OPERATION BILLY GOAT: THE TARGETING AND KILLING OF A UNITED STATES CITIZEN ON UNITED STATES SOIL

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> *It is possible, I suppose, to imagine an extraordinary circumstance in which it would be necessary and appropriate under the Constitution and applicable laws of the United States for the President to authorize the military to use lethal force within the territory of the United States.*[1]

I. Introduction

A. Abdul al Sad

Days later, witnesses would recount at approximately 2:00 a.m. on Tuesday, February 11, 2014, hearing a dull thumping from the sky in the Wrigleyville neighborhood of Chicago, as they watched what appeared to be armed men jumping out of helicopters onto the roof of a neighboring apartment building.[2] Who the men were and what they were doing was unclear to spectators, but a few things were certain: the helicopters

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[1] Letter from Eric Holder, Attorney General of the United States, to Senator Rand Paul (March 4, 2013) [hereinafter Letter to Paul] (on file with the author).

[2] Abdul al Sad, the scenario depicting terrorist involvement, and all other characters introduced throughout this article are a creation of the author's imagination. Any similarities, either by name or actions, they may share with actual individuals living or dead, are coincidental.

remained in the area for anywhere between three to five minutes; depending on who was telling the story, there were no unusual sounds other than the dull thumping of the helicopters' rotor blades, and then the men and the helicopters were gone.

On February 11, 2014, at 5:00 p.m., the President of the United States called for a press conference at the White House. Speculation had been ongoing throughout the day about what he was going to say, but no one, not a single reporter, could speculate with any certainty about what was to come. And then, it happened; the President took the podium and explained that in the late evening hours of February 10, 2014, he had ordered special operations forces from the U.S. military to conduct an operation in Chicago, Illinois, to capture or kill Abdul al Sad, a known terrorist in the al-Qaeda network, who was planning an attack on U.S. soil, against U.S. citizens. The President explained the mission was a success. Abdul al Sad was killed, and no U.S. military personnel or civilians were injured. What the President did not mention, at least during the press conference, but what reporters discovered within a matter of days, was that Abdul al Sad—a senior operational leader in al-Qaeda—was born Jeremy Jeffries in Syracuse, New York.

Over the coming weeks, the melee that ensued in the media rivaled only that of the mission to capture or kill Osama bin Laden. "Talking heads" from every camp led the news hours with headlines such as, "*The President Orders an Attack on a U.S. Citizen in the United States*," and, "*Did the President Go Too Far?*" However, the White House remained silent. That was, until approximately three weeks later—when the Department of Defense, at the order of the President—released Abdul al Sad's shocking dossier to the press.

Abdul al Sad, also known as Jeremy Jeffries, was born on January 10, 1977, in Syracuse, New York. His parents, Steven and Joan Jeffries, were teachers; Steven, a math teacher at one of the high schools near Syracuse University, and Joan, a biology professor at Syracuse University. Jeremy, the middle of three children, had an older brother, Jonathan, and a younger sister, Jackie.

Growing up, Jeremy was a scrawny kid and not particularly athletic, but he was incredibly smart. He excelled at mathematics and science and his family fully expected him to be a doctor. Jeremy graduated from high school in 1995, first in his class, with a full scholarship from the Massachusetts Institute of Technology (MIT). Because of the advanced

placement classes Jeremy took while in high school, he entered MIT as a sophomore and graduated with a Bachelor of Science in mechanical engineering in the summer of 1998.

While in school, Jeremy excelled academically, but his social life was non-existent. Interviews with classmates revealed very few people remembered him, and no one claimed to be his friend. Indeed, it was his parents and his siblings that would later tell reporters that it was not until Jeremy was in graduate school that he ever mentioned having a friend. Though his family regularly encouraged him to get involved with social activities, Jeremy never did.

Immediately after graduating from MIT, Jeremy was recruited to work for major corporations and government entities, but he turned them all down because he wanted to continue his education. He began graduate school as a Ph.D. candidate in biomechanical engineering. While pursuing his Ph.D., he participated in an exchange program that sent him to the University of Oxford in Oxford, England. It was there that he met another exchange student, Fariq al Libby.

During the year that Jeremy was in England, he and Fariq became fast friends. For the first time in Jeremy's life, he had a "best friend," at least, that is how he would explain it to his mother over email and phone calls home. To this day, little is publicly known about Fariq al Libby, other than that he is Saudi-born, has strong ties to al-Qaeda, and is very good at disappearing for years at a time.

After leaving Oxford, Jeremy kept in close contact with his best friend, Fariq. Indeed, Jeremy visited him in London during almost every holiday and break in his schedule; Fariq always paid for the trips. After graduating from MIT, at the urging of Fariq, Jeremy moved to London in 2002.

Shortly after moving to London, Jeremy's correspondence home became less and less frequent. His family was not sure what, if anything, Jeremy was doing for work. Jeremy later told them that he had a job with an oil company which required him to travel. But beyond that, Jeremy did not share much information. What no one knew was that Fariq had been slowly recruiting Jeremy to become an al-Qaeda operative from the day they met. What even Fariq did not know was how easy it would be to not only recruit Jeremy, but also to turn him against his country.

Jeremy did get a job with an oil company—a job Fariq procured for him; though the job did not last very long. In fact, by the time the United States invaded Iraq in 2003, Jeremy was no longer working, although he was still on the oil company's books and being paid handsomely. Instead of working, he used his time with Fariq and their group of associates to travel throughout the Middle East. It was at Fariq's urging that Jeremy converted to Islam. For Jeremy, the choice was not particularly difficult. After all, all of his friends were Muslim and he was not raised practicing any religion. It was at Fariq's urging that Jeremy learn Arabic—a language, which it turns out, Jeremy had no problem grasping. Within 18 months, Jeremy was able to read and write at the level of a native–speaking 7th grader. Growing his beard, on the other hand, was a little more difficult for Jeremy. Jeremy was fair skinned and did not have a lot of facial hair to begin with. However, that did not stop him from trying, and after a couple of years he had a decent, albeit scraggly, beard.

By spring of 2006, Jeremy had accumulated quite a lot of money and experience travelling throughout the Middle East and Africa. He had spent time in Jordan, Saudi Arabia, Yemen, Pakistan, the United Arab Emirates, Iraq, Morocco, and Egypt—all under the guise of work. However, Jeremy was neither travelling on a U.S. passport nor "working" under his given name. In fact, Jeremy Jeffries, the U.S. Citizen with a British work visa, had not existed in some time. In his stead was Abdul al Sad, a Saudi national, with a Saudi passport.

As time passed, Jeremy's devotion to the jihadist cause grew stronger and stronger. His brilliant, though impressionable, mind was pumped full of anti-American, anti-western propaganda, and Jeremy ate it up. Fariq rose through al-Qaeda's recruiting ranks quickly, and took Jeremy with him at every stage. Before long, Jeremy was given the responsibility of developing new and inventive ways to plan, construct, and detonate explosive devices used in Iraq and Afghanistan, against U.S. soldiers and local nationals; he was good at it too. His degree in mechanical engineering, and Ph.D. in biomechanical engineering from MIT, was a pretty good stepping-off point for constructing weapons capable of inflicting mass casualties.

By 2009, Abdul al Sad was on several intelligence agencies' radars, and on the capture/kill lists of the United States, the United Kingdom, and Israel. Each knew he was a senior operational leader in al-Qaeda, but no one could seem to locate him, nor were there any good pictures of him. He operated from multiple locations, in multiple countries, and was

responsible for training hundreds of fighters in the art of bomb-making. In 2011, at the direction of Fariq, Abdul al Sad returned to his flat in London as Jeremy Jeffries, and continued the ruse of working for the Saudi oil company that had been paying him generously since 2002. Upon returning to London, Jeremy shaved his beard and cut his hair, so as to not draw suspicion. By late 2012, Fariq and Jeremy decided that Jeremy would soon return to the United States. They planned an operation requiring Jeremy's expertise.

In January 2013, Jeremy Jeffries resigned from his position at the oil company and returned to the United States. While in London, he purchased a dilapidated, four-unit apartment building in Chicago, Illinois, which he paid for in cash. Over the next six months, Jeremy renovated and rehabilitated the building, merging three of the units into one apartment, and the fourth into an office. The building was by all accounts magnificent. It would later be described as a "fortress," although from a passerby's perspective it was simply a run-down, old, Wrigleyville flat.

What no one knew was that by January 2014, Abdul al Sad, with his vast resources and using his extensive al-Qaeda network, had smuggled significant amounts of bomb-making materials into the United States, and his fortress was wired to disintegrate at the push of a button. Fariq al Libby was captured by U.S. officials in Pakistan near the Afghanistan-Pakistan border in 2014. What he would ultimately reveal to U.S. intelligence officials during the interrogation process later that same month, made the hair on the neck of his captors rise.

Al Libby spelled out, in great detail, the operation al Sad had planned to undertake. Al Sad, who over the course of the last decade had become quite a remarkable bomb maker, had been constructing multiple, low-intensity, high-yield, dirty bombs for the last six months. These bombs, when detonated in the Chicago subway system would not only wreak havoc and death throughout the subway tunnels, but would also take out the infrastructure below the two federal buildings on the corners of Jackson and Dearborn Streets in Chicago. One of those buildings housed the federal courthouse. The other housed multiple federal agencies, including the Federal Bureau of Investigation. Al Libby did not tell his interrogators was how many bombs; when the attack was to occur; and who had planned to deliver the devices.

As this information shot up the chain of command, it became clear to the White House that al Sad was operating without even the faintest

inkling by any U.S. intelligence or law enforcement agency. Everyone understood a response was necessary, and needed to happen fast. Whether the United States should respond with military action or law enforcement action was a hotly contested debate amongst the decision-makers. As there always are, a variety of opinions were put forth. In the end, because of the immediate and potentially catastrophic nature of the threat, the President ordered the commander of the military's special operations forces to either capture or kill al Sad, while minimizing collateral damage; and so they did.

On February 11, 2014, for the first time since the "War on Terror" began in 2001, the U.S. military targeted and killed a U.S. citizen-terrorist on American soil. Abdul al Sad was a senior operational leader of al-Qaeda, and a direct participant in hostilities against the United States. The team responsible for conducting the operation recovered three dirty bombs, all of the explosives wired throughout al Sad's office unit, along with other materials of significant intelligence value. Operation Billy Goat was a success. Al Sad's targeted killing was legal.

B. The Art of War

The topic of fighting and waging war has been the subject of countless debates and scholarly writings for hundreds of years.[3] The result has been a haze of misunderstanding, misapplication, and misrepresentation of the rules associated with armed conflict, and the targeting of those individuals involved in armed conflict. To be sure, questions of war are rarely easy, and are fraught with grave consequences. However, obscuring the legal principles of armed conflict transforms the idea of waging war into a discussion of what *should* be done vice a discussion of what is legally permissible. This in turn does two things; first, it largely ignores the vast body of treaties, customary international law, and domestic law on the subject; second, it shifts the debate from what is legally permissible, to what is acceptable from a policy perspective. In armed conflict, policy should never be the first consideration, because it is indefensible if the ultimate action violates of the law.

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[3] *See, e.g.*, SUN-TZU, THE ART OF WAR (1913).

C. What this Article is Not

This article does not seek to answer the "should we" question—that is, the policy question concerning whether the United States should use military action to target United States citizen "terrorists" domestically, nor does it analyze the ways various countries apply and interpret the law of armed conflict (LOAC). This article provides the legal justification, under both international law and U.S. domestic law, for the targeted killing of Jeremy Jeffries, a.k.a. Abdul al Sad. This article also discusses the legal framework that supports the accomplishment of this task within the bounds of both domestic and international law as they exist today. This article further analyzes and explains various doctrines of international law, domestic law, and the rights of both citizens and noncitizens as they pertain to being targeted by the United States vis-a-vis military action. This article will then develop the legal analysis necessary to provide a comprehensive understanding of how the law should apply to the hypothetical Abdul al Sad. Where differences in opinion exist between the United States' interpretation and/or application of a rule and/or law and another country's or non–governmental organizations'interpretation, the United States' interpretation will govern.[4]

Based on the intelligence available against Abdul al Sad, it would be within the Executive's power and legal authority to order Abdul al Sad's killing in Chicago. What follows is an analysis of *why*.

II. Lawful Use of Force (*Jus in Bello*)

Targeting and killing individuals in accordance with the LOAC during armed conflict is not new.[5] International law, to include Hague Conventions,[6] the Fourth Geneva Convention,[7] and the 1977 Additional

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[4] That is not to suggest this article ignores other bodies' interpretations. Contrary views are discussed throughout, as is analysis as to why the United States does not follow alternate views, insofar as an explanation is available.

[5] *See generally infra* notes 6-8 (The body of authorities that make up law of armed conflict (LOAC) are vast. A non-exhaustive list of authorities, however, includes: The Hague Regulations (Hague IV), 1907; Geneva Conventions I-IV (1949); Additional Protocols I-III (1977), Customary International Law (CIL), and domestic law.).

