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Fighting Words: Targeting Speech in Armed Conflict

Cover Page Footnote

A. Louis Evans, Fighting Words: Targeting Speech in Armed Conflict, 30 WASH. INT'L L.J. 598 (2021).

Fighting Words: Targeting Speech in Armed Conflict

A. Louis Evans[†]

Abstract: Freedom of speech is considered one of the most fundamental human rights, but it is not without limits. In the context of an armed conflict, engaging in certain types of speech can form the basis for lethal targeting by States. Consensus exists in customary international law that speech-driven strikes constitute a lawful use of force under *jus in bello* standards. For example, a civilian who communicates the position of targets, or broadcasts tactical intelligence for a specific military operation has, by their speech, made themselves a lawful target. While customary international law agrees that speech-driven targeting is lawful, there has been little discussion by States or scholars of the requirements that form the basis for speech-driven targeting. The lack of scholarship concerning speech-driven targeting by States undercuts the legitimacy of speech-driven targeting and suggests that international law is not currently imposing adequate limits on the use of force by States against the fundamental human right of free speech. To justify speech-driven strikes, States and commentators use traditional tests based on a person's actions to determine whether an individual has forfeited their protected status and is targetable. These action-based tests are problematic and lead to inconsistent results because they are designed to assess an individual's actions as opposed to speech. To address this problem, this article will provide the first descriptive and normative analysis of speech-driven targeting. Descriptively, the article explains how speech-driven targeting currently exists in international law while simultaneously demonstrating the lack of guidance and agreement about what is required before the lawful use of lethal force. Next, from a normative perspective, the article proposes a core set of factors that should inform the speech-driven targeting analysis. The article then applies these factors to a real-world example of America's use of force in Yemen against Anwar al-Awlaki to explore how using the factors would affect the legality of such a strike. The article concludes that using these proposed factors would enhance protections for freedom of speech while simultaneously enhancing State decisions and actions from a substantive and procedural perspective.

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INTRODUCTION

On September 30, 2011, President Barack Obama announced that Anwar al-Awlaki was killed by a targeted American drone strike in Yemen and that his death marked a “major blow to al-Qaida’s most active operational affiliate.”¹ While Awlaki was a self-professed extremist and vocal leader in

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¹ President Barack Obama, Remarks at the Change of Command Ceremony for the Chairman of the Joint Chiefs of Staff at Fort Meyer, Virginia (Sept. 30, 2011).

the al-Qaida terrorist network, he never personally conducted a violent attack or used armed force against the United States. Instead, Awlaki attacked the United States with speech by “calling on individuals in the U.S. and around the globe to kill innocent women and children to advance [his] murderous agenda.”² Based on Awlaki’s violent speech as opposed to actions, the Department of Justice (DoJ) under the Obama administration determined that Awlaki posed an imminent threat of violent attack against the United States. And, based on this determined imminent threat, the DoJ determined that targeting Awlaki based on his speech was not unlawful.³

Unfortunately, international law currently provides little guidance on what factors are relevant when making what this article calls “speech-driven” targeting decisions. However, the stakes are high: freedom of speech is considered one of the most fundamental human rights, and using lethal force is the most extreme response. When States have the unchecked ability to decide that any dissident speech beyond their borders can be met with lethal force, the consequences are dire for the marketplace of ideas made possible by freedom of speech.

The lethal strike on Awlaki is only the most recent manifestation of speech-driven targeting. A long history of state practice indicates that speech-driven targeting is lawful under certain circumstances. Prominent examples of speech-driven targets include propagandists such as Wa’il Adil Hasan Salman al-Fayad in 2016⁴, recruiters like Awlaki in 2011, and planners and coordinators like Osama-bin Laden in 2011⁵ and Qasem Soleimani in 2020.⁶ Despite the prevalence of speech-driven targeting, there has been very little discussion, by either States or

² *Id.*

³ U.S. DEP’T OF JUSTICE, WHITE PAPER ON LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE (2011) [HEREINAFTER DOJ WHITE PAPER ON LAWFULNESS OF LETHAL OPERATION AGAINST U.S. CITIZEN].

⁴ *US Says It Killed IS Information Minister al-Fayad*, BBC (Sept. 16, 2016), <https://www.bbc.com/news/world-middle-east-37390408>.

⁵ Helene Cooper, *Bin Laden Dead, U.S. Official Says*, N.Y. TIMES (May 1, 2011), <https://web.archive.org/web/20110502033900/http://thelede.blogs.nytimes.com/2011/05/01/bin-laden-dead-u-s-official-says/>.

⁶ Michael Crowley et al., *U.S. Strike in Iraq Kills Qasim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html>.

scholars, as to what factors determine whether an individual is a lawful target based on their speech.

Traditional targeting decisions are made based on an individual's actions, and for the purpose of this article, this kind of targeting will be referred to as "action-driven" targeting. The factors for traditional targeting, however, were developed only with a person's *actions* in mind and not their *speech*. Therefore, the factors have historically been inconsistently and inappropriately applied in speech-driven targeting situations. This article contains both descriptive and normative descriptions of speech-driven targeting. In the descriptive portion, Part I of this article illustrates current state practice surrounding speech-driven strikes and demonstrates how States currently make speech-driven targeting decisions. Part II then examines speech-driven targeting in a historical context and provides an original analysis of speech-driven targeting.

After establishing that the current speech-driven targeting test lacks sufficient content to act as a rule for States, Part III looks to two primary sources to establish a core set of factors for a better speech-driven targeting test. First, Part III looks to the history set out in Part II to establish a core set of factors for speech-driven targeting. Next, in order to understand what speech is protected and what speech falls outside of protected limits, Part III turns to the First Amendment of the United States Constitution. Identifying what speech the United States values and protects, from a constitutional perspective, serves as instructive guidance as to what speech the United States should also value and protect in the international context.

After creating factors for a speech-driven targeting test based on historical practice and domestic freedom of speech protections, Part IV applies this test to the real-world case of Anwar al-Awlaki. By applying the newly proposed factors to the United States' lethal strike against Awlaki, Part IV will therefore provide greater texture to the proposed speech-driven targeting test. Furthermore, Part IV will demonstrate how international law can affect foreign policy decisions: as a constraint on action, as a

basis for justifying or legitimizing action, and by providing organizational structures and procedures.⁷

As States monitor more speech and project lethal force further from the battlefield via technology, a speech-driven targeting test is crucial for creating international norms that properly balance the freedom of speech against the right of States to use force in self-defense. A properly developed speech-driven targeting test should serve as an essential check on States' use of force against speech, but to do so requires a test with greater substantive content than exists at present. This article provides that content.

I. *JUS IN BELLO* AND SPEECH-DRIVEN TARGETING

The primary goal of a State in any armed conflict is the destruction or neutralization of the enemy's ability to wage war. International Humanitarian Law (IHL) tempers the way in which States achieve this goal by requiring that States avoid *unnecessary* death, destruction, and suffering to the extent possible while waging war.⁸ To achieve this end, IHL sets forth four principles that, as applicable, must be addressed prior to the use of force in a *jus in bello* context.⁹ These four principles are: (1) military necessity, (2) humanity, (3) proportionality, and (4) distinction. These four principles apply to both individuals and objects. However, due to this article's emphasis on speech-driven

⁷ ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 7 (Oxford Univ. Press 1974); see generally Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 55 VA. J. INT'L L. 483 (2012) (discussing a structure for a descriptive and normative discussion for interpretations of international law).

⁸ OFFICE OF GEN. COUNSEL, U.S. DEP'T OF DEF., *LAW OF WAR MANUAL* ¶ 2.3.1 (2016) [hereinafter *LAW OF WAR MANUAL*]. The International Humanitarian Law is also referred to as the Law of Armed Conflict or the Law of War. For consistency, this Article will refer to this body of law as International Humanitarian Law (IHL).

⁹ The applicability of the Law of Armed Conflict is limited to conflicts of sufficient scope and intensity to be classified as conflicts as opposed to law enforcement actions. If a conflict does not possess the appropriate level of scope or intensity it is covered by international human rights law (IHRL), which is akin to a law enforcement legal construct. For example, violent protestors planning to bomb a police station would be treated under an IHRL framework. This Article will deal exclusively with (IHL). INT'L COMM. OF THE RED CROSS, *What Is the Difference Between IHL and Human Rights Law?* (Jan. 22, 2015), <https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law>.

targeting, the application of force against individuals will be the primary focus.

