



Al Qaeda in the Arabian Peninsula through the Framework of International Humanitarian Law

Simon Henderson

While Al-Qaeda in the Arabian Peninsula (AQAP) has garnered significant media attention, its role in the Middle East raises legal issues that are not currently being explored. With AQAP having presences in Saudi Arabia and Yemen, questions arise as to which legal frameworks can be utilized: international humanitarian law, human rights law, or criminal law. This paper will discuss some of these issues, with a particular focus on international humanitarian law.

Since 2008, more than 60 countries have been affected by armed conflicts, both inter-state and non-international, with devastating impacts upon civilian populations.¹ Civilians continue to be the primary victims of violations of International Humanitarian Law (IHL), committed by both state parties and non-state armed groups. Accompanying such conflict has been increased international attention to terrorism and the

spectre of transnational or global conflicts, particularly since the September 11, 2001, attacks by al-Qaeda.² This has amplified the focus on IHL, bringing into the media debate IHL principles and rules. A major difficulty in examining issues of armed conflict is the lack of a 'bright line test' or formula to determine when armed conflict is occurring.³ If there are difficulties in determining whether or not an armed conflict is taking place during armed conflicts that do not amount to "war",⁴ then deciding on how to categorize transnational conflict is likely to be even more challenging.

Historically, the law of armed conflict has only applied to sovereign states fighting one another; non-international armed conflicts have been subject to the domestic law of the state concerned. Establishing the nature of the armed conflict, whether it is a non-international armed

conflict or a matter of law enforcement, is vital to establishing the applicability of certain treaty-based rules. The rules that govern the conduct of hostilities in non-international armed conflicts are largely treaty-based, established by the provisions of Article 3 Common to the 1949 Geneva Conventions as developed and supplemented by Additional Protocol II.⁵ Conduct under these

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treaty obligations includes matters such as the treatment of the wounded, sick, and shipwrecked. This paper will argue that existing IHL, specifically Common Article 2 and 3 of the 1949 Geneva Conventions, can encompass transnational armed conflicts. Drawing upon these articles as a framework, I will use them to discuss the case of Al-Qaeda in the Arabian Peninsula (AQAP) and the involvement of Yemen, Saudi Arabia, and the U.S., arguing that this case fits the criteria of a transnational conflict. I suggest that where an armed conflict has not developed, states should be resorting to criminal law enforcement and international cooperation wherever possible, while protecting human rights. Finally, I will point out that the practical realities of unstable political environments, unpredictable actors, and states who do not generally abide by international law can make it difficult to apply this framework.

TRANSNATIONAL ARMED CONFLICT AS ARMED CONFLICT

Legally speaking, the only types of armed conflict are international armed conflicts and non-international armed conflicts. These two categories respectively cover armed conflict involving opposing states and armed conflict between governmental forces and non-governmental armed groups, or between such groups.⁶ In circumstances where a non-state armed group is engaged in protracted armed violence with a state and is operating from across an international border, the prevailing view is that this is a non-international armed conflict with the associated rights and obligations, such as adherence to the relevant Geneva Conventions.⁷

Where a state is party to a non-international armed conflict and conducts military operations in another state on whose territory the non-state armed group is present, there are certain ways in which the state's actions can be interpreted. It could be asserted that if attacks by the outside state are limited to the non-state armed group, the status of the conflict is unchanged. However, if attacks occur more broadly on the infrastructure of the state on the territory of which the non-state armed group is present, this could transform the

conflict into an international one.⁸ The distinction can be difficult to qualify and is often unclear.

However, another way is to consider whether the second state has given its consent to the military intervention, or at least acquiesced.⁹ When such consent or acquiescence occurs, the conflict remains one of a non-international character, thus Common Article 3 can be invoked. If however, the state opposes this intervention, or at least condemns it, this results in an armed conflict of an international character between the two states simultaneous, in addition to the non-international armed conflict between the first state and the non-state armed group, in which Common Article 2¹⁰ and Common Article 3¹¹ are both invoked.¹²

Armed conflict by its very nature evolves and shifts over time. Transnational armed conflict operates on a spectrum, developing similarly to other forms of conflict. What may at one point be a localized insurgency may spread to different countries, depending upon the motivations and

goals of the non-state organization. Additionally, one country may face an armed conflict, but another may not due to the strength of the non-state organization in that territory or state actions. By looking at the case study of AQAP, these ambiguities can be explored further.