[6] Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Noveau Recueil 9 ser. 3) 461 (entered into force Jan. 26, 1910) [hereinafter Hague IV].

[7] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GCIV].

Protocols (AP I and AP II) to the Geneva Convention,[8] all contribute to the legal framework of lawful targeting of those who take direct part in hostilities. Though it has not ratified the AP I or AP II, the United States recognizes many of the protocols' provisions as customary international law (CIL)—those laws that develop through a consistent state practice and are followed out of a sense of legal obligation (*opinio juris*)[9]—and follows other CIL as a matter of policy.[10] Before getting too far into the legal issues surrounding the killing of a United States citizen in Chicago, however, it is important to understand the legal basis for the use of force—when force can be employed, against whom, and under what circumstances.

A. Laws Governing Armed Conflict, Generally

At the outset, it is important to understand that in international law, no universal definition of "war" exists.[11] Various sources posit different definitions and requirements necessary for a conflict to be categorized as "war." For example, the United States Army's Judge Advocate General's Legal Center and School suggests that four elements are necessary for war: 1) a contention, 2) between at least two nation-states, 3) wherein armed force is employed, 4) with an intent to overwhelm.[12] Other than official declarations of war by Congress, conflicts meeting these criteria are more aptly described as "armed conflicts,"[13] in that not every contention between at least two nation-states that include an armed force, with an

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[8] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, *and* Relating to the Protection of Victims of International Armed Conflicts art. 51(3), Dec. 12. 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[9] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) [hereinafter RESTATEMENT].

[10] *See* Memorandum, W. Hays Parks, Lieutenant Commander Michael F. Lohr, Dennis Yoder, & William Anderson to Assistant General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (8 May 1986).

[11] Clausewitz presented the widely-accepted view of war, which was "an act of force to compel our enemy to do our will." CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Parrot, 1976).

[12] INT'L & OPERATIONAL LAW DEP'T., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 7 (2014) [hereinafter DESKBOOK].

[13] "Armed conflict" is a term of art with specific meaning and legal ramifications. The definitions of armed conflict are discussed *infra* in parts II.A.1. and II.A.2.

intent to overwhelm, carries with it the legal classification of "war." As such, the term "armed conflict" will be used throughout this article.[14]

1. International Humanitarian Law/Law of Armed Conflict

Also often referred to as International Humanitarian Law (IHL),[15] the Law of Armed Conflict is the primary body of international law applicable during armed conflict.[16] As a legal system or body of law, the LOAC is generally applicable to armed conflicts of both an international and non-international nature.[17] This continuously-evolving system of law is comprised of both treaties and customary international law.[18]

Treaties are essentially contracts between states that create binding, codified international law.[19] Customary international laws, on the contrary, often tend to be more open for interpretation than are codified international treaty law. Often referred to as "persistently objecting," if a

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[14] GARY D. SOLIS, THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW IN WAR 21 n.90 (Cambridge Univ. Press 2010) ("As the [International Committee of the Red Cross] (ICRC) notes, 'it is possible to argue almost endlessly about the legal definition of "war". . . . The expression "armed conflict" makes such arguments less easy.'").

[15] International Humanitarian Law (IHL) and the Law of Armed Conflict (LOAC) are often considered interchangeable, though debate exists as to whether that is accurate. For purposes of this article, however, the two are used interchangeably as the bodies of law applicable during armed conflict. For a more detailed discussion of the differences, *see generally* SOLIS, *supra* note 14.

[16] *See* Nils Melzer, *Int'l Comm. of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-reportres/$File/direct-participation-guidance-2009-icrc.pdf [hereinafter Interpretive Guidance] (stating that some, including the ICRC, argue that International Human Rights Law (IHRL), which unquestionably exists during times of peace, also applies to armed conflict); *but see* SOLIS, *infra* note 14, at 24 (Solis argues the U.S. view is that "traditionally, human rights law and [law of war] (LOW) have been viewed as separate systems of protection. This classic view applies human rights law and LOW to different situations and different relationships respectively."); *and* U.S. DEP'T OF STATE: FOURTH PERIODIC REP. OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMM. ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (11 Dec. 2011), http://www.state.gov/j/drl/rls /179781.htm#iii [hereinafter FOURTH PERIODIC REPORT] (explaining that the United States also holds the position that IHRL can apply to armed conflicts, and that the International Convention on Civil and Political Rights *can* apply during armed conflict; however, it recognizes that in times of armed conflict, under the doctrine of *lex specialis*, LOAC is usually the better of the legal paradigms).

[17] SOLIS, *supra* note 14, at 23 n. 101.

[18] *Id.*

[19] BLACK'S LAW DICTIONARY 1257 (8th ed. 2004).

state "consistently and unequivocally refuse[s] to accept a custom during the process of its formation,"[20] that state may argue that the CIL provision does not apply.[21]

There are certain fundamental international laws, known as *jus cogens*, considered to be so paramount to humanity that no amount of persistent objection absolves a nation from complying—prohibitions against genocide, slavery, and murder.[22] *Jus cogens* are universally prohibited as pillars of fundamental human rights law regardless of the body of law governing a conflict.[23]

2. Conflict Classification

For purposes of this article, two types of conflicts trigger LOAC: those described under Common Article 2 of the Geneva Conventions (International Armed Conflicts (IAC)) and those described under Common Article 3 of the Geneva Conventions (Non-International Armed Conflicts (NIAC)).[24] During an IAC, two or more states must be engaged in armed conflict against one another.[25] In armed conflicts of an international character, all four of the Geneva Conventions apply, as does AP I (for those states that have ratified AP I, which does not include the United States). Non-International Armed Conflicts however, generally involve "internal" armed conflict between states and non-state actors.[26] The only provision of the Geneva Conventions applicable during a NIAC is Common Article 3.[27] Examples of Common Article 3 NIACs include the United States' involvement in both Iraq and Afghanistan, following the initial invasions of both countries.[28]

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[20] [20] SOLIS, *supra* note 14 at 12, n. 53.

[21] *Id.*

[22] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 511-17 (5th ed., 1998).

[23] Barcelona Traction, Light and Power Company, Limited, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5); *see also* RESTATEMENT, *supra* note 9 at § 701.

[24] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GCIII].

[25] *Id.* art. 2.

[26] SOLIS, *supra* note 14, at 152.

[27] *Id.* at 153.

[28] *Id.* at 154, 211. During the invasion of both Iraq in 2003 and Afghanistan in 2001, and during the United States' occupation of both countries following the initial invasions (essentially until such time as the United States was present in both countries at the request and consent of their respective governments), the United States was involved in Common Article 2 International Armed Conflicts (IACs) with each.

Inherent in any decision to use force up to and including targeted killing during armed conflicts (both international [29] and non-international),[30] is an analysis that must address four basic principles. The principles that form the foundation of the LOAC are military necessity, distinction (also known as discrimination), proportionality, and humanity (and arguably, honor).[31]

3. Principles of the LOAC

Military necessity is the principle that "justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."[32] Put another way, military necessity permits the identification of a military objective and the subsequent elimination of that objective with urgency. Military necessity "limits those measures not forbidden by international law to legitimate military objectives whose engagement offers a definitive military advantage."[33] The military necessity analysis can be broken down into two questions: "[I]s there a 'military requirement' to take certain action?" and "[D]o the laws of war forbid that action?"[34] Determining what constitutes a valid military objective for purposes of targeting individuals often requires analysis beyond that which is conducted to target a tank or a building. A more detailed discussion of the status of persons involved in armed conflicts who constitute valid military objectives follows in parts II.A, B, and C. For purposes of military

[29] GCIV, *supra* note 7, art. 2.
[30] *Id.* art. 4.
[31] U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para 3.1 (22 Feb. 2011) [hereinafter DoDD 2311.01E]; U.S. DEP'T OF DEF. LAW OF WAR MANUAL para. 2 (12 June 2015) [hereinafter LOW Manual] (The LOW manual included a fifth principle; honor. Honor refers to chivalry in war-making; it demands fairness and mutual respect between opposing forces. While honor is not a new concept, it is newly identified as in independent principle of the LOW. As such, it will not be discussed in detail throughout this article.).
[32] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para 3a. (18 July 1956) [hereinafter FM 27-10]; LOW Manual, *supra* note 31, para. 2.2.
[33] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING, Appendix E, para. E.3.b. (31 Jan. 2013) [hereinafter JP 3-60]. LOW Manual, *supra* note 30, para. 2.2.
[34] *See generally* SOLIS, *supra* note 14, at 258.

necessity, civilians are never valid military objectives until such time as they take a direct part in hostilities.[35]

Often referred to as discrimination, distinction is "the grandfather of all principles"[36] and requires that combatants are at all times distinguished from noncombatants (civilians).[37] Distinction requires that military operations be directed against combatants only, not against civilian targets.[38] "Combatant," however, is a term of art and has a very specific definition under the Geneva Conventions.[39] Discussed in greater detail throughout, "Combatant" refers generally to either (1) "the regular armed forces of a State Party to the conflict,"[40] or (2) "[m]ilitia, volunteer corps, and organized resistance movements belonging to a State Party to the conflict that are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war . . . ."[41] "Combatant" is a term limited to persons involved in Common Article 2 IACs.[42] Therefore, the vast majority of lethal targeting conducted by the United States, since its involvement in Afghanistan in 2001 and Iraq in 2003 has technically not been against "combatants" given the transition from IACs to NIACs in both theaters of operation in 2002 and 2003 respectively.[43]

The concept of distinction extends further than the idea of civilians versus combatants. It also distinguishes military property from civilian property and protected property and places from non-protected property and places.[44] For purposes of this article, the principle of necessity will be applied against persons exclusively.

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[35] Protocol I, *supra* note 8, art. 51(3). What constitutes "direct participation in hostilities" is highly controversial and discussed in greater detail later in this article. *See also* LOW Manual, *supra* note 31, para. 5.9.

[36] DESKBOOK, *supra* note 12, at 136.

[37] Protocol I, *supra* note 8, art. 48; LOW Manual, *supra* note 31, para. 2.5.

[38] Protocol I, *supra* note 8, art. 48.

[39] GCIII, *supra* note 24.

[40] *Id*. art 4; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 13, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI].

[41] GCI, *supra* note 39, art. 13; GCIII, *supra* note 23, art. 4.

[42] MICHAEL N. SCHMITT AND JELENA PEJIC, INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 335 (2007).

[43] *See* SOLIS, *supra* note 14, at 207.

[44] LOW Manual, *supra* note 31, para. 2.5.

The third principle of LOAC, proportionality, is akin to conventional notions of collateral damage. As it is applied to *jus in bello*, proportionality requires that "the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained."[45] The principle of proportionality "provides a method by which military commanders can balance military necessity and civilian loss . . . when an attack may cause incidental damage to civilian personnel."[46] Like many legal concepts, proportionality involves a balancing test. One must weigh the importance of the military objective (person or place) in relation to the potential damage to civilians and civilian objects.[47] There is no fixed formula for this analysis that determines when collateral damage is excessive. Such determinations are often a judgment call by the on-scene commander or the person making the targeting decision.[48]

Also referred to as the principle of "unnecessary suffering," the fourth LOAC principle, humanity, forbids military forces from inflicting an amount of "suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose."[49] There is no codified definition of what constitutes unnecessary suffering. However, the United States Department of Defense (DoD) employs a weapons review program in order to ensure that weapons included within the United States' arsenal comply with this principle, and when used properly, dispatch a humane death.[50]

B. Classification of Individuals Participating in Hostilities

In terms of international law and the use of force pursuant to the laws of armed conflict, two classifications of persons exist—combatants and civilians.[51] Several variations of "combatant" have been used by the

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[45] FM 27-10, *supra* note 32, para. 41. *See also* LOW Manual, *supra* note 31, para. 2.4.

[46] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 13 (2014) [hereinafter HANDBOOK].

[47] LOW Manual, *supra* note 31, para. 2.4.

[48] Protocol I, *supra* note 8, art. 51(5)(b) (A disproportionate attack is "[a]n attack 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.").

[49] LOW Manual, *supra* note 31, para. 2.3; Hague IV, *supra* note 6, art. 23(3).

[50] U.S. DEP'T OF DEF., 5000.69-M, JOINT SERVICES SAFETY WEAPONS REVIEW (JSSWR) PROCESS (30 July 2014) [hereinafter DoD 5000.69-M].

[51] SOLIS, *supra* note 14, at 207.

