effective strategy to win the war on terror. Although the actual case has drawn to a close, first with the ACLU and the CCR abandoning their opportunity for an appeal, and second with al-Aulaqi's death, these questions remain important ones.

This case has larger implications as a consensus of experts agrees on the high likelihood that the government has designated other Americans for targeting.[18]

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ing American Muslims to commit violent Jihad against other Americans; using the magazine *Inspire* to threaten writers, journalists, and cartoonists; meetings with the Christmas day underpants bomber; and meetings with Abdulmutallahab prior to the attempted attack on a Detroit airplane. *See* Bruce Hoffman, *American Jihad*, 107 NAT'L INT. 17, 23-27 (May-June 2010); *see also* Charlie Szrom & Chris Harnsich, *Al Qaeda's Operating Environments: A New Approach to the War on Terror*, CRITICAL THREATS PROJECT OF THE AM. ENTER. INST. 1, 7, *available at* http://www.aei.org/docLib/AQAM-final.pdf; *see also* Gordon Lubold, *Why is Anwar Al-Awlaki Terrorist 'No. 1?,'* CHRISTIAN SCI. MONITOR, May 19, 2010, http://www.csmonitor.com/USA/ Foreign-Policy/2010/0519/Why-is-Anwar-Al-Awlaki-terrorist-No.-1 (describing Aulaqi's links to Major Nidal Malik Hassin who killed 13 people at Fort Hood, and Aulaqi's inspirational role in Faisal Shahzad's attempted Times Square bombing).

[16] Robyn E. Blumner, *Some Basic Rights of an American*, ST. PETERSBURG TIMES, Aug. 8, 2010, http://www.tampabay.com/opinion/columns/some-basic-rights-of-an-american/1113429.

[17] *See generally* Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law, in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 346-400 (Benjamin Wittes, ed., 2009); *see also* Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009, in* SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), *available at* http://ssrn.com/abstract=1501144; *see also* Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law,'* Y.B. INT'L HUMANITARIAN L. (forthcoming), *available at* http://ssrn. com/abstract=1801 179.

[18] *See* Brian Bennett and David Meeks, *Still in U.S. Sights*, CHICAGO TRIB., Oct. 2, 2011, http://www.yellowbrix.com/index.nsp?sid=bp&pid=6&demo=1&story_id=164214766&&ID=infobrix&scategory=Defense (mentioning Adam Gadahn, a top propagandist, as a target); Nick Baumann, *Judge Dismisses Anwar al-Awlaki Targeted Killing Lawsuit*, MOTHER JONES, Dec. 7, 2010, http://motherjones.com/mojo/2010/12/judge-dismisses-anwar-al-awlaki-targeted-killing-lawsuit; *see also* Lendman, *supra* note 8 (noting that "[i]n late June, Deputy White House National Security Adviser for Homeland Security and Counterterrorism, John O. Brennan, acknowledged a hit list with dozens of other names, saying, 'There

As home-grown terrorism grows,[19] the number of Americans listed will likely increase as well. While some believe that al-Aulaqi's targeting is *sui generis*,[20] others have gone so far as to suggest that the precedent may allow such attacks in the United States or will encourage other countries to kill their citizens abroad.[21] At the very least, our capacity to carry out such strikes against our own citizens in similar locations has been enhanced with the creation of a new counterterrorism unit for Yemen and Somalia[22] along with construction of a new air base in Yemen.[23]

Rather than attempt to resolve the numerous legal issues raised by the al-Aulaqi litigation,[24] this short piece seeks to explain why the ACLU and CCR brought this lawsuit and then ultimately abandoned it.[25] In short, al-Aulaqi's case demonstrates both the potential for, and the limitations of, litigation as a strategy to curb executive authority during the so-called long war on terror. Even though Judge Bates rightly noted that al-Aulaqi's case is a "unique and extraordinary" one,[26] many issues raised by the litigation speak to more run of the mill terrorism cases. This article begins by identifying the ACLU and CCR's successful challenge of a specific procedural burden, effectively ensuring greater access to lawyers for many of those designated as terrorists.[27] This small victory

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are, in my mind, dozens of US persons who are in different parts of the world, and they are very concerning to us, not just because of the passport they hold, but because they understand our operational environment here, they bring with them certain skills, whether it be language skills or familiarity with potential targets, and they are very worrisome, and we are determined to take away their ability to assist with terrorist attacks.'" Brennan also stated, "'If an American person or citizen is in Yemen or in Pakistan or in Somalia or another place, and they are (suspected of) trying to carry out attacks against U.S. interests, they also will face the full brunt of a US response. What we need to do is to apply the appropriate tool and the appropriate response.'"); *but see* Raffaela Wakeman, *The Kill or Capture List*, LAWFARE, http://www.lawfareblog.com/2011/10/the-kill-or-capture-list/ (Oct. 6, 2011, 3:21 PM) (suggesting that some U.S. officials indicated Gadahn would not be listed as he was "not directly involved in plotting attacks").

19 *See* Alex Wilner & Claire-Jehanne Dubouloz, *Homegrown Terrorism and Transformative Learning: An Interdisciplinary Approach to Understanding Radicalization*, 22 GLOBAL CHANGE, PEACE AND SECURITY 33, 33 (2010), *available at* http://www.tandfonline.com/doi/pdf/10.1080/14781150903487956. This, of course, assumes that some homegrown terrorists will spend time outside the United States.

20 Op-Ed., *A Rare Act, Killing of al-Awlaki Accords with Sound Legal Rules*, BOSTON GLOBE, Oct. 1, 2011, http://articles.boston.com/2011-10-01/bostonglobe/30233426_1_al-awlaki-al-qaeda-navy-seal.

21 *See* Matt Apuzzo, *American Drone Kills American Al-Qaeda*, LEWISTON MORNING TRIB., Oct 1, 2011 (available on Lexis Nexis); *see also* Scott Shane, *Coming Soon: The Drone Arms Race*, N.Y. TIMES, Oct. 9, 2011, http://www.nytimes.com/2011/10/09/sunday-review/coming-soon-the-drone-arms-race.html (noting that while only the United States, Israel, and Britain have engaged in drone strikes, more than 50 countries have unmanned aerial vehicles which could be equipped with weapons including China, Russia, Iran, India, and Pakistan); *but see* Kenneth Anderson, *What Kind of Drones Arms Race Is Coming*, VOLOKH CONSPIRACY (Oct. 10, 2011 3:19 PM), http://volokh.com/2011/10/09/what-kind-of-drones-arms-race-is-coming (suggesting that UAV technology and weaponization would have developed even in the absence of U.S. drone use).

22 Greg Miller, *Joint Strike Is Latest Example of CIA-Military Convergence*, *supra* note 5.

23 Laura Kasinof & Alan Cowell, *U.S. Drone Strike Kills Qaeda Leader*, INT'L HERALD TRIB., Oct. 1, 2011 (available on Lexis Nexis).

24 *See generally* Chesney, *infra* note 73.

25 The timely appeal period had expired. Benjamin Wittes, *No Appeal in al-Aulaqi*, LAWFARE, http://www.lawfareblog.com/2011/02/no-appeal-in-al-aulaqi/ (Feb. 22, 2011, 1:55 PM).

26 Al-Aulaqi v. Obama, *supra* note 1.

27 75 Fed. Reg. 234, 75904 (Dec. 7, 2010) (codified at 31 C.F.R. pts. 594, 595, and 597).

aids many of those seeking access to the courts, not just American citizens.[28] In contrast, Part II of this article notes the ACLU and CCR's general failures in accomplishing their immediate litigation goals. Their efforts to expand the standing doctrine and narrow the application of sovereign immunity, state secrets, and political question doctrines were largely futile. Yet, Part III suggests the ACLU and CCR's real goals may have been the lawsuit's extra-legal consequences and contributions. While they were unable to obtain a judicial review of the executive branch's behavior, this part documents how they leveraged the litigation to provoke and influence a public debate over certain aspects of the war on terror. As detailed below, the lawsuit allowed the ACLU and CCR to raise and initiate the framework for legal and policy questions about the targeting of American citizens. In the wake of al-Aulaqi's death, this framework is bearing some limited fruit as the push for greater transparency over legal standards for and reviewability of targeting decisions increases in strength and the demand for a rethinking of the policy wisdom of pursuing a targeting policy grows more fervent.

II. Eliminating Pre-litigation Barriers to Terrorism Lawsuits

In order to make litigation more viable not only for al-Aulaqi, but also for many other terrorism suspects who wish to challenge the government's authority, the ACLU and CCR chose to address a pre-existing regulatory scheme that limits legal representation of "specially designated global terrorists."[29] In 2003, the U.S. Treasury's Office of Foreign Assets Control (OFAC) passed a regulation prohibiting lawyers from defending certain accused terrorists pro bono without explicit governmental permission.[30] Thus, while Nasser al-Aulaqi originally retained the ACLU and CCR on his son's behalf, OFAC's subsequent decision to name Anwar al-Aulaqi a "specially designated global terrorist" prohibited further legal representation until OFAC decided to grant his attorneys a license.[31]

Thus, in the complaint filed by the ACLU in *ACLU v. Geithner*,[32] the two non-profits challenged the government's licensing policy as an unconstitutional violation of their "First Amendment right to represent clients in litigation consistent with their organizational missions,"[33] and a violation of due process and separation of powers by "depriving a U.S. citizen of the ability to obtain repre-

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[28] *Id.*

[29] *ACLU, CCR and ACLU Receive License From OFAC to Pursue Challenge to Targeted Killing*, AMER. CIVIL LIBERTIES UNION, Aug. 4, 2010, http://www.clu.org/national-security/ccr-and-aclu-receive-license-ofac-pursue-challenge-targeted-killing.

[30] 31 C.F.R. 594.506(a) (2001). OFAC promulgated regulations to implement this order, which requires specific licenses for persons whose property or interests are blocked under the regulations. *Id.* President Bush issued an order blocking the "property of foreign persons determined by the Secretary of the Treasury to assist in, sponsor, or provide financial, material, or technological support for. . .acts of terrorism." Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

[31] OFAC labeled al-Aulaqi as such on July 16, 2010. *ACLU and CCR v. Geitner*, ACLU, Dec. 17, 2010, http://www.aclu.org/national-security/aclu-and-ccr-v-geithner.

[32] Complaint ACLU v. Geithner, No. 10-CV-1303 (D.D.C. filed Aug. 3, 2010).

[33] *Id.* at 3.

sentation in litigation against the United States in U.S. Courts."[34] Soon thereafter, not only did OFAC grant the ACLU and CCR the specific license to represent al-Aulaqi,[35] but it also voluntarily revised its rules and regulations to eliminate the licensing requirement for attorneys seeking to represent clients who have had their assets frozen as terrorists.[36] This decision on the part of an executive agency represents a real victory for the ACLU and CCR against potential future licensing delays or denials. At the very least, those individuals who have been designated terrorists can now freely hire lawyers and begin to navigate both the court and administrative system.

III. Failing to Achieve Direct Litigation Goals

Viewed narrowly, the ACLU and CCR pursued some very specific litigation goals as embodied in their requested relief. First, they sought a declaration that both the Constitution and International Law prohibited the government from carrying out targeted killings outside of armed conflict except as a last resort to protect against "concrete, specific, and imminent threats" of death or serious injuries.[37] Relatedly, they further asked for an injunction prohibiting the targeted killing of al-Aulaqi outside the narrow confines of the aforementioned declaration.[38] Finally, they requested an injunction "requiring the government to disclose the standards under which it determines whether a U.S. citizen can be targeted for death."[39] Ultimately, the court provided none of the requested relief, nor did it even engage in a merits discussion of these requests.

Viewed more expansively, Al-Aulaqi's case also presented these non-profits with an opportunity to push for a broad interpretation of standing in certain types of terrorism cases. Individuals who wish to challenge their placement on these targeting lists, as well as other suspected terrorists living abroad who have had their assets frozen, are very unlikely to surrender themselves simply to enforce their legal rights. Thus, the ability for third parties or other parties in interest to stand in for them is quite important for pursuing litigation and challenging the very authority of many of these determinations. As a prudential matter, courts can construe next friend and third party standing broadly, but Judge Bates determined in this instance that the decision to hide from law enforcement, even under threat of death, is an insufficient explanation for a failure to appear on one's behalf.[40] As Judge Bates decided that both domestic and international law would require the U.S. government to allow al-Aulaqi to surrender peacefully, he concluded mere fear of violence or death is insufficient to allow another to stand in

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[34] *Id.* at 4. They also challenged the regulations exceeding statutory authority by regulating non-economic activity [as] "arbitrary and capricious." *Id.* at 10.

[35] ACLU, *CCR and ACLU Receive License*, supra note 29.

[36] 75 Fed. Reg. 234, 75904 (Dec. 7, 2010) (codified at 31 C.F.R. pts. 594, 595, and 597).

[37] Complaint, Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C 2010) (No. 10-01469).

[38] *Id.*

[39] *Id.*

[40] Al-Aulaqi v. Obama, *supra* note 1.

for him as a "next friend."[41] However, Professor Jack Goldsmith has noted that Judge Bates' mention in dicta of the possibility of teleconferencing with attorneys from remote locations does provide some very slight solace for future plaintiffs.[42] Similarly, the court rejected third party standing because, among other reasons, Judge Bates concluded Anwar al-Aulaqi's failure to bring suit or express desire to litigate in American courts suggests his rights are not truly important to him and that a third party representative would have divergent interests.[43]

Even had they prevailed on the standing issue, other threshold matters loomed large in this and many other terrorism cases challenging executive authority. Moving from the most favorable to least favorable rulings, at best, the ACLU and CCR got a draw on the military and state secrets privileges. While the government argued that resolving the claims would require disclosure of protected information, they urged the court to resolve the case on other grounds, which it did.[44] Accordingly, the litigation neither narrowed the scope of the state secrets doctrine, nor clearly affirmed its widespread use. Similarly, the plaintiffs' requested relief under the Alien Tort Statute was deemed inappropriate on sovereign immunity grounds. While this holding is a more clear loss for the ACLU and the CCR, the court did at least decline to rule on whether the Administrative Procedure Act's waiver of sovereign immunity would apply to it.[45] Instead, the court used its equitable discretion, leaving the more significant question of the statute's applicability unanswered.[46]

The threshold issue on which the ACLU and CCR suffered the most resounding defeat was on the political question doctrine, which is likely to present formidable obstacles for many cases brought during the long war on terror. Courts invoke the political question doctrine as a constitutional preclusion mechanism that forbids them from reviewing cases that turn on "policy choices and value determinations" committed to the executive branch or Congress.[47] In this case, Judge Bates determined that Anwar al-Aulaqi's citizenship and claims of Constitutional violations did not forestall the application of the political question doctrine.[48] If the ACLU and CCR were hoping that al-Aulaqi's case might be extraordinary and exceptional in the court's willingness to engage the merits in the face of procedural escape hatches, their hopes were certainly dashed.[49]

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41 *Id.* at 22.

42 Jack Goldsmith, *What the ACLU and CCR Won in* al-Aulaqi, LAWFARE, http://www.lawfareblog.com/2010/12/what-aclu-and-ccr-won-in-al-aulaqi/#more-931 (Dec. 7, 2010, 6:32 PM); *see Al-Aulaqi*, 727 F.Supp.2d at 19; *but see,* Benjamin Wittes, *Some Thoughts on Judge Bates' Decision*, LAWFARE, http://www.lawfareblog.com/2010/12/some-thoughts-on-judge-bates-decision/ (Dec. 8, 2010, 7:33 AM).

43 *Al-Aulaqi*, 727 F.Supp.2d at 33-34.

44 *Id.* at 54.

45 *Id.* at 61.

46 *Id.*

47 *Id.* at 65.

48 *Id.* at 49.