AQAP was formed in January 2009 following a merger between two regional offshoots of al-Qaeda: al-Qaeda in Yemen and al-Qaeda in Saudi Arabia.¹³ However its foundations date back to 2004 in Saudi Arabia.¹⁴ AQAP has attacked oil facilities, foreign citizens, government officials, and security forces in pursuit of its goals to topple the Saudi monarchy and Yemeni government, and to establish an Islamic caliphate. AQAP has claimed responsibility for numerous attacks in

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Yemen and Saudi Arabia, including: the failed August 2009 assassination attempt on Saudi Prince Mohammed bin Nayef;¹⁵ suicide bombings of Korean tourists in March 2009¹⁶ and; oil pipeline bombings and attacks on several oil facilities.¹⁷ It has also attempted attacks on U.S. targets, notably by sending Nigerian-born Umar Farouk Abdulmutallab to detonate an explosive device aboard a Northwest Airlines flight on December 25, 2009,¹⁸ and by attempting a parcel bomb attack on two U.S.-bound cargo planes in October 2010.¹⁹

In January 2010, AQAP was formally designated a terrorist organization by the U.S. government²⁰ and Yemen declared open war on AQAP.²¹ The U.S., along with other countries in

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the Middle East region, specifically Saudi Arabia and Yemen, have expressed fears that AQAP will exploit the current instability in Yemen as a result of the 2011-2012 Yemeni uprising and launch further attacks. In response, the U.S. has been coordinating with the Yemeni government, providing training,

intelligence sharing, and small numbers of troops.²² Similarly the U.S. has been providing assistance to the Saudi Arabian government to combat terrorism, with military and financial cooperation.²³

While U.S. drone attacks have taken place in Yemen since 2002, there has been a recent upsurge in U.S. airstrikes amid fears of political instability. In 2011-2012, the U.S. launched a series of drone attacks on targets in Yemen,²⁴ with intelligence assistance from the Yemeni government, leading to the U.S. becoming more involved in the conflict.²⁵ Unlike Pakistan, where the Central Intelligence Authority (CIA) has presidential authorization to launch drone strikes almost at will, until recently each U.S. attack in Yemen required White House approval.²⁶ Intended targets were drawn from an approved list of key

members of AQAP deemed by U.S. intelligence officials to be involved in planning attacks. John O. Brennan, the top U.S. counterterrorism advisor, has said: 'We reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.'²⁷ However, on April 25, 2012, authority was expanded with the CIA and the U.S. Joint Special Operations Command (JSOC) granted greater leeway, being allowed to fire on targets based on their 'intelligence signatures', patterns of behavior that are detected through signal intercepts, human sources, and aerial surveillance that indicate the presence of an important operative or a plot against U.S. interests.²⁸ To date, the U.S. has not launched drone attacks or provided the same level of military assistance to the Saudi Arabian government.

THE ROLE OF INTERNATIONAL HUMANITARIAN LAW IN YEMEN & SAUDI ARABIA

The second state in this example, Yemen, has consented to the first state, the U.S., operating militarily in its territory. Recent information released by the whistle-blowing website WikiLeaks indicates that Ali Abdullah Saleh, the former Yemeni president, cooperated secretly with the U.S., allowing drone attacks to take place²⁹, a factor which may have helped galvanize opposition to his rule and eventually contributed to his downfall. In discussing the role of IHL, the requirements of Common Article 3 must be examined first. Those requirements are: firstly whether the parties demonstrate a certain level of organization and; secondly whether the violence reaches a certain level of intensity.

AQAP has a stronger presence in Yemen than in Saudi Arabia, due to the fragile security situation in the former state. Yemen has been plagued by instability for decades, although recent years have seen an increase in the power of militant groups. Within Yemen, AQAP has training camps³⁰ and has demonstrated its capacity to plan, coordinate, and carry out military-style operations,³¹ and procure and transport arms throughout the country.³² Based on

these facts, AQAP appears to satisfy the criterion of being an organized armed group.

The issue of the intensity of violence is difficult to determine accurately. Media reports indicate that Islamic militants fought for, and now have control over, certain cities in the provinces of Abyan and Shabwah, such as Zinjibar and Jaar, although that control remains fluid. The militants include members of AQAP, but also include other Islamic militants and insurgent groups such as Ansar al-Sharia, which is affiliated with, and may be a front for, AQAP,³³ and Hirak.³⁴ Portions of Abyan are partially controlled by AQAP.³⁵ The exact numbers and identity of those responsible for each attack is uncertain. In situations in which military groups have been working in alliances, it can be hard to isolate the conduct of one organization. Furthermore, there is the risk that governments may brand certain opponents as militants for the purposes of political gain. Thus, it would be desirable to have further details on the nature of the attacks and their perpetrators in order to apply the IHL framework.