United States throughout the last decade and a half. "Unlawful combatant" was a de facto individual status "frequently employed by the United States."[52] The term "combatant" and its derivations "such as 'unlawful combatant,' 'enemy combatant,' and 'unprivileged combatant,' are germane only to Common Article 2 international armed conflict."[53] A person's classification in an IAC directly affects the protections afforded him under the Geneva Convention III (GCIII).[54] However, the United States has often demonstrated a tendency to use the term "combatant" more colloquially to refer to any persons engaging in armed conflict on behalf of parties to a conflict.[55]

Under the 1949 Geneva Conventions,[56] (lawful) combatants are generally classified as military personnel or the like who are engaged in hostilities in an IAC on behalf of a party to the conflict.[57] While engaged in international armed conflict, lawful combatants enjoy a combatant's privilege—"they bear no criminal responsibility for killing or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property, provided their acts comply with the LOAC."[58] Combatants are legally permitted to carry out attacks

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[52] *Id*.
[53] *Id.*
[54] LOW Manual, *supra* note 31, paras. 4.3, 4.4.
[55] *See* SOLIS, *supra* note 14, at 206-07.
[56] GCIII, *supra* note 24, art. 4; GC I, *supra* note 39, art 13.
[57] *Id.* Combatants are defined as:

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.

[58] LOW Manual, *supra* note 31, para. 4.4; HANDBOOK, *supra* note 46, at 17.

against the enemy and, in turn, may legally be the target of attack by the enemy.[59]

Civilians not participating in hostilities are protected and may not legally be the target of attack by any party.[60] However, when civilians take up arms and directly participate in hostilities,[61] they lose any protected status they may have enjoyed and may be lawfully targeted.[62] When civilians directly participate in hostilities, they are no longer "civilians" and, under the United States' view, are classified as "unprivileged enemy belligerents" (formerly classified as "unlawful enemy combatants").[63] Unprivileged enemy belligerents—"a purported battlefield status in the war on terrorism,"[64] or armed conflicts generally,[65] are "persons not entitled to combatant immunity who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict."[66] Synonymous with "unprivileged enemy belligerent," "unlawful enemy combatant" "include[s], but is not limited to, an individual who is or was part of or supporting Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."[67]

The United States invaded Afghanistan in response to al-Qaeda's attack on the World Trade Center on September 11, 2001, seemingly under the classification of an international armed conflict. It was the United

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[59] SOLIS, *supra* note 14, at 188.

[60] GCIV, *supra* note 7; Protocol I, *supra* note 8; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non–International Armed Conflicts, Dec. 12. 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[61] Directly participating in hostilities is a highly controversial issue about which much disagreement exists. For a more detailed discussion, *see infra* Section II.C.

[62] LOW Manual, *supra* note 31, para. 5.9.

[63] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006) [hereinafter FM 2-22.3]. The two classifications are synonymous with each other. *See also* JOINT CHIEFS OF STAFF, JOINT PUB. JP 3-63, DETAINEE OPERATIONS, Summary of Changes. (13 Nov. 2014) [hereinafter JP 3-63]; DoDD 2311.01E, *supra* note 31.

[64] SOLIS, *supra* note 14, at 209 (Solis uses the term, "unlawful enemy combatant," not "unprivileged enemy belligerent."). However, the two are synonymous. *See* FM2-22.3, *supra* note 63.

[65] *See* Harold Hongju Koh, The Obama Administration and International Law, Address at the Annual Meeting of the Am. Soc'y Of Int'l Law, U.S. Dep't of State (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm (explaining that the United States is no longer engaged in a war on terrorism; it is instead engaged in armed conflict).

[66] FM 2-22.3, *supra* note 63, at vii.

[67] *Id*. *See also* The Authorization for the Use of Military Force, Pub L. No. 107-40, 115 Stat 224 (2001) [hereinafter AUMF].

States and its coalition partners against the government of Afghanistan—the Taliban.[68] So too, when the United States invaded Iraq in 2003, it did so under the classification of an international armed conflict—the United States and its coalition partners against Saddam Hussein and the country of Iraq.[69] However, those conflicts evolved such that in both theaters of operation, the conflicts transitioned into non-international armed conflicts, at least insofar as United States' involvement was concerned.[70]

But what of the classification of individual members of al-Qaeda and its associates? Terrorist organizations are most aptly defined as criminal organizations—at least until they overthrow a government and become the government of that state.[71] But, unless and until that happens, al-Qaeda and its associates are non-state actors, and any conflict that ensues with such an organization may not be classified as an International Armed Conflict under Common Article 2.[72] On the contrary, by default, armed conflict with organizations such as al-Qaeda constitute non-international armed conflicts, no matter how organized the groups or how organized the attacks. Classification of individuals matters because it affects the privileges that members of al-Qaeda and its associated forces enjoy—Common Article 3 privileges versus the full protections of the Geneva Conventions. As discussed in greater detail below, not only are members of al-Qaeda and its associated forces subject to criminal prosecution for their acts of terror under domestic criminal law, they are lawfully subject to targeting under the LOAC.[73]

It is a crucial legal distinction that combatants are specific to Common Article 2 IACs.[74] Under a Common Article 3 NIAC, combatant status

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[68] SOLIS, *supra* note 14, at 211.
[69] *Id.* at 154.
[70] *See* Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 308 (2007) (tracing the view that the category of non–international armed conflict was limited to intra–state civil wars).
[71] *See generally* SOLIS, *supra* note 14, § 5.2.
[72] *Id.*
[73] Afsheen John Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT'L SECURITY L. & POL'Y 439, 451 (2012) ("Under circumstances that include 9/11, American officials have reasonably concluded that the American conflict with the Taliban and al-Qaeda is not among states; it is a non-international armed conflict. This conclusion allows the United States to target and kill some members of these armed groups in some places under IHL's relatively relaxed rules on killing.").
[74] SCHMITT AND PEJIC, *supra* note 42, at 335.

(lawful or otherwise) does not exist.[75] Neither members of the Taliban nor al-Qaeda or its associates enjoy combatant status during an NIAC. They are instead unprivileged enemy belligerents.[76] Perhaps because doing so identifies al-Qaeda as an armed opposition group without a state, the United States uses this classification,[77] to avoid any misunderstanding that al-Qaeda's associates are civilians not subject to attack. The questions asked when attempting to determine whether a group receives combatant status under Article 4, GC III, do not apply to Common Article 3 conflicts.[78] Al-Qaeda is a terrorist organization, and its members are terrorists. Their actions almost certainly violate the domestic laws of every nation in which they operate and when they engage in combat, they lose any protections they would have enjoyed as civilians and therefore may be targeted. That is not to suggest that if captured they would not enjoy any protections. However, those protections would be limited to those provided by Common Article 3.[79]

In its Standing Rules of Engagement, the United States generally describes two broad categories of potential belligerents (hostile forces who may be targeted): status-based belligerents and conduct-based belligerents.[80] Status-based belligerents are those groups or individuals who, by virtue of their membership, affiliation, or continuous participation in hostilities, are declared hostile, and may be targeted at any time with immediacy, without a particularized showing of hostile intent or a hostile act, during the moment of targeting.[81] An example of a status-based target is Osama bin Laden, or in the instant case, Abdul al Sad. On the other hand, a conduct-based target describes an actor whose hostile conduct—act or intent—in a particularized moment in time would justify attack against that actor who otherwise would be a civilian, not subject to attack.[82] An example of a conduct-based target is a man resting on a hilltop, signaling enemy forces that U.S. forces are moving in a particular direction, for the purpose of facilitating an ambush on those U.S. forces.

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[75] SOLIS, *supra* note 14, at 207.
[76] *Id*. *See* FM 2-22.3, *supra* note 63, for discussion.
[77] 10 U.S.C. § 948(a)(1)(i) (2015).
[78] *See* SOLIS, *supra* note 14, at 212.
[79] See GCIV, *supra* note 7, art. 3; SOLIS, *supra* note 14, at 219.
[80] CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005).
[81] *Id.*
[82] LOW Manual, *supra* note 31, para. 4.8.2.

Under the LOAC, that man's actions in that instance allow him to be targeted while he is engaged in hostilities.

All this is to say that while agreement may not be universal on this subject,[83] al-Qaeda fighters and its associates who participate in hostilities during a NIAC are unprivileged enemy belligerents, civilians taking a direct part in hostilities, who thereby forfeit their protection from being the lawful target of an attack—a protection they would have enjoyed as uninvolved civilians. As such, they are valid military targets.

C. Direct Participation in Hostilities

During all instances of armed conflict, attackers are obligated to follow the LOAC principle of distinction.[84] Distinction clearly prohibits attacks against civilians with one caveat—protected civilians may not take a direct part in hostilities.[85]

> In an international armed conflict, a party may attack enemy combatants who are not [out of the fight]. Thus, an attacker may bomb opposing forces in their barracks due to their status as enemy combatants. Civilians, however, may only be directly attacked if their conduct amounts to direct participation in hostilities.[86]

During non-international armed conflicts, however, identifying targetable actors is less straightforward. Under the LOAC as it applies to NIACs, the legal status of "combatant" does not exist. Instead, arguably everyone (outside of state actors) is a civilian—a person not associated with the military.[87]

Directly participating in hostilities (DPH) speaks to the level to which a civilian needs to participate in hostilities such that they lose civilian

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[83] SOLIS, *supra* note 14, at 164.
[84] LOW Manual, *supra* note 31, para. 2.5.
[85] Rasdan & Murphy, *supra* note 73, at 454-55.
[86] *Id*.
[87] NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 442-44 (2008); PHILIP ALSTON, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, ADDENDUM, STUDY ON TARGETED KILLINGS, at 58, U.N. Doc. A/HRC/14/24/ (May 28, 2010).

protection, and may be targeted.[88] Especially in the context of non-international armed conflicts, what constitutes that level of conduct (otherwise known as "DPHing") is highly controversial and hotly contested.[89] The two most widely accepted positions on "DPHing" are the United States' view and the ICRC's interpretative guidance.[90] These two viewpoints are at odds with each other.[91] The United States' interpretation of DPH, under which it operates, is more expansive than the ICRC's position.[92]

The idea that direct participation in hostilities results in the loss of civilian status such that a person—who would otherwise be a civilian but for his participation in hostilities—may be legally targeted using deadly force is found in Article 51(3) of AP I and Article 13(2-2) of AP II, among other sources.[93] The United States understands and applies direct participation in hostilities on a case-by-case basis to both organized armed groups and individuals.[94]

> [United States] forces use a functional DPH analysis based on the notions of hostile act and hostile intent as defined in the Standing Rules of Engagement, and the

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[88] LOW Manual, *supra* note 31, para. 5.9.

[89] The sheer volume of material on the subject-matter demonstrates just how unclear the definition of "directly participating in hostilities" really is. *Id.*; *see e.g.*, Melzer, *supra* note 16; sources cited *infra* note 83; Parks, *infra* note 104; DINSTEIN, *infra* note 129; sources cited *infra* note 172.

[90] *See generally* Melzer, *supra* note 16.

[91] *Id.*

[92] Rasdan & Murphy, *supra* note 73, at 455 ("Hina Shamsi, Director of the National Security Project of the ACLU, observes that 'whatever definition [of DPH] the United States is using . . . [it] is more expansive than that of the ICRC.'").

[93] The notion of requiring direct participation in hostilities during non-international armed conflict as a requisite to use deadly force is well-rooted in both treaty and customary international law (CIL). *See* Geneva Convention art 3, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW rules 1, 2, and 7 (2005). States that are not party to the Additional Protocols nevertheless acknowledge their customary nature to some degree. *See, e.g.*, DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, § 8-2 (2007) [hereinafter NWP 1-14M]. *See, e.g.*, Rome Statute of the Int'l Criminal Court art. 8.2(b)(i), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON–INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006), reprinted in 36 ISR. Y.B. HUM. R. (Special Supplement) § 2.1.1.1 (2006) [hereinafter NIAC Manual]; Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 100–127 (Oct. 2, 1995).

[94] *See generally* Melzer, *supra* note 16.

> criticality of an individual's contribution to enemy war efforts. After considering factors such as intelligence, threat assessments, the conflict's maturity, specific function(s) performed and individual acts and intent, appropriate senior authorities may designate groups or individuals as hostile. Those designated as hostile become status-based targets, subject to attack or capture at any time if operating on active battlefields or in areas where authorities consent or are unwilling or unable to capture or control them.[95]

The ICRC, however, proposed a very narrow definition of DPH, which requires far more subversive conduct in order to constitute DPHing than the United States' application. Essentially, the test the ICRC propagated requires:

> (1) a threshold showing of harm or a likelihood of harm, (2) a direct causal link between the act in question and that harm, and (3) a belligerent nexus to the conflict [(membership in an armed group party to the conflict)], as shown by specific intent to help or harm one or more sides. The ICRC also proposed that those individuals engaged in "continuous combat functions" could be attacked at any time, but suggested that combatants should attempt to capture civilians first and use deadly force as a last resort.[96]

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[95] DESKBOOK, *supra* note 12, at 142-43; *See, e.g.*, U.S. Dep't of Justice, Attorney General Eric Holder Speaks at Northwestern University School of Law, Mar. 5, 2012, http://www.justice.gov/iso/opa/ag/speeches /2012/ag-speech-1203051.html ("[T]here are instances where [the U.S.] government has the clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force. . . . [I]t is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al-Qaeda and associated forces."). *See also* LOW Manual, *supra* note 31, para. 5.9.