49 Steven I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 123-26 (2001).

As a result of these various determinations, the court chose not to address the question of when the United States may target a particular foreign terrorist organization and its senior leadership. Nor did the court address several subsidiary questions such as: whether the Authorization to Use Military Force (AUMF) implicitly authorizes the targeted killing of members of al-Qaeda in the Arabian Peninsula; whether the AUMF covers AQAP members because they have sufficient ties to al-Qaeda or because they are properly considered co-belligerents; and what sort of ties the AUMF requires in terms of training, operations, and/or shared membership for non-listed terrorist organizations? Similarly, the court punted on related fact-specific questions of whether Anwar al-Aulaqi's role with either al-Qaeda or AQAP would render him either a combatant or a civilian taking direct participation in hostilities. Relatedly, the court did not elucidate how the standards for targeting might differ between combatants and civilians taking direct participation in hostilities.

The conversation the ACLU and CCR seemed most interested in follows from negative answers to the previous set of questions. If the AUMF does not properly cover al-Aulaqi, then does he, as a US citizen abroad, have a Fifth Amendment right not to be deprived of life without due process? If so, what does the content of that right include in this particular context? As mentioned earlier, the ACLU and the CCR sought a declaration that in such instances both the Constitution and international law prohibit the government from carrying out targeted killings except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury. They also sought a judicial role in reviewing any executive determination that an individual's behavior satisfied such criteria, (or at least the identification of what criteria the executive branch may use). Yet, the court demurred – identifying these inquiries as complex policy questions in which it both lacks competence and manageable standards to guide its answers.[50]

IV. Assessing Extra Litigation Goals: Generating and Framing a Public Debate

While the ACLU and CCR lost big on paper, they may have achieved some gains in instigating other checks on executive authority. These litigation-savvy organizations must have recognized the very low probabilities of a judicial victory on most of the issues they raised. That said, they also know high profile lawsuits garner attention for an issue, and, when managed correctly, can cause a public outcry and allow the losing litigants to frame the debate.[51] By bringing this case, the ACLU and CCR spurred a heated public and academic debate on the limits of the executive's authority to target individuals. For instance, the al-Aulaqi suit prompted editorials in the New York Times,[52] the Washington Post,[53]

[50] Al-Aulaqi, 727 F.Supp.2d at 52.

[51] *See generally* Timothy Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809 (2007).

[52] Op-Ed., *Judicial Scrutiny Before Death*, N.Y. TIMES, Dec. 13, 2010, http://www.nytimes. com/2010/12/13/opinion/13mon2.html.

and many other widely circulated publications.[54] The debate also continued online through spirited blog fights.[55] The ACLU and CCR certainly succeeded not only in creating a high profile debate, but also in introducing a new frame through which the issues should be viewed and assessed. Although targeting is a long-standing practice, the lawsuit serves as a mechanism by which the ACLU and the CCR can tie a renewed moral outrage about its current incarnation to specific legal hooks. Rather than starting from a national security perspective, the lawsuit and its resulting discourse encourages the media, the public, and the relevant policy actors to focus on constitutional, statutory, and international law questions.[56] By filing a lawsuit, the ACLU and CCR raised another issue not previously a significant part of the public debate on targeting: whether the President should have unreviewable authority to carry out the targeted killing of an American anywhere that the President deems to be a threat to the nation. This forces a debate about whether unilateral executive authority will sufficiently provide the constitutional protections of due process and whether new, publically reviewable constraints on executive authority need to be developed. The ACLU and CCR posed these questions as necessary to create a set of rules not just for al-Aulaqi, but also for future targets and future presidents.

It is worth noting that Al-Aulaqi's case is just one part of the ACLU's larger legal strategy to challenge targeting policy and the secrecy surrounding it. For instance, in January 2010, the ACLU used the Freedom of Information Act to request documents related to the drone strikes.[57] This request included any records including "information about the legal basis in domestic, foreign, and international law" for drone strikes as well as any information "regarding the rules and standards that the Armed Forces and CIA use to determine where and

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53 Op-Ed., *Whether to Use Drones on Americans Linked to al-Qaeda*, WASH. POST, Sept. 6, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/05/AR2010090502877.html; Op-ed., *Should U.S. Citizens Who Join Forces with al-Qaeda Be Subject to Drone Strikes*, WASH. POST, Sept. 6, 2010, at A14 (this editorial is available on LexisNexis but is not available online); Anthony Romero & Vincent Warrant, Op-ed., *Sentenced to Death without Trial,* WASH. POST, Sept. 3, 2010, at A19 (this editorial is available on LexisNexis but is not available online).

54 *See, e.g.*, David Cole, *Breaking Away*, THE NEW REPUBLIC, Dec. 30, 2010, at 17; Philip Giraldi, *Deep Background*, THE AM. CONSERVATIVE, Apr. 1, 2010, at 21; Kevin Williamson, *Assassin in Chief – The War on Terror Has Blinded the Right to a Disturbing Expansion of Executive Power*, NAT'L REV., Nov. 1, 2010; Eric Posner, *Dockets of War*, NAT'L INTEREST, Mar- Apr 2011; Ben Lerner, *Citizenship as Sword,* AM. SPECTATOR, Oct. 25, 2010; Alex Kingsbury, *Can the CIA Put a U.S. Born al-Qaeda Figure on Its Kill List*, US NEWS, Sept. 7, 2010; *see also* Op-ed., *Judicial Scrutiny Before Death*, N.Y. TIMES, Dec. 12, 2010, at 24.

55 *See, e.g.* John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. 175 (2011) (each author presented different sides of a debate); *see also* Kevin Jon Heller, *Ben Wittes' Unconvincing Hostage Taking Analogy*, OPINIO JURIS (Sept. 3, 2010) http://opiniojuris.org/2010/09/03/ben-wittes-unconvincing-hostage-taking-analogy/; Benjamin Wittes, *A Response to Kevin Jon Heller*, LAWFARE, http://www.lawfareblog.com/2010/09/a-response-to-kevin-jon-heller/ (Sept. 4, 2010); David Rivkin & Lee Casey, *The American Terrorist Obama Wants To Kill,* THE DAILY BEAST, Apr. 7, 2010, http://www.thedailybeast .com/articles/2010/04/07/the-american-terrorist-obama-wants-to-kill.html.

56 Of course, whether this frame is the normatively preferable way to conceptualize these issues is another inquiry entirely.

57 Michael Doyle McClatchy, *Targeted Killing of al-Awlaki Debated*, SPOKESMAN REV., Oct. 1, 2011, http://www.spokesman.com/stories/2011/oct/01/targeted-killing-of-al-awlaki-debated/.

when these weapons may be used, the targets they may be used against, and the processes in place to decide whether their use is legally permissible in particular circumstances."[58] In their letter, the ACLU raised the specific concern that U.S. citizens might be targeted as one of the reasons supporting the release of information.[59] In the subsequent litigation, Judge Rosemary Collyer granted summary judgment for the CIA concluding they did not have to disclose any material.[60] She determined that acknowledging or releasing even the information limited to the "scope, limits, oversight, and legal basis of this killing program" would implicate sources and methods of intelligence gathering.[61] The other suits against the Department of Defense, the State Department, and the Justice Department continue, but they seem, like al-Aulaqi's suit, more influential in creating public rather than judicial checks on executive action.

This section identifies four mechanisms by which the ACLU and CCR might have deployed the al-Aulaqi litigation as part of a larger strategy to challenge unfettered executive authority in the long war on terror. First, it raises the possibility that the public pressure generated by the lawsuit would constrain the administration's willingness or ability to engage in drone strikes against American citizens. Such constraints could include the development and disclosure of the legal limits on the executive's authority. Second, public pressure may instead lead to a second or third best situation in which the government instead discloses some of those legal limits by leaks. Third, this section notes that the litigation induced public debate may encourage the legislature to become more involved in targeting practices. Though such an involvement may lead to more rather than less targeting, it does in some sense limit the power of the unilateral executive and creates some democratic accountability. Finally, this section notes that the litigation may have helped reinvigorate the policy debate about whether targeting is a necessary or successful approach to conducting the long war.

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[58] Memorandum Opinion at 2, ACLU, et. al. v. Dep't of Justice, Civil Action No. 10-0436 (D.D.C., Sept. 9, 2011) *available at* http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2010cv00436/141218/34/0.pdf.

[59] *Id.* at 4. The C.I.A. responded by issuing a letter neither confirming nor denying the existence of any related records and asserting its legal defense against revealing such information. Notably, the C.I.A. declined to explicitly raise the state secrets doctrine at any point in the FOIA litigation, though the Washington Legal Foundation's amicus brief did assert it. In fact, the Washington Legal Foundation argued that C.I.A. director Leon Panetta's arguments that the al-Aulaqi litigation raised state secret problems was a reason the court should acknowledge the privilege in the FOIA case as well. Press Release: *Court Urged to Dismiss Request for CIA Records on Drone Attacks*, WASH. LEGAL FOUNDATION (Oct. 19, 2010) (available via Targeted News on Lexis Nexis).

[60] The court found that releasing or even acknowledging the existence or nonexistence of records would reveal correctly protected classified information. In so doing, Judge Collyer found that the National Security Act of 1947 is a withholding statute. ACLU v. Dep't of Justice, No. 10-0436 at 6-8 (D.D.C. Sept. 9, 2011). The court further concluded that opening the records could "reveal information on the CIA's internal structure and its capabilities and potential interests and involvement in/operation of the drone program." *Id.* at 10.

[61] *Id.* at 11-15.

A. Direct Executive Checks through Public Pressure

Given the reluctance of judges to engage these issues on the merits, any ultimate review of the individual listing determinations seems likely to be embedded in the executive rather than in the judiciary. Even so, the ACLU and CCR seem to be using lawsuits as part of a larger strategy to push for more transparent executive review, or at the very least an acknowledgement and elucidation of existing review standards. While the lawsuits themselves did not directly result in a judicial order calling for executive constraints or transparency, litigation can provide a frame from which the public and policy makers can pressure for such limits.

That said, the ACLU and CCR's generation of legal attention and framing failed in the most immediate sense to alter the executive's behavior. Despite the lawsuits, the CIA continued to target al-Aulaqi until it ultimately struck and killed him. Nor did the litigation and ensuing debate force a public account of the legality of this action. Thus far, the administration has been largely silent on the legal grounds and evidence for the targeting of al-Aulaqi.[62] At best, the government has made a few modest nods towards a public justification by describing al-Aulaqi as someone who could be lawfully targeted.[63] Yet, the administration has provided no evidence to support its assessment nor any meaningful explanation of which facts, if true, would allow his targeting.

In fact, the number and scope of issues on which the administration has remained silent is staggering.[64] To begin with, the administration has not even acknowledged the existence of a drone program. Unsurprisingly then, it has also been close-lipped on the existence of a targeting list, the names of those on the list, the legal and evidentiary standards by which someone is placed on the list, and any review processes that might take place both after listing and after successful targeting. Human rights groups are reading the administration's silence as a deliberate decision,[65] particularly in light of the more detailed explanation

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[62] Paul Harris & Jamie Doward, *How US Tracked Objective Troy to his Death*, THE GUARDIAN, Oct. 2, 2011, (describing President Obama's reluctance to provide any operation details, including his role in the chain of command).

[63] Court Urged to Dismiss Request for CIA Records on Drone Attacks. Laura Kasinof & Alan Cowell, *U.S. Drone Strike Kills Qaeda Leader*, *supra* note 23. Obama also referred to al-Aulaqi as the leader of al Qaeda's external operations. Matt Apuzzo, *American Drone Kills American Al-Qaeda*, *supra* note 21. Relatedly, Obama's Press Secretary also stated that al-Aulaqi "was also very demonstrably and provably involved in operational aspects of AQAP." White House Press Secretary Jay Carney, News Briefing (Sept. 30, 2011). White House Spokesman Robert Gibbs had previously identified al-Aulaqi as a regional commander for AQAP. Matt Apuzzo, *American Drone Kills American Al-Qaeda*, *supra* note 21.

[64] Victoria Nuland, State Department Spokesperson, State Department News Briefing (Sept. 30, 2011) (referring questioners to ask the Justice Department for answers to questions about the legality of the strike); White House Press Secretary Jay Carney, News Briefing (Sept. 30, 2011) (refusing to answer questions about the circumstances surrounding al-Aulaqi's death including questions about whether any proof of al-Aulaqi's operational role will be made available to the public).

[65] Scott Wilson, *No Safe Haven Anywhere in the World*, WASH. POST, Oct. 1, 2011, http://www.pressherald.com/news/nationworld/obama-uses-high-risk-tactics-against-terrorists_2011-10-01.html.

provided after the boots on the ground operation leading to Osama bin Laden's death.[66]

In the wake of al-Aulaqi's death, many in the domestic and foreign press have questioned the legal precedent.[67] And notably, many have also mentioned the incident in reference to the ACLU's lawsuit in making their objections.[68] Even Al Qaeda in the Arabian Peninsula has argued that the "U.S. government did not prove the accusations against [him], and did not present evidence against [him] in their unjust laws of their freedom."[69] Unfortunately, few politicians on either side of the aisle have seriously questioned the legality of the decision,[70] with even Obama's political rivals lauding the outcome.[71] If restraint and overt trans-

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66 Adam Baron, *Al-Awlaki's Death Deprives al-Qaida of Key Recruiting Voice*, McCLATCHY NEWS BUREAU, Sept. 30, 2011, http://www.mcclatchydc.com/2011/09/30/125728/us-born-cleric-anwar-al-awlaki.html.

67 For example, *see* Neil Steinberg, *Suddenly They Trust Obama to Kill People*, CHICAGO SUN TIMES, Oct. 3, 2011, http://www.suntimes.com/news/steinberg/7999840-452/suddenly-they-trust-obama-to-kill-people.html; Op-Ed., *Al-Awlaki and the Bounds of Power*, NEWSDAY, Oct. 3, 2011, at A34; Adam Bates, *Judged and Assassinated*, WASH. POST, Oct. 3, 2011, http://www.washingtonpost.com/opinions/no-jury-for-mr-awlaki/2011/09/30/gIQAraTOGL_story.html; Op-Ed., *Terrorist Assassination Exposes Hypocrisy of Obama Policies*, WASH. TIMES, Oct. 3, 2011, http://www.washingtontimes.com/news/2011/sep/30/awlaki-the-model-moderate-muslim/; Op.ed, Yasir Qadhi, *An Illegal and Counterproductive Assassination*, N.Y. TIMES, Oct. 2, 2011, http://www.nytimes.com/2011/10/02/opinion/sunday/assassinating-al-awlaki-was-counterproductive.html; Maajid Nawaz, Commentary, *By Abandoning Our Own Values We Reinforce The Extremists*, OBSERVER, Oct. 2, 2011, http://www.guardian.co.uk/world/2011/ oct/01/drone-killing-anwar-al-awlaki; Matt Apuzzo, *American Drone Kills American Al-Qaeda*, *supra* note 21; Matt Apuzzo, *Drone Strike on Two Americans Raises Questions*, ARMY TIMES, Sept. 30, 2011, http://www.armytimes.com/news/2011/09/ap-drone-strike-on-2-americans-raises-questions-093011/; Scott Shane, *Judging a Long Deadly Reach*, N.Y. TIMES, Oct. 1, 2011, http://www.nytimes.com/2011/10/01/world/american-strike-on-american-target-revives-contentious-constitutional-issue.html; Michael Doyle McClatchy, *Targeted Killing of al-Awlaki Debated*, SPOKESMAN REV., Oct. 1, 2011, http://www.spokesman.com/stories/2011/oct/01/ targeted-killing-of-al-awlaki-debated/; Sophie Quinton, *No Due Process in Awlaki's Killing, Civil Libertarians Worry*, NAT'L J., Sept. 30, 2011, http://www.nationaljournal.com/nationalsecurity/no-due-process-in-awlaki-s-killing-civil-libertarians-worry-20110930; Op-ed., Ed Husain, *U.S. Shouldn't Have Killed al-Awlaki*, CNN OPINION, Sept. 30, 2011, http://articles.cnn.com/2011-09-30/opinion/opinion_husain-awlaki-killing_1_al-awlaki-al-zawahiri-yemeni-prison?_s=PM:OPINION.