That being said, it appears that AQAP has had a direct hand in intensifying the violence. In September 2010, a five-day Yemeni offensive against AQAP militants displaced at least 15,000 civilians.³⁶ In January 2012, AQAP militants took over the town of Rada using 1,000 gunmen³⁷ and in early March 2012 AQAP militants killed 185 Yemeni soldiers in a surprise attack.³⁸ Battles with the Yemeni military and AQAP members have been taking place for over a year, involving hundreds of casualties on both sides³⁹ and forcing civilians to flee the affected areas.⁴⁰ The U.S. itself has attacked AQAP targets directly at least 26 times over the past few years.⁴¹ While these attacks on their own might not be sustained and prolonged, the U.S. is employing force in support of the government of Yemen in that armed conflict and in doing so has helped to legitimize and maintain international support for the Saleh government, particularly in a legal sphere. As a result it would appear that the U.S.'s intervention in Yemen's non-international armed conflict with AQAP has been in support of Yemen, with both states becoming parties to the conflict, thereby invoking Common Article 3.⁴²

Saudi Arabia's situation is quite different. Recent attacks in Saudi Arabia, for example the 2009 assassination attempt on Saudi Arabia's security chief Prince Muhammad bin Nayef, seem to fit the category of sporadic terrorist acts, rather than of the organized military operations that are taking place in Yemen.⁴³ Saudi Interior Ministry spokesman al-Turki said of AQAP that while it is no longer 'capable of waging a war' as it was in 2003, 'the threat now is that it could be capable of planning and carrying out any atrocity - targeting oil facilities, residential compounds or targeting an official ... This is their danger.'⁴⁴ In recent years, AQAP have not consistently carried out attacks in Saudi Arabia, aside from the 2009 assassination attempt. AQAP in Saudi Arabia has not been able to operate in the same way as it has in Yemen due to effective Saudi counterterrorism efforts. Certainly there appears to be an insufficient intensity for AQAP's operations to be covered under Common Article 3. Saudi Arabia has a greater degree of control over the territory within its borders. Even if it could be demonstrated that AQAP had the necessary organizational requirements, both elements must be satisfied in Common Article 3 for a non-international armed conflict.⁴⁵ In this case, neither Saudi Arabia nor the U.S. is party to a non-international armed conflict. Therefore, it is necessary to look to alternative measures to deal with AQAP's activities in Saudi Arabia.

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CRIMINAL LAW ENFORCEMENT, INTERNATIONAL COOPERATION, & INTERNATIONAL HUMAN RIGHTS LAW

States have been cooperating, multilaterally and bilaterally, to combat terrorism for many years. For example, as early as 1963, states signed the Convention on Offences and Certain Other Acts Committed on Board Aircraft in Tokyo.⁴⁶

Treaties operating in this space often require parties to criminalize the prohibited conduct under their national laws, and to either investigate and prosecute, or to extradite a suspect apprehended on its territory.⁴⁷ In terms of international cooperation, recent years have seen a wave of bilateral meetings,⁴⁸ forums,⁴⁹ and the developments of task forces such as the United Nations Counter-Terrorism Implementation Task Force Office (CTITF), which is designed to enhance inter-agency coordination at the UN and promote cooperation to combat terrorism.⁵⁰ Legislation has been introduced in a number of countries, such as Australia, Canada, New Zealand, and many others.⁵¹

The above points are raised to demonstrate the coexistent role that international cooperation and law enforcement plays within the field of transnational armed conflict. Following a spectrum of conflict, whereby in certain circumstances armed conflict will invoke IHL and where sporadic attacks may not trigger IHL, there is a gap that criminal law enforcement and International Human Rights Law (IHRL) should fill.⁵² If such laws are applied in an equitable and just manner, they can provide the necessary balance between limiting the impact of transnational armed conflict and protecting fundamental rights and freedoms.⁵³ In cases such as AQAP in Saudi Arabia, such measures should be used instead of IHL, and by both Saudi Arabia and the U.S. where applicable. Common Article 3 recognizes this role. As stated by the International Committee for the Red Cross in a 2011 Report:

The applicability of IHL to a given situation in no way detracts from the fact that members of the non-state party remain legally subject to domestic law and prosecutable under it for any crimes they may have committed. That is what the drafters of Common Article 3 had in mind when they determined that the application of its provisions does not affect the legal status of the parties to the conflict and what is overlooked when its applicability is denied, to the detriment of victims of armed conflict.⁵⁴