[96] DESKBOOK, *supra* note 12, at 142. *See also* Melzer Interpretative Guidance, *supra* note 16; KENNETH ANDERSON, TARGETED KILLING IN U.S. COUNTERTERRORISM STRATEGY AND LAW: A WORKING PAPER OF THE SERIES ON COUNTERTERRORISM AND AMERICAN STATUTORY LAW, A JOINT PROJECT OF THE BROOKINGS INSTITUTION, THE GEORGETOWN UNIVERSITY LAW CENTER, AND THE HOOVER INSTITUTION 19 (May 11, 2009), https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/Anderson CounterterrorismStrategy.pdf. *See also* LOW Manual, *supra* note 31, para. 5.9.

Though examples of disagreement between both parties are plentiful, and extensive criticism of the ICRC's interpretative guidance exists,[97] both parties agree that a "concomitant obligation" exists on the part of a civilian not to use his otherwise protected status to engage in hostile acts. Both parties also agree that the concept of direct participation in hostilities is a concept that "applies only to civilians."[98]

What then constitutes a civilian directly participating in hostilities? "Direct participation must refer to specific hostile acts, and it clearly suspends a civilian's noncombatant protection."[99] To answer this question, the Commentary to Additional Protocol I to the Geneva Conventions provides some guidance. It states that direct participation refers to "acts of war, which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[100] Another source posits, "Direct participation 'implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.'"[101]

Direct participation, however, is not limited to picking up a weapon and shooting. Direct participation includes preparatory acts as well. It includes "deployment to and from the location of the direct participation. It includes the preparatory collection of tactical intelligence, the transport of personnel, the transport and position of weapons and equipment, as well as the loading of explosives in, for example, a suicide vehicle."[102]

However, what about a Common Article 3 conflict, where a civilian unprivileged enemy belligerent is the norm? In a conflict between a state and a non-state armed group, the non-state armed group is the de facto armed force party to the conflict, although without the protections afforded combatants.[103] As such, the members of that armed group are generally targetable at any time and at any place. Their roles are such that they are never *not* directly participating in hostilities, much like a U.S. Army soldier engaged in conflict with non-state actors in Iraq or Afghanistan.

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97 *See* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (2010).
98 SOLIS, *supra* note 14, at 202.
99 *Id.* at 203.
100 Protocol I, *supra* note 8, op. cit. (note 10), Article 51(3); Additional Protocols: Commentary, op. cit. (note 21), para 1944.
101 SOLIS, *supra* note 14, at 203.
102 *Id.* at 204.
103 Melzer, *supra* note 16; SOLIS, *supra* note 14, at 205.

Unanswered by the aforementioned guidance is the question, "When and how much force may be applied against a civilian directly participating in hostilities during an NIAC?"[104] While this question seems complex in theory, aside from recognizing protections for civilians against attack, the LOAC does not create categories of people who may not be attacked while directly participating in hostilities, or who may be attacked but only slightly. On the contrary, LOAC permits the use of deadly force against all those "directly participating in hostilities."[105] This is where the United States' and the ICRC's view regarding DPH seem to diverge.[106]

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[104] W. Hays Parks, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: Part IX of The ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 830.

[105] LOW Manual, *supra* note 31, para. 5.9.3.

[106] ANDERSON, *supra* note 96, at 5-6.

> In 2003, the International Committee of the Red Cross (ICRC), in cooperation with the T.M.C. Asser Institute, launched a major research effort to explore the concept of "direct participation by civilians in hostilities" (DPH Project). The goal was to provide greater clarity regarding the international humanitarian law (IHL) governing the loss of protection from attack when civilians involve themselves in armed conflict. Approximately forty eminent international law experts, including government attorneys, military officers, representatives of non-governmental organizations (NGOs), and academics, participated in their personal capacity in a series of workshops held throughout 2008. In May 2009, the ICRC published the culmination of this process as the "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law."
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> Although the planned output of the project was a consensus document, the proceedings proved highly contentious. As a result, the final product contains the express caveat that it is "an expression solely of the ICRC's views." Aspects of the draft circulated to the experts were so controversial that a significant number of them asked that their names be deleted as participants, lest inclusion be misinterpreted as support for the Interpretive Guidance's propositions. Eventually, the ICRC took the unusual step of publishing the Interpretive Guidance without identifying participants. This author participated throughout the project, including presentation of one of the foundational papers around which discussion centered . . . [and] withdrew his name upon reviewing the final draft.
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> A common theme pervades the criticisms set forth below. International humanitarian law seeks to infuse the violence of war with humanitarian considerations. However, it must remain sensitive to the interest of states in conducting warfare efficiently, for no state likely

The ICRC seemingly creates limitations on the authority to use deadly force that are not found in the principles of the LOAC. For example, under the ICRC's interpretation of DPH, a member of a targetable non-state actor armed group must be performing a "continuous combat function" before employing deadly force against that member.[107]

To illustrate this divergence, if, during armed conflict, the United States identifies an enemy engaging in a hostile act against U.S. forces, depending on the scope of that hostile act, that person may or may not be targeted under the ICRC's interpretation of DPHing. Under the ICRC's guidance, that single act may be criminal under domestic law but not enough to use deadly force against the actor under principles of the LOAC.[108] However, if the United States has proof positive that the same person engaged in a hostile act against the United States a week earlier, under the U.S. view, that previous single incident is enough to lawfully target that individual for DPH.[109] The individual may be targeted regardless of whether the United States is able to identify whether that person's activities were continuous or isolated to a single or possibly subsequent hostile act.

Additionally, under the "continuous combat function"[110] principle, members of known armed groups are afforded greater protections than a state's military members. Under the ICRC's view, while a member of the military may be targeted and attacked at any time, a known member of a belligerent organized armed group may not be attacked unless he or she "directly participates and then only for such time as the participation

> to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk. As a result, IHL represents a very delicate balance between two principles: military necessity and humanity. This dialectical relationship undergirds virtually all rules of IHL and must be borne in mind in any effort to elucidate them. It is in this regard that the Interpretive Guidance falters.

Id.

[107] *See generally* Schmitt, *supra* note 97, at 21-23.

[108] *Id.* at 21-24.

[109] *Id*.

[110] Melzer, *supra* note 16, at 27, 33 ("Continuous Combat Function" (CCF) describes those members of individual non–state actor armed groups who, in a non–international armed conflict, continuously directly participate in hostilities. The intent was to distinguish those members from civilians who DPH on a "sporadic," "spontaneous," or "unorganized" basis. However, there is very little functional distinction between the notions of directly participating in hostilities and continuous combat function, as defined by Melzer.).

occurs."[111] This idea flies in the face of military necessity and distinction under a traditional analysis of the principles of the LOAC and creates an untenable revolving-door effect.[112]

Under the ICRC's view, while engaged in an armed conflict in Afghanistan, a U.S. soldier is lawfully targetable by the enemy while he is eating lunch in a dining facility on a Forward Operating Base. Likewise, a member of an armed group of a non–state actor may emplace an improvised explosive device (IED) in the morning and be immediately targeted. But, after he returns home for breakfast, he is no longer an unprivileged enemy belligerent DPHing and, therefore, may not be targeted for that act until he returns in the afternoon to command-detonate the IED he emplaced that morning (unless it can be established that he continuously engages in this type of activity).

This argument is *reductio ad absurdum*. For purposes of DPH, members of organized armed groups are "civilians continuously directly participating,"[113] and therefore may be targeted at any time (assuming proper application of the remaining principles of LOAC—namely proportionality and humanity).

There is certainly a difference, both functionally and legally, between direct and indirect participation, and what constitutes each—making a bomb, versus driving a commercial cargo truck full of food or supplies, being used to directly support an armed group. This article does not suggest (nor does the United States operate on the notion) that simply participating in hostilities to the extent that a cargo truck driver does, authorizes the use of deadly force against a person. While the cargo truck may be a valid military objective, the truck driver likely is not. But, whether participation is direct such that the participant may be targeted without further intelligence, or indirect such that more information about the individual may be necessary before making a targeting decision, is a question of fact.[114] The United States does not require the individual's actions be specifically designed to cause harm in support of a party to the

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111 *See* Schmitt, *supra* note 97, at 23.

112 Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUM. L. 49 (2010).

113 *See* Schmitt, *supra* note 97, at 24. LOW Manual, *supra* note 30, para. 5.9.2.

114 UNITED KINGDOM MINISTRY OF DEFENSE, ON THE LAW OF ARMED CONFLICT §5.3.3. (2004).

detriment of another.[115] Nor does the United States adopt the revolving-door, "for such time" standard applicable to the ICRC's definition of DPH[116] and "continuous combat function."

The United States uses a functional analysis to distinguish lawful targets based on notions of hostile act and hostile intent, and the critical nature of that target's actions and his or her contribution to the enemy's efforts.[117] A soldier on the ground observing a person emplacing an IED may conduct this analysis over a long period of time or in a matter of moments. Either way, during armed conflict, facts inform that decision, not an IHRL-infused interpretation of the LOAC such as that found in the ICRC's guidance on direct participation in hostilities.[118] Again, the United States' interpretation of DPH is more expansive than that of the ICRC,[119] and it is the standard under which the United States operates.

III. Legal Basis for the Use of Force (*Jus ad Bellum*)

Once a state becomes involved in armed conflict, the LOAC applies. But where exactly does the authorization to engage in armed conflict come from? Where does the authority to target anyone, let alone citizens of the United States inside the United States, originate?[120]

Any decision to employ military force must be based upon the existence of a viable legal basis in both international law and domestic law.[121] Under international law (namely the United Nations Charter), the use of force, in particular violating another state's sovereignty, violates international law generally.[122] However, exceptions to this general rule do exist.[123] Some are well-established exceptions found within the U.N.

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115 *See* Melzer, *supra* note 16, at 49 (The ICRC's definition creates a prerequisite of specific intent.).

116 For a more detailed discussion of that standard, *see* Schmitt, *supra* note 97, at 35-38.

117 *See* Parks, *supra* note 104; Schmitt, *supra* note 97.

118 *See generally* Schmitt, *supra* note 97, at 41-42.

119 Rasdan & Murphy, *supra* note 73, at 455 ("Hina Shamsi, Director of the National Security Project of the ACLU, observes that 'whatever definition [of DPH] the United States is using . . . is more expansive than that of the ICRC.'").

120 The idea of a sovereign consenting to another's presence in its country and using force while present in that host country is not addressed in this article, but remains another possible legal basis for the use of force under *jus ad bellum.*

121 LOW Manual, *supra* note 31, para. 1.11.

122 U.N. Charter arts. 2(3)–(4).

123 *See infra* in part III.B.

Charter, while others are arguments to except the general rule, if not already CIL.[124]

A. Chapter VII of the United Nations Charter

Chapter VII of the U.N. Charter[125] authorizes the Security Council[126] to label aggression towards states by states and non-state actors as threats to peace, breach of peace, or acts of aggression.[127] Moreover, Article 42 of the same chapter authorizes military action for the purpose of "maintain[ing] and restor[ing] international peace and security."[128]

Article 42 actions prove difficult to carry out. The deficiency with Article 42 is that its mechanism of enforcement is the military action vested in Article 43—the creation of a U.N. military force.[129] But, the United Nations does not employ a military force under Article 43 of Chapter VII.[130] Because no standing United Nations force exists, Chapter VII actions are generally carried out by individual countries using their organic military assets, as they would for those actions undertaken based on a nation's inherent right to self-defense, as contemplated by Article 51 of the same chapter.

B. Inherent Right to Self-Defense

1. Article 51 of the U.N. Charter

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[124] *Id.*

[125] U.N. Charter ch. VII: Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

[126] *See* United Nations Security Council, U.N. Current Members: Permanent and Non-Permanent Members, http://www.un.org/en/sc/members (There are five permanent members on the United Nations' Security Council: China, France, Russia, the United Kingdom, and the United States, and ten non-permanent elected members.).

[127] U.N. Charter art. 39.

[128] *Id.* art. 42.

[129] *See generally* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (Camb. Univ. Press 5th ed. 2012).

[130] U.N. Charter art. 43 is the framework under which the United Nations would create a military force. U.N. Charter, *supra* note 111, art.43. However, no agreement has been reached between the U.N. and its member states and therefore, the United Nations does not employ a military force. *Id.*

A state's inherent right to defend itself is well settled in CIL and certainly predates Article 51 of the U.N. Charter. Like Article 43 of the same chapter, Article 51 provides a mechanism for a state to employ those military assets necessary to ensure its defense. Article 51 says,

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[131]

Article 51's implementation presents several pragmatic difficulties. First, Article 51 attempts to codify what is otherwise, under CIL, a nation's inherent right to self-defense.[132] This limits a nation's right to that which is defined by the Charter. A plain language reading of the Charter suggests a nation must wait until *after* it suffers from an armed attack to take action, and that such action may only continue until such time as the Security Council takes some affirmative, yet undefined, action.[133] The inherent tension between this solution and a nation's need for military action is that the Security Council is practically incapable of military action under Article 43 for the reason stated above: it does not have a military force it can deploy. Instead, it must rely completely on a country's willingness to use its own military.