When considering the use of force against an individual in an armed conflict, the foremost principle is that of military necessity. This principle permits any action that creates a distinct military advantage that helps defeat the enemy as quickly and efficiently as possible and is not otherwise prohibited under the law of war.¹⁰ The first question in deciding whether speech-driven targeting is lawful is to determine whether targeting speech can result in a distinct military advantage. The next principle to consider is humanity, which forbids injury, destruction, or suffering that is unnecessary to accomplish a legitimate military purpose.¹¹ The third principle, proportionality, requires that the anticipated military advantage gained outweigh any death to civilians or destruction of civilian objects.¹² Finally, the principle of distinction requires parties to distinguish between combatants and the civilian population.¹³

These four factors taken together form a conjunctive test, whereby the expected violation of any one principle renders the proposed targeting unlawful. Therefore, any decision to target an individual requires consideration of all the applicable principles before the legality of the targeting may be determined. Although the fundamental principles of IHL outlined above are widely agreed upon, their application and interpretation varies between States.¹⁴ In an attempt to minimize variance, the Geneva Conventions recognized the International Committee of the Red Cross (ICRC) as an impartial, neutral, and independent organization to promote, strengthen, and offer guidance on interpretation of IHL.¹⁵ For this reason, when comparing and

¹⁰ LAW OF WAR MANUAL, *supra* note 8, ¶ 2.2; *see also* NELS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW (2009).

¹¹ LAW OF WAR MANUAL, *supra* note 8, ¶ 2.3.

¹² *Id.* ¶ 2.4.

¹³ *Id.* ¶ 2.5.

¹⁴ *See generally* INT'L COMM. OF THE RED CROSS, *Casebook, Glossary, Fundamental Principles of IHL*, <https://casebook.icrc.org/glossary/fundamental-principles-ihl> (last visited Apr. 6, 2021).

¹⁵ INT'L COMM. OF THE RED CROSS, *Status Update: The ICRC's Legal Standing Explained* (Mar. 12, 2019), <https://www.icrc.org/en/document/status-update-icrcs-legal-standing-explained>.

examining any States' interpretation of IHL, it is important to use the ICRC's interpretation for comparison.

Under both the United States' and the ICRC's principles, the principles of distinction and military necessity carry the most significant weight. However, all the principles must still be considered to assess the legality of speech-driven targeting. By examining state practice and commentary, Part I demonstrates that speech-driven targeting can be conducted in a manner consistent with these four principles and therefore in compliance with IHL.

A. *Military Necessity and Speech-Driven Targeting*

The first principle to consider in speech-driven targeting is military necessity. As outlined above, the critical element of military necessity is determining whether targeting an individual's speech can result in a distinct military advantage or help to defeat the enemy. In making this decision, the United States' and the ICRC's guidance differ slightly. The United States' guidance states that military necessity allows "all measures needed to *defeat the enemy* as quickly and efficiently as possible."¹⁶ This position is in contrast to the ICRC guidance, which states that military necessity only permits actions that "weaken the *military capacity*" of the enemy.¹⁷ This difference in the two definitions centers on the scope what is targetable. The ICRC guidance is limited to targets tied to *military capacity*, while the United States' definition is broader and centers on any targets that help *defeat the enemy*. This difference in definition, while slight, results in three notable disagreements in speech-driven targeting. The three primary differences between the United States' and the ICRC's interpretations are manifested in three classes of individuals: (1) planners and leaders of armed groups, (2) propagandists, and (3) recruiters and trainers. Discussion of targeting these three categories of individuals based on speech, spans across military necessity, proportionality, and distinction, and will be examined in greater detail in Part II of this article.

Despite these differences, it is important to note that both the United States and the ICRC agree that speech alone can form

¹⁶ LAW OF WAR MANUAL, *supra* note 8, ¶ 2.2.

¹⁷ INT'L COMM. OF THE RED CROSS, *Casebook, Glossary, Military Necessity*, <https://casebook.ICRC.org/glossary/military-necessity> (last visited Feb. 15, 2020).

the basis for targeting under military necessity analysis. For example, both the United States and the ICRC would agree that an unarmed civilian who is verbally directing troops into firing positions on the frontline is targetable. This individual's speech is directly enhancing the military capacity of the enemy and targeting her weakens the enemy's military capacity, thereby making her a lawful target under the principle of military necessity. On the other end of the spectrum, is speech that supports military capacity. However, speech that supports military capacity does so in such an anemic manner that both the ICRC and the United States would agree this speech is not targetable. For example, a civilian who voices support for the military in general terms by wearing a yellow ribbon may help the military's morale, but in such an anemic manner that the civilian would retain her protections no matter how vocal and fervent her verbal support is for the military.¹⁸

Based on the preceding discussion, it is clear that on either end of the debate, some forms of speech meet the criteria for targeting under military necessity, while others unmistakably fall short. What is more concerning, however, is the vast area of speech between these two extremes that have insufficient state practice or law surrounding the speech to give clear indications of the speech's status. This lack of clarity can be fatal for individuals that misjudge an enemy's interpretation of international law in an armed conflict. As seen in analysis below, similar concerns arise when analyzing the principle of distinction.

B. Humanity and Speech-Driven Targeting

The principle of humanity forbids "the infliction of suffering, injury or destruction unnecessary to accomplish a legitimate military purpose."¹⁹ Since it has been established that speech-driven targeting can serve a legitimate military purpose, there is little left to consider under the principle of humanity, as this principle only prohibits injury or destruction that does not have a legitimate military purpose. The fact that speech-driven

¹⁸ *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.C. Cir. 2009) ("[M]ere sympathy for or association with an enemy organization does not render an individual a member of that enemy organization's armed forces. Instead, the individual must have some sort of 'structured' role in the 'hierarchy' of the enemy force.").

¹⁹ LAW OF WAR MANUAL, *supra* note 8, ¶ 2.3.

targeting serves a legitimate military purpose, however, does not allow the targeting of speech by any means available. There must still be consideration of the anticipated military advantage gained versus the damage to civilian objects or people, which invokes the principle of proportionality.

C. Proportionality and Speech-Driven Targeting

Proportionality requires that when making targeting decisions, any anticipated collateral damage or death to civilian objects or people cannot exceed the expected or anticipatory military advantage gained.²⁰ It might be an intuitive reaction of liberal societies to argue that lethal force is never an appropriate response to speech, or that any collateral damage in a speech-driven strike is excessive. This position, however, is not supported by States or commentators either in state practice or rhetoric (e.g., no State has ever claimed that speech-driven targeting is per se unlawful). It must be accepted, as outlined by numerous examples cited in this paper, that speech-driven targeting is practiced by all States in some form. Therefore, when conducting speech-driven strikes, so long as the military advantage gained by targeting the speech²¹ is not outweighed by the collateral damage to civilians and civilian objects, the proportionality requirement will be met.

D. Distinction and Speech-Driven Targeting

Distinction is often the most challenging of the four principles to apply in traditional action-driven targeting decisions, and the same holds in the examination of speech-driven targeting. Cited by the International Court of Criminal Justice as a “cardinal” rule in armed conflicts, distinction prohibits direct targeting of

²⁰ Note that the definition of proportionality under *jus in bello* differs from the definition for proportionality under *jus ad bellum*. Under *jus ad bellum*, a state’s decision to use force cannot exceed the force used in the attack suffered. Robert Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 52–53 (2009). Ample opportunity exists for further scholarly research and debate as to what forms and kinds of speech are sufficient to warrant the use of force in the *jus ad bellum* context, but they are beyond the scope of this Article.

²¹ Throughout this article the term speech or speaker are used interchangeably when discussing targeting, just as act and actor are used interchangeably when discussing action-driven targeting.

civilians in an armed conflict.²² Determining what speech causes a civilian to lose their protections and become a lawful target requires careful examination.