THE IMPLEMENTATION OF YEMEN AND SAUDI ARABIA'S REQUIREMENTS UNDER INTERNATIONAL LAW FRAMEWORKS

The primary purpose of this analysis has been to demonstrate the applicability of IHL in transnational conflicts, but there are practical implications from this discussion beyond the legal analysis. IHL is a body of law that governs relations of states and does not strictly apply to non-state actors. While there are cases of actors in some self-determination conflicts attempting to apply IHL principles, there is no indication that AQAP is moving down that path. Adherence and enforcement of international law, whether that is IHL, IHRL, or some other body of international law, is dependent on the role of states.

In the context of Yemen, there are two state parties involved in the non-international armed conflict: Yemen and the U.S. Both sides have obligations to ensure that IHL is adhered to. Yemen has ratified both the 1949 Geneva Conventions and Additional Protocol II, while the U.S. has ratified the 1949 Geneva Conventions. Regardless of Yemen's instability, both states have an obligation to adhere to IHL principles. In fact, because they are involved in an armed conflict, it is all the more important that during the conduct of hostilities they abide by their international legal obligations. Nonetheless, it is worth noting the current political instability within Yemen and the associated problems with its military forces. While Saleh has been replaced as president by the election of Abd Rabbuh Mansur Al-Hadi, political stability remains a concern with Saleh and members of his inner circle still exercising influence.⁵⁵ From the military perspective, loyalty and disunity is still an issue. For example, from January 2012 until early April 2012 the Yemeni Air Force was on strike demanding the overthrow of the Commander of Air Forces, General Mohammed Saleh Al-Ahmer, one of the remaining relatives of Saleh who was still in a position of power.⁵⁶ Meanwhile on April 7, 2012, Yemeni air force officers shut down Sana'a airport, stopping all flights in protest at the sacking of their commander, a half-brother of former President Ali Abdullah Saleh.⁵⁷ There is also an escalating humanitarian crisis, with an

estimated one-fifth of the population in need of emergency food aid.⁵⁸ However, Yemen has expressed its commitment to ensure IHL training in military educational institutions and such information is published in military media.⁵⁹ This is a positive development.

Looking at Saudi Arabia, there are difficulties in arguing that it should focus on criminal law enforcement, international cooperation, and IHRL in dealing with AQAP. Saudi Arabia has a very poor human rights record, with numerous reforms promised by King Abdullah failing to materialize in recent years.⁶⁰ Women's rights, migrant worker rights, arbitrary detention, torture, and freedom of expression are areas in which Saudi Arabia has received extensive criticism from the international community. In order to combat terrorism Saudi Arabia has implemented a range of measures, many of which have been used to target human rights activists. In 2008, the Specialized Criminal Court was formed to handle terrorism cases; however, the Court has been used on a number of occasions to target human rights activists. Most prominent was a decision by the court in November 2011, in which 16 reform advocates were given lengthy prison sentences for attempting to set up a human rights organization.⁶¹ In another example, human rights organizations have expressed fears that a 2011 proposed anti-terror law will be used to reinforce draconian and abusive measures against human rights activists.⁶² If Saudi Arabia implements measures that are aimed at halting terrorism activities, the Saudi government should be consistent with the country's obligations under international law, for example the United Nations Convention Against Torture, which Saudi Arabia has signed and ratified. However, based upon the Saudi government's track record, there are genuine concerns about its willingness to do so.

Finally, in analyzing the U.S. as a party to the non-international armed conflict, it is important to note that it also has obligations under IHL. The U.S. is primarily engaged in the conflict though its use of drones, which is particularly contentious; a number of commentators have raised concerns about whether or not their use is legal under

IHL.⁶³ This criticism centers on two factors. Firstly, the principle of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects should not be the object of the attack. Secondly, the principle of proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the direct military advantage anticipated. Assessing these criteria requires a case-by-case analysis, but there are well-founded fears over the way drones are currently being used in Yemen. Research from the Bureau of Investigative Journalism at London's City University has found 516 people have been killed in Yemen drone attacks, mostly AQAP members, however 104 were civilians.⁶⁴ Additionally, some reports indicate that the attacks may even be helping to recruit members for AQAP's cause.⁶⁵ Concerns about the legality of drone attacks are only likely to rise now that the CIA and JSOC have been granted greater leeway over drone attacks,⁶⁶ potentially increasing the risk of killing innocent civilians.⁶⁷ Human Rights Watch has made public comments indicating that it is apprehensive about the CIA taking a greater role in Yemen drone strikes, expressing worry over issues of transparency and accountability.⁶⁸ Legal scholars have also weighed in with Professor Bruce Ackerman of Yale Law School, questioning the constitutionality of the use of force in Yemen, arguing that President Obama should return to Congress for express approval.⁶⁹ There are genuine concerns as to whether the U.S. is fulfilling its international legal obligations as a party to the non-international armed conflict in Yemen.