Second, the language of the Article is *just vague enough* to subject it to extreme interpretations on both sides—overly restrictive or overly permissive. This is due in large part to the differences in the language between Article 51 of the Charter and interpretations associated with Article 2(4) of the Charter's language "threats or use of force" and the

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131 U.N. Charter, art. 51.
132 *See generally* DINSTEIN, *supra* note 129, at 193-200.
133 *Id* at 194.

ability for the Security Council to take action for "any threat to the peace" in Article 39.[134] Yet, as one author notes,

> [A]t-bottom, self-defence consonant with Article 51 implies resort to counter-force: it comes in reaction to the use of force by the other party. When a country feels menaced by a threat of an armed attack, all that it is free to do—pursuant to the United Nations Charter—is make the necessary military preparations for repulsing the anticipated attack should it materialize, as well as bring the matter fore with to the attention of the Security Council . . . .[135]

It is no wonder why the idea of self-defense is such a confusing and controversial issue under international law.[136]

2. Inherent Right to Self-Defense (outside the parameters of Article 51)

The United States interprets the right of self-defense differently than does the United Nations under Article 51 of its charter.[137] A plain language reading of Article 51 requires a nation to let the bombs drop on it—so to speak—before responding in kind.[138] The United States does not hold that position. The United States has consistently asserted it has the right to take military action preemptively in the exercise of its right of self-defense.[139] This is often referred to as anticipatory self-defense.[140] Whether calling it preemptive self-defense, anticipatory self-defense, or the Bush Doctrine,[141] the U.S. position is that it may use force to interdict

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134 Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 189 (Nov. 6).
135 DINSTEIN, *supra* note 129, at 200.
136 ANDERSON, *supra* note 96 (focusing on self-defense as a rationale for targeted killing of terrorists).
137 *Id. See also* W.M. Reisman, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AJIL 525, 527-30 (2006).
138 U.N. Charter art. 51. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27).
139 Reisman, *supra* note 137, at 527-30; ANDERSON, *supra* note 96.
140 *See* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 73 ILS 263 (A.R. Thomas and J.C. Duncan, eds., 1999).
141 DINSTEIN, *supra* note 129, at 195.

or stop imminent attacks before they occur.[142] This position certainly falls outside of a restrictive interpretation of the limited scope of the language of Article 51 as promulgated by the United Nations.[143]

Under the United States' view of self-defense, "imminence" does not necessarily mean immediate and does not require "the United States to have clear evidence that a specific attack on U.S. persons and [or] interests will take place in the immediate future."[144] On the contrary, the United States defines imminence far more broadly in that it "incorporate[s] considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."[145] This view of a nation's inherent right to self-defense is certainly not new, nor is it simply a reaction to the attacks of September 11, 2001. On the question of the use of force in self-defense, at least since the 1980s—America has been consistent in its position—that the right of self-defense supports "direct attack on terrorist leaders when 'their actions pose a continuing threat to U.S. citizens or the national security of the United States.'"[146]

Nevertheless, even under the United States' view of self-defense, a license to inflict limitless destruction (be it through war or an unrelenting, overwhelming use of force), does not exist. International law demands necessity[147] and proportionality[148] in the decision to use force.[149] The main difference between the United States' justification of force in self-defense and that of others who subscribe to the strict language of Article 51 of the U.N. Charter, is that in the United States' view, the use of IHL

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[142] Use of Force and Arms Control: Preemptive Action in Self-Defense, 2002 DIGEST § 18, at 951-52. *See The Caroline Case of 1837* (also known as the Caroline Doctrine) (For a description of the *Caroline* incident, see Matthew Allen Fitzgerald, Note, *Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas under Article 51 of the UN Charter,* 49 VA. J. INT'L. L. 473, 477-79 (2009)).

[143] Nicaragua (Nicar v. U.S.) Judgment, 1986 I.C.J. 14 (June 27).

[144] Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida of An Associated Force* (Nov. 8, 2011) [hereinafter White Paper], https://www.fas.org/irp/eprint/doj-lethal.pdf.

[145] *Id*.

[146] ANDERSON, *supra* note 96 (citing Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination 7 n.16 (Dec. 1989), http://www.hks.harvard.edu/cchrp/Use %20of%20 Force/October%202002/Parks_final.pdf.).

[147] LOW Manual, *supra* note 31, para. 1.11, 2.1.

[148] *Id.* (describing the *jus ad bellum* notion of proportionality which is "limit[ng] the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack").

[149] Rasdan & Murphy, *supra* note 73, at 450.

as a body of law does not necessarily require ongoing armed conflict as a trigger.[150] Instead, the United States' invocation of its inherent right to self-defense triggers IHL.[151]

IV. Targeting

In 2013, the United States policy regarding targeted killings generally and against United States citizens specifically, became clear. While discussing targeting of U.S. citizens abroad, Attorney General Eric Holder wrote to Senator Patrick Leahy,

> I am writing to disclose to you certain information that until now has been properly classified . . . the number of U.S. citizens who have been killed by U.S. counterterrorism operations outside of areas of active hostilities. Since 2009, the United States . . . has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi. The United States is further aware of three other U.S. citizens who have been killed in such U.S. counterterrorism operations over that same time period.
>
> . . . [I]t is clear and logical that United States citizenship alone does not make [those who have decided to commit violent attacks against their own country] immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to U.S. citizens.
>
> In short, the Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-

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150 *See* ANDERSON, *supra* note 96, at 21.

151 *Id.* at 21 ("With respect to international law, therefore, the U.S. justification for the legality of a particular targeted killing should focus on self-defense as a basis, irrespective of whether or not there is also an armed conflict under IHL underway that might provide a further basis.").

> Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans.[152]

Almost three months before his letter to Senator Patrick Leahy, Attorney General Eric Holder wrote to Senator Rand Paul,

> [C]oncerning the Administration's views about whether "the President has the power to authorize lethal force . . . against a U.S. citizen on U.S. soil, and without trial [,]" . . . [t]he question you have posed is . . . entirely hypothetical, unlikely to occur, and one we hope no President will have to confront. It is possible, I suppose, to imagine an extraordinary circumstance in which it would be necessary and appropriate under the Constitution and applicable laws of the United States for the President to authorize the military to use lethal force within the territory of the United States.[153]

What constitutes targeted killings, whether or not they are legal, under what authority, who may be killed, where, and how, are certainly controversial issues, and have been the subject of countless articles, op-ed pieces, congressional hearings, and television programs.[154]

Notwithstanding all of the commentary on the subject, suggesting that targeting United States citizens is illegal, while targeting foreign nationals is legal, is intellectually dishonest. Moreover, asserting that targeting United States citizens abroad is legal, but to do so in the homeland would

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[152] Letter from Eric Holder, Attorney General of the United States, to Senator Patrick J. Leahy, Chairman, Committee on the Judiciary (May 22, 2013) [hereinafter Letter to Leahy] (on file with the author).

[153] Letter to Paul, *supra* note 1.

[154] *See e.g*., Rasdan & Murhpy, *supra* note 73, at 463 n.2; MELZER, *supra* note 87, at 442-44 (2008); ALSTON *supra* note 87; ANDERSON, *supra* note 96; William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 749 (2003); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT. SEC. J. 145 (2010); Chesney, *supra* note 112; W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 724 (2007); Amos Guiora, *Targeted Killing as Active Self–Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005); Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y. 343 (2010); Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 Naval War Coll. Rev. 127, 134-36 (2007).

violate domestic or international law, is also misguided. As hard as it may be for some to digest, if targeted killings are legal, which they are under both international and domestic law,[155] citizenship and geography are legally inconsequential.[156]

A. What is "Targeted Killing" Generally (and why is it Legal)?

Within the international community, no concrete definition of targeted killing exists. One author proposed a definition as "the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non–international armed conflict."[157] This definition, however, places a burden on a state to demonstrate why a target cannot be apprehended—a requirement that does not exist under the LOAC, though it may exist under a law enforcement-type paradigm.[158] Another definition of targeted killing is: "[t]he use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them."[159]

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[155] Rasdan & Murhpy, *supra* note 73, at 446, (citing Medillin v. Texas, 552 U.S. 491, 504-05 (2008)).

> One should recall that international law binds American officials only if it is also U.S. law. This fact leads to the problem of determining just which international laws convert into U.S. law. Some cases are easy: a treaty approved by the Senate constitutes a type of U.S. law, although making it domestically enforceable may require additional legislation.

Id.

[156] It is important to distinguish between law and policy. Refraining from taking certain actions for policy reasons is far different than refraining to act because to take such actions violate the law.

[157] SOLIS, *supra* note 14, at 538 n.92. There are other definitions of targeted killing. An ICRC legal advisor defines targeted killing as "[t]he use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them." MELZER, *supra* note 87, at 5. Another is the "premeditated killing of an individual by a government or its agents." *See* Banks & Raven-Hansen, *supra* note 154, at 671.

[158] *See generally* FOURTH PERIODIC REPORT, *supra* note 16.

[159] SOLIS, *supra* note 14, at 538 n.92.

Though the United States and other countries have a long history of striking military targets, targeting individuals as it is understood today came into common usage in 2000, when Israel made its policy of targeting terrorists throughout the West Bank and Gaza Strip public.[160] Since that time, the subject of using lethal force to respond to terrorism has been written about, argued, and litigated extensively.[161] However, with regard to targeted killing, the means and methods of killing are legally of little consequence. Though the policy implications may change depending on what means and methods are used to kill (i.e. a drone strike versus an infantry line platoon) the laws implicated—specifically the LOAC—do not. What matters to the targeting analysis is that "lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance."[162]

Contrast targeted killing then with extrajudicial killing. Extrajudicial killing is far more apropos to a law enforcement paradigm, as it is defined as "deliberated killing[s] not authorized by a previous judgment pronounced by a regularly constituted court affording all of the guarantees which are recognized as indispensable by civilized peoples." [163] Extrajudicial killings are generally considered illegal but for two legal justifications: first, involvement in an armed conflict, and second, a nation's inherent right to self-defense.[164]

B. Targeting During an Internationally Recognized Armed Conflict

The United States' position is that it is involved in an armed conflict with those "organizations, or persons" determined to have "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"—essentially amounting to al-Qaeda and its

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[160] ALSTON, *supra* note 87, at 7-8.
[161] *See* Chesney, *supra* note 112.
[162] ALSTON, *supra* note 87, at 7-8.
[163] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(a), 106 Stat. 73 (1991).
[164] ALSTON, *supra* note 87, at 8 ("The Legal Advisor to the Department of State outlined the Government's legal justifications for targeted killings. They were said to be based on its asserted right to self-defence, as well as on IHL, on the basis that the [United States] is 'in an armed conflict with al-Qaeda, as well as the Taliban and associated forces.'" *Id.* (citing Koh, *supra* note 65.).

affiliates.[165] In the context of armed conflict,[166] as stated above, targeted killing is lawful insofar as the LOAC is followed. If the target is a

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[165] AUMF *supra* note 67; Koh Speech, *supra* note 65; *See also* Rasdan & Murphy, *supra* note 73, at 451 ("Under circumstances that include 9/11, American officials have reasonably concluded that the American conflict with the Taliban and al-Qaeda is not among states; it is a non-international armed conflict. This conclusion allows the United States to target and kill some members of these armed groups in some places under IHL's relatively relaxed rules on killing.").

[166] *See* ALSTON, *supra* note 87, at 17.

> The tests for the existence of a non-international armed conflict are not as categorical as those for international armed conflict. This recognizes the fact that there may be various types of non-international armed conflicts. The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions. Under treaty and customary international law, the elements which would point to the existence of a non-international armed conflict against a non-state armed group are:
>
> (i) The non-state armed group must be identifiable as such, based on criteria that are objective and verifiable. This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians. The criteria include:
>
> • Minimal level of organization of the group such that armed forces are able to identify an adversary (GC Art. 3; AP II).
>
> • Capability of the group to apply the Geneva Conventions (i.e., adequate command structure, and separation of military and political command) (GC Art. 3; AP II).
>
> • Engagement of the group in collective, armed, anti-government action (GC Art. 3).
>
> • For a conflict involving a State, the State uses its regular military forces against the group (GC Art. 3).
>
> • Admission of the conflict against the group to the agenda of the U.N. Security Council or the General Assembly (GC Art. 3).
>
> (ii) There must be a minimal threshold of intensity and duration. The threshold of violence is higher than required for the existence of an international armed conflict. To meet the minimum threshold, violence must be:
>
> • "Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (AP II).

combatant or a civilian directly participating in hostilities, and the killing meets the threshold requirements of necessity, distinction, proportionality, and humanity, it is lawful. These legal standards apply regardless of the nature of the armed conflict—international or non-international.[167] If, however, "one contests the presence of an ongoing armed conflict, the lawfulness of any targeted killing" may be questionable, and certainly the subject of scrutiny by the international community.[168] Thus, alternatively, a state may need to rely on its inherent right to self-defense as a legal basis to use force, independent of the existence of an ongoing armed conflict.