68 Donna Leinwand Leger, *Al-Awlaki Strike Did Not Kill Bombmaker; Critics Say Drone Hit Disregards U.S. Law*, USA TODAY, Oct. 3, 2011 at 6A; Carol J. Williams, *CIA Drone Strike Raises Debate*, CHICAGO TRIB., Oct. 2, 2011 at C29; Peter Finn, *Awlaki Assassination Triggers Legal Debate*, BOSTON GLOBE, Oct. 1, 2011, http://articles.boston.com/2011-10-01/news/30233533_1_yemen-awlaki-military-force; Op-Ed., *Targeting Those Who Target Us*, DENVER POST, Oct. 1, 2011, http://www.denverpost.com/opinion/ci_19014973; Scott Shane, *In Cleric's Killing An Issue of Due Process*, INT'L HERALD TRIB., Oct. 1, 2011, http://www.highbeam.com/doc/1P1-198217615.html.

69 Thomas Jocelyn, *AQAP Confirm Anwar Al-Awlaki Killed in U.S. Drone Strike*, THE LONG WAR J., OCT. 10, 2011, http://www.longwarjournal.org/archives/2011/10/al_qaeda_ confirms_an.php.

70 Jackie Calmes, *Success Battling Terrorists, but Scant Glory for It*, N.Y. TIMES, Oct. 3, 2011, http://www.nytimes.com/2011/10/03/us/politics/for-obama-success-battling-terrorists-seems-to-mean-little.html?pagewanted=all (noting Dennis Kucinich as one of the few Democrats to respond publicly who "objected that the killing was 'wrong legally, internationally, and morally."); Stu Bykofsky, *Home Grown Terrorists Deserved to Die*, THE PHILADELPHIA DAILY, Oct. 3, 2011, http://www.nytimes.com/2011/10/03/us/politics/for-obama-success-battling-terrorists-seems-to-mean-little.html?pagewanted=all (noting that Republican Ron Paul criticized the action, but most of the far left has remained silent); Sophie Quinton, *No Due Process in Awlaki's Killing, Civil Libertarians Worry*, *supra* note 67.

71 Anissa Haddadi, *Al-Awlaki's killing: Obama's Proof he is Better at Fighting the War Against Terror than Bush?*, INT'L BUS. TIMES NEWS, Sept. 30, 2011, http://uk.ibtimes.com/articles/222881/

parency were the measures by which one ought to judge the success of the *al-Aulaqi* lawsuit, it again appears to be a failure.

B. Creating Conditions for Indirect Transparency: Government By Leaks

All that said, the ACLU and CCR successfully contributed to an atmosphere that encouraged the administration to at least leak information about the legal standards governing the targeting of an American citizen and about constraints on targeting more generally. Between the al-Aulaqi lawsuit and the FOIA lawsuit, the ACLU and CCR generated momentum to push for answers to at least three different types of related questions.[72] First, what are the legal standards for listing and how are those abstract standards interpreted on the ground? Second, who makes those legal determinations and who reviews them? Third, what are the evidentiary standards by which those determinations are made? And finally, what deference or review exists for those evidentiary requirements? Although the government has not provided anything approaching full disclosure on any of these questions, we now at least seem to have more information about Al-Aulaqi's listing and the listing procedure in general.

For instance, at the time Anwar al-Aulaqi appeared on the list, the government provided very little public detail on how it selected anyone, much less an American citizen, for listing.[73] After the news of al-Aulaqi's placement on the list, Director of National Intelligence, Dennis Blair, did articulate a relevant factor in listing as "whether that American is involved in a group that is trying to attack us, whether that American is a threat to other Americans. . .We don't target people for free speech. We target them for taking action that threatens Americans or has resulted in it."[74] But much more information has been revealed in the wake of al-Aulaqi's death as several sources have come forward. For instance, former head of the Office of Legal Adviser Jack Goldsmith recently commented that in order for the government to place anyone on the kill list, high level agency lawyers along with high level policy makers must assess the legal and political

20110930/al-awlaki-s-killing-obama-s-proof-he-is-better-at-fighting-the-war-against-terror-than-bush.htm.

[72] While proving such a causal relationship is often difficult, it does seem that the ACLU and CCR request for transparency and accountability may have helped motivate the leaks. Of course, the government may have chosen to leak information in the absence of either political pressure or the lawsuits, but given both the intensity and quality of the pressure, it would be reasonable to think a relationship does exist.

[73] The State Department Legal Adviser Harold Koh did "address the factors that the United States considers in connection with specific targeting decisions including the imminence of the threat," but not the evidentiary thresholds for when someone makes the list. *See* Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, Y.B. OF INT'L HUMANITARIAN L. 1, 10 (forthcoming 2011), *available at* http://ssrn.com/abstract=1754223; *see also* Harold Hongju Koh, Legal Adviser, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

[74] *See* Stephen Lendman, *Targeted Assassinations: Challenging U.S. Policy*, ATL. FREE PRESS, Aug. 6, 2010, http://www.atlanticfreepress.com/news/1/13632-targeted-assassinations-challenging-us-policy.html; *see also* Eli Lake, *'Permission' Needed to Kill U.S. Terrorists*, WASH. TIMES, Feb. 4, 2010, http://www.washingtontimes.com/news/2010/feb/04/permission-needed-to-kill-american-terrorists/.

risk, approve the action, and inform the Congressional intelligence committee about the intelligence community's role in the operations.[75] News reports also contend that the C.I.A. general counsel along with White House counsel[76] review individual determinations every six months to ensure that targets continue to satisfy the legal standards.[77] In addition, some evidence suggests the entire National Security Council reviews the determination if an American citizen is listed.[78]

Moreover, in the wake of al-Aulaqi's death, the public learned that the Justice Department's Office of Legal Counsel issued a classified memorandum detailing its understanding of the legality of al-Aulaqi's strike.[79] While the administration has not officially declassified and released the memo, it seems those at the highest levels may have allowed or even encouraged its leakage. At the very least, some officials who have read it anonymously described its contents to NYT reporter Charlie Savage. According to these sources, Office of Legal Counsel attorneys David Barron and Martin Lederman served as primary drafters, writing the memo after deliberations and consultations with high-level lawyers from the Pentagon, the State Department, the National Security Council, and intelligence agencies.[80] Under this account, the memo assesses an executive order banning assassinations, domestic prohibitions on murder, constitutional protections, and the laws of war and concludes none barred the targeting of al-Aulaqi.[81]

While these leaks provide some vague sense of the decision-making process, the memo leaves as many questions as answers. For instance, the memo is not thought to reveal the identity of those who decide to put targets on the kill list and no public record has been made of their reasoning or decisions.[82] Nor is the

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[75] Op.-Ed, Jack Goldsmith, *A Just Act of War*, N.Y TIMES, Oct. 1, 2011, http://www.nytimes.com/2011/10/01/opinion/a-just-act-of-war.html.

[76] Op-Ed., David Ignatius, *Risks of Drone Addiction*, WASH. POST, Sept. 22, 2011, http://www.washingtonpost.com/opinions/the-price-of-becoming-addicted-to-drones/2011/09/21/ gIQAovp4lK_story.html.

[77] Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, http://www.washingtonpost.com/world/national-security/aulaqi-killing-reignites-debate-on-limits-of-executive-power/2011/09/30/gIQAx1bUAL_story.html.

[78] Op-Ed., David Ignatius, *Risks of Drone Addiction*, WASH. POST, Sept. 22, 2011, http://www.washingtonpost.com/opinions/the-price-of-becoming-addicted-to-drones/2011/09/21/gIQAovp4lK_story.html.

[79] Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, *supra* note 77; Scott Shane & Thom Shanker, *Yemen Strike Reflects U.S. Shift to Drone as Cheaper War Tool*, N.Y. TIMES, Oct. 2, 2011, http://www.nytimes.com/2011/10/02/world/awlaki-strike-shows-us-shift-to-drones-in-terror-fight.html?pagewanted=all. The arguments within the memo are believed to have constrained decision-making; for instance, the C.I.A. may have delayed the strike until Al-Aulaqi was away from a populated area. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 9, 2011) http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all.

[80] Allegedly, no writer raised a dissenting opinion as to the legality of killing al-Aulaqi. Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, *supra* note 77.

[81] Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, *supra* note 79.

[82] Bruce Ackerman, *On the Presidential Assassination of American Citizens*, BALKINIZATION (Oct. 9, 2011 7:17 PM), http://balkin.blogspot.com/2011/10/on-presidential-assassination-of.html (observing that we do not know how much information midlevel operatives who make list recommendations provide to National Security Council panels or how that evidence is weighed, nor does the president make the final

memo alleged to have grappled with the specific evidence that such individuals assessed to put al-Aulaqi on the list. Given that the memo is merely leaked, rather than declassified, the public and scholars do not have the opportunity to see or question the arguments and precedents that inform the writers' reasoning and conclusions. Nor can they be sure that the leaks accurately represent the actual positions taken by the administration.

Many, including the ACLU, scholars, and politicians, have now called for the declassification of the memo and an ensuing public debate over its contents.[83] Some explicitly note the absence of the kind of judicial review called for in al-Aulaqi's case as a reason why the memo's disclosure is so important.[84] Even those supportive of targeting like the former head of the House Intelligence Committee[85] and Former State Department Legal Adviser John Bellinger III have asked the White House to make public the secret memos.[86] Others like Professor David Cole have suggested that a public justification of the legal grounds upon which the decision to target al-Aulaqi rested is necessary to keep both international and domestic support for on-going targeting.[87] Given the government's skittishness about compromising intelligence sources and methods, some have limited their call for disclosure for legal reasoning only,[88] while others also want an assessment of the facts on the ground. Whether the administration will release the memo remains to be seen, but we do appear to know more than we did before

decision- he merely retains veto power); Jonathan Turley, *Death Panel: Obama Delegates Hit List to Panel of Unnamed Officials*, JUNATHANTURLEY.ORG (Oct. 20, 2011 4:16 PM), http://jonathanturley.org/2011/10/06/death-panel-obama-delegates-hit-list-to-panel-of-unnamed-officials/.

83 Op-Ed., *Explaining the Awlaki Strike*, WASH. POST, Oct. 6, 2011, http://www.washingtonpost.com/opinions/administration-should-do-more-to-defend-the-awlaki-strike/2011/10/04/gIQASHEbOL_story.html (calling for a release of the memo); Op-Ed., *Define the Rules of Engagement*, SAN FRANCISCO CHRON., Oct. 5, 2011, at A13 (calling for a public justification), Op-Ed., Karinne Combes, *The Killing of Anwar al Awlaki*, TORONTO STAR, Oct. 5, 2011, at A19 (calling for a public debate); Steve Huntley, *Obama Right to Target al-Awlaki*, CHICAGO SUN TIMES, Oct. 4, 2011, http://www.suntimes.com/news/huntley/8010361-452/obama-right-to-target-al-awlaki.html (supporting the targeting but also the release of the memo so long as it does not compromise intelligence gathering or military operations); Peter Finn, *Legal Experts Ask for Release of Awlaki Memo*, WASH. POST, Oct. 8, 2011, http://www.washingtonpost.com/world /national-security/political-legal-experts-want-release-of-justice-dept-memo-supporting-killing-of-anwar-al-awlaki/2011/10/07/gIQABCV9TL_story.html (noting that several democrats and former George W. Bush administration officials have now called for a release of the memo).

84 Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, Or Its Reasoning*, LAWFARE, http://www.lawfareblog.com/2011/10/release-the-al-aulaqi-olc-opinion-or-its-reasoning/ (Oct. 3, 2011 7:45 a.m.) (calling for the release of the OLC memo since a judicial review of the action is not going to happen and suggesting that release of the memo would allow a fuller vetting of the constitutional arguments made and it may "describe the limits of presidential power in this context").

85 Joby Warrick, *Cheney Says Obama Owes an Apology after Awlaki Killing*, WASH. POST, Oct. 3, 2011, http://www.washingtonpost.com/world/national-security/cheney-after-yemen-strike-obama-owes-apology-to-bush/2011/10/02/gIQADug9FL_story.html.

86 Op-Ed., John B. Bellinger, *Obama's Drone Danger*, WASH. POST, Oct. 3, 2011, http://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQA0ReIGL_story.html; Op-Ed., Linda Ocasio, *The Use of Drones to Kill Terrorists Comes under Fire*, THE STAR LEDGER PERSPECTIVE, Oct. 2, 2011, http://blog.nj.com/njv_editorial_page/2011/10/qa_the_use_of_drones_to_kill_t.html.

87 Linda Ocasio, *The Use of Drones to Kill Terrorists Comes under Fire*, *supra* note 86.

88 Jack Goldsmith, *More on al-Aulaqi and Transparency*, LAWFARE, http://www.lawfareblog .com/2011/10/more-on-al-aulaqi-and-transparency/ (Oct. 5, 2011, 2:17 PM) (distinguishing transparency as to legal justifications and transparency as to methods of intelligence gathering).

the lawsuit about the rules that govern the determination of listings and of the listings of Americans in particular.[89] Both the government's decision in how much information to reveal and the manner in which the revelations have occurred are likely deeply unsatisfying to the ACLU and CCR, but perhaps better than nothing.

C. Revitalizing Congressional Checks

Another way in which *al-Aulaqi* may move the decision-making away from an unfettered executive is by revitalizing the discussion about amending the AUMF to cover nations like Yemen or groups like AQAP, as well as organizations that share some goals with al-Qaeda. Of course, such a debate does not guarantee that Congress will limit the executive. In fact, Congress may decide to expand the scope of the AUMF and with it provide a greater reach to the executive.[90] While this may not have been the ACLU and CCR's first order preference, as a second order matter, such amendments have the non-trivial benefit of enhanced democratic legitimacy and greater clarity about the scope of the war on terror.

D. Encouraging Policy Debate over Targeting

Filing *al-Aulaqi v. Obama* also provided the ACLU and CCR with a platform to address policy issues of whether targeting is necessary, sufficient, or preferable to other strategies to ensure national security. Media coverage and, to some extent, the government has presented the decision as a binary one: either allow the executive unreviewable authority to target al-Aulaqi or do nothing. Yet, the lawsuit allowed the ACLU and CCR to present another option to the court, to the executive, and to the public. This third (and clearly lawful) approach is to use law enforcement to attempt an arrest.[91] Yemen had already arrested al-Aulaqi once in 2006.[92] Though al-Aulaqi's re-arrest would have presented many logistical burdens, U.S. diplomatic pressure could have been quite effective in persuading Yemen to arrest al-Aulaqi if the opportunity had presented itself. For instance, although Yemen refused for a long time to extradite al-Aulaqi, as of October 2009, they agreed to charge him and subsequently sentenced him in

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[89] Most interestingly, the memo is said to require the capture of an American citizen if feasible. Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, *supra* note 77.

[90] For instance, the U.S. has been increasingly concerned about the Haqqanis in Pakistan and Afghanistan. Rob Crilly, *Warlord Snared*, SUNDAY TELEGRAPH, Oct. 2, 2011 at 27. One could imagine Congress expanding the AUMF to include them.

[91] Complaint, Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C 2010) (No. 10-01469).

[92] Scott Stewart, *Why Anwar al-Awlaki Is NOT Bin Laden's Successor*, BUS. INSIDER (May 12, 2011, 1:08 PM), http://www.businessinsider.com/why-anwar-al-awlaki-is-not-bin-ladens-suc-e-sor-2011-5?utm_source=feedburner&utm_medium=feed&utm_campaign=feed%3A+businessinsider+%28Business+Insider%29 (stating al-Aulaqi was only released at the behest of the United States which did not believe at the time it had "sufficient evidence" to pursue legal action. One might find it worrisome that the executive branch refuses to allow the judiciary or the public review the evidence leading it to conclude al-Aulaqi is a legitimate target, but it was not convinced that it had sufficient evidence to prosecute him. In fairness, however, the arrest took place several years before his alleged placement on the targeting lists).

absentia.[93] At the time of his death, the Yemeni police were authorized to arrest him by any means necessary.[94] They were also well equipped to handle the post-arrest phase as they are successfully prosecuting other American al-Qaeda suspects like Al-Hajj.[95] Presumably, the intelligence required to locate al-Aulaqi for targeting ought to be sufficient to locate him for an arrest as well. Of course, an arrest presents different and much more significant risks than drone targeting because it requires people to put themselves in harm's way. Despite this risk, the successful use of "boots on the ground" in getting to Osama bin Laden shows the United States is capable of executing such a plan even with well-protected, high-value targets.