In an armed conflict, whether international or non-international, individuals become distinguishable as targets based on two primary theories.²³ First, individuals may be targeted based on their status as members of the military or of an organized armed group.²⁴ For example, if State A is in an armed conflict with State B, all of State B's soldiers, with minor exceptions, are lawful targets for State A's military.²⁵ Under this paradigm, it is not a person's specific actions that make them targetable, but their status as a member of a government military force or organized armed group. Targeting decisions based on an individual's status are referred to in international law as "status-based" targeting.²⁶

The second category is "conduct-based" targeting, which allows the targeting of any individual, regardless of their military affiliation, if that individual is engaged in conduct hostile to friendly forces.²⁷ In IHL, this analysis of whether an individual has engaged in hostilities and becomes targetable is referred to as direct participation in hostilities (DPH).²⁸ For instance, under a

²² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

²³ An International Armed Conflict (IAC) is covered by Geneva Conventions Common Article 2 and is when the belligerents are both States, e.g. State A is fighting State B. A Non-International Armed Conflict (NIAC) is covered by Geneva Conventions Common Article 3, and is when a State is fighting a Non-State Armed Group. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) art. 2–3, Aug. 12, 1949, 75 U.N.T.S. 31.

²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43(1)–(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

²⁵ Exceptions include non-combatants such as doctors, chaplains and those that are *hors de combat*.

²⁶ U.S. ARMY, JUDGE ADVOCATE, GENERAL'S LEGAL CTR. AND SCH., INT'L AND OPERATIONAL LAW DEP'T, LAW OF ARMED CONFLICT DESKBOOK 137 (5th ed., 2015) [hereinafter ARMED CONFLICT DESKBOOK].

²⁷ Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(3), Dec. 7, 1978, 1125 U.N.T.S. 610 [hereinafter Protocol II].

²⁸ DPH indicates when a civilian has forfeited their protections from being made the object of an attack. While what specific actions constitute DPH differs by State, the concept of DPH and the loss of protections remains the same. *See generally* LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8; NELS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW (2009).

traditional action-driven targeting test, a civilian who picks up a rifle and starts shooting at enemy troops is targetable, regardless of any previous protected status. Individuals are targetable for the duration of their direct participation.²⁹ International law refers to those who become targetable based on their conduct as “conduct-based” targets because their personal conduct has made them targetable.³⁰

Status-based and conduct-based targeting designations are well accepted in international law, but were designed with an individual’s actions in mind rather than their speech. Despite this, the categories remain valid when examining targeting based on an individual’s speech, and these established definitions will be used for the purposes of examining speech-driven targeting.

1. Conduct-based targeting in the speech-driven context. — Conduct-based targeting centers upon the actions of an individual. Once an individual’s conduct crosses a threshold of participation in hostilities, they are said to have directly participated in hostilities and are targetable. The conduct that provides the required direct participation for targeting often falls into one of two categories: (1) if an individual conducts an “attack,” or (2) if their actions are going to cause an “imminent attack.” While this paradigm was designed with an individual’s actions in mind, the categories of attack and imminent attack again remain valid when examining targeting based on an individual’s speech. Accordingly, these categories will be used in the examination of speech-driven conduct-based targeting.

1.a. Speech constituting an attack. — While the definitions of “attack” and “imminent attack” vary among States, the concepts are consistent. An attack is generally defined as the actual use of force or violence in the immediate present, against a party to the conflict.³¹ Imminent attacks are those that have not yet occurred but will transpire in the determinate future.³² As it is the

²⁹ It is important to note that there is significant debate surrounding the question of duration of participation. There are a wide range of positions from States and commentators on how long an individual is targetable for after D.P.H.’ing. While this debate is outside the scope of the speech-driven targeting debate, it is important to note.

³⁰ ARMED CONFLICT DESKBOOK, *supra* note 26, 137.

³¹ MELZER, *supra* note 10, at 45; U.S. ARMY, JUDGE ADVOCATE GENERAL’S LEGAL CTR. AND SCH., INT’L AND OPERATIONAL LAW DEP’T, OPERATIONAL LAW HANDBOOK 473 (2015) [hereinafter OPERATIONAL LAW HANDBOOK].

³² MELZER, *supra* note 10, at 45; OPERATIONAL LAW HANDBOOK, 473.

more concrete and immediate concept, how attacks manifest themselves in speech-driven context will be addressed first.

One illustration of an action-driven “attack” is a civilian who fires a rifle at troops. By their conduct, this civilian has committed an attack and is a lawful target. While an attack is easy to define in the action-driven context, it is more challenging to define for speech-driven targeting. Indeed, based on the immediacy requirement of an attack under conduct-based targeting, it is difficult to argue that speech alone can ever constitute an actual attack. While speech and words can inspire others to act, speech itself can never be considered an act of force or violence. Further, no state manual or interpretative guidance reviewed for this article indicated that speech could rise to the level of harm to be considered an attack.³³ Thus, under speech-driven targeting, it does not seem that an individual could conduct a verbal attack.

For example, the actions against the United States on September 11, 2001, were an attack within the definition outlined above. Despite this, it would be difficult to argue that the architect of the attack, Osama bin Laden, committed a conduct-based attack.³⁴ While bin Laden planned and directed the attack via speech, he did not carry out the actual attack.³⁵ Because speech itself cannot be considered an attack, under conduct-based targeting, the only remaining possibility for lawful speech-driven targeting rests on the premise that speech can constitute an “imminent attack.”

³³ See generally LAW OF WAR MANUAL, *supra* note 8; THE JOINT DOCTRINE & CONCEPTS CENTRE, U.K. MINISTRY OF DEFENCE, JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (2004); DEFENCE PUBL’G SERV., COMMONWEALTH OF AUSTRALIA DEPARTMENT OF DEFENCE, MANUAL ON THE LAW OF ARMED CONFLICT (2006); CANADA OFFICE OF THE JUDGE ADVOCATE GENERAL, LAW OF ARMED CONFLICT MANUAL AT THE OPERATIONAL AND TACTICAL LEVELS (2001).

³⁴ This is not to say that targeting bin Laden was unlawful under international law. This example merely helps to illustrate and understand how to frame speech-based targeting decisions.

³⁵ Of course, some would argue that in the bin-Laden example, the “attack” distinction is moot because as a member of al-Qaeda, bin Laden could be targeted under a status-based targeting analysis. However, this counter-argument fails because the analysis of speech-driven status-based targeting will show that, without additional action, speech alone is insufficient to confer status as a member of a military or organized armed group for the purposes of “status-based” targeting.

I.b. Speech constituting an imminent attack. — In contrast to an attack, an “imminent attack” is one that has not yet occurred, yet its manifestation is instant and overwhelming.³⁶ An example of an action-driven imminent attack is a civilian who picks up a loaded rifle and aims it at troops.³⁷ Although the civilian has yet to attack or cause harm, their actions and intent to commit an attack are obvious, and the civilian is therefore targetable. This section concludes that speech can form the basis of an imminent attack, thereby justifying the targeting of individuals based on speech.

Three well-accepted examples illustrate how speech can constitute an imminent attack. The first example of an imminent attack through speech is a civilian who provides tactical directions, such as acting as a spotter for indirect fire.³⁸ The second example returns to the bin-Laden example above. Although bin-Laden’s actions did not constitute an attack on the United States on September 11, 2001, his speech planning the attack and directing others to conduct the attack did constitute an imminent attack. The third example is a civilian acting as a lookout, alerting enemy forces to troop movements.³⁹ These examples are all widely accepted as situations where speech constitutes an imminent attack.⁴⁰

Despite agreement that speech can constitute an imminent attack, disagreement remains among States as to precisely what kinds of speech are sufficiently imminent to justify the use of force. Examining the positions on each end of the imminence debate helps to frame the discussion in Part II. As noted throughout this article, the ICRC has a generally restrictive view on when civilians lose their protections and become targetable. The ICRC maintains a particularly conservative view of how

³⁶ OPERATIONAL LAW HANDBOOK, *supra* note 31, at 473.

³⁷ What qualifies as an “imminent attack” or “hostile intent” is difficult to define in the abstract. Recognizing this, the San Remo Manual, a non-binding codification of customary international law, gives the following non-exhaustive list: a. Aiming or directing weapons, b. Adopting an attack profile, c. Closing within weapon release range, d. Illuminating with radar or laser designators, e. Passing targeting information, f. Laying or preparing to lay naval mines. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, 22 (Louise Doswald-Beck ed., 1995). *See also* LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8.3.1.

³⁸ LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8.3.1.