C. Targeting Under a State's Inherent Right to Self-Defense

Conducting extraterritorial killings after a state invokes its inherent right to self-defense, thereby triggering LOAC, is lawful.[169] A common criticism of the United States conducting targeted killings is that when operating outside of the borders of Iraq or Afghanistan, absent consent, the United States is violating the territorial sovereignty of the nation in which

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> • "[P]rotracted armed violence" among non-state armed groups or between a non–state armed group and a State;
>
> • If an isolated incident, the incident itself should be of a high degree of intensity, with a high level of organization on the part of the non-state armed group;
>
> (iii) The territorial confines can be:
>
> • Restricted to the territory of a State and between the State's own armed forces and the non-state group (AP II); or
>
> • A transnational conflict, i.e., one that crosses State borders (GC Art. 3). This does not mean, however, that there is no territorial nexus requirement.

Id.

[167] *See generally* ALSTON, *supra* note 87. The application of International Human Rights Law (IHRL) to conflicts not amounting to armed conflict, but still demanding a non-law-enforcement response from a state is certainly worthy of discussion. For example, even under IHRL, targeted killings may be permissible under a very narrow set of circumstances notwithstanding that the idea of IHRL seems to suggest the opposite.

[168] SOLIS, *supra* note 14, at 135 (concluding that targeted strikes against civilians are legal only if: (a) the civilian is directly participating in hostilities, and (b) the attack was authorized by a senior military commander).

[169] *See generally infra* notes 171-72.

it conducts operations.[170] Nevertheless, the United States may lawfully conduct targeted killing operations in countries other than Iraq and Afghanistan. Insofar as the state in which a person is being targeted is responsible for an armed attack against the United States, the United States has a right under international law to use force in self-defense under Article 51 of the U.N. Charter. In the alternative, if that state is unwilling or unable to stop armed attacks by a non-state actor against it, the United States has a right to self-defense as long as such operations are conducted in accordance with the LOAC.[171] This proposition has been written on extensively and appears settled under international law.[172]

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[170] *See generally* U.N. Charter art. 2(3)–(4).

[171] *See generally* ALSTON, *supra* note 87. This proposition is not to suggest the United States should carry out strikes in countries such as Canada, the United Kingdom, Germany, or any other country that exercises control over their territories and are "unequivocally opposed to al-Qaeda." *See also* Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 487-88 (2012).

> The "unwilling or unable" test requires a victim state to ascertain whether the territorial state is willing and able to address the threat posed by the non-state group before using force in the territorial state's territory without consent. If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the non-state group. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the non-state group poses.

Id.

[172] *See, e.g.*, THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 336 (4th ed. 2007); ANTONIO CASSESE, INTERNATIONAL LAW 354-55 (2d ed. 2005); LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 1191 (5th ed. 2009); DINSTEIN, *supra* note 129, at 183-85, 204-06; JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 150 (2004); JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 490 (2d ed. 2005); Deeks, *supra* note 171; Sophie Clavier, *Contrasting Perspectives on Preemptive Strike: The United States, France, and the War on Terror*, 58 ME. L. REV. 565, 571-72 (2006); Thomas M. Franck, *Editorial Comment, Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L. L.J. 7, 16-18, 21-23, 37 (2003); Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L. & COMP. L.J. 195, 211, 213-17 (2001); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L. L. 319, 323-26, 330 (2004); *John W. Head, Essay: The United States and International Law after September 11*, 11 KAN. J. L. & PUB. POL'Y. 1, 3 (2001).

V. Putting the Test to the Test: Targeting Abdul al Sad

A. United States Policy versus International Humanitarian Law When Targeting United States Citizens

The distinction between well-established international and domestic law with respect to LOAC—specifically targeting under LOAC—and the recent promulgation of United States *policy* on targeting U.S. citizens is certainly relevant for discussion.[173] Notwithstanding the wide latitude for targeting under the LOAC, the United States has limited its own authority, as a matter of policy, when targeting United States citizens by creating a test that limits when a U.S. citizen may be targeted in a foreign country.

In his May 22, 2013, letter to Senator Leahy, Attorney General Eric Holder outlined the criteria a United States citizen must meet before lethal force will be *considered* against a U.S. citizen in a *foreign country*.[174] Before considering the use of lethal force, a threshold showing of the following must take place: (1) the person being targeted must be "a senior operational leader of al-Qa'ida or its associated forces" and (2) that person must be actively engaged in "planning to kill Americans."[175] If those two factors are present, only then will the United States consider lethal targeting—but only after "a thorough and careful review" of whether the senior operational leader who is actively engaged in hostilities (1) poses an "imminent threat of violent attack against the United States," and (2) "capture is not feasible."[176] Under U.S. policy, imminence does not require "the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."[177] Instead, imminence is a broader concept incorporating considerations of windows of opportunity, including "the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."[178]

Holder also said that such targeted killings would be conducted in accordance with the four principles of the LOAC: necessity, distinction,

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[173] *See* White Paper, *supra* note 144; Letter to Leahy, *supra* note 152; Letter to Paul, *supra* note 1.
[174] Letter to Leahy, *supra* note 152 (emphasis added).
[175] *Id.*
[176] *Id.*
[177] White Paper, *supra* note 144, at 7.
[178] *Id*.

proportionality, and humanity.[179] Later in the same letter to Senator Leahy, Holder explained that the Administration's policy is clear: "lethal force should not be used when it is feasible to capture a terrorist suspect."[180]

On the other hand, the LOAC is not necessarily as restrictive. It does not require senior operational leadership as a prerequisite to being the subject of a targeted killing, nor does it require actively planning an attack.[181] These factors are part of a necessity analysis, but LOAC does not require such affirmative findings prior to engaging in a LOAC analysis,[182] as appears to be the case under current U.S. policy laid out by Holder in the Department of Justice (DoJ) White Paper. Put another way, the LOAC does not create an affirmative duty to establish that al Sad is a senior operational leader in al-Qaeda as a prerequisite to determining whether al Sad is a valid military target under an IHL analysis.

Whatever the United States' reasons, political or otherwise, Holder makes it clear that killing a United States citizen-member of al-Qaeda on foreign soil is absolutely a last possible resort.[183] This policy seems more restrictive of targeting than is the prevailing law on the subject.

B. Targeting al Sad in Yemen or Pakistan

Is al Sad a lawful military target that may be targeted outside the United States in Yemen, for example?[184] The first question that must be answered is whether Abdul al Sad is a lawful target under international law, and if so, under which legal basis—IHL, International Human Rights Law (IHRL), or some complementary theory of self-defense which does not require an affirmative hostile act?[185] The answer depends, in large part, on the nature of the conflict and that person's involvement. Does a non-international armed conflict exist? If so, what is the target's relationship

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179 *Id.* at 8.

180 Letter to Leahy, *supra* note 152, at 4.

181 *See generally* LOW Manual, *supra* note 31, paras. 5.9, 17.5, 17.7.

182 *Id.*

183 Letter to Leahy, *supra* note 152, at 4.

184 Some argue that a stand-alone non-international armed conflict exists with Yemen as a result of increasing hostilities between the United States and Yemini governments. *See generally* Chesney, *supra* note 112. For purposes of this analysis, this article assumes the opposite; a non-international armed conflict does not exist between the United States and Yemen.

185 *See generally* ANDERSON, *supra* note 96; Chesney, *supra* note 112.

to that conflict and that non-state group? The limits of what constitutes an armed conflict have been addressed previously in this article.[186] The U.S. position is clear, and the objective evidence supports, that the United States is engaged in a non-international armed conflict with al-Qaeda,[187] the geographic boundaries of which extend to those areas where authorities either consent to U.S. action or "are unwilling or unable to capture or control hostile actors."[188] Once involved in a non-international armed conflict, the laws of armed conflict apply, and the U.S. may engage that enemy, subject to the LOAC, wherever he may be, inasmuch as the country in which he is being targeted consents, or is either unwilling or unable to capture or control the target.[189]

Once the targeting analysis is conducted under the LOAC's legal paradigm, the question becomes, "What is al Sad's status?" Is he an unprivileged enemy belligerent who may be targeted at any time? Is he a civilian who is directly participating in hostilities, or is he a civilian who may not be targeted? From the United States' perspective, unprivileged enemy belligerents and civilians directly participating in hostilities may be a distinction without a difference.[190] As stated throughout, generally speaking, belligerents do not enjoy any type of combatant status during NIACs.[191] "Unprivileged enemy belligerents" may be targeted at any time regardless of whether they, in that moment, are directly participating in hostilities.[192] Under the United States' view, when a civilian persistently and directly participates in hostilities, that civilian abandons his protected

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[186] Chesney, *supra* note 112.

[187] AUMF, *supra* note 67; Koh Speech, *supra* note 65. However, independent of Congressional enactment, and regardless of the position expressed by the United States, based on the intensity of the violence, the duration of the conflict, the methods used while fighting, and the organization of the enemy (notwithstanding those who have argued against it), the United States is involved in a non-international armed conflict with al-Qaeda and its associated forces. *But see* Letter from Anthony D. Romero, Executive Director, American Civil Liberties Union, to Barack Obama, President of the United States (Apr. 28, 2010), http://www.aclu.org/human-rights-national-security/letter-president-obama-regarding-targeted–killings [hereinafter ACLU Letter].

[188] DINSTEIN, *supra* note 129; Holder Speech, *supra* note 95; HANDBOOK *supra* note 46, at 7; *See* Deeks, *supra* note 171, at 477–78 and accompanying text (test for "unwilling or unable").

[189] *Id*.

[190] *See* LOW Manual, *supra* note 31, paras. 4.3.4, 5.9.

[191] Chesney, *supra* note 112, at 40.

[192] *See generally* DINSTEIN, *supra* note 129; HANDBOOK *supra* note 46, at 7. *See* SOLIS, *supra* note 14, at 334 (citing to Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23/1-A (12 June 2002)).

status and may be targeted at any time.[193] Therefore actions matter, and conduct matters. In any event, there is no doubt that based on all available intelligence, al Sad, is a valid military target under the principle of distinction. This is because he is a senior leader in al-Qaeda, the organized armed group participating in the conflict,[194] and is actively plotting an attack on United States soil—not *necessarily* requirements for al Sad to be a valid military target, but nonetheless facts in this scenario.

Some argue, albeit unconvincingly, that a duty exists under the LOAC to use lethal targeting only as a last resort.[195] Under this view, if the United States was capable of arresting al Sad, the United States is under an obligation to do so before executing his targeted killing. Such arguments fly in the face of customary IHL, and as a matter of law the United States generally does not subscribe to that point of view.[196] The IHL principle of distinction allows for the "kind and degree of force . . . which is reasonably necessary to achieve a legitimate military purpose with a minimum expenditure of time, life, and physical resources."[197] The Law of Armed Conflict, however, is not the only employable paradigm under which targeted killings are legal. Under limited circumstances, human rights law, also permits targeted killings, albeit under extraordinary circumstances.

C. Targeting Under an International Human Rights Law Analysis

For the sake of argument, what if IHRL—which unquestionably constrains states' abilities to kill compared to that of IHL—is the appropriate legal framework to analyze targeting al Sad in Yemen or Pakistan? The International Convention on Civil and Political Rights (ICCPR) holds an individual's right to life of paramount importance[198]—

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193 SOLIS, *supra* note 14, at 542-44; HANDBOOK, *supra* note 46, at 16, 21; *See also* ICRC, *Commentary on 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, at 478.

194 *See* Kretzmer, *supra* note 154, at 197-98.

195 *But see The Public Committee Against Torture v. Israel* (HJC 769/02), Judgment of 14 Dec. 2006.

196 MELZER, *supra* note 87, at 43 (citing the Government's Brief, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 2010 U.S. Dist. LEXIS 129601 (D.D.C. 2010). *But See* White Paper, *supra* note 144, at 8; Letter to Leahy, *supra* note 152, at 4 (expressing as a matter of policy capture is preferable to killing).

197 Chesney, *supra* note 112, at 46 n.192 (citing Melzer, *supra* note 87, at 109).

198 Int'l Covenant on Civil and Political Rights, G.A. Res 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, art. 6 (Dec. 16, 1966) [hereinafter ICCPR].

certainly more so than does IHL. And though the United States "has long taken the position that the ICCPR has no extraterritorial application,"[199] that position appears to be in transition.[200]

In late December 2011, the United States established its position that the LOAC and IHRL are not mutually exclusive bodies of law.[201] They can and indeed do complement each other to some degree. However, during that same time period, the United States made clear that under the doctrine of *lex specialis*, the LOAC is the body of law that generally governs during armed conflict.[202]

Those who do evaluate the use of force under a "right-to-life" IHRL paradigm emphasize legality, proportionality, and necessity,[203] albeit differently than under an IHL paradigm. Legality is the foundation in domestic law for lethal targeting.[204] Under an IHRL legality analysis, a domestic authorization for the use of force must exist to be legal, lowering the risk of an arbitrary deprivation of life through the use of force.[205] As applied to al Sad, an operational leader in al-Qaeda who is planning an attack on U.S. soil, the United States has explicitly authorized the use of force through the Authorization for the use of Military Force[206] (AUMF), thereby fulfilling its domestic authorization for the use of force requirement under IHRL.