Moreover, law enforcement strategies to incapacitate specific suspected terrorists include more than arrests and prosecutions. The United States has long been using other law enforcement mechanisms to dry up funding, seize assets, and generally make it more difficult for terrorists to operate.[96] The national security frame often overlooks or obscures these tools, while the ACLU and CCR's reframing can help bring them to the forefront.

Finally, implicit in this discussion of lawful and unlawful approaches to dealing with al-Aulaqi is a prior policy question about whether emphasizing leadership decapitation is the right strategy in the war on terror.[97] Will targeting succeed? In this context, success means more than the first order question of whether the United States can find and eliminate the targets it seeks which it is in fact rather good at.[98] But rather, if the executive branch does eliminate these targets, will terrorism directed at the United States and its allies subside?[99] While the empirical literature here is still in its nascent stages, work from politi-

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93 Robert F. Worth, *Yemen: U.S. - Born Cleric is Sentenced*, N.Y. TIMES, Jan. 19, 2011, at A7 (article available on LexisNexis).

94 *American Born al-Qaeda Cleric Al-Awlaki Killed*, AL-ARABIYA NEWS, Sept. 29, 2011, http://english.alarabiya.net/.

95 Robert Chesney, *GTMO Habeas Ruling Excluding Detainee Statements Based on Prior Abuse*, LAWFARE, http://www.lawfareblog.com/2011/06/gtmo-habeas-ruling-excluding-detainee-statements-based-on-prior-abuse/ (June 8, 2011 4:13 PM) (describing the ongoing prosecution).

96 James J. Savage, *Executive Use of the International Emergency Economic Powers Act- Evolution through the Terrorist and Taliban Sanctions*, 10 CURRENTS INT'L L.J. 28, 37-41 (2001).

97 *See, e.g.*, Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18 SECURITY STUDIES 719, 721 (2009) (stating "Israel has consistently targeted the leaders of Hamas.") Other countries, such as Peru and Spain, have shown diverging responses and instead focused on arrest for high-level operatives.

98 The United States intelligence capabilities seem quite good given its strong of high level targeted killings. William McLean, *After Awlaki's Death, alQaeda Woes Deepen with Loss of Its Top Propagandist*, ALARABIYA NEWS, Sept. 30, 2011, http://www.alarabiya.net/articles/2011/10/01/169586.html. The U.S. Undersecretary of Defense for Intelligence suggests that eight of alQaeda's top 20 leaders have been killed this year. CNN Wire Staff, *U.S. Officials Warn of Possible Retaliation after al Qaeda Cleric Is Killed*, CNN U.S., Sept. 30, 2011, http://articles.cnn.com/2011-09-30/middleeast/world_africa_yemen-radical-cleric_1_al-qaeda-cleric-samir-khan-awlaki?_s=PM:MIDDLEEAST.

99 No doubt, the United States has eliminated some high value targets. Moreover the policy of targeting can itself make it more difficult for terrorists to operate as they must hide and reduce or eliminate communications and planning roles. *See, e.g.*, Daniel L. Byman, *The Targeted Killings Debate*, COUNCIL ON FOREIGN REL. (June 8, 2011), www.cfr.org/international-peace-and-security/targeted-killings-debate/p25230.

cal scientist Jenna Jordan suggests that successfully targeting high-level operatives rarely causes organizational collapse.[100] In fact, she suggests terrorist organizations effectively replace even very high-level members.[101] Her work also suggests that religiously-motivated organizations engaged in terrorist activities are more likely to fade away when states choose not to pursue a decapitation strategy.[102] International security scholar Robert Pape has similarly suggested that killing key members of religiously motivated groups can be particularly counter-productive because it may cause splintering with increasingly smaller numbers of groups that attempt more and more attacks.[103] Likewise, many question the benefits of killing al-Aulaqi as he may not have been a key player in al-Qaeda's hierarchy[104] or similarly they question the focus on killing Bin Laden given the decentralized nature of al-Qaeda and its affiliates.[105] That said, others suggest that some individuals play such an important recruiting and organizational role that they cannot be replaced.[106] Regardless of where one falls on this issue, the executive implemented this strategy without a thorough public debate. By emphasizing the legal standards for targeting, the ACLU and CCR helped invigorate a discussion of available options and strategies for combating high-level terrorists.

V. Conclusion

Although the resolution of both the legal and the policy debate, has ultimately been left to the executive, the ACLU and CCR helped make these questions part of the larger landscape of public discourse by filing *al-Aulaqi*. While raising constitutional and statutory questions brings the discussion within a legal framework, the related media and academic commentary encourages a more thorough public vetting of the policy issues implicated by targeting. One of the most important lessons of *al-Aulaqi* may be that while the judiciary remains cautious about treading on executive prerogatives, even seemingly hopeless litigation can generate the conditions for some public check on the executive during the long war on terror.

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[100] Jordan, *supra* note 97 at 720, 745.

[101] *Id.* at 736.

[102] *Id.* at 739.

[103] *See* ROBERT PAPE AND JAMES FELDMAN, CUTTING THE FUSE: THE EXPLOSION OF GLOBAL SUICIDE TERRORISM AND HOW TO STOP IT, 43 (2010); *see also*, Kate Clark, *The Targeted Killings Debate*, COUNCIL ON FOREIGN REL. (June 8, 2011), www.cfr.org/international-peace-and-security/targeted-killings-debate/p25230.

[104] Erik Stier, *Is Anwar al-Awlaki's Importance to Al-Qaeda Overstated?*, CHRISTIAN SCI. MONITOR, May 10, 2011, http://www.csmonitor.com/World/Middle-East/2011/0510/Is-Anwar-al-Awlaki-s-importance-to-Al-Qaeda-overstated (citing Gregory Johnsen, a Yemen specialist at Princeton University, suggesting that he "would argue that if the U.S. were to kill him AQAP would continue without missing a beat").

[105] Scott Shane & Robert F. Worth, *Even Before Al-Qaeda Lost Its Founder, It May Have Lost Some of Its Allure*, N.Y. TIMES, May 2, 2011, http://www.nytimes.com/2011/05/03/ world/03qaeda.html.

[106] Op-Ed., Ali H. Soufan, *The End of the Jihadist Dream*, N.Y. TIMES, May 2, 2011, http://www.nytimes.com/2011/05/03/opinion/03Soufan.html.

POTENTIAL PITFALLS OF "STRATEGIC LITIGATION": HOW THE AL-AULAQI LAWSUIT THREATENED TO UNDERMINE INTERNATIONAL HUMANITARIAN LAW

Michael W. Lewis†

Professor Wexler[1] has described how the *al-Aulaqi*[2] lawsuit[3] was dismissed on standing and political question grounds and she has discussed some of the procedural and policy making benefits that the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) may have derived from pursuing this litigation. While I will briefly address the policy question she raises concerning the efficacy of drone attacks and a decapitation strategy in the conflict with al-Qaeda, the focus of this short essay will be on the substantive legal position taken by the ACLU and the CCR in the *al-Aulaqi* lawsuit concerning how and where the law of war applies, and why that approach threatens to undermine traditional understandings of International Humanitarian Law (IHL).[4]

The primary substantive claim of the lawsuit is that as an American citizen, al-Aulaqi's Fifth Amendment due process rights would be violated if he were targeted for death "outside the context of armed conflict."[5] The concept that the targeting of al-Aulaqi in Yemen is occurring "outside of armed conflict" is so central to the rest of the claims advanced on al-Aulaqi's behalf that it appears 17 times in the 11-page complaint.[6] The ACLU and the CCR had little choice in taking this position because historically American citizens who have joined America's enemies during an armed conflict are not entitled to any form of due process on the battlefield.[7] As an example, numerous German-Americans returned to Germany to fight for their "Fatherland" during WWII and no attempt was made to differentiate between them and non-American citizens on the battle-

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[1] This article is in response to a piece by Lesley Wexler immediately preceding [hereinafter Wexler] and the two pieces should be read together.

[2] Al-Aulaqi is also commonly spelled al-Awlaki. *See, e.g.*, Andrew Cohen, *Judge: Terror 'Kill Target' Can't Sue U.S. From Hide-out in Yemen*, POL. DAILY, Dec. 7, 2010, http://www.politicsdaily.com/2010/12/07/judge-terror-kill-target-cant-sue-u-s-from-hiding-in-yemen/.

[3] Complaint, Al-Aulaqi v. Obama, 727 F.Supp.2d 1 (D.D.C 2010) (No. 10-01469).

[4] International Humanitarian Law (IHL) is the term given to the body of law that governs armed conflicts. It is also referred to as the Law of Armed Conflict (LOAC) and encompasses the Geneva and Hague Conventions, the Additional Protocols to the Geneva Conventions, and the customary law that has developed around these treaties.

[5] Complaint, Al-Aulaqi v. Obama, 727 F.Supp.2d.

[6] *Id.*

[7] *See, e.g.*, Louis Jacobson, *Lieberman says President can Approve Killing a U.S. Citizen who Affiliates with Terrorists*, POLITIFACT (May 11, 2010, 2:38 PM), http://www.politifact.com/truth-o-meter/statements/2010/may/11/joe-lieberman/lieberman-says-president-can-approve-killing-us-ci/.

fields of Europe and North Africa.[8] This like treatment of belligerent citizens and non-citizens extended to those captured as well. In *ex parte Quirin*, the Supreme Court held that Herbert Haupt's American citizenship did nothing to change his status, stating that "citizens who associate themselves with the military arm of the enemy government . . . are enemy belligerents within the meaning of the Hague Convention and the Law of War."[9] Ben Wizner and Arthur Spitzer – two of the ACLU lawyers who filed the lawsuit, whom I debated separately in New York and Washington, D.C. last year – both stated that if al-Aulaqi were in Afghanistan, he could be targeted.[10] Therefore, al-Aulaqi's central contention is that he is somehow "outside the context of armed conflict" with the United States because of where he is, rather than because of who he is.

There are three possible legal theories that could support this position. The first is that the United States is not involved in an armed conflict with al-Qaeda because IHL does not recognize armed conflicts between states and transnational non-state actors. Traditional state versus state warfare is covered by Common Article 2 of the Geneva Conventions, which applies the provisions of the Conventions to conflicts between two "High Contracting Parties."[11] The only other form of armed conflict mentioned by the Conventions is a conflict "not of an international character occurring in the territory of one of the High Contracting Parties."[12] Although there are indications that this provision was intended to apply only to civil wars and other internal insurgencies,[13] it was applied to the U.S. conflict with al-Qaeda in Afghanistan by the Supreme Court in *Hamdan*.[14]

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[8] Because the United States did not actively seek out those citizens that fought in the German Army after the war, specific numbers are not available. However, sources indicate that at least 8 American soldiers were killed while serving in the elite Waffen-SS divisions. *See, e.g., Foreign Volunteers,* AXIS HISTORY FORUM, http://www.axishistory.com/index.php?id=310 (last visited Nov. 3, 2011). No numbers are available for the much larger Wehrmacht (German Army) formations. One American (Martin Monti) was imprisoned for treason after defecting from the US Army to the Germans and joining the Waffen-SS where he served as a junior officer. Another American, Boy Rickmers, was awarded the Knights Cross for his service in the 320th Infanterie-Division; *see Heer Units*, AXIS HIST. FORUM, http://www.axishistory.com/index.php?id=3898 (last visited Nov. 3, 2011).

[9] *Ex parte* Quirin, 317 U.S. 1, 37-38 (1942). Haupt was executed along with most of the other saboteurs. Subsequently, the series of Guantanamo cases *Hamdi*, *Rasul* and *Boumediene* ultimately concluded that alleged enemy belligerents in Guantanamo, citizen and non-citizen alike, were entitled to *habeas corpus* challenges to their detention.

[10] *Predator Drones and Targeted Killings*, FEDERALIST SOCIETY (Mar. 22, 2011), http://www.fedsoc.org/publications/detail/predator-drones-and-targeted-killings-podcast (Podcast, Michael W. Lewis and Ben Wizner discuss the legal limits and policy considerations of unmanned aerial vehicles in the War on Terror). No transcript is available of the debate between Michael Lewis and Arthur Spitzer at Georgetown University.

[11] *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

[12] *Id.* art. 3.

[13] *See* GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY VOL. III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 28 (Jean S. Pictet ed., 1960) (stating that the purposes of Common Article 3 was to "aid the victims of civil wars and internal conflicts") (Library of Congress call No. JX5136 .A482 1949d); *see also* FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, VOL. 1, 1, 40-43 (William S. Hein & Co., Inc., 2004) (Library of Congress call No. JX5141 .A1 1949d).

[14] Hamdan v. Rumsfeld, 548 U.S. 557, 628-29 (2006).

While there are still those that support the view that there is no armed conflict between the United States and al-Qaeda,[15] given the statements on al-Aulaqi's ability to be targeted in Afghanistan made by the ACLU lawyers that filed this suit, this view of IHL is clearly not the basis for the ACLU's claim that al-Aulaqi is "outside the context of armed conflict."

The second theory that might support a finding that the targeting of al-Aulaqi is "outside of armed conflict" concedes that an armed conflict exists between the United States and al-Qaeda, but maintains that al-Aulaqi's organization, al-Qaeda in the Arabian Peninsula (AQAP), is not definitively part of al-Qaeda and is not itself involved in an armed conflict with the United States. As Wizner pointed out during our debate, AQAP did not even exist when the attacks of September 11, 2001 (9/11), took place.[16] However, although AQAP did not exist at the time of 9/11, al-Qaeda had a presence in Yemen long before September 2001. A Yemeni member of al-Qaeda, Abd al Rahim al Nashiri, proposed attacking a U.S. vessel off the coast of Yemen as early as 1998.[17] Bin Laden approved the operation, and after an unsuccessful attack on the USS *The Sullivans* in early 2000, Nashiri's men successfully damaged the USS *Cole* in October 2000, killing 17 U.S. sailors and wounding over 40.[18] A year later in Yemen, Nashiri's organization achieved another successful attack on the French tanker *Limburg*.[19] However, in November 2002, Nashiri was captured in the United Arab Emirates.[20] That event, combined with the killing of Abu Ali al-Harithi by a U.S. drone in Yemen on November 3, 2002,[21] severely weakened the Yemeni al-Qaeda group and they did nothing of consequence for several years.[22] That changed in 2006, however, after a large number of al-Qaeda prisoners escaped from a Yemeni prison.[23] Although many were recaptured, several future leaders remained at large and began renewed operations against both the United States and Saudi Arabia, including an attack on the U.S. embassy in the Yemeni capital of Sanaa.[24]

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15 *See, e.g.*, Kevin Jon Heller, *No, the UN Has Not Said the U.S. Is Engaged in an "Armed Conflict" with Al Qaeda*, OPINIO JURIS BLOG (May 21, 2011, 1:36 AM), http://opiniojuris.org/2011/05/21/no-the-un-has-not-affirmed-that-the-us-is-engaged-in-an-armed-conflict-with-al-qaeda//.

16 *See Predator Drones and Targeted Killings, supra* note 10.

17 NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM'N REPORT: FINAL REP. OF THE NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., at 152-53 (2004), *available at* http://www.gpoaccess.gov/911/pdf/fullreport.pdf (stating that, like Bin Ladin, Nashiri was a native Saudi, who lived in Yemen) [hereinafter 9/11 COMM'N REPORT].

18 *Id.* at 190-91.

19 *See* Jonathan Masters, *Al-Qaeda in the Arabian Peninsula (AQAP)*, COUNCIL ON FOREIGN REL. (Oct. 18, 2011), http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369 [hereinafter *AQAP*].

20 9/11 COMM'N REPORT, *supra* note 17 at 153.

21 Walter Pincus, *US Missiles Kill al Qaeda Suspects*, THE AGE, Nov. 6, 2002, http://www.theage.com.au/articles/2002/11/05/1036308311314.html?oneclick=true.

22 *Profile: Al-Qaeda in the Arabian Peninsula*, BBC NEWS, June 14, 2011, http://www.bbc.co.uk/news/world-middle-east-11483095 [hereinafter *Profile*].