³⁹ *Id.*

⁴⁰ *Id.*

closely an individual's actions must be associated with the battlefield before they constitute DPH and provide the legal grounds for targeting.⁴¹ Despite this restrictive view, ICRC interpretive guidance supports the position that speech can constitute an imminent attack. The ICRC does not say this directly, but includes "transmitting tactical targeting information for an attack," as well as verbal planning and direction of specific attacks as examples of imminent attacks.⁴²

Requiring targetable speech to be in close proximity to the battlefield aligns with ICRC's position on action-driven targeting requirements. In particular, the ICRC requires that actions directly cause harm and be only one causal step away from an attack to be considered imminent.⁴³ For example, under ICRC interpretations, generally recruiting people to fight in a conflict is too broad, but recruiting people to conduct a specific attack is only one causal step away from an attack and therefore targetable behavior.⁴⁴ The one causal step requirement is the subject of tremendous debate and criticism by States and commentators. Specifically, the United States believes that the one causal step requirement is an overly restrictive means of determining when an individual has demonstrated hostile intent.⁴⁵

If the ICRC and States that follow the ICRC guidance represent the more conservative end of the spectrum in assessing imminence, there must be an examination of the other end of the spectrum. In defining the limits of what would *not* be considered targetable speech, the ICRC specifically mentions enemy "recruiters, trainers, and propagandists" as too many causal steps removed from an imminent attack to be lawful targets.⁴⁶ State practice demonstrates that a number of States disagree with this assertion.⁴⁷

⁴¹ Ryan Kresbach, *Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 J. NAT'L SEC. L. & POL'Y 125, 156 (2017).

⁴² MELZER, *supra* note 10, at 48.

⁴³ *Id.* at 53.

⁴⁴ *Id.*

⁴⁵ Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, in 88 INTERNATIONAL LAW STUDIES, NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 186 (Kenneth Watkin & Andrew J. Norris eds., 2012).

⁴⁶ MELZER, *supra* note 10, at 34.

⁴⁷ Pomper, *supra* note 45 at 187–90.

Using the three categories of recruiters, trainers, and propagandists is useful for two reasons. First, each of these categories uses speech to conduct imminent attacks, whether by verbally recruiting others to conduct attacks, verbally training others to conduct attacks, or verbally encouraging the population at large to conduct attacks via propaganda. Second, this list is helpful because, on numerous occasions, the United States and other North Atlantic Treaty Organization (NATO) allies have targeted and killed recruiters, trainers, and propagandists, creating clear categories of disagreement among States and the ICRC for what constitutes an imminent attack in speech-driven targeting analysis.⁴⁸

The United States' position is that even though individuals from these categories might not be engaged in a specific imminent attack, their speech is sufficient to justify targeting because they are seeking to "inspire, enable, and direct attacks."⁴⁹ What constitutes "imminence" is the gray area that consumes this part of IHL and will be examined further in Part II and used to produce a proposed rule for speech-driven targeting in Part III. Despite disagreement as to the precise definition of imminence, it is important to note that there is a general consensus that speech can form the legal basis for conduct-based targeting, so long as the speech represents an imminent attack.

2. Status-based targeting in the speech-driven context. — State practice indicates that speech alone cannot support status-based targeting. This conclusion is based on an examination of status-based targeting in both the formal military

⁴⁸ Prominent examples in the war on terror include Anwar al-Awlaki, Ahmad Abousamara (aka Abu Sulayman ash-Shami and Abu Maysarah ash-Shami), and Abu Muhammad al-Furqan (aka Dr. Wa'ik Adel Hasan Salman al-Fayad). See, e.g., Mark Mazzetti et al., *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), <https://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html>; see also Paul Cruickshank, *ISIS Lifts Veil on American at Heart of its Propaganda Machine*, CNN (Apr. 7, 2017), <https://edition.cnn.com/2017/04/06/middleeast/isis-american-propaganda-editor/>; see also *IS Confirms Death of Propaganda Chief Abu Mohammed al-Furqan*, BBC (Oct. 11, 2016), <https://www.bbc.com/news/world-middle-east-37619225>.

⁴⁹ Owen Bowcott, *Is the Targeting of ISIS Member Sally Jones Legally Justified? UK Attorney General Set Out Legal Advice That Allows Such Actions But Strike Raises Question of Whether UK is Operating Kill-List*, THE GUARDIAN (Oct. 12, 2017, 10:39 AM) (quoting Jeremy Wright, Queens Counsel), <https://www.theguardian.com/world/2017/oct/12/isis-targeting-of-isis-member-sally-jones-legally-justified>.

context and the more informal context of organized armed groups.⁵⁰ In traditional militaries, civilians are regularly transformed into combatants by swearing an oath of enlistment, going to basic training, and taking up arms. In non-traditional military settings of organized armed groups, like the Islamic State of Iraq and the Levant (ISIL), civilians achieve a similar transformation by swearing an oath of loyalty to a group and taking up arms against the enemy. In each case, it is necessary to determine when an individual transforms from a civilian to a combatant, thus becoming a lawful target. The “when” is of crucial import because it determines whether swearing an oath (i.e., speech alone), is sufficient for a civilian to lose protections from attack or whether there must be further action, such as training or taking up arms.

2.a. Speech conferring status in the military. — As IHL has expanded protections to civilians and made the distinction between civilians and the military more important, the question of *when* an individual is targetable, based on status, has become a matter of crucial import.⁵¹ The most formal targetable position an individual can assume is as a member of a state’s military. Despite the importance of this status, United States’ guidance on what precisely transforms a civilian into a formal member of the military is lacking. This want of guidance means that it is unclear whether an oath of enlistment, i.e., speech alone, is sufficient to provide a legal basis for targeting. Thus, to determine the United States’ position on speech-driven targeting, there must be an examination of United States’ state practice.

While current United States’ guidance is silent, historical guidance and state practice is not. The 1863 Lieber Code, a general order signed by President Lincoln, dictated how soldiers should comport themselves in wartime and is informative as one

⁵⁰ LAW OF WAR MANUAL, *supra* note 8, ¶ 4.3.

⁵¹ Article 22 states: “[A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms.” INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE U.S. IN THE FIELD, GENERAL ORDERS NO. 100, art. 22 (War Dept., Washington D.C., 1863) (emphasis added) [hereinafter Lieber Code].

of the first codifications of IHL.⁵² In determining who is a lawful combatant, the Lieber Code states that “so soon as a man is armed by a sovereign government *and* takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”⁵³ The conjunctive “and” included in the Lieber Code means that, in addition to an “oath of fidelity,” (i.e., speech), a civilian must also take some action, such as taking up arms, before they become targetable based on their status. This early codification of state practice makes clear that speech alone is insufficient to transform a civilian into a combatant. Unfortunately, the clarity provided by the Lieber Code no longer exists in current United States doctrine.

Due to the lack of explicit guidance, state practice provides the only source on whether speech alone can cause a civilian to lose their protections from attack. Practice by the United States and other States indicates that speech alone cannot support status-based targeting. The state practice in question centers on non-combatants. Although all military members take the same oath of enlistment, not all military members are targetable. Certain military members, such as chaplains, are non-targetable and are labeled as non-combatants and do not carry weapons.⁵⁴ Despite taking the same oath and engaging in the same speech to join the military as combatants, it appears to be the *action* of not taking up arms that preserves non-combatants’ protected status. Thus, current state practice seems to support the action-driven requirements outlined by the Lieber Code.

In keeping with the explicit requirements outlined by the Lieber Code, because non-combatants have not followed their oath with action, they are not targetable. Since these non-combatants have joined the armed forces through the same speech as other military members, but retain a non-targetable status, an inference can be made that speech alone is insufficient to transform a civilian into a combatant based on their status as a member of a military. Because States regularly recognize and

⁵² See generally *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (24 Apr. 1863), INT’L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/110>.

⁵³ Lieber Code, *supra* note 51, at art. 57.

⁵⁴ Non-combatants, like civilians, can of course lose their protections if they DPH. LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8.

practice this distinction and do so out of a sense of legal obligation, there exists a presumption under customary international law that military oaths alone are insufficient to support status-based targeting.⁵⁵

2.b. Speech conferring status in organized armed groups. — The informal membership in organized armed groups stands in contrast to the formal membership in state militaries. This informal association makes assessing what precise event denotes membership even more difficult. However, the question is of significant import, as most modern conflicts involve organized armed groups. Determining membership in organized armed groups based on speech is further complicated by two additional factors. First, the concept of organized armed groups in armed conflicts is a relatively new concept when compared to formal military membership.⁵⁶ Second, States rarely provide candid, unclassified explanations as to the rationale behind targeting decisions.⁵⁷ Despite the difficulties presented by these two factors, state practice, coupled with advisory opinions, indicates that speech alone cannot establish membership in an organized armed group.