If Congress had not passed the AUMF, the use of force against al Sad would be lawful under the United States' inherent right to self-defense, recognized in CIL and codified in Article 51 of the U.N. Charter.[207] The U.N. Charter is a treaty to which the United States is a party.[208] Under the

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[199] Chesney, *supra* note 112, at 50.
[200] *See* FOURTH PERIODIC REPORT, *supra* note 16.
[201] *Id.*
[202] *Id.* para. 507.
[203] Chesney, *supra* note 112, at 50.
[204] *Id*.
[205] *Id.* (citing Melzer, *supra* note 87, at 174–75).
[206] *See* AUMF, *supra* note 67. As Chesney notes, the statute's "plain language suffices to convey domestic law authority to use lethal force without an implied precondition that such force be used only if there happens to be a preexisting state of armed conflict or the government is prepared to use force on such a sustained basis so as to generate one." Chesney, *supra* note 112, at 51.
[207] Gov. Brief at 4-5, *Al-Aulaqi*, 727 F. Supp. 2d 1 ("In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda . . . , including the inherent right to national self-defense recognized in international law."); s*ee, e.g.*, U.N. Charter Article 51.
[208] *See generally infra* notes 122, 126.

Supremacy Clause of the Constitution, ratified treaties are the supreme law of the land[209] are as binding as federal statutes, and therefore would arguably provide a domestic authorization for the use of force.

Furthermore, the duty to repel attacks against the United States rests with the President under Article II of the Constitution.[210] When a decision is made to target an individual, that decision is the President's, operating in his roles as the Executive and Commander-in-Chief.[211] His decisions on military operations are based in military necessity, and courts lack competence to assess those decisions, including the dispatching of military resources.[212] When involved in matters of national security, the President acts with the maximum constitutional authority when engaged in armed conflict.[213] As the supreme law of the land, the Constitution is not limited by the terms of the AUMF. As Commander-in-Chief, and the Chief Executive, the President arguably has the ability to use force independent of Congressional authorization,[214] and certainly has the ability to use force—temporarily—without other express authorization under the War Powers Act.[215] Under either the AUMF, the President's inherent authority under Article II, or both, a legal basis for the use of force exists in domestic law to target under IHRL.[216]

Turning next to proportionality, in the IHRL context, the consideration is whether the "harm caused is proportionate to the sought objective."[217] In the context of al Sad, can it be said that the use of force by the government is necessary and proportionate because he is an actual threat

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209 U.S. CONST. art. VI, para. 2.

210 The Prize Cases, 67 U.S. 635, 647, 659–60 (1863).

211 *See generally infra* notes 209, 210; *See* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

212 *See* Mike Dreyfuss, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249, 288, n. 235 Cf. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010) (citing Gilligan v. Morgan, 413 U.S. at 10 (stating that courts lack the competence to assess the strategic decision to deploy force, or create standards to determine whether it was justified, because the control of military forces is essentially professional military judgments, subjected to civilian control by the legislative and executive branches); *see also Al-Aulaqi*, 727 F. Supp. 2d at 44-52 (holding that the executive order was unreviewable by any court under the political question doctrine).

213 *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 (1952); AUMF, *supra* note 67.

214 *Id.*

215 50 U.S.C. §§ 1541–48 (2015).

216 Gov. Brief at 4-5, *Al-Aulaqi*, 727 F. Supp. 2d 1.

217 Chesney, *supra* note 112, at 53.

to human life?[218] Based on the intelligence, al Sad posed a real and imminent—in the literal sense of the word—threat to American lives, and therefore lethally targeting him was proportional in relation to the risk of not eliminating him as a threat.

Also referred to as necessity, imminence asks whether the target may be "incapacitated" by the use of force "which may or may not have lethal consequences"[219] without a loss to life, and balances that against the risk to others.[220] In the case of al Sad, the use of lethal force passed the necessity test precisely because he was not just a "trigger puller"; he was also planning an imminent attack, and Yemen/Pakistan were arguably unwilling or unable to stop or control him.

Disagreement does exist on what constitutes imminence in this context.[221] About-to-kill is certainly different than will-likely-kill at an undetermined time and location. However, the U.S. view of imminence is not nearly so restrictive as to require a finger on the button, so to speak, as a predicate to authorize force, even in the context of IHRL.[222] Window of opportunity, thwarting future attacks against the United States, and limiting the loss of civilian lives, are all part of the IHRL imminence analysis.[223]

Therefore, international human rights law does not protect al Sad from lawfully being targeted. Under an IHRL targeting analysis, al Sad could also be targeted in Yemen and/or Pakistan. But what of targeting al Sad in Chicago, Illinois?

D. Targeting al Sad Domestically

The legal framework allowing al Sad to be lawfully targeted in the United States is rooted in the application of the LOAC. Aside from any legal justification, it is important at the outset to understand that a decision not to target al Sad in the United States is properly a policy decision, not one rooted in law. In fact, notwithstanding domestic constitutional concerns, the analysis required to target a United States citizen

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[218] *Id*. at 51.
[219] *Id.* at 53.
[220] *Id.* at 54-55.
[221] *See generally infra* Section II.C
[222] *See generally* White Paper, *supra* note 144.
[223] *See* Kretzmer, *supra* note 154, at 203.

domestically is simpler than that necessary to target that same citizen internationally. This is because neither legal nor policy considerations of other states' sovereignty are at issue.

In al Sad's case, the AUMF operates as the formal recognition by Congress that the United States is involved in an armed conflict with al-Qaeda, of which al Sad is a member.[224] The AUMF expressly authorizes the President to engage in hostilities and take all necessary measures against those responsible for the September 11, 2001, attacks.[225] However, Congressional authorization for the use of military force is not the only mechanism by which the President has the domestic authority to use force, thereby triggering IHL as the legal paradigm for targeting (domestically or internationally). There are other legal paradigms under which the use of force is appropriate, such that a United States citizen may be militarily targeted, self-defense being one of them.[226]

The United States has historically held the position that a claim of self-defense "has an existence as a doctrine apart from IHL armed conflict that can justify the use of force against an individual."[227] As Abraham Sofaer, then Legal Advisor to the State Department, stated in 1989, "[an] inherent right to self-defense potentially applies against any illegal use of force, and . . . extends to any group or State that can properly be regarded as responsible for such activities."[228]

That being said, a non-international armed conflict exists between the United States and al-Qaeda, of which al Sad is a member.[229] Beyond just his membership, al Sad is a senior operational leader and is planning an imminent—immediate—attack against the United States.[230] His position within al-Qaeda alone is enough to trigger the targeting analysis. Because al Sad is an enemy actor within a NIAC, the legal paradigm under which the targeting analysis takes place is IHL, and not formalized notions of due process.[231]

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[224] AUMF, *supra* note 67.
[225] *Id.*
[226] *See* ANDERSON, *supra* note 96, at 16. *See also* Chesney, *supra* note 112, at 51–52.
[227] *Id.*
[228] *Id.* (quoting Abraham D. Sofaer, *Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL L. REV. 89 (Fall 1989), at 117–18.).
[229] AUMF, *supra* note 67.
[230] *See supra* Section I.A.
[231] *See generally* Koh Speech, *supra* note 65.

The first step in the analysis is to determine if al Sad is a valid military target under the IHL principle of necessity. Based on his affiliation and his role within that organization, he qualifies as a status-based target who may be killed on sight.[232] If there is any doubt as to his status, his current and continuous direct participation in hostilities certainly qualifies him as a lawful conduct-based target pursuant to the United States' view, and a valid military target under CIL.

The next step in the analysis is distinction. For purposes of distinction, al Sad is an unprivileged enemy belligerent, not a civilian, and may be targeted within the United States under the LOAC.[233] Geography, from a legal perspective, is not relevant in distinguishing a civilian from an unprivileged enemy belligerent. [234]

The next step in the analysis is the proportionality of the strike. As stated above and throughout, proportionality is a balance between the necessity of the strike and the incidental damage to civilian life and property.[235] Under the principle of proportionality, the collateral damage expected may not be excessive in relation to the military advantage gained.[236] At the end of the day, the operational commander makes that decision.[237] In this case, based on the imminence of the attack planned by al Sad, and the amount of destruction that attack will cause, some loss of civilian life incident to targeting al Sad may be acceptable.

The final principle in the analysis is humanity. Insofar as the forces involved in the attack to do not inflict gratuitous violence on al Sad while killing him, or operate in a manner intent on creating undue suffering, the concept of humanity does not appear to be at issue under the facts presented.

Because al Sad is a United States citizen, there are other considerations which merit discussion beyond just that of a strict LOAC application. For

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[232] *See* LOW Manual, *supra* note 31, para. 5.9.
[233] *Id.* at 12, 22; *see also* Letter to Paul, *supra* note 1.
[234] *See generally Ex Parte* Quirin, 317 U.S. 1, 39 (1942); *see also* Jeh Johnson, Dean's Lecture at Yale Law School, *National Security Law, Lawyers, and Lawyering in the Obama Administration* (Feb. 22, 2012), http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school.
[235] LOW Manual, *supra* note 31, para. 2.4.
[236] *Id.*
[237] *See generally* LOW Manual, *supra* note 31, paras. 4.6.3, 5.1, 18.3.

example, why is the legal paradigm not IHRL? Does the use of military force not violate the Posse Comitatus Act[238]? Why is it not assassination? Does killing him in the United States not violate his Fourth or Fifth Amendment rights under the United States Constitution?

1. International Human Rights Law Does Not Protect al Sad from Targeted Killing?

Targeting and killing al Sad under an IHRL paradigm is legal. As stated above, until 2011, the U.S.'s view had traditionally been that IHL and IHRL treaty law do not coexist during armed conflict.[239] Nevertheless, the current U.S. policy seems to be that IHL and IHRL complement each other to some degree, and the ICCPR *does* apply to actions taken by the United States domestically.[240] Yet, as the *Fourth Periodic Report* notes, under the doctrine of *lex specialis*, IHL is the prevailing law on the subject of armed conflict.[241] Because al Sad is a status–based target pursuant to an ongoing armed conflict, IHL, not IHRL, is the proper legal paradigm. But targeting al Sad within the United States using military action raises several domestic concerns. One potential concern is the violation of the Posse Comitatus Act of 1878.[242]

2. Posse Comitatus

The Posse Comitatus Act does not apply to using military force pursuant to military action within the United States.[243] After the Civil War, Congress enacted Posse Comitatus to prevent "local civilian law enforcement from using military personnel and equipment."[244] Today, it stands for the proposition that the military will not be used to perform law enforcement functions—to police the civilian population.[245] Specifically,

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238 18 U.S.C. § 1385 (2015).

239 *See generally* Chesney, *supra* note 112, at 49–51; *but see* FOURTH PERIODIC REPORT, *supra* note 16, para. 507.

240 *See* FOURTH PERIODIC REPORT, *supra* note 16, para. 507.

241 *Id*.

242 18 U.S.C. § 1385 (2012).

243 *See generally* Tom A. Gizzo & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle against International Terrorism*, 15 PACE INT'L. L. REV. 149, 153–55 (2003).

244 Marshall Thompson, *The Legality of Armed Drone Strikes against U.S. Citizens within the United States*, 2013 B.Y.U. L. REV. 153, 167 (2013).

245 Gizzo & Monoson, *supra* note 243, at 153–55.

the Posse Comitatus Act says,

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[246]

Targeted killing is a military action, not a law enforcement function. While terrorism may also be addressed by domestic law-enforcement, using military action pursuant to the LOAC is an inherently military function.[247] The fact that it occurs on U.S. soil is of no consequence, at least insofar as posse comitatus is concerned, because the military is not being used to carry out a law enforcement function; it is being used to carry out a military action.

3. Assassination

What of the ban on assassinations found in Presidential Executive Order 12333? Executive Order (EO) 12333 provides that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[248] What the EO does not do, however, is define assassination. Generally, assassinations are understood to involve killings that are politically motivated, whereas targeted killings are based strictly on national security concerns.[249]

If a viable argument exists that somehow EO 12333 does prohibit the military from engaging in domestic, targeted killings pursuant to IHL, two points are worthy of note. First, Executive Orders are not international law, and the President has the authority to modify and rescind them, including EO 12333.[250] As the President is also responsible for targeted killings, it would follow that if targeted killings did constitute a form of assassination, the EO would have been rescinded or modified. The United States is alleged to have conducted thousands of targeted killings over the

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246 18 U.S.C. § 1385 (2012).
247 Gizzo & Monoson, *supra* note 243, at 153–55.
248 Exec. Order No. 12, 333, 46 Fed. Reg. 59,941, 59, 952 (Dec. 4, 1981).
249 Dreyfuss, *supra* note 212, at 255.
250 *See generally* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 7:31 (3d ed. 2010).

past decade by at least one non–governmental organization,[251] yet the EO has not been so rescinded.