23 *See AQAP, supra* note 19.

24 *See Profile, supra* note 22.

Al-Aulaqi himself returned to Yemen in 2006 where he was arrested by Yemeni authorities for his alleged role in a kidnapping.[25] He was released from prison in 2007 and since then has been in the desolate tribal regions amongst the other members of AQAP. He sent e-mails to Major Nidal Malik Hasan, the Fort Hood shooter, urging him to do his Islamic duty and carry out his planned attack.[26] According to Umar Farouk Abdulmutallab (the "underpants bomber" who attempted to blow up an Airbus A330 over Detroit on Christmas Day 2009), al-Aulaqi was involved in the planning of his operation.[27] More recently, AQAP was implicated in the toner cartridge explosives that were addressed to two synagogues in the Chicago area, but were intercepted before they could cause any harm.[28] The U.S. response to these events has been to step up its efforts to eliminate AQAP leadership. A few days after Osama bin Laden was killed in Pakistan, the U.S. conducted a number of attacks in Yemen. Drones fired several missiles at a truck carrying al-Aulaqi, and shortly thereafter, an airstrike killed Abu Ali al-Harithi (not to be confused with the al-Qaeda member of the same name killed by a drone strike in Yemen in 2002).[29] Although these June strikes failed to kill al-Aulaqi, a strike on September 30 killed him, Samir Khan and Ibrahim al-Asiri, AQAP's top bomb maker.[30]

Any claim the ACLU might make that AQAP is a separate and distinct organization from al-Qaeda and that it is not involved in an armed conflict with the United States is severely undermined by the actual facts on the ground. Al-Qaeda's long presence in Yemen, AQAP's continued operations against American targets in both Yemen and the United States, and al-Aulaqi's rising prominence as a leader of both organizations[31] makes any attempted distinction between the two groups more of a legal technicality than an accurate description of the actual situation. Such a distinction is all the less convincing because only the ACLU and CCR are trying to make it. Neither AQAP nor al-Qaeda has made any serious attempts to distance themselves or their actions from each other.

The final theory supporting al-Aulaqi's claim to being "outside the context of armed conflict," and perhaps the one most troubling for IHL, is that the boundaries of the battlefield are defined by geopolitical lines, and the laws of armed

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[25] Patrick Symmes, *Anwar al-Awlaki: The Next bin Ladin*, GQ, July 2011, http://www.gq.com/news-politics/newsmakers/201107/anwar-al-awlaki-profile?currentPage=1.

[26] *Id.*

[27] *See Profile*, *supra* note 22.

[28] *Id.*

[29] Robert Chesney, *Accelerating US Operations Against AQAP in Yemen (and Support from Opposition Leaders)*, LAWFARE, http://www.lawfareblog.com/2011/06/accelerating-us-operations-against-aqap-in-yemen-and-support-from-opposition-leaders/ (June 9, 2011) (Abu Ali al-Harithi had been an important AQAP figure since his release from a Yemeni jail in 2007).

[30] *See* Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *CIA Strike Kills U.S. Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html; *see also Top al Qaeda bombmaker dead in drone strike*, CBS NEWS, Sep. 30, 2011 http://www.cbsnews.com/stories/2011/09/30/national/main20114215.shtml.

[31] *See* Symmes, *supra* note 25 (indicating that al-Aulaqi is prominent enough to be considered a possible future successor to bin Laden).

conflict only apply within those geographical areas.[32] Commentators supporting this position maintain that the laws of armed conflict only apply to geographic areas in which a threshold level of violence exists.[33] This intensity requirement is met in Afghanistan and may be met in the border regions of Pakistan, but is certainly not present in Yemen.[34] As a result, it is argued that the laws of armed conflict do not apply there and any actions taken against al-Aulaqi in Yemen must exclusively utilize the tools of law enforcement rather than the tools of armed conflict.

A crucial difference between operations conducted under law enforcement rules and those conducted under IHL is that law enforcement requires that an opportunity to surrender be offered before lethal force is utilized.[35] Further, law enforcement limits the use of lethal force to situations in which the target poses a "concrete, specific and imminent threat" to public safety.[36] Because armed drones and airstrikes cannot offer an opportunity to surrender, they may not be utilized at all in law enforcement situations, leaving helicopter-borne special forces as the most rapidly deployable assets. In remote and desolate areas like Yemen, with a constantly moving target like al-Aulaqi, the lag time between identification and the arrival of an attempted capture team would be several hours at a minimum, greatly reducing the likelihood of success of any single attempt while alerting al-Aulaqi and his colleagues to the means and methods by which he was identified.

Not only does this view of the boundaries of the battlefield greatly diminish the likelihood of success in incapacitating al Qaeda or AQAP leaders like al-Aulaqi that operate in remote areas of ungoverned states like Yemen, Somalia or Sudan, more importantly, it threatens to undermine the more traditional understanding that IHL goes where the participants in the armed conflict go. In order to understand how this interpretation of IHL that the *al-Aulaqi* lawsuit advocates threatens to undermine the core principles of IHL, it is important to understand how IHL structures itself in its attempt to regulate armed conflict.

IHL divides the world into two groups. There are combatants and there are civilians.[37] Combatants are defined as members of the "armed forces of a Party

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[32] *See* Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858 (2009), *citing* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol II), art.1, Dec. 7, 1978, 1125 U.N.T.S. 609.

[33] *See, e.g., id.* at 860–64.

[34] *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (Apr. 28, 2010) (statement of Mary Ellen O'Connell, Professor, University of Notre Dame), *available at* http://oversight.house.gov/images/stories/Hearings/pdfs/20100428OConnell.pdf (Prof. O'Connell maintains that there is no armed conflict in the border regions of Pakistan either).

[35] *See* Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 15-16 (NYU School of Law, Public Law Research Paper No. 11-64, 2011) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928963 (forthcoming in the HARV. NAT'L SECURITY J.).

[36] Complaint, Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 9-10 (D.D.C 2010) (No. 10-01469).

[37] Protocol Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1, June 8, 1977, 1125 U.N.T.S. 3 (stating in ¶ 2 that, In cases not covered by this Protocol or by other international agreements, civilians and combat-

to a conflict."[38] To qualify as an "armed force" whose members can attain combatant status, the group must "be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."[39] Combatant status is beneficial because it confers the "combatants' privilege" on those that qualify, allowing them to participate in armed conflict without becoming subject to prosecution for violating domestic laws prohibiting murder, assault, and the destruction of property.[40] The combatant's conduct is regulated by IHL rather than domestic law, and the combatant may only be criminally charged with conduct that violates the laws of war.[41] All those not defined as combatants are civilians.[42] Civilians are immune from targeting unless they take affirmative steps to forfeit that immunity.[43] There are two ways that civilians can forfeit that immunity – one temporary, and one more permanent. The temporary forfeiture of immunity comes from direct participation in hostilities (DPH).[44] While the exact contours of what constitutes DPH are not clearly established, it is generally associated with a discrete act.[45] Picking up a gun, planting a bomb, or serving as a decoy as part of an attack are some examples of direct participation that results in a temporary forfeiture of immunity for such time as the civilian continues the participation. After putting the gun down and disengaging from the attack— the civilian regains immunity.[46]

A more permanent loss of immunity is associated with becoming a continuous combat functionary (CCF).[47] A civilian who repeatedly engages in hostilities, the "farmer by day, terrorist by night" example, can be considered a CCF. Likewise, those that occupy a leadership role may be considered CCFs and are therefore permanently targetable, unless or until they clearly disavow membership in the group and cease operations with it.[48] As a leader of AQAP, al-Aulaqi is permanently targetable as a continuous combat functionary.

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ants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.") [hereinafter Protocol I].

38 *Id.* art. 43, ¶ 2.

39 *Id.* art. 43, ¶ 1.

40 *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 188-89 (2010).

41 *Id.*

42 *See* Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009)*, 90 INT'L REV. OF THE RED CROSS 991, 997 (2008), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf [hereinafter *Interpretative Guidance*].

43 Protocol I, *supra* note 37, art. 51, ¶ 2.

44 *Id.* art. 51, ¶ 3.

45 *See Interpretative Guidance*, *supra* note 42, at 995-96.

46 *See id.* at 997.

47 *Id.* at 996. It should be noted that the level of involvement with an organized armed group necessary to trigger CCF status is much greater than that required to trigger domestic criminal liability for material support of terrorism. Hence the use of military force against those that have forfeited their immunity by fulfilling a continuous combat function would not significantly diminish the extensive role that law enforcement continues to play in the conflict with terrorist organizations like al Qaeda.

48 *Id.* at 996, 1007, 1036-37.

IHL structures itself in this way in order to better achieve its goals. One of IHL's principal goals is to spare the civilian population and members of the military that are hors de combat from the ravages of warfare.[49] To this end, it insists on proportionality and military necessity for all attacks.[50] IHL requires the acceptance of surrender, ties the availability of the combatants' privilege to organizational respect for IHL, and removes civilian immunity from those participating in an armed conflict either temporarily for such time as they directly participate in hostilities as a DPH, or more permanently for those who continuously perform a continuous combat function as a CCF.[51] Because organizationally al-Qaeda and AQAP do not enforce the laws of war, their members are civilians, not combatants.[52] As such, they are targetable when they engage in attacks as a DPH, and their leadership (like al-Aulaqi), is targetable at all times as a CCF because they consistently engage in the planning and direction of operations.[53] IHL rewards organizations that enforce the laws of war by granting the combatants' privilege to members of those organizations.[54] It discourages terrorist organizations like al-Qaeda and AQAP that target civilians and blend in with the civilian population (thereby placing the civilian population at greater risk) by denying them the combatants' privilege and by removing civilian immunity from its members.

But the interpretation of IHL advanced by the ACLU, the CCR and the commentators supporting the *al-Aulaqi* lawsuit severely undermine this set of incentives. Reading IHL to prohibit the use of the tools of armed conflict outside of certain geographically defined areas confers a tremendous strategic advantage upon the very same terrorist organizations that IHL otherwise strongly disfavors. By limiting the use of the tools of armed conflict to territories on which the threshold of violence for an armed conflict is currently reached, IHL would effectively create sanctuaries for terrorist organizations in any state not currently involved in a domestic insurgency in which law enforcement is known to be ineffective, such as (until recently) Yemen, Somalia, Sudan and the Federally Administered Tribal Areas (FATA) of Pakistan. This reading of IHL would thereby cede the initiative[55] in the conflict between a state actor that abides by

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[49] *See The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp (last visited Nov. 2, 2011) (The ICRC describes the purpose of the Geneva Conventions as protecting people who are not participating in hostilities and those that are no longer participating such as sick, wounded and shipwrecked soldiers and prisoners of war.)

[50] Complaint, Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 9-10 (D.D.C 2010) (No. 10-01469).

[51] *See supra* notes 44, 47.

[52] In fact, these organizations and other terrorist groups like them intentionally violate some of the most important rules of IHL. They routinely target civilians and they fail to make any attempt to distinguish themselves from the civilian population, thereby placing civilians at greater risk.

[53] *See supra* notes 44, 47.

[54] *See supra* note 40.

[55] The "initiative" in an armed conflict is the ability to decide when, where and how that conflict is conducted. Every officer and senior NCO is taught the value of gaining and maintaining the initiative at both the tactical and the strategic level, because determining when, where and how a conflict is conducted confers a tremendous advantage on the side that holds the initiative.

IHL and a non-state terrorist organization (which IHL disfavors in every other way because of its conduct during an armed conflict) to the terrorist organization. The disfavored terrorist organization would be able to remain in these safe areas beyond the reach of law enforcement tools and immune from the tools of armed conflict, training, recruiting and planning for the next attack. They alone would be allowed to decide where the next "battlefield" will be, whether it is New York, London, Madrid, Washington, DC, Mumbai, Detroit or Bali, and when the "fighting" would take place. Such an interpretation is contrary to what IHL has stood for since 1949.

Because the *al-Aulaqi* lawsuit as written could only succeed if al-Aulaqi were deemed to be "outside the context of armed conflict," it is fortunate for IHL that the case has been dismissed. This is not to say that there are not checks that should be placed on the executive's use of the tools of armed conflict, particularly where American citizens are involved. One example of such a check upon an executive's use of targeted killings can be found in the approach Israel has taken to this issue. The Israeli Supreme Court in *Public Committee Against Torture in Israel v. Israel* did not require any prestrike judicial review of targeted killings, but did require that the Israeli military and security services conduct be subjected to an independent investigation of the precision of the identification and the circumstances of the attack after the fact.[56] Although potentially burdensome, such an *ex post* investigation requirement that verified the intelligence and the means and methods of attack that were employed would seem like an appropriate check on executive power in these circumstances. While some form of review does occur,[57] questions concerning its sufficiency are likely to fall victim to the same standing and political question doctrines that led to the dismissal of this lawsuit. While there may be good policy reasons supporting calls for greater transparency in the legal process underlying the drone program, judicially-imposed investigation or review requirements are not likely to be forthcoming.

It should also be noted that there are a number of voices from across the political spectrum calling for increased transparency in the legal underpinnings of the drone program.[58] Thus far the administration has officially limited itself to broad comments about the justification for these strikes.[59] These justifications include

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[56] HCJ 769/02 Public Comm. Against Torture in Israel v. The Gov't of Israel [2005] (Isr.) ¶ 40, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

[57] *See* Harold Hongju Koh, Legal Advisor for the U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Washington, D.C., March 25, 2010) *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (describing the target identification and proportionality screening procedures as "extremely robust").

[58] *See e.g.* Alston *supra* note 35; Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, LAWFARE, http://www.lawfareblog.com/2011/10/release-the-al-aulaqi-olc-opinion-or-its-reasoning/ (Oct. 3, 2011, 7:45 AM); Op-ed., *Administration should do more to defend the Awlaki strike*, WASH. POST, Oct. 7, 2011, http://www.washingtonpost.com/opinions/administration-should-do-more-to-defend-the-awlaki-strike/2011/10/04/gIQASHEbOL_story.html.

[59] *See* Koh *supra* note 56; *see also* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

both self-defense targeting and the application of IHL principles that allow for the targeting of someone like al-Aulaqi as a continuous combat functionary.[60] However news articles have indicated that a lengthy memorandum by the Justice Department's Office of Legal Counsel addressed a variety of issues raised by targeting al-Aulaqi in June 2010 and concluded that such targeting did not violate US or international law.[61] Reportedly this memorandum specifically examined the question of whether al-Aulaqi's geographical distance from a "hot" battlefield in Afghanistan precluded targeting him under the laws of armed conflict and concluded that it did not.[62]

The last question that Professor Wexler raises is the policy question of whether drone strikes and targeted killings are effective anti-terrorism tools. Before engaging in a brief discussion on this topic, it should be pointed out that from a legal standpoint, such policy judgments reside solely with the political branches of government. With that in mind, it is worth considering whether such attacks are counterproductive. Professor Wexler cites studies indicating that targeting leadership, particularly religious leadership, may be ineffective because it has not caused organizational collapse in other circumstances, particularly in the Israeli conflicts with Hamas and Hezbollah.[63] However, there is a key difference between the situation in Israel and the situation in Pakistan where the vast majority of the drone strikes are taking place. Hamas and Hezbollah enjoy a great deal of popular support in Gaza and Lebanon, respectively, something that cannot be said of al-Qaeda and the Pakistani Taliban (TTP)[64] in the FATA areas of Pakistan.

Those who have spent time in the FATA areas report that opposition to drone strikes is much greater amongst Pakistanis living outside the FATA region than it is amongst those who have to live with the TTP.[65] This is because al-Qaeda and the TTP are broadly viewed as brutal occupiers by the residents of FATA. The residents generally support any outside force that can help to end this occupation and they view American drones as being vastly preferable to Pakistani airstrikes, or worse, Pakistani Army artillery.[66] The Pakistani Army's campaign in the Swat region displaced millions of people and destroyed large numbers of homes due to the largely indiscriminate use of artillery.[67] Amongst the people most affected by them, drones are broadly seen as the most accurate and most effective

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[60] *See* Koh *supra* note 56.

[61] *See* Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=1&_r=2&hp.