Because the United States rarely declassifies the basis for individual targeting decisions, it is essential to understand the overarching intent behind United States' practice. Through both action and verbiage, the United States expresses a strong bias and intent to assess the liability of combatants—privileged and unprivileged—similarly.⁵⁸ Because of the intent for similar treatment, and because Section 1.4.2.1 of this article established

⁵⁵ Customary international law is typically defined as law that results from a general and consistent practice by States, which the States follow out of a sense of legal obligation, or acceptance of the norm. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000). Therefore, understanding past state practice in related circumstances is instructive as to the state of customary international law in a particular area.

⁵⁶ Gloria Gaggioli, *Targeting Individuals Belonging to an Armed Group*, 51 VAND. J. TRANSNAT'L L. 901, 904 (2018).

⁵⁷ *Id.* at 914.

⁵⁸ This distinction is between persons who have met the qualifications to receive the privileges of combatant status and those who have not; the terms "lawful combatant" and "unlawful combatant" are also used. The United States has made its position clear regarding similar considerations for combatant liability purposes in two aspects. First, in the temporal aspect of for how long an individual is targetable, and second, in the functional aspect of targeting concerning what actions constitute a continuous combat function to justify targeting. LAW OF WAR MANUAL, *supra* note 8, ¶ 4.3.2.2, 5.8.4.2.

that the United States does not consider speech sufficient to establish combatant status in the military context, there should be a bias for arriving at the same conclusion in the context of membership in organized armed groups.⁵⁹

In addition to the Lieber Code, one of the oldest codifications of IHL, and thus the best evidence of historical state practice, are the Hague Conventions. While the Lieber Code only applied to United States soldiers, the Hague Conventions, first signed in 1899, were international in nature and signed by 51 States, including the United States.⁶⁰ Because the United States is a signatory to 1907 The Hague Convention, the factors listed are more than evidence of historical state practice; they also provide a baseline for current United States' interpretations of international law.⁶¹ Specifically, the 1907 Hague Convention spells out the "*Qualifications of Belligerents*" to include not only regular armies but also informal groups, including organized armed groups.⁶² Of the factors listed, none reference oaths of loyalty or speech as a factor to determine belligerent status. However, the factors are not exclusive, and state practice may expand them.

Although the United States' Department of Defense (DoD) Law of War Manual (Law of War Manual) does not represent the official positions of the United States, it does provide a non-exhaustive list of factors to consider when assessing membership in an organized armed group.⁶³ Only one of the factors listed concerns speech: "[f]ormal membership in an armed group *might be indicated by . . . taking an oath of loyalty to an OAG [Organized Armed Group] [emphasis added].*"⁶⁴ Thus, the

⁵⁹ *Id.*

⁶⁰ Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, July 29, 1899, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=150.

⁶¹ Convention Between the United States & Other Powers Respecting the Law & Customs of War on Land, Feb. 28, 1910, 36 Stat. 2277.

⁶² *Id.* at art. 1-2. The list includes, militia, volunteer corps and *levee en masse*.

⁶³ LAW OF WAR MANUAL, *supra* note 8, vi.

⁶⁴ *Id.* ¶5.7.3.1; *see also* REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATE'S USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, THE WHITE HOUSE (2016), <https://www.state.gov/wp->

Manual implies that while speech might indicate membership in an organized armed group, it is not a stand-alone factor. This position is supported by DoJ motions written and filed in the Guantanamo Bay Litigation Cases, which state that:

Evidence relevant to a determination that an individual joined with or became part of al-Qaida or Taliban forces might range from . . . an oath of loyalty, to more functional evidence, such as training with al-Qaida . . . or taking positions with enemy forces. In each case, given the nature of the irregular forces, and the practice of their participants or members to try to conceal their affiliations, judgments about the detainability of a particular individual will necessarily *turn on the totality of the circumstances*.⁶⁵

Although this position considers detainability rather than targetability, it supports the argument that the totality of the circumstances, not a single speech act, establishes membership in an organized armed group. Furthermore, extensive research into historical practice did not reveal any instances where a member of an armed group was targeted solely based on an oath of loyalty.⁶⁶ Although United States' domestic criminal law is at best persuasive on United States' interpretations of IHL, the DoD Law of War Manual cites to the United States' Federal Cases and United States criminal code, and it is of note in this context.⁶⁷ In

content/uploads/2019/10/Report-to-Congress-on-legal-and-policy-frameworks-guiding-use-of-military-force-.pdf; see also Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the I.C.R.C. "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 690-91 (2009); Eran Shamir-Borer, *Fight, Forge, and Fund: Three Select Issues on Targeting of Persons*, 51 VAND. J. TRANSNAT'L L. 959, 963 (2018).

⁶⁵ Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 6-7, In Re Guantanamo Bay Detainee Litigation, 624 F. Supp. 2d 27 (D.C. Cir. 2009) (Misc. No.08-442), U.S. Dist. Ct. Motions Lexis 96279 (emphasis added).

⁶⁶ The court cases cited by the Manual involved situations where members of organized armed groups had appealed their convictions, and the courts made a ruling on their status based on factors exhibited. In most instances the individual was targetable based on their conduct as opposed to status. Examples of classifications found included "fighter, bomber, bomb maker, planner, propagandist, financier, leader, etc." LAW OF WAR MANUAL, *supra* note 8, ¶¶ 5.7.3.1-5.7.3.2.

⁶⁷ *Id.*

addition to these DoJ memos, both the United States Code and the United States Supreme Court have clarified that mere association or oaths to organized armed groups, in isolation, do not constitute unlawful behavior.⁶⁸ Instead, the Code makes clear that some further action must accompany the oath before an individual can be convicted of supporting terrorism.⁶⁹

While the DoD Law of War Manual lists “taking an oath” as a factor, based on stated United States intent in interpreting IHL, historical state practice, contemporary state practice, and application of United States domestic law, it seems that the United States does not consider speech alone sufficient to establish membership in an organized armed group. In other words, simply verbally pledging allegiance to an organized armed group, without further conduct, does not appear sufficient to establish the legal basis for status-based targeting.⁷⁰ Instead, there must be some additional conduct, combined with the speech, that makes a civilian targetable. Examples of typical additional conduct that occur after swearing an oath could include, but are not limited to: basic training, receiving uniforms, official training, etc. The fact that some additional targetable conduct must accompany declarations of status means that status-based targeting in the speech-driven context is not a *stand-alone category*. Even though status-based targeting is not a stand-alone category, as seen below, it is possible that speech declaring status could interact with speech constituting targetable conduct to satisfy the requirement for status-based targeting in the speech-driven context.

3. The interaction of conduct and status-based targeting. — Before concluding the discussion on distinction, it is necessary to consider how conduct and status-based targeting interact in the speech-driven context. Based on the conclusions reached in the above sections, status-based targeting cannot be established simply by verbally declaring membership. Rather, in

⁶⁸ Holder v. Humanitarian Law Project, 561 U.S. 1, 25–26 (2010).

⁶⁹ 18 U.S.C.S. § 2339B Notes to Decisions states, “18 USC § 2339B does not penalize mere association with foreign terrorist organization; what it prohibits is act of giving material support. 18 U.S.C.S. § 2339B (Notes to Decision, §2 Constitutionality & LexisNexis 2021); see also United States v. Farhane, 634 F.3d 127, 149–150, 175 (2d Cir. 2011).

⁷⁰ Since speech cannot make someone a status based combatant, it stands to reason that speech alone cannot rescind that status either.

order to establish membership, there must be some conduct that accompanies the verbal declaration. There should be an understanding that this required additional conduct could be in the form of speech. As such, it is possible that verbal declaration of membership *when coupled with* targetable verbal conduct could form the legal basis for speech-driven status-based targeting. For example, someone who met status-based criteria (such as proclaiming status in an armed group) would not be targetable until they engaged in conduct-based criteria (such as directing specific fighters to carry out a specific attack). However, after both of these criteria were met the person would be targetable as a member of an organized armed group until they take affirmative steps to end their membership in the group.⁷¹ Based on the state practice examined in previous sections, it appears that speech can support status-based targeting, but only after a basis for conduct-based targeting has been established.