Second, there is no statute in the United States Code that speaks to assassination—the closest reference is the prohibition on killing foreign officials.[252] Violations of the ban against assassinations within EO 12333 are punishable under the United States Code, specifically Chapter 51 of Title 18. Under 18 U.S.C. § 1111, murder of any kind requires the *unlawful killing* of another human being.[253] Targeting an individual under IHL in times of armed conflict is neither unlawful under domestic or international law, nor does it qualify as a politically motivated killing.[254] Therefore the assassination ban in Executive Order 12333 does not prohibit targeting al Sad on U.S. soil. What, however, of al Sad's constitutional protections?

4. Fourth and Fifth Amendments

Generally speaking, as a United States citizen, al Sad enjoys the protections afforded him by the United States Constitution. However, neither the Fourth nor Fifth Amendments to the Constitution prohibit killing al Sad using military action for committing acts of armed conflict against the United States.[255]

The Fourth Amendment to the United States Constitution reads,

> The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[256]

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[251] Human Rights Watch, *Q&A, U.S. Targeted Killings and International Law* (December 19, 2011), http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law.

[252] 18 U.S.C. §1116(a) (2014) ("Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title.").

[253] 18 U.S.C. §1111 (2014) (emphasis added).

[254] Dreyfuss, *supra* note 212, at 25 ("Based on the conduct of . . . the current administration . . . targeted killing is based strictly on security concerns; assassination is political.").

[255] White Paper, *supra* note 144, at 5.

[256] U.S. CONST. amend. IV.

The Fifth Amendment provides:

> No person shall be held to answer for a . . . crime, unless one presentment or indictment of a Grand Jury; . . . nor be deprived of life, liberty, or property, without due process of law . . . .[257]

There is no question al Sad is entitled to the same constitutional protections as any other United States citizen both domestically and abroad.[258] The question is, "Do those protections prevent his targeted killings under the circumstances?" The answer is no.

The Fourth Amendment does not protect al Sad from targeted killing. In fact, it does not speak to killing. It speaks to seizure—most commonly under a law-enforcement paradigm and not military action.[259] A seizure only occurs when, "by means of physical force or show of authority [an officer] has in some way restrained the liberty of a citizen."[260] If al Sad was detained instead of killed he would have a Fourth Amendment claim in addition to some formal due process.[261] However, as the discussion in this article pertains to targeted killings, he does not.[262]

The Supreme Court has never specifically addressed the Fourth Amendment implications associated with the President's decision to target and kill a United States citizen in accordance with IHL. Perhaps this is because the judiciary's role in national security and war–making is exceedingly limited.[263] Notwithstanding, under a domestic *law enforcement* analysis, the Supreme Court in *Tennessee v. Garner* seemingly acknowledged that seizure through use of deadly force implicates the Fourth Amendment, at least insofar as law enforcement is concerned.[264] However, implicating the Fourth Amendment in and of itself does not necessarily prohibit the use of deadly force. On the contrary, the Court held that deadly force may be used when it is necessary

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257 *Id.* amend. V.
258 Reid v. Covert, 354 U.S. 1, 5–9 (1957).
259 Terry v. Ohio, 392 U.S. 1, 19 (1968).
260 *Id.*
261 *See generally* Hamdi v. Rumsfeld, 542 U.S. 507, 528–35 (2004).
262 *See* Al-Aulaqi v. Panetta, 2014 U.S. Dist. Lexis 46689 (2014 WL 1352452) U.S. Dist. Ct. D.C. (Apr. 4, 2014).
263 *Id.* at 60.
264 Tennessee v. Garner, 471 U.S. 1, 7 (1985).

to prevent the escape of a suspect that law enforcement has probable cause to believe poses a "significant threat of death or serious physical injury to . . . others."[265] Ultimately, under the Fourth Amendment, the Court balanced the intrusion on the suspect's rights against the importance of the government's interests in justifying the intrusion.[266]

Under a *Garner* analysis, which does not contemplate a seizure outside the context of law enforcement and certainly did not address targeted killings during armed conflict, al Sad remains targetable. Under the balancing test promulgated in *Garner*, the government's interests in using deadly force to prevent al Sad from committing catastrophic attacks against the United States outweigh al Sad's individual right against seizure. Notwithstanding the Supreme Court deciding *Garner* in 1985, a more recent lower court decision dealing with the issue of targeted killing during armed conflict held that a targeted killing is not a seizure under the Fourth Amendment.[267]

In *Al-Aulaqi v. Panetta,* the U.S. District Court for the District of Columbia addressed whether the United States violated Anwar Al-Aulaqi's Fourth Amendment rights by targeting and killing him.[268] In doing so, the Al-Aulaqi court held the Fourth Amendment did not apply under these circumstances.[269] "While Plaintiffs assert that Defendants violated the Fourth Amendment right to be free from unreasonable seizure, in fact there was no 'seizure' of Anwar Al-Aulaqi, Samir Khan or Abdulrahman Al-Aulaqi as that term is defined in Fourth Amendment jurisprudence."[270] "Only when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[271] The court makes it clear that none of the decedents' liberty interests were restrained; they were never taken into the control of the government, either by the use of force, show of force, or authority.[272] The decedents were simply targeted and killed by the United States for being actively engaged in an armed conflict

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265 *Id.* at 11.
266 *Id.* at 8.
267 *See Panetta*, 2014 WL 1352452, at *37.
268 *Id*.
269 *Id.* at 40.
270 *Id.*
271 *Id*. (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).
272 *Id.*

with the United States and were at no point seized under the Fourth Amendment.[273]

The Fourth Amendment is not a bar against the targeted killing of al Sad. Whether a targeted killing is not a seizure under the Fourth Amendment as explained in *Panetta*,[274] or it is, the government's interest in killing al Sad outweighs his constitutional protection against seizure, because of the threat he bears to the United States. As explained in *Garner*, [275] al Sad may be killed without diminishing the Fourth Amendment. However, justifying the targeted killing of al Sad under the Fourth Amendment does not answer to what extent he is protected from a targeted killing under the due process clause of the Fifth Amendment.

In order for al Sad to be entitled to protection under the due process clause of the Fifth Amendment, the government would have to be so "deliberately indifferent" to his constitutional rights in its decision to target and kill him, that such indifference would "shock[] the conscience."[276] As the Supreme Court acknowledged, "[conduct that] shocks in one environment may not be so patently egregious in another," and "concern with preserving the constitutional proportions of substantive due process demands an exact analysis of the circumstances before any abuse of power is condemned as conscience shocking."[277] No court has ever examined the rights of a U.S. citizen-enemy who has been killed pursuant to the LOAC. However, the District Court in *Panetta* did hold that even if a substantive due process violation existed for deprivation of life without judicial process, there is no available remedy under United States law.[278] This is because the Supreme Court "has never applied a *Bivens* remedy[279] in a case involving the military, national security, or

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[273] *Id.* at 41.

[274] *See Panetta*, 2014 WL 1352452, at *40.

[275] *See generally Garner*, 471 U.S. 1. As explained above, the Court in *Garner* did not address lethal force constituting seizure outside the narrow scope of a law-enforcement paradigm. Al Sad is a United States citizen unprivileged enemy belligerent engaged in armed conflict against the United States, and as such falls squarely in line with the Court's reasoning in *Panetta*.

[276] *See Panetta*, 2014 WL 1352452, at *37 (citing County of Sacramento v. Lewis, 523 U.S. 833 (1998)).

[277] *Lewis*, 523 U.S. at 850–51.

[278] *See Panetta*, 2014 WL 1352452, at *48-49.

[279] In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized a damages action in federal court against a federal officer for violating a plaintiff's clearly-established constitutional rights. *Id.* A

intelligence."[280] The court did state that in the "delicate area of war-making, national security, and foreign relations, the judiciary has an exceedingly limited role" and is "ill-equipped to question a suspected terrorist's relationship with that terrorist organization."[281]

In al Sad's case, he was a known senior leader in al-Qaeda, operating on American soil. The information concluding as much was highly classified and not available for public consumption. At the time of his targeted killing, al Sad was planning an extremely dangerous, deadly, imminent attack on United States soil. The bombs were made and ready to be deployed, and al Sad was hiding in a virtual fortress. The United States judicial system, and by extension federal law enforcement, was not equipped to deal with the national security threat al Sad posed. Al Sad was a United States citizen engaged in armed conflict against the United States and as such, was a valid military target under the LOAC. In targeting al Sad, the United States was not operating so indifferently to his constitutional rights as to shock the conscious. On the contrary, the United States was acting out of necessity and national security. For those reasons, al Sad fell outside the protections of the Fifth Amendment.

Assuming *in arguendo* (and despite his actions) al Sad falls within the parameters of protection the Fifth Amendment due process clause provides, targeting and killing him remains lawful.[282] In *Hamdi*, the United States Supreme Court acknowledged,

> *Mathews* dictates the process due in any given instance is determined by weighing the "private interest that will be affected by the official action" against the Government's asserted interest "including the function involved" and the burdens the Government would face in providing greater process."[283]

The *Mathews* test then "contemplates a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if

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Bivens suit is the federal counterpart of a claim brought under 42 U.S.C. § 1983 against a state or local official for violation of constitutional rights. 42 U.S.C. § 1983.

[280] Doe v. Rumsfeld, 683 F. 3d 390, 394 (D.C. Cir. 2012).

[281] *See Panetta*, 2014 WL 1352452, at 60–61.

[282] White Paper, *supra* note 144, at 5.

[283] *Hamdi*, 542 U.S. at 529 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (decision based on the context of detention, not targeting).

any, of additional or substitute procedural safeguards.'"[284] In other words, the Court in *Mathews* balanced the government's interest in taking action against an individual's interest in being free from action.[285]

Contrasting the protections discussed in *Hamdi* afforded to a law of war detainee residing in U.S. custody (and posing no imminent threat to the United States) with that of al Sad (a terrorist waging war against the United States who poses a deadly, imminent threat to the United States and American lives), the balance shifts to the government's interest. Certainly, the deprivation of a person's life is significant, as is "a citizen's liberty in the absence of sufficient process"[286]; however, the realities of combat, and the threat al Sad poses render the use of force without due process necessary, appropriate, and legal.[287]

Although the Fourth and Fifth Amendments to the Constitution certainly apply to al Sad, as he is a United States citizen entitled to the full protections of his fellow citizens, neither Amendment protects him from being targeted and killed by the United States inside the United States pursuant to the LOAC.

VI. Choice of Law

This article discusses the legal authority under which al Sad, a U.S. citizen and terrorist member of al-Qaeda, may be targeted and killed under the laws of armed conflict within the United States. It sets the conditions, explains the analysis, and explores the legal paradigms, both domestically and internationally, necessary for carrying out the legal, targeted killing of a United States citizen domestically. However, targeting and killing al Sad, as with any other unprivileged enemy belligerent subject to the LOAC, is a choice. It is a policy decision made by those who make policy decisions. But, it is not the only choice, and in most, if not all, cases it may not be the best choice. The best choice may be to avail terrorists of the federal criminal justice system under a law enforcement model.

While policy reasons may dictate why the United States has chosen not to target terrorists using military force domestically, there is a crucial

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[284] *Hamdi*, 542 U.S. at 529.
[285] *See* Mathews, 424 U.S. at 335.
[286] *Id.* at 530.
[287] White Paper, *supra* note 144, at 6.

difference between policy and legal authority. Though policy may suggest it is not desirable to militarily target terrorists within the United States, policy does not, and indeed cannot, diminish the legal authority to do so.

VII. Conclusion

Since the homeland was attacked in September 2001, the United States has been in an unwavering, unforgiving, enduring "war" with those responsible, their affiliates, and their subsidiaries. Those responsible for perpetrating the attacks, and those who belong to those groups incorporated by reference under the AUMF, come in different shapes and sizes. They are not confined to specific borders, and those who join their ranks do not share commonality of citizenship. They are from nearly everywhere, and as the world has learned over the last decade and a half, they are indeed everywhere.

The United States' ability to fight and destroy then, cannot be confined to fighting *somewhere*. Under operation of law, the United States and its allies must be permitted to fight everywhere—everywhere that is, where the host nation consents, or is either unwilling or unable to address the threat itself, including on America's soil.

Neither the AUMF nor the President's inherent authority under Article II of the Constitution limit their grant of authority to target based on geography or nationality. The sole discriminators are membership or affiliation to that non-state actor group and conduct. Neither is the applicability of the LOAC limited by geography in its scope of application.

Al Sad was a senior operational member of al-Qaeda who was also a U.S. citizen living in Chicago. He was planning an attack on the homeland. He was a valid military target, an unprivileged enemy belligerent, not a protected civilian. In accordance with the LOAC, he was lawfully targeted. He was not entitled to the level of due process required under a domestic law enforcement paradigm. Of his own volition, he was an enemy of the state and an active participant in hostilities during an armed conflict. He could be and indeed was (at least under the facts of this article) targeted and killed by the United States military at the direction of the President. Doing so was legal.