[62] *See id.*

[63] *See* Wexler, *supra* note 1.

[64] TTP stands for Tehreek-e-Taliban-e-Pakistan, Tehrik-i-Taliban Pakistan, or Tehrik-e-Taliban Pakistan. *See, e.g.*, Farhat Taj, *Drone Attacks: Challenging Some Fabrications*, DAILY TIMES (Jan. 2, 2010), http://www.dailytimes.com.pk/default.asp?page=2010%5C01%5C02%5Cstory_2-1-2010_pg3_5.

[65] *Id.*

[66] *Id.*

[67] C. Christine Fair, *Drones over Pakistan: Menace or Best Viable Option?*, HUFFINGTON POST, Aug. 2, 2010, http://www.huffingtonpost.com/c-christine-fair/drones-over-pakistan——m_b_666721.html.

option for removing al-Qaeda and the TTP from the region.[68] This on-the-ground assessment of effectiveness has been echoed by a recent study from the International Centre for the Study of Radicalisation & Political Violence at Kings College London.[69] That report indicates that targeting "middle managers" within al Qaeda, in concert with the decapitation attacks directed at top leadership, is proving to be effective at disrupting ongoing al Qaeda operations.[70]

While these are not the only voices that should be heeded when considering this policy question, they certainly strengthen the conclusion that reasonable people can disagree over whether drone use and decapitation strikes are an effective policy tool in the tribal regions of Pakistan. If that is the conclusion that we reach on this issue, deference to the executive's judgment is certainly the appropriate outcome.

[68] *Id.* It should be noted that both Taj and Fair also challenge the claims commonly reported in the Pakistani and American media that the drones result in large numbers of civilian casualties. Taj goes to some length in detailing why and how these numbers are intentionally inflated by al Qaeda and the TTP.

[69] *See* John Walcott, *Killing al-Qaeda's Middle Managers May be Key to its Destruction*, BLOOMBERG, Oct. 26, 2011, http://www.bloomberg.com/news/2011-10-26/killing-al-qaeda-s-middle-managers-may-be-key-to-its-destruction.html (briefly summarizing the findings of the report).

[70] *Id.*

THE DESTRUCTION OF MASS WEAPON DISTRIBUTION: THE UNITED NATIONS ARMS TRADE TREATY & THE PART AMERICA MUST PLAY

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I. Introduction

A. United Nations Arms Trade Treaty

The United Nations has spent the better part of the last century attempting to foster diplomacy and understanding between the nations of the world. It has succeeded in bringing together nations that have been bitter enemies, nations that have refused to meet unilaterally with foes, and nations that want to change the world without picking up a weapon. Although sometimes it may be necessary to weaponize to defend one's ideals, what happens when those weapons are turned on the innocent, the undeserving, or the unprotected? What has happened is that at least a quarter of a million people have been killed annually in armed conflicts around the globe since 1989, with many of those deaths being facilitated by the trade in conventional arms.[1] Therefore, the United Nations sees fit to address this situation, as it remains largely problematic in many regions of the world.

The United Nations (U.N.) is currently working on drafting an Arms Trade Treaty (ATT) that will attempt to not only codify the large weapons that have been at issue in the past, but also the Small Arms and Light Weapons ("SA/LW") that have become the scourge of third-world countries and the deadliest of weaponry.[2]

The U.N. created an ATT Preparatory Committee that met most recently on July 11-15, 2011.[3] Since 2009, the committee has been meeting "to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms. . .."[4] The U.N. established July 2012 as the target date to pass the ATT, with ratification by signatory nations in the months following.[5]

B. United States Position on an ATT

United States Secretary of State, Hillary Rodham Clinton, has stated that the U.S. "is committed to actively pursuing a strong and robust treaty that contains the highest possible legally binding standards for the international transfer of

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[1] *Killer Facts, The Impact of the Irresponsible Arms Trade on Lives, Rights and Livelihoods*, AMNESTY INT'L 4 (May 2010) (Index No. ACT 30/005/2010), http://controlarms.org/wordpress/wp-content/uploads/2011/03/killer_facts_en.pdf.

[2] U.N. Group of Governmental Experts on Arms Trade, Rep., transmitted by letter dated Aug. 8, 2008 from the Chairperson of the Group of Governmental Experts established pursuant to General Assembly resolution 61/89 (2006) concerning an Arms Trade Treaty addressed to the Secretary-General, ¶¶ 21, 23, U.N. Doc A/63/334, 63rd Sess. (Aug. 26, 2008) [hereinafter Report of GGE].

[3] *U.N. Arms Trade Treaty Preparatory Committee: Meeting Dates*, UNITED NATIONS, http://www.un.org/disarmament/convarms/ATTPrepCom/index.htm (last visited Oct. 3, 2011).

[4] Rep. of the Open-ended Working Group towards an Arms Trade Treaty, July 13-17, 2009, U.N. Doc. A/AC.277/2009/1, 2d. Sess. (July 20, 2009).

[5] *See generally* UNITED NATIONS ARMS TRADE TREATY PREPARATORY COMMITTEE WEBSITE, http://www.un.org/disarmament/convarms/ATTPrepCom/ (last visited Nov. 11, 2011).

conventional weapons."[6] The U.S. for the first time in more than a decade is open to the possibility of supranational arms control, a large diplomatic step that will strengthen several areas of interest for the American government.

Secretary Clinton, however, also understands that this will not be an easy task, and a useless ATT will be no better than no treaty at all. Secretary Clinton stated that the U.S. will actively support the negotiations so long as "the Conference operates under the rule of consensus decision-making needed to ensure that all countries can be held to standards that will actually improve the global situation. . ."[7] Therefore, it will be important for the United States to take an active role in the formation of this treaty, especially by participating over the next two years and garnering support in the international community.

The U.S. is seeking a treaty that will make concrete strides in the area of arms control and protect those who are the senseless victims of unsafe weapons trading. Ellen Tauscher, the U.S. Under Secretary for Arms Control and International Security stated, "What we are after is a means to have all nations do what the United States already does: examine each conventional weapons transfer before it is authorized to be certain that it will enhance. . .not undermine. . .security and stability."[8]

C. The U.S. Must Take an Active Leadership Role in Developing the ATT

The U.S. has taken the first step to making the ATT a reality, namely, it has publicly expressed support for its passage. Now, in order to unmistakably back its public support, the U.S. must take the next step and actively participate in the stages of development and writing, as well as international lobbying and negotiations that will result in an effective treaty.

The U.S., however, need not look at the ATT as a moral project; rather, it will enhance several legitimate goals that the U.S. government would like to reach. Therefore, this paper proposes that the objectives of the U.S. will be furthered in a number of ways by its active participation in the negotiations and ratification of the U.N. Arms Trade Treaty. First, an ATT will quell terrorism and regional conflicts. Second, the ATT can ensure the safety of millions of citizens in various countries where arms trafficking has led to a rash of organized killings and genocidal-type deaths. And third, an ATT will allow the U.S. to strengthen alliances and potentially make new ones as the negotiations progress and diplomacy is furthered among participant nations.

It will not be a simple, straightforward path, however. The U.S. must be willing to negotiate with countries with which it typically does not have an open dialogue. This will be necessary as the U.S. has much at stake in the development of this treaty. For instance, the U.S. must protect legitimate weapons sales because it is vital to its economy, as evidenced by the fact that the U.S. is the

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[6] Press Release, Hillary Rodham Clinton, Sec'y, of State, U.S. Support for the Arms Trade Treaty (Oct. 14, 2009), *available at* http://www.state.gov/secretary/rm/2009a/10/130573.htm.

[7] *Id.*

[8] Ellen Tauscher, Under Sec'y for Arms Control & Int'l Sec., U.S. State Dep't, Arms Trade Treaty Remarks at the Carnegie Endowment for International Peace (Feb. 18, 2010).

leading arms exporter in the world, responsible for 30% of the world's arms exports from 2006 to 2010.[9] At the same time, concessions may be necessary to ensure a respectable number of signatories. If the ATT is ratified by a only small percentage of nations, it will carry no more weight than past U.N. Arms Trafficking agreements.

By way of a roadmap, this article will, in Section II, give a background on the historical development of arms trade agreements previously employed. Section III will discuss the state of current global arms trade control. Next, Section IV will address what is being proposed for inclusion in the United Nations Arms Trade Treaty, as well as why those elements are crucial for the overall success and implementation of that treaty. Section V will propose several reasons why the United States will benefit from active participation in the ATT negotiations, along with pinpointing potential regional conflicts that would be impacted by the new treaty. And finally, a short conclusion in Section VI will emphasize how the U.S. government can go about implementing the treaty both at home and abroad.

II. Background

In order to understand why the Arms Trade Treaty is both desirable and pressing, it is necessary to give a timeline of the historical development of arms control at the international level. As discussed in the following section, history shows that now is the time to take action because the world is ready for a comprehensive arms trade treaty.

A. Historical Calls for Arms Control in the U.N.

After World War II, the Cold War brought attention to the problems that arise when arms stockpiling becomes commonplace. The arms race between the United States and the Soviet Union led to the First Special Session on Disarmament (SSODI) in 1978.[10] However, the first SSODI was, essentially, an admission of the failure of the declared "Decade of Disarmament" that had begun in 1969, as the U.N. realized that disarmament was likely further away in 1978 than it was in 1969.[11]

At the same time, there was worldwide growth in awareness about nuclear weapons.[12] This newfound fear of nuclear weapons, predicated on the destruction that took place in Hiroshima and Nagasaki, led to a movement for nuclear disarmament that took center stage as the U.S. and Soviet Union stockpiled these

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[9] *14 March 2011: India world's largest arms importer according to new SIPRI data on international arms transfers*, STOCKHOLM INT'L PEACE RESEARCH INST., http://www.sipri.org/media/pressreleases/armstransfers (last visited Nov. 11, 2011).

[10] First Special Session of the General Assembly devoted to Disarmament, Final Document of SSOD-I: Resolutions and Decisions of the Tenth Special Session, ¶ 1-2, U.N. Doc. A/S – 10/4 (1978), *available at* http://www.un.org/disarmament/HomePAge/SSOD.ssod4-documents.shtml. Report of the First Special Session on Disarmament.

[11] *Id.* at ¶ 7.

[12] *Id.*

weapons of mass destruction.[13] But all of the activists had basically failed when it came to the arms race. They all focused on nuclear weapons and the devastation that a single bomb could inflict, while small arms and conventional weapons were brushed aside despite the fact that these weapons would go on to kill far more people than nuclear, chemical, and biological weapons combined over the next several decades.[14]

In response to the growing concern over all types of weapons, the U.N. adopted two instruments aimed at promoting transparency on military matters and conventional arms transfers: the 1980 U.N. Standardized Instrument for Reporting Military Expenditures and the 1991 U.N. Register of Conventional Arms.[15] Additionally, in 1991, the U.N. Security Council adopted Guidelines for Conventional Arms Transfers.[16]

The 1991 Register of Conventional Arms ("the Register") is viewed as the forerunner to the upcoming ATT.[17] The Register covered seven categories of weapons: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, and missiles.[18] However, despite initial optimism in the international community, the Register is generally viewed as a failure[19] because although the international community had assented to transparency in arms transfers, there was no useful data harvesting mechanism and no way to follow the transfers in order to monitor a potentially destabilizing build-up of arms.[20]

B. A Renewed Call for Arms Control

Over a decade into the 21st century, SA/LW have increasingly threatened security in several conflict regions around the world, as well as fueling terrorism all over. At the turn of the millennium, the U.N. once again began discussing what it could do to help stem the tide of weapons reaching the hands of groups who intended to violate basic principles of human rights. Therefore, "[r]ecognizing that the illicit trade in small arms and light weapons in all its aspects sustains conflicts, exacerbates violence, contributes to the displacement of civilians. . .and fuels crime and terrorism," the U.N. embarked on several initiatives to aid the fight.[21]

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[13] *Id.*

[14] Tauscher, *supra* note 8.

[15] Report of GGE, *supra* note 2, ¶ 7.

[16] *Id.*

[17] *See generally* Cristiane Carneiro, *From the United Nations Arms Register to an Arms Trade Treaty – What Role for Delegation and Flexibility?*, 14 ILSA J. INT'L & COMP. L. 477 (2008).

[18] *Id.* at 478.

[19] *Id.* at 479.

[20] *Id.*

[21] United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, July 9-20, 2001, *U.N. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, ¶ 5, U.N. Doc. A/Conf.192/15 (July 20, 2001) [hereinafter Conference on Illicit Trade].

The U.N. Register failed to cover the transfer of small arms, so it became apparent that this issue needed to be addressed on an international level.[22] The first attempt was made in 2001, with the passing of the U.N. General Assembly's Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components, and Ammunition.[23] Additionally, the U.N. held the Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, which led to a Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects in 2001.[24]

This Programme of Action was an attempt by the U.N. to memorialize what the member nations believed was an effective method for registering, manufacturing, trading, and maintaining a safe market for SA/LW.[25] The Programme sought to create global norms, develop and implement agreed measures, emphasize particular regional problems, increase international cooperation and information sharing, and promote responsible action by States.[26] While this document has been marginally effective in creating the standards it aimed to promote, after a few years the U.N. membership began to desire more.

In December 2006, the U.N. General Assembly asked the Secretary-General to seek the views of member states in regards to an arms trade treaty as well as to put together a Governmental Group of Experts to assess the situation.[27] The General Assembly, in taking this step, recognized that arms control, disarmament, and non-proliferation are essential for the maintenance of international peace and security, each state has a right to take legitimate self-defense steps, and each country must respect international law, including human rights and humanitarian law.[28] Nevertheless, it also recognized the need for a balance between these goals and the safety of individuals around the globe.[29]

C. Recent American Attitudes Toward Arms Control

In 2001, the U.S. was far from amenable when discussions turned towards arms control. John Bolton, then the U.S. Representative to the U.N. Illicit Trade in Small Arms and Light Weapons Conference, stated that the U.S. "does not support any course of action that constrains the legal trade and manufacture of small arms."[30] The consensus in the George W. Bush Administration was that any type of constraint would be bad for American business and might hamper national interests abroad, especially as wars in Afghanistan and Iraq ramped up.[31]

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22 Carneiro, *supra* note 17, at 481.

23 Conference on Illicit Trade, *supra* note 21, ¶ 20.

24 *Id.* ¶ 1.

25 *Id.* ¶ 9-14.

26 *Id.* ¶ 22.

27 G.A. Res. 61/89, ¶ 1, U.N. Doc. A/RES/61/89 (Dec. 18, 2006).

28 *Id.*

29 *Id.*

30 Elizabeth Powers, *Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. Rev. 383, 416 (2008).

31 *Id.*

However, U.S. policy changed courses in the latter half of Bush's presidency as alliances became harder to cultivate. Robert Loftis, then the American Ambassador to the Organization of American States, said in an April 2005 speech to the Organization of American States that the U.S. supports the 2001 U.N. Programme of Action on Illicit Trade of Small Arms and Light Weapons.[32] He went on to state that the U.S. sees an arms trade treaty as facilitating the timely, reliable identification and tracing of illicit SA/LW, which will be a goal of the current administration as it strives to enact the proposed U.N. ATT.[33]

Secretary Clinton is fully behind the ATT proposition being discussed by the preparatory committee. Secretary Clinton stated that the United States would actively support the negotiations as long as the ATT "will improve the global situation by denying arms to those who would abuse them."[34] To be sure, this is a good sign for those who support an Arms Trade Treaty because, even as the image of America as the last world superpower dwindles, America is still a powerful country whose opinion matters to many nations around the world.

III. Discussion

A. Status of Current Regional Arms Control

The majority of current arms control safeguards around the world are at the national or regional level. There are a number of agreements, such as the U.N. Register previously discussed, that are only politically binding because the country itself did not pass or ratify the law.[35] A legally binding instrument, which is the goal of the ATT, would become part of the law of a nation if that nation ratified it.[36] Once ratified and legally binding, breaking or subverting that law would have consequences.[37]

Politically binding agreements in place now, such as the Wassenaar Arrangement and the U.N. Register, are voluntary.[38] This has led countries that already have national laws regulating arms trade to acquiesce to these agreements, meaning little actual progress has been made because countries where illicit trafficking exists without national laws are the real targets of an international arms trade treaty.[39] In other words, until countries without national laws to regulate the arms trade are willing to sign an arms trade treaty and adopt it as national law, true progress is minimal.