This interpretation, supported by state practice, takes aspects from both the ICRC and United States' position to bridge the middle ground between them. By requiring conduct-based speech to serve as the foundation for speech-driven targeting, the interpretation described above adopts the portion of the ICRC's position on DPH, limiting the definition of participation to "measures preparatory to the execution of a specific act."⁷²

⁷¹ When membership in an organized armed group and the accompanying targetable status ends is a matter of some debate in the traditional action-driven context. States and commentators disagree about how long the targetable status endures and what steps need to be taken to end membership or participation in hostilities. The intricacies of this debate need not be repeated here, but it is interesting to consider whether a targetable status based only on speech can be rescinded by speech alone. To answer this question, it is once again helpful to look to action-driven targeting to make analogous comparisons. In traditional action-driven targeting the ICRC and the United States specifically state that one of the factors used to determine whether an individual is still a target includes renunciation of membership or an informal public declaration that the individual no longer wishes to participate in hostilities. Therefore, if speech can rescind an action-driven targetable status, it would stand to reason that genuine renunciations could end a speech-driven targetable status. The qualifier of "genuine" is added to renunciations in order to prevent individuals from taking part in hostilities, then renouncing membership or participation in hostilities to regain civilian protections. Therefore, while speech alone can terminate a speech-driven targeting designation, it must be a genuine statement, and may need to be accompanied by actions that demonstrate the authenticity. *See generally* LAW OF WAR MANUAL, *supra* note 8; NELS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW (2009).

⁷² MELZER, *supra* note 10, at 65–68.

Simultaneously, this interpretation embraces the United States' position on status-based targeting in that there is no "revolving door" – once someone has participated in hostilities, by action or by speech, they are targetable until they permanently cease their participation.⁷³ This middle-ground interpretation in the area of speech is appropriate due to the nature of speech. As this article has made clear, freedom of speech rightfully holds a more protected place in both United States and international policy. Due to speech's protected status, States should bear a higher burden before placing an individual in a more permanent status-based target category. Speech-driven targeting allows for speech to serve as a more permanent status-based targeting status, but only if preceded by speech that justifies conduct-based targeting.

While this distinction between justifications for targeting may seem trivial, it is a crucial distinction. Under a conduct-based targeting justification, an individual is only targetable for such time as they commit targetable conduct. In status-based targeting, a person is targetable for the duration of the conflict regardless of their conduct. If in the speech-driven context, conduct-based targeting can be used to support status-based targeting, an individual would be targetable for a longer period, thereby enlarging the window during which States could take action.

The United States' state practice pertaining to these four fundamental principles of IHL, make clear that speech can form the legal basis for the use of force under a *jus in bello* analysis. Throughout Part I, there exists a salient counterargument that the conclusions reached are based too much on inference rather than explicit state guidance or explanation of practice. Although this counterargument may weaken the case surrounding the speech-driven targeting analysis, it strengthens this article's overarching argument. By acknowledging that insufficient guidance or explanation of practice exists, this counterargument demonstrates that more defined standards are necessary in the area of speech-driven targeting.

⁷³ LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8.4; U.S. Dep't of Army, *Field Manual 6-27/U.S. Marine Corps, Techniques Publication 11-10C, The Commander's Handbook on the Law of Land Warfare* (Aug. 7, 2019), ¶ 2-18, https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN19354_FM%206-27%20C1_FINAL_WEB_v2.pdf.

Part I demonstrated the United States and other States practice speech-driven targeting; the ICRC, as the primary independent commentator in IHL, accepts the practice. Specifically, Part I demonstrated all speech-driven targeting decisions must center on a discussion of what speech constitutes an “imminent attack,” which denotes direct participation in hostilities. However, in establishing the existence of speech-driven targeting, Part I also showed there is genuine disagreement surrounding the definition of imminence. Although similar debates regarding imminence exist in the context of action-driven targeting, the debate is different in speech-driven targeting due to the vital status of speech as a fundamental human right.⁷⁴

II. HISTORICAL AND CONTEMPORARY USES OF SPEECH-DRIVEN TARGETING

Because there is universal agreement that speech is a protected fundamental human right, there must be similar agreement on what speech falls outside of this protected rights status and is therefore targetable. Clear guidelines as to the boundaries of protected speech in an armed conflict means that individuals can express themselves without fear of retribution are based on a nebulous standard. Simultaneously, clear boundaries allow states to act in self-defense when speech truly constitutes an imminent attack. In order to construct a meaningful test, Part II examines three categories of current and historical state practice pertaining to: (1) individuals who engage in propaganda; (2) planners and leaders who take part in hostilities by verbally directing others; and (3) recruiters and trainers who verbally encourage others to join in hostilities. Assessing how individuals in these three categories are targeted, and the international community’s response will achieve two goals. First, this descriptive approach will clarify where disagreement exists in the application of speech-driven targeting. Second, this approach will show where a proposed test would need to focus in order to resolve this disagreement.

⁷⁴ Both in the US and international community cite the freedom of speech and expression as paramount in both the U.S. Constitution and the Universal Declaration of Human rights. U.S. CONST. amend. I; G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948), at 19.

A. Propagandists

The first recorded historical description of targeting based on speech alone concerns propagandists and comes from a controversial and influential medieval Muslim jurist named Ibn Taymiyya.⁷⁵ During the 14th century, Ibn Taymiyya wrote on a number of topics, including under what circumstances protected classes of persons could be considered appropriate targets.⁷⁶ In the 14th century, women were considered non-combatants by almost all standards. Ibn Taymiyya was clear in his writing that, despite this protected status, women could become legitimate targets if they engaged in propaganda.⁷⁷ While international law did not have the same structure as today, the logic behind Taymiyya's conclusion is clear. Targeting propagandists satisfies military necessity because propagandists provide a clear military advantage to the enemy, and the distinction is arguably satisfied because propagandists participate in hostilities by encouraging others to engage in attacks. Based on this logic, there has been an argument since the 14th century that propagandists are targetable based on their speech.

Six centuries later, NATO used similar logic to justify targeting propagandists during the 1999 Kosovo air campaign. In justifying strikes against media targets, NATO Air Commodore David Wilby stated, "Serb radio and TV is an instrument of propaganda and repression, it has filled the air waves with hate and with lies over the years and especially now. It is therefore a legitimate target in this campaign."⁷⁸ Providing further legitimacy to this position, British Prime Minister Tony Blair stated that "these television stations are part of the apparatus of dictatorship and power of Milosevic . . . [a]nd we are entirely justified as the

⁷⁵ IBN TAYMIYYA, ON PUBLIC AND PRIVATE LAW IN ISLAM 141 (Omar A. Farrukh trans., Khayat Book & Publ'g, 1st ed. 1966); Naser Ghobadzdeh & Shahram Akbarzadeh, *Sectarianism and the Prevalence of 'Othering' in Islamic Thought*, THIRD WORLD QUARTERLY 694–97 (2015).

⁷⁶ While Taymiyya did not write in terms that included modern legal language such as "civilian" or "direct participation in hostilities" he did write on when protected classes of people could be attacked. The best example of this is his controversial interpretation that Muslims could declare fatwa against other Muslims. DEVIN SPRINGER ET AL., ISLAMIC RADICALISM AND GLOBAL JIHAD 29 (Geo. Univ. Press 2009).

⁷⁷ *Id.*

⁷⁸ Press Release, NATO, David Wilby, Air Commodore, and Fabrizio Maltinti, Commander (Apr. 8, 1999) <https://www.nato.int/kosovo/press/p990408a.htm>.

NATO alliance in damaging and attacking all these targets.”⁷⁹ Thus, it is clear that the United Kingdom, and likely NATO, take the position that speech, which is part of the enemy’s state apparatus, is targetable under a military necessity analysis.

The position outlined above, however, seems to ignore the distinction analysis and has not gone unchallenged. Indeed, there is a fine line between a propagandist who uses speech to inspire support generally and those who use speech to direct specific attacks. Highlighting this distinction and discrediting the United Kingdom’s interpretation, the International Criminal Tribunal for the former Yugoslavia’s (ICTY) Final Report on the NATO bombing campaign, found that:

Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the "effective contribution to military action" and "definite military advantage" criteria required.⁸⁰

This tension between the NATO and ICTY position is concerning, as it demonstrates the vast amount of speech-driven targeting undefined under international law. This lack of clarity can be fatal for individuals and media outlets that misjudge an enemy’s interpretation of international law in an armed conflict.