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CONCLUSION

IHL has a role to play in the context of transnational armed conflicts. As seen above, Common Article 3 can apply where the second state has consented to the first state's intervention. Yemen can be described as being involved in a non-international armed conflict in which AQAP and the U.S., and of course Yemen, are all parties. However, AQAP's activities in Saudi Arabia fail to meet the required threshold of intensity. In the event that violence increases further, then IHL may be applicable and thus Saudi Arabia and potentially the U.S., depending on its future involvement, could be drawn into a non-international armed conflict. Criminal law procedures and IHRL should be adhered to in these circumstances - to the extent they are applicable. In both Yemen and Saudi Arabia, there are domestic issues limiting their implementation as a measure to deal with AQAP. Disunity in the Yemeni military, the escalating humanitarian crisis, and ongoing political battles are causes for concern. Meanwhile for Saudi Arabia, a country

with a very poor human rights record, it is questionable whether measures aimed at dealing with terrorism in the future will provide sufficient human rights and criminal procedure protections. In reference to the U.S., there are real concerns with the way in which drones are being utilized: the high number of civilian casualties indicates that IHL principles of proportionality may be being violated and the expanded leeway granted to the CIA and JSOC puts this at even higher risk. Nonetheless, it is important to acknowledge the capacity for international law to operate in this space. By adopting a flexible framework when implementing IHL, the global fight against terrorism and transnational conflict can be conducted in a manner consistent with IHL, IHRL, and domestic criminal law.

The views and opinions expressed in articles are strictly the author's own, and do not necessarily represent those of Al Nakhlah, its Advisory and Editorial Boards, or the Program for Southwest Asia and Islamic Civilization (SWAIC) at The Fletcher School.

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² Transnational conflict here is defined as 'cross-border armed violence between a state and a (collective) non-state actor.' See: Claus Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflict', *J Conflict Security Law* (2010) 15 (2) at p. 246. It should also be noted that the concept of transnational conflict is not new and has been occurring for many years in cases in which revolutions, guerrilla wars, and civil wars have spread across one or more boundaries.

³ Gary D. Solis, "The Law of Armed Conflict: International Humanitarian Law in War," Cambridge University Press (2010) p. 149.

⁴ *Ibid*, see discussion p. 151-152.

⁵ International Human Rights Law and certain rules of international armed conflict may also apply, however they will not be discussed in detail in this paper.

⁶ See Common Article 2 and 3 of the 1949 Geneva Conventions.

⁷ See *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, International Committee of the Red Cross Opinion Paper, March 2008, and the judgment of the ICTY in April 2008 in the *Ramush Haradinaj* case, paragraphs 49 and 60.

⁸ Author unknown, "Qualification of Armed Conflicts," *Rule of Law in Armed Conflicts Project*, October 8, 2009. <http://www.adh-geneva.ch/RULAC/qualification_of_armed_conflict.php> (accessed January 29, 2012).

⁹ The scope of a state's enforcement jurisdiction is territorial and thus it is prohibited for a state to infringe on another state's sovereign power without consent. Obtaining consent from a host party avoids a violation of Article 2(4) of the UN Charter. However, because consent is received, this does not mean that an act will necessarily comply with IHRL or IHL. Consent can be inferred by the action of the party whose territory is being infringed upon.

¹⁰ Common Article 2 states that: '...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.'

¹¹ Common Article 3 of the four Geneva Conventions of 1949 contains a provision that establishes the specific rules of humanitarian protection that each party to an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' must enforce. Such rules apply, as a minimum, in situations not expressly covered by the Geneva Conventions. Common Article 2 and Common Article 3 are relevant as they assist in helping to define whether a conflict is an international conflict or a non-international conflict under IHL. When the criterion of an international conflict is met under Common Article 2, then the full protections of the Geneva Conventions are provided. However, if the conflict is of a non-international character, then Common Article 3 offers a minimum protection to persons taking no active part in hostilities, including members of armed forces in certain situations. Additionally, Protocol II will also apply to those states that have signed and ratified the treaty, although certain provisions are considered customary international law.

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