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[32] *Id.*

[33] *Id.* at 416-17.

[34] Clinton, *supra* note 6.

[35] Katherine Orlovsky, Note, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers,* 29 HASTINGS INT'L & COMP. L. REV. 343, 369 (2008).

[36] *Id.*

[37] *Id.*

[38] Jonathan T. Stoel, Note, *Codes of Conduct on Arms Transfers – The Movement Toward a Multilateral Approach,* 31 LAW & POL'Y INT'L BUS. 1285, 1288-89 (2000).

[39] *Id.* at 1289.

As mentioned above, states and regional organizations have attempted to add layers to national laws to protect their citizens and foreign interests. The United States and European Union (EU) have regimes in which they "attempt to identify rogue states that act outside acceptable norms of behavior and bar the exportation of weapons to these states."[40] This unilateral stance has created an international system that forbids the movements of weapons to Iran, Iraq, Libya and North Korea, via the Wassenaar Arrangement, but permits sales to any other country, with constraints coming only from the laws of the receiving nation.[41]

While this may seem like a positive step forward, the problem with this arrangement is its inherent leniency that allows for decisions based on several factors, not just who is on the other side of the transaction. In America, policy guidelines are supposed to use a balancing test between the possibility that the transfer "may exacerbate regional arms races or contribute to human rights abuses" and "the effect on the U.S. arms industry and the defense industrial base."[42] Unfortunately, capitalism generally prevails under the theory that we are aiding developing nations by giving them the means for self-defense, or at least to balance the weaponization of a region.[43]

However, there have been some recent regional agreements that have seen success. The best example is the European Union (EU) Code of Conduct on Arms Exports.[44] The EU's Code of Conduct sets out eight criteria for assessment of applications for the export of conventional arms. Those eight criteria are: (1) comportment with international obligations of EU member states (U.N. treaties, other international treaties, etc.); (2) the respect of human rights in the country of final destination; (3) the internal situation in the country of final destination; (4) preservation of regional peace, security and stability; (5) national security of the member states and of territories whose external relations are the responsibility of a member state; (6) behavior of the buyer country with regard to the international community, particularly attitudes to terrorism and alliances; (7) existence of a risk that the weapons may be diverted in the buying country; and (8) compatibility of the arms exports with the technical and economic capacity of the recipient country.[45] The EU Code of Conduct sets out these eight criteria along with a method of evaluating each criterion. Additionally, the EU Code established a notification and consultation mechanism for denials and insists on transparency throughout the entire procedure through the publication of the EU annual reports on arms exports.[46]

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[40] *Id.* at 1287.

[41] *Id.* at 1287-88.

[42] *Id.* at 1288.

[43] *Id.* at 1290.

[44] *The EU's Support for a Legally Binding International Arms Trade Treaty*, COUNCIL OF THE EUROPEAN UNION, http://www.consilium.europa.eu/uedocs/cmsUpload/016_09_EN_low.pdf (last visited Oct. 15, 2010) [hereinafter EU's Support for ATT].

[45] 1998 O.J. (L 75) 81.

[46] EU's Support for ATT, *supra* note 44.

The European Union also adopted a *Strategy to combat illicit trade and excessive accumulation of SA/LW and their ammunition.*[47] This document sets out a few guidelines, but is particularly noteworthy as it came out strongly in favor of international initiatives like the ATT. One of the strategic initiatives, in fact, was to encourage the EU to foster discussion in other regional groups and with U.N. member states throughout the world.[48]

B. United Nations Renews Arms Control Effort

In December of 2006, the U.N. General Assembly adopted Resolution 61/89 entitled, "Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms."[49] Within this resolution, the General Assembly requested that the Secretary-General appoint a group of governmental experts to examine "the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms."[50] According to that Group of Governmental Experts (GGE), an ATT is necessary for several reasons. First of all, globalization changed the dynamics of the international arms trade.[51] The types of weapon systems, equipment and components manufactured were being developed through joint ventures between states, allowing for faster development and increased production capabilities.[52] Second, the GGE noted that, on certain occasions, U.N. Security Council arms embargoes were being violated because weapons were traded on illicit markets, re-exported through illegal brokering, and unsecure weapons storage and transportation allowed for re-direction far more easily than should have been the case.[53] Further, the GGE observed that "such weapons could be used for terrorist acts, organized crime and other criminal activities," all of which are now being targeted by the ATT.[54]

C. The World Calls for an Arms Trade Treaty

In the first comprehensive collection of States' Views on an Arms Trade Treaty, the reasons for promoting such a broad initiative restricting arms trading became clear. There is growing support for a legally binding instrument negotiated on a non-discriminatory, transparent and multilateral basis, to establish common international standards for the import, export and transfer of conventional arms.[55] There are three global concerns that have continually surfaced in discus-

47 *Id.*

48 *Id.*

49 G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 18, 2006).

50 Report of GGE, *supra* note 2, ¶ 1.

51 *Id.* ¶ 12.

52 *Id.*

53 *Id.* ¶ 13.

54 *Id.*

55 G.A. Res. 63/240, U.N. Doc. A/RES/62/240 (Jan. 8, 2009).

sions, and while they are not specific in nature, they have provided the basis for further discussion: the impact of the arms trade worldwide, the changing nature of the arms trade, and the inadequacy of existing arms transfer control mechanisms.[56]

At this point, it is undisputed that the impact of the arms trade reaches nearly every corner of the world and "the absence of common international standards. . .is a contributory factor to conflict, the displacement of people, crime and terrorism," that undermines peace, security and sustainable development.[57] Sarah Parker, who authored the U.N. study that categorized and analyzed states' views on an ATT, wrote that in the context of civil conflict, illicit arms transfer can contribute to the beginning or continuing of conflict, meaning that it is an omnipresent danger in countries where strife is ready to strike at all times.[58] Parker also notes that irresponsible arms transfers have an impact on development, citing military expenditures that often divert financial, technological and human resources from development objectives.[59] Furthermore, underdeveloped and broken societies have compounded their own problems with misguided weapons purchases, which have created widespread corruption and have had a disparaging impact on economic growth and development.[60]

Second, the changing nature of the arms trade has increased the concern over how weapons are controlled, as old safeguards are no longer effective. The sharing of information among nations has become far more widespread than it used to be and although weapons development is in the hands of a few firms, the increased cooperation leads to the necessity of adaptable regulation standards.[61] Parker continues by observing that technology has allowed more delocalized sales and trade networks, making detection of illegal activities more difficult.[62] Parker recommends that, by challenging illegal transfers on an international level, the ATT will more accurately address the issues raised by a globalized trade network.[63]

Finally, the international community has expressed concern over the inadequacy of existing arms transfer control mechanisms. Current instruments such as the U.N. Register and the Programme against the Illicit Trade of Small Arms and Light Weapons have already been discussed, but these mechanisms are insufficient for dealing with an evolving market.[64] In the end, these documents must not be considered failures; rather they should be recognized as steps in the con-

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[56] SARAH PARKER, IMPLICATIONS OF STATES' VIEWS ON AN ARMS TRADE TREATY 7 (Jan. 2008) (report for the United Nations Institute for Disarmament Research) *available at http://www.unidir.org/pdf/ouvrages/pdf-1-92-9045-008-B-en.pdf.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 8.

[61] *Id.* at 8-9.

[62] *Id.* at 9.

[63] *Id.*

[64] *Id.*

tinuing process, utilizing the past treaties as examples on what has worked and what can be improved upon.

D. The United States' Outlook

As a result of our capitalist democracy and the incentives it creates, the question raised in America during the Bush administration was, "what's in it for us?" At the time, as reflected by the statements made by John Bolton to the U.N. there was not much for the United States to gain, as it was already seen as the "benchmark" for arms trade regulation.[65] Moreover, America was and still is the world's largest exporter of SA/LW, so more stringent regulations might dampen the profit potential for many American companies in the industry.[66]

However, in light of the September 11, 2001 terrorist attacks in the United States, the continued resistance in Afghanistan, and a war in Iraq, the United States fundamentally altered its position because it now might benefit from the ATT. The United States sees that the ATT could temper illegal arms trade in regions where terrorism and internal strife are continuous threats.[67]

The United States must be active in the formation of this treaty in order to continue giving aid to states in need as well as continue to provide SA/LW for military preparedness. An ATT would successfully regulate the arms trade industry, while still allowing exporters to properly equip countries that cannot produce the means to defend themselves.[68] Regulation of the SA/LW industry is critical as recent history has demonstrated the devastating effects where regulation is non-existent and the transfer of these weapons is like selling any other commodity.[69] As Elizabeth Powers wrote, "The availability of SA/LW adds to the causes of conflict and generates a vicious circle in which greater insecurity further increases the demand for, and use of, these weapons."[70] The U.S. can see this as the case, so it now must take action to prevent further abuses while maintaining its own ability to sell weapons to allies who will use the weapons for proper purposes such as self-defense.

The final reason the U.S. would benefit from an ATT is because it will further the human rights goals the U.S. has set for itself and reflect these goals on an international level.[71] Already, the U.S. has joined the Organization for Security and Cooperation in Europe (OSCE), which is committed to the principle that "each participating State will avoid [arms] transfers which would be likely to be used for the violation or suppression of human rights and fundamental freedoms."[72] Additionally, the Wassenaar Arrangement, to which the U.S. was a

65 Powers, *supra* note 30, at 416.

66 *Id.* at 406.

67 Tauscher, *supra* note 8.

68 *Id.*

69 Powers, *supra* note 30, at 415.

70 *Id.*

71 *The U.S. Should Support an Effective Human Rights Rule in the Arms Trade Treaty*, AMNESTY INT'L 4 (July 1, 2010) (Index No. AMR 51/057/2010) [hereinafter AMNESTY INT'L].

72 *Id.*

party, stated that "each Participating State will avoid issuing licenses for exports of SA/LW where it deems that there is a clear risk that the small arms in question might. . .be used for the purpose of repression; be used for violation or suppression of human rights and fundamental freedoms."[73]

For America, there is a delicate balance that the Arms Trade Treaty must strike. On one hand, the U.S. needs to protect the interests of businesses and their right to trade weapons to those in need, as well as protect those individuals in regions where these weapons could be used for improper purposes. That is precisely why the U.S. government sees the value in supporting an arms trade treaty.

E. Non-Governmental Organizations Call for Arms Control

There is no shortage of Non-Governmental Organizations (NGOs) actively campaigning for the ATT to become a reality. The main interest from these organizations stems from the desire for increased human rights awareness and the desire to see the rule of international law proliferate.[74]

Control Arms, a coalition made up of over 25 different smaller NGOs, is a highly active campaigner in ATT discussions.[75] Control Arms heavily relies upon statistics to support a swift implementation of an ATT, the most alarming of which is that "[e]ach year, at least a third of a million people are killed directly with conventional weapons and many more are injured, abused, forcibly displaced and bereaved as a result of armed violence."[76] It is apparent that the level of casualties must be curtailed, so the Control Arms campaign is exerting as much pressure on governments and regional organizations as possible to expedite negotiations by actively lobbying national governments and other NGOs to join the cause.

Much like Sarah Parker's U.N. backed analysis of states' views on an ATT, Control Arms shows empathy for more than just those that are killed or injured by arms. They are concerned for the development of entire nations, citing the fact that "even outside of wartime, governments arms purchases can exceed legitimate security needs, diverting substantial amounts of money away from health and education."[77] For instance, Botswana, the Democratic Republic of Congo, Nigeria, Rwanda, Sudan and Uganda each doubled their military spending from 1985 to 2000 while their people continue to lack basic essentials such as clean water, food and housing.[78] Control Arms advocates for inhibiting the flow of

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[73] *Id.*

[74] *Id.* at 9.

[75] *See generally About Control Arms*, CONTROL ARMS, http://www.controlarms.org/about-control arms (last visited Nov. 11, 2011).

[76] *Updated - Facts & Figures*, AMNESTY INT'L, http://www.amnesty.at/uploads/tx_amnesty/act30017 2008en_02.pdf (last visited Nov. 11, 2011).

[77] *Id.*

[78] Edmund Cairns, et.al, *Arms Without Borders: Why a Globalized Trade needs Global Controls*, CONTROL ARMS Campaign of Amnesty Int'l 6 (Oct. 2006) (Index No. POL 34/006/2006) *available at* http://www.amnesty.org/en/library/asset/POL34/006/2006/en/34ec3a8b-d403-11dd-8743-d305bea2b2c7/pol340062006en.pdf.

SA/LW because "while weapons do not cause these conflicts, the continuing supply and misuse of easily available arms and ammunition fuels their continuation, and makes them more deadly."[79] As Control Arms bluntly notes, "[t]he human suffering caused by collapsing economies, devastated health and security infrastructures, disease and famine is horrifying."[80]

While NGOs do not necessarily call on a single country to completely drive the process, there is a sense that the U.S. is in the best position to ensure that certain elements are included in an ATT that will not only further the goals of the international human rights community, but also those of the U.S. as well.[81] Amnesty International gives credit to the U.S. for maintaining human rights as a "central foundation of U.S. conventional arms export control law," but it says that for an ATT to be useful, "a similarly robust standard" is necessary, especially one backed by the world's largest exporter.[82]

IV. Analysis

Not enough has been done in the international sphere. While there have been legitimate attempts to quell the illicit transfer of arms, they have been insufficient.[83] Previous attempts such as the Programme of Action have been voluntary, meaning the real culprits of discord and merchants of death have not been subjected to the terms. It is now time for the world to commit to a legally binding ATT that will foster national laws in accordance with international principles agreed to at the Arms Trade Treaty Convention in 2012.

A. A Legally Binding Arms Trade Treaty

By far, the most discussed issue in the preliminary stages of negotiations has been that the new treaty will be legally binding on the countries that ratify it, not simply politically binding as past agreements have been.[84] From the outset, the goal has been to write a "legally binding instrument negotiated on a non-discriminatory, transparent and multilateral basis, to establish common international standards for the import, export and transfer of conventional arms."[85] The importance of a legally binding ATT with a broad, multilateral framework and clear, concise expectations cannot be overstated. These expectations and what transfers will fall within the grasp of the ATT must be made known internationally to minimize the number of illicit transfers. Thre must be no room to plead ignorance of the ATT.

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79 *Id.* at 25.

80 *Id.*

81 AMNESTY INT'L, *supra* note 71, at 3.

82 *Id.*

83 *See* background *supra* Part II.B.

84 Orlovsky, *supra* note 35.

85 G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 18, 2006).

B. The Scope of an Arms Trade Treaty

Two key issues are being contemplated for inclusion in the ATT though the details are not yet resolved. The first issue is what categories of weapons or items will be included on the list; the second issue is what types of activities and transactions will be included.[86]

In regards to the first issue, a list of weapons must be included. The primary question is whether the list will be one that already exists, such as the list used by the U.N. Register of Conventional Arms, or if a new list will be created. The likely resolution is the use of an existing list with simply modifications as many of the lists include the obvious choices, leaving room for additions or subtractions.[87] However, one main concern raised by several countries is that this list should be unambiguous and to allow for easy updates so that new weapons can be incorporated.[88]

Secondly, the scope of included activities and transactions must be determined. While a broad cross-section of activities and transactions is inherent in the goals of the ATT ("import, export and transfer"), most states desire something more definitive, expressing what each of those singular terms encompasses.[89] Other terms that have been suggested include: "brokering" (laws about who can broker and what can be brokered), "transit" (who is responsible for regulation – exporting country, transitional country, or importing country), "re-export" (guidelines for reselling arms and under what conditions this can be done), and "intangible transfers and licensed production" (trading of manufacturing knowledge or information).[90]

C. Parameters for an Arms Trade Treaty

After the scope, the Group of Governmental Experts should discuss the parameters of arms transfers, specifically, what concerns the treaty should encompass when deciding whether to allow an arms transfer to a country.[91] This will require a survey of the regional agreements and national laws in existence to develop a "best practice" idea to then be put in place on the international level.[92] It will also require an ATT to take into account the current regional and international commitments, embargoes, and U.N. Charter and Security Council Resolutions so as not to create a situation where, by acting in accordance with the ATT, a country would violate duties owed in other circles.[93]

The other major issue that must be considered when evaluating how far an ATT can reach is whether the exporter must evaluate the likely use of the weap-

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[86] PARKER, *supra* note 56, at 12.