Because NATO gave multiple justifications for targeting the radio station, some of which were not speech-driven, it is important to provide one specific instance here to demonstrate that the United States and NATO still firmly believe that propagandists are targetable. In September 2016, the United States targeted and killed Wa’il Adil Hasan Salman al-Fayad, whom the

⁷⁹ 23 April: *NATO Defends TV Attack What Was done, What Was Said; All Friday’s Developments at a Glance*, GUARDIAN (Apr. 23, 1999, 1:38 PM), <https://www.theguardian.com/world/1999/apr/23/balkans17>.

⁸⁰ Of note is the fact that NATO later provided further justification for the bombing of the RTS, by stating that the communication equipment at the station was also being used to support the command, control, and communications network of the military. Under international law, civilian objects being used for a military purpose are lawful targets in an armed conflict. Final Report to the Prosecutor by the committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ICTY Doc. PR/P.I.S./510-E, 39 I.L.M. 1257, ¶ 1, 76 (June 13, 2000) [hereinafter ICTY Final Report Yugoslavia].

Pentagon described as ISIL's "Minister of Information."⁸¹ This strike is noteworthy because there is no evidence that Fayad committed any action-driven attacks that would otherwise make him targetable.⁸² Furthermore, Fayad was not part of a larger strike against senior ISIL members; he was targeted in isolation while riding a motorcycle.⁸³ While no statement by the United States mentions speech-driven targeting, the details of this strike make clear that United States' practice supports the position that speech-driven targeting of propagandists is lawful.

Despite this position by the United States, it is difficult to justify how targeting propagandists meets the criteria established for speech-driven targeting. While NATO and the United States seem to arrive at the correct conclusion that there is a military advantage from targeting propagandists, any justification for targeting propagandists fails the distinction requirement. The analysis fails the distinction requirement based on both the ICRC's position that the act be one casual step away from the harm, and the United States' position that the act be the proximate, or but-for cause, of the harm. Under either interpretation, it is difficult to argue that the actions of propagandists are sufficiently connected to hostilities or responsible for harm from attacks to be considered as participating in hostilities.⁸⁴ It is important to note that there is a distinct line between propaganda and directly inciting violence. If the latter is occurring, then the action is no longer propaganda and is likely targetable. However, as the ICTY stated in their Final Report to the NATO bombing in Yugoslavia, "[i]f the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target."⁸⁵

⁸¹ Press Release, U.S. Dep't of Def., Statement from Pentagon Press Secretary Peter Cook on Airstrike Against ISIL Senior Leader (Sept. 16, 2015) <https://www.defense.gov/Newsroom/Releases/Release/Article/946983/statement-from-pentagon-press-secretary-peter-cook-on-airstrike-against-isil-se/>.

⁸² *Id.*

⁸³ Barbara Starr & Ryan Browne, *US Says it Killed New ISIS Information Minister in Drone Strike*, CNN (Sept. 16, 2016), <https://edition.cnn.com/2016/09/16/politics/drone-strike-isis-minister-information/>.

⁸⁴ In assessing whether an action constitutes DPH the DoD Law of War Manual lists, "degree to which the act is connected to hostilities" and "the degree to which the act causes harm" and factors that should be considered. LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8.3.

⁸⁵ ICTY Final Report Yugoslavia ¶ 47.

Because propaganda influences and manipulates behavior in a general way, as opposed to specific actions, it is difficult to justify how propaganda can meet the requirements for an imminent-attack under a speech-driven targeting analysis.

Some would counter this position with the argument that propagandists are targetable, not because of their specific actions, but because of their membership in an organized armed group. This argument fails, however, because of the requirements established in Part I of this article. Part I specifically established that membership in an organized armed group could be achieved by speech only if an individual declared membership *and* engaged in speech that constituted an imminent attack. Therefore, despite long-standing historical practice, a speech-driven targeting analysis would mean that propagandists are not a lawful target under current United States' guidance and practice, because propaganda cannot be classified as an imminent attack, due to its lack of specificity.

B. Planners and Leaders

Planners and leaders of militaries and organized armed groups often do not engage in hostilities personally, but rather direct others to do so. This tactical direction and conduct-based behavior is often the foundation of state targeting decisions, and the correct analysis under the speech-driven standards defined in Part I of this article. An uncontroversial example of state practice in this area is the U.S. strike on Osama bin-Laden in 2011. Bin-Laden was clearly a leader and member of al-Qaeda as well as a tactical level planner of attacks against the United States.⁸⁶ It can be argued that his speech formed the initial conduct that transformed bin-Laden from a civilian to a lawful target, but once his speech made him a lawful status-based target, he remained so until the ultimate strike. Although the United States did not reference a speech-driven standard in targeting bin-Laden, they did use the two-step process outlined by Part I. The United States followed this process by first identifying speech that constituted an imminent attack under conduct-based targeting, and then used

⁸⁶ *United States of America, The Death of Osama bin Laden*, INT'L COMM. OF THE RED CROSS, <https://casebook.icrc.org/case-study/united-states-america-death-osama-bin-laden> (last visited Apr. 6, 2021).

that speech to support a more permanent status-based targeting justification from 2001 until the strike in 2011.⁸⁷

This analysis that bin-Laden never stopped being a status-based target is supported by the statements released immediately following the death of bin-Laden. Five days after the raid that killed bin-Laden, a Pentagon official told the press corps that bin-Laden “remained an active leader in al-Qaida, providing strategic, operational, and tactical instructions to the group . . . He was far from a figurehead [and] continued to direct even tactical details of the group’s management and to encourage plotting.”⁸⁸ This official statement, and others at the time of bin-Laden’s death, clearly demonstrate that the United States was not relying solely on bin-Laden’s verbal declaration of membership in al-Qaeda as a basis of targeting. The statement also indicates that the United States relied on the fact that bin-Laden was giving tactical directions to members of the group to form the basis of the speech-driven targeting. By analyzing the statements following the death of bin-Laden, it is clear that the United States relied on the speech-driven analysis outlined in Part I to form the basis for targeting. While other cases like bin-Laden provide clear examples where the imminence standard is satisfied, a more recent case shows the tension in the imminent attack standard under speech-driven targeting.

In January of 2020, the United States carried out a strike against Qasem Soleimani because he “was actively developing plans to attack American diplomats and service members in Iraq and throughout the region.”⁸⁹ Using this statement as the basis for the strike, it is clear that the United States’ legal basis centered on the fact that General Soleimani was, via speech, directing imminent attacks against the United States. In speaking about the justification for the strike, at no point did the United States explicitly state that the strike on Soleimani was based on a speech-

⁸⁷ President Barack Obama, Address at the White House: Osama Bin Laden Dead (May 2, 2011), <https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead>.

⁸⁸ *United States of America the Death of Osama bin Laden*, INT’L COMM. OF THE RED CROSS, <https://casebook.icrc.org/case-study/united-states-america-death-osama-bin-laden> (last visited Apr. 6, 2021).

⁸⁹ Press Release, U.S. Dep’t of Def., Statement by the Department of Defense (Jan. 2, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense/>.

driven standard. Despite this, in reviewing the facts and justifications behind the strike, a convincing case emerges that a speech-driven analysis provides the best foundation for justifying the strike. The strike against Soleimani has drawn sharp critique in the international community for lack of justification under international law.⁹⁰ The purpose of this article is not to debate the different justifications, but rather demonstrate how this strike could be justified from a speech-driven perspective.

If a speech-driven analysis is applied to Soleimani as a planner, it is clear that his alleged actions in verbally directing others to attack the United States could satisfy the requirement that targetable speech constitutes an imminent attack, exclusive of their status in a military.⁹¹ Much of the critique surrounding the Soleimani strike, however, centers on the fact that even if he were planning actions against the United States, the actions were neither imminent nor rose to the necessary levels to constitute an attack. These critiques, while perhaps valid, are meaningless because there is no rule for what constitutes imminence under speech-driven targeting.

While the exact definition of the imminence standard used in the speech-driven strike on Soleimani is an unsettled area of the law, the strike provides a valuable case study on how speech-driven targeting can be used to justify strikes on individuals based on their conduct, via speech, exclusive of their status in a military. Nowhere in the statement justifying the strike does the United States ever claim that Iran was planning to attack. Rather Soleimani, as an individual, was “developing plans to attack.”⁹² If the United States was able to use a speech-driven targeting test that focused on Soleimani’s verbal actions in planning attacks, the United States could establish a legal basis for targeting him as an individual without entangling his actions with the state of Iran, or his status as an Iranian general. By doing this, the United States

⁹⁰ Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why it Matters*, JUST SECURITY (Jan. 8, 2020), <https://www.justsecurity.org/67949/th-e-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/>.

⁹¹ There has also been critique of the strike claiming that there was insufficient evidence to show that Soleimani was planning imminent attacks. Again, the purpose of this Article is not to dispute the facts, but analyze how the facts, as presented by a government, could justify a strike based on a speech-driven standard.

⁹² DoD Statement, *supra* note 89.

could make an argument that the basis of the strike was not actions by Iran, but rather speech by Qasem Soleimani. Because Soleimani's speech makes him targetable as an individual, this could have, in theory, precluded retaliatory action by Iran.

If States can target individuals like Soleimani based on speech and divorce the speech of individuals from the actions of States, this would have a limiting effect on the retaliatory actions States can take, thereby limiting conflict and violence. In the case of Soleimani, the United States was very careful in its language justifying the strike not to tie Soleimani's actions to Iran.⁹³ If this interpretation were the norm in the case of Soleimani, Iran would have been forced to make a difficult choice. Either take responsibility for Soleimani's speech in planning imminent attacks on the United States and incur liability as a State *or* refuse to adopt Soleimani's speech and allow the United States to take action against Soleimani as an individual. However, in order to have these discussions, there must be an agreement as to what speech constitutes an imminent attack. In analyzing propagandists and planners as categories of speakers, a lack of consistent definition as to imminence is inhibiting the development of a rule in the context of speech-driven targeting.

C. Recruiters and Trainers

The final category of individuals who are regularly targeted based on speech are those individuals who recruit or train civilians to take part in hostilities. Recruitment and training are tasks that have historically been essential to armed conflicts. However, in the information age, recruiting and training are dominated by speech as opposed to action. Much of this speech takes place online through platforms such as YouTube, Twitter, Tumblr, Telegram, Facebook, or a myriad of other online platforms.⁹⁴ Because much of this recruiting and training takes place online, it is pure speech with no tangible action outside of

⁹³ *Id.*

⁹⁴ *An Update on our Efforts to Combat Violent Extremism*, TWITTER (Aug. 18, 2016), https://blog.twitter.com/official/en_us/a/2016/an-update-on-our-efforts-to-combat-violent-extremism.html; Dhiraj Murthy, *Evaluating Platform Accountability: Terrorist Content on YouTube*, 65 AM. BEHAV. SCIENTIST 800, 800–24 (2021); Rebecca Tan, *Terrorists' Love for Telegram Explained*, VOX (June 30, 2017), <https://www.vox.com/world/2017/6/30/15886506/terrorism-isis-telegram-social-media-russia-pavel-durov-twitter>.

the digital world.⁹⁵ This isolation of speech is invaluable in the discussion of speech-driven targeting.

One of the most infamous online recruiters was the American born al-Qaeda recruiter and trainer, Anwar al-Awlaki. Awlaki's case is unique for several reasons. For the discussion at hand, Awlaki is unique because he was exclusively a verbal participant in hostilities. All official statements and positions by the United States concerning Awlaki agree that he was a verbal participant in hostilities who "repeatedly called on individuals to kill innocent men, women, and children to advance the murderous agenda."⁹⁶ Based on Awlaki's speech, he was targeted and killed by a United States drone strike in September 2011.

As established by Part I, even though Awlaki proclaimed membership in al-Qaeda, this speech alone cannot establish status-based targeting. Instead, there must first be an accompanying conduct-based foundation. Legal opinions by the United States DoJ written to justify the targeting of Awlaki support this conclusion. In 2010, David Barron, the Acting Assistant Attorney General, wrote, "the targeted person [Awlaki] is part of a dangerous enemy force [al-Qaeda] and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests."⁹⁷ By acknowledging the conjunctive nature of Awlaki's activities conducted via speech, United States' practice, through the DoJ memo, is tacitly endorsing the two-step process outlined in Part I.

While the Awlaki case again confirms this two-part test that Part I set forth, it also brings the debate back to the question of imminence. Awlaki was dangerous because he motivated and recruited others to join al-Qaeda and eventually carry out attacks.⁹⁸ In this role Awlaki acted as (1) a general propagandist

⁹⁵ *Id.*

⁹⁶ Obama, *supra* note 1.

⁹⁷ While the use of both bases could simply be the U.S. government building a case to the American people and not reflective of the legal or policy requirement to target Awlaki, it is an official statement that, without contradiction, will translate into state practice. Memorandum from David J. Barron to the U.S. Att'y Gen., Applicability of Federal Criminal Law and the Constitution to Contemplated Lethal Operations Against Anwar al-Aulaqi (July 16, 2010) (emphasis added) [hereinafter Awlaki DoJ Memo].

⁹⁸ *How Dangerous Is Anwar al-Awlaki*, N.Y. TIMES (May 31, 2011), <https://www.nytimes.com/roomfordebate/2011/05/31/how-dangerous-is-anwar-al-awlaki>; See also Glenn Greenwald, *Criminalizing Free Speech*, SALON (June 1, 2011), https://www.salon.com/control/2011/06/01/free_speech_4/.

for al-Qaeda by making videos and sermons justifying jihad against the West in the context of Islam, (2) a recruiter for al-Qaeda for encouraging faithful Muslims to join in jihad against America, and (3) as a spiritual trainer helping specific individuals justify their missions. Was Awlaki's speech as a recruiter and trainer sufficient to justify an imminent attack under conduct-based standards? While the United States would claim that his actions were sufficient, many scholars and States would disagree.⁹⁹

The dispute about what constitutes direct participation under the definition of imminence in action-driven targeting is a constant that many scholars and States have accepted as the norm.¹⁰⁰ However, this is unacceptable in a speech-driven targeting context. Not only is the freedom of speech a universal human right in international law, the United States has also characterized First Amendment principles as a universal human right.¹⁰¹ Allowing a nebulous standard to exist around speech-driven targeting undermines speech's importance from both the international and United States perspective. A more precise rule-based standard is necessary. Creating a rule that defines imminence and sets forth procedural guidelines will allow individuals to clearly understand the limits of free speech and enhance the uniform application of free speech standards under international law. Part III will develop a model rule for speech-driven targeting to achieve these goals.

III. DEVELOPING THE TEST'S FACTORS

Part II established that speech-driven targeting is practiced by States and accepted by international law commentators. Despite this well-accepted practice, the examination of speech-driven targeting also revealed that States and scholars do not agree on the limits of speech-driven targeting

⁹⁹ NELS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW 20 (2009).

¹⁰⁰ Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 14–15 (2010).

¹⁰¹ Historically the U.S. has characterized the First Amendment as a universal human right. Timothy Zick, *Territoriality and the First Amendment: Free Speech At - And Beyond - Our Borders*, 85 NOTRE DAME L. REV. 1543, 1549 (2010); G.A. Res. 217(III) A, *supra* note 74, at 19.

or on a common set of definitional guidelines. In order to remedy this gap in international law, Part III will normatively define the factors that should be used in speech-driven targeting. Preeminent international law scholars, Abram Chayes and Thomas Ehrlich, have posited that international law can affect international policy in three ways: (1) as a constraint on policy, (2) as a justification for policy, and (3) as an organizational structure for policy decisions.¹⁰² Adapting these conclusions to speech-driven targeting shows that developing clear factors for speech-driven targeting decisions will provide three core advantages: (1) serving as a substantive constraint on the ability to use lethal force in response to speech, (2) justifying the use of force against speech without violating the rights associated with free speech, and (3) organizing decision-makers' actions in a manner that provides consistent policy decisions when targeting speech. By using clear factors, speech-driven targeting decisions would no longer consist of nebulous legal or policy standards, but more precise legal rules, that allow better decisions by both states and speakers.

In order to develop a more precise rules-based application, Part III will propose three factors for use in speech-driven targeting decisions. These factors are adapted from United States First Amendment case law because when speech-driven strikes are conducted in a manner divorced