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

Michael W. Lewis†

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

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

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

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

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

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

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

6 *Id.*

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

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

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

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

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

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

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

[12] *Id.* art. 3.

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

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

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

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

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

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

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

[18] *Id.* at 190-91.

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

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

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

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

[23] *See AQAP, supra* note 19.

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

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

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

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

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

[26] *Id.*

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

[28] *Id.*

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

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

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

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

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

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

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

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

[33] *See, e.g., id.* at 860–64.

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

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

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

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

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

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

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

38 *Id.* art. 43, ¶ 2.

39 *Id.* art. 43, ¶ 1.

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

41 *Id.*

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

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

44 *Id.* art. 51, ¶ 3.

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

46 *See id.* at 997.

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

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

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

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

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

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

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

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

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

[54] *See supra* note 40.

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

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

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

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

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

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

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

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

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

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

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

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

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

[62] *See id.*

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

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

[65] *Id.*

[66] *Id.*

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

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

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

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

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

[70] *Id.*