[87] *Id.* at 12-13.

[88] *Id.* at 13.

[89] *Id.* at 17.

[90] *Id.* at 18-21.

[91] *Id.* at 21.

[92] *Id.*

[93] *Id.* at 23-25.

ons by the end user. The most obvious consideration is whether these weapons might end up in the hands of terrorist and organized crime groups. In that case, the exporter will be expected, if not required, to refrain from making an arms deal.[94] In the same vein, diversion during legitimate transport will have to be included as a subject, especially regarding who is responsible for shipments or when responsibility shifts (if it does as at all).[95] However, the GGE had not yet considered diversion, thus, it is an open issue. This concern has bled into a discussion on selling weapons to non-state actors and whether there should be a blanket ban on such transactions, though at this stage of an ATT, Parker believes this subject will be left to future treaties.[96]

D. Country Considerations Based on Likely Use of Transferred Arms

In short, the use of transferred arms to commit human rights violations is the aspect where NGOs and the human rights movement hope an ATT would be most effective. The conclusion of an ATT will likely stem the flow of SA/LW, which, in the aggregate, do the most damage.[97]

But how far can the treaty go? Several states suggested a method for assessing the level of risk when countries are being considered for a sale transfer of weapons, but there is no consensus.[98] The only sort of agreement that can be discerned at this point is to use the criteria established by the EU Code of Conduct on Arms Transfers, but its ability to be adapted to the world level may not prove so easy.[99] It will again be up to the U.N., much like with the earlier Register, to maintain a database that all countries will abide by. Finland suggested that the human rights bodies of the U.N., specifically The Human Rights Council, would be in charge of those determinations, but even that resolution might have issues depending on which country is a member of that committee at any given moment.[100]

E. Country Considerations Based on Likely Impact of Arms Transfers

Many states went beyond the impact on individuals and human rights to express concern for the states where arms transfers may hinder broader sustainable development and regional stability. Both of these are complicated issues, mainly because an exporter of arms is not necessarily oblivious to either one. In regards to sustainable development, an ATT will likely address whether a country can export weapons to a country where purchasing of arms should not be at the top of the list on how they should spend money, but does the international community

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94 *Id.* at 25-26.

95 *Id.* at 27.

96 *Id.* at 29.

97 Tauscher, *supra* note 8, ¶ 6, 9-11.

98 PARKER, *supra* note 56, at 29.

99 *Id.*

100 *Id.*

have the right to dictate such a judgment?[101] Additionally, exporters do not take the monetary priorities of purchasing countries into account because their financial benefit is the same regardless of whether it is derived from a rich country or a poor one. Parker refrains from making a suggestion in her U.N. report because the topic is difficult to gauge based on the countries submitting views.[102]

Again, a selling country would also likely have to make considerations based on regional stability; however, this is an inexact science because the country will not make decisions devoid of their own interest in regional power balances.[103] For instance, the United States may want to continue weaponizing the United Arab Emirates to have an ally in the Middle East with usable conventional weapons should Iran take action, or alternatively, the U.S. may continue selling aircraft and long-range weapons to South Korea in case North Korea takes military action. Parker writes that an ATT must have criteria for objectively assessing whether or not an arms transfer will have a destabilizing effect on a region.[104]

The final consideration on impact of arms transfers is whether the exacerbation of an ongoing conflict will take place. Much like regional stability, exporters must consider the entire situation including neighbors of a country before they allow weapons systems to cross borders and potentially fuel arms races.[105]

In the end, the considerations that the GGE must address require guidelines that are both specific enough to prevent misallocation of weapons and broad enough that they are adaptable as new situations arise. Although this is a difficult balance to strike, an effective treaty created with multilateral cooperation could save lives, ensure international human rights, and prevent further destabilization or exacerbation of regional conflicts.[106] The potential danger must be weighed against the legitimate defense needs, economic considerations of exporting countries, and the behavior of countries throughout transactions.[107]

F. Range of Implementation Measures

As the U.N. General Assembly noted, "the political will of States to implement non-proliferation, arms control and disarmament obligations and commitments and to participate in the associated verification agreements. . .is crucial."[108] Though it is helpful for a State to simply sign an international treaty, it is much more useful when the State ratifies it, incorporates it as a national law,

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[101] Note by the U.N. Secretary-General, *Verification in all its aspects, including the role of the United Nations in the field of verification*, 14, UN Doc. No. A/61/1028 (Aug. 15, 2007).

[102] *Id.* at 32-33.

[103] *Id.* at 33.

[104] *Id.*

[105] *Id.* at 34.

[106] *Id.* at 32-34.

[107] *Id.* at 34-36.

[108] Panel of Government Experts, *Verification in all its aspects, including the role of the United Nations in the field of verification*, transmitted by letter July 30, 2007, from the Chairman of the Panel established pursuant to ¶ 3 of General Assembly resolution 59/60 (2004), ¶ 14, U.N. Doc. A/61/1028 (Aug. 15, 2007).

and then follows through on that commitment "to share information, allocate resources, use available verification mechanisms and deal with cases of non-compliance."[109]

G. The Capacity to Implement an Arms Trade Treaty

In order for the ATT to take effect, it must be implemented, but this is not a simple task. The U.N. recognizes, and several states agree, that international cooperation and assistance will be vitally important.[110] This means that countries must be responsive to one another, allowing the exchange of information, creation of border control procedures, and collaboration in educating, training, and offering legal assistance to other nations.[111] No country is likely in a better position to assist than the United States, which already has similar mechanisms in place with personnel capable of handling the new procedures.

Another place developing states will look for assistance with implementation is through the approval and publishing of detailed implementation guidelines as part of the ATT.[112] Approving states were apathetic as to whether this was in the form of a checklist or standard form to be submitted, they simply wanted a known set of guidelines so that implementation, application and problem resolution took place similarly in one country to the next, allowing for better understanding and more effective evaluation of pending transfers.[113] In addition, a more controversial topic, but most likely one that would set this treaty apart from previous agreements is the desire for included recommendations for national legislation.[114] For example, these recommendations include: suggestions for penal and administrative sanctions for non-compliance; licensing systems that require licenses for the export, import, and international transit of conventional arms; marking of all SA/LW so that international tracing requirements can be met; record-keeping for accurate compliance with external obligations; and establishing a national agency in each country to oversee all of these different aspects.[115]

H. Transparency and Accountability

One of the major problems with past international weapons transfer protocols was that they did not increase transparency in the area.[116] Without transparency, accountability suffered and those agreements were viewed as unsuccessful.[117] In fact, individual national desire for increased accountability has kept the ATT on

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109 *Id.*

110 PARKER, *supra* note 56, at 37.

111 *Id.* at 37-38.

112 *Id.* at 38-39.

113 *Id.*

114 *Id.* at 39.

115 *Id.* at 38-39.

116 Carneiro, *supra* note 17, at 490-491.

117 *Id.* at 493; *see also* Background *supra* Part II, B.

the bargaining table for so long.[118] Therefore, the most prevalent suggestion for an ATT is a method for sharing information, including whether transfers were denied or approved, information on authorized dealers, producers and carriers, technical information to prevent illicit arms manufacturing and movement, experience and expertise, and information on national regulations.[119] Another possibility is the use of a mandatory reporting mechanism, as opposed to a voluntary one used by the U.N. Register.[120] While this may take the form of an international database maintained by the U.N., that question is up for debate and consideration by the GGE.

I. The Problem of Compliance Mechanisms

Arguably the most challenging issue that any legally binding treaty must address is compliance and enforcement. Many states will not appreciate being questioned about their level of commitment and might not be willing to accept such an intrusive verification mechanism.[121] Parker suggests several possibilities for verification, including, allowing a secretariat or other state party to request clarification, a request-and-respond system that could lead to a fact-finding mission, and/or a requirement for interstate communication prior to a request for clarification with a provision for on-site inspection.[122] However, all of these appear to have drawbacks, as some countries will target others to the point where they might withdraw or disavow the treaty. The best solution is the final one suggested by Parker's report: an international roster of trained auditors to carry out spot checks on states' submissions to a register.[123] This method will ensure that all countries are participating fairly without the added necessity of accusations and alienation.

The other compliance problem is enforcement. The enforcement problem has two prongs: first, who will do the compliance monitoring, and second, if a country is found to be in violates the treaty, what penalties are available?

When it comes to a monitoring organization, the best suggestion is for a U.N. body to be created or have the responsibility be added to an existing organ. One country suggested that the Security Council essentially govern the entire process: have it be in charge of investigating, penalizing and enforcing the penalization, even though this will be a continued topic of debate throughout the treaty's development.[124]

In regards to consequences for nations who violate the treaty, the most popular suggestion has been to institute either import-export embargoes or U.N. Security

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118 *Id.*

119 PARKER, *supra* note 56, at 40-41.

120 *Id.* at 41.

121 *Id.* at 47-48.

122 *Id.* at 48-49.

123 *Id.*

124 *Id.* at 48.

Council sanctions.[125] However, either option appears to lack support in practice as studies have suggested that U.N. arms embargoes have done little to stem the flow of weapons to target countries with few countries effectively enforcing the embargoes or sanctions.[126] Other suggested consequences for violations are financial penalties for misconduct or a lack of oversight, or temporary restrictions and/or prohibitions on trading arms for gross failures.[127] The question is far from settled, but the U.S. could affect its resolution because their opinion is valuable as a major player in both arms exportation and U.N. enforcement mechanisms.

V. Proposal

The United States should support and actively work for the development of the United Nations Arms Trade Treaty. The ATT can be utilized to further several U.S. goals, including winning the global war on terror, preventing nations such as Iran and North Korea from building weapons stockpiles, strengthening current alliances and winning new allies in countries in need of regulatory aid, and making strides in the fight for human rights.

A. The War on Terror

The U.S. recognizes what is at stake in the negotiation of an effective, binding, high-standard ATT. Ellen Tauscher, Under Secretary of State for Arms Control and International Security stated:

> The arms trade treaty negotiations will likely be long and difficult. Some participants will be tempted to take the easy road of seeking the lowest common denominator just to get a quick agreement from those states who would like to continue to support. . .directly or indirectly. . .terrorists, pirates and genocidal warlords for a quick profit or short-term advantage.[128]

Tauscher's words articulate the first goal that America could potentially reap in an ATT: the world could see fewer terrorists equipped with the weapons that make them most dangerous. SA/LW that fuel insurgency would no longer be available as widely on the black market. In short, the advantages of a regulated world arms trade begin with the advantages the entire world can enjoy: safety and security.

Additionally, Tauscher commented, "For the [ATT] to be effective at thwarting irresponsible transfers, it must ensure that members effectively implement national laws that criminalize such transfers and allow for the monitoring of commerce."[129] America is in a spectacular position to affect the ATT despite their

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125 *Id.*

126 Michael Brzoska, *Putting More Teeth in U.N. Arms Embargoes*, *in* SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 132 (David Cortright & George Lopez eds., 2002).

127 PARKER, *supra* note 56, at 48.

128 Tauscher, *supra* note 8.

129 *Id.*

image being tarnished by ongoing regional conflicts recently in the international community because the U.S. is still seen as a beacon of hope by many downtrodden people.

B. Prevention of Rogue States Obtaining Weapons

Iran and North Korea present a problem, but not one that is unique to world power politics of the 20th and 21st centuries. Those two countries pose a legitimate threat to neighboring countries when it comes to exacerbating regional conflict or even starting one because they have proven willing to engage in inflammatory discourse and, on a small-scale, actually take military or covert action. Therefore, the more widespread the international pressure, the more likely countries will abide by their commitments, and the more difficult it will become for rogue states to obtain weapons.[130]

The U.S. may in fact be able to more closely monitor what exports and imports are going in and out of those countries. If the ATT develops an effective mechanism for monitoring, the world will better be able to see what types of armaments are being traded in the region, even tracing some of them to black markets and into the countries where they are not supposed to be.

C. Strategic Alliances

If the U.S. demonstrates its commitment to all stages of ATT development and negotiations, other countries, especially those dependent on America for trade or other aid, will more likely be party to the Treaty. Countries understand that if they take a risk by not signing the Treaty, the U.S. could limit trade and weapons exports to that country, thereby leaving them in a vulnerable position.[131] Also, if the U.S. decides to limit aid to non-signatory countries, other allies may follow. The U.S. must understand and utilize its position and ability to control what might be viewed as a watershed effect. If the United States participates, their allies and their allies' allies will see the benefit in participation and ratification of an ATT, but if the United States allows the Treaty to simply continue without an active role, the entire process might be undermined.[132]

The U.S. must take a hardline stance, but must also be willing to help those nations that may not be able to afford participation from the start. Tauscher noted that if a country does not have the resources to implement safeguards in their own country, then the international community will have to step up and make available the necessary resources. [133] There is no better way to lead than by example, so if the U.S. were to provide resources such as funding and training to back the new treaty and its implementation, while making clear that those who

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[130] Tauscher, *supra* note 8.

[131] David Kopel, Paul Gallant, Joanne D. Eisen, *The Arms Trade Treaty: Zimbabwe, The Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 144 PENN ST. L. REV. 891, 935-936 (2010).

[132] Clinton, *supra* note 6.

[133] *Id.*

participate will be rewarded and those who do not may face economic consequences, America may succeed in garnering significant support for an effective, legally binding ATT.

D. Human Rights

The U.S. maintains a pledge to aid human rights victims, thus participation in an ATT takes that pledge one step further by taking steps to prevent human rights crimes that victimize innocent people. Tauscher noted, "[t]he treaty is worth doing because it can have, unlike many things we do, a more immediate impact. Lessening the arms trade can lead to less killing and maiming."[134]

However, the biggest issue lies in getting the countries that speak about aiding human rights to actually follow through with their commitments.[135] Contemporary history shows that countries with little or no intent to comply with human rights initiatives are more than willing to sign any treaty, knowing that there is nothing in their home country that will require fulfillment of their promises.[136] This will be an incredibly difficult issue, but the U.S. must not be deterred. Instead, the U.S. must hope and understand that increased political pressure can bring about positive change elsewhere.

The United States must demand that the highest ethical standards are included in the treaty in order to garner support, and make a pledge to abide by them. By doing this, NGOs will support the treaty more fully, and those NGOs, despite not having political power, have been able to harness valuable voices through the arena of public opinion. Governments often find it hard to ignore their own people when they are calling for a new program or assistance, therefore, with the backing of NGOs, States will hear the call for an ATT and hopefully answer in the affirmative.

VI. Conclusion

The United States should fully support the writing and development of the Arms Trade Treaty, while garnering allies to ensure the eventual effectiveness. The U.S. can utilize this opportunity to further national goals such as the war on terror, specifically stemming the tide of illegal weapons into the hands of terrorists and militants who seek to injure Americans, their allies, and other peaceful nations. However, the U.S. will likely have to keep an open mind, monetary resources available, and political will to achieve the "strong and robust" treaty it desires.[137]

It will be important for the White House and State Department to channel resources and open lines of communication to allies around the world to garner support for the ATT. The ATT can provide another avenue for pursuing international peace, fighting the war on terror, leading the battle for human rights, and

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[134] *Id.*

[135] Kopel, *supra* note 131, at 909.

[136] *Id.*

[137] Clinton, *supra* note 6.

strengthening alliances through diplomatic means while actual armed conflict winds down under the Obama administration. The wars in Iraq and Afghanistan have lasted longer than anyone might have guessed in 2001; therefore upping the ante in the diplomatic fight against terrorism could save more lives both within the army and civilian populations.

The ATT is an opportunity for the world to begin to control and diminish a problem that has caused great atrocities and continues to plague third world countries. If the U.S. is actively involved, other countries are likely to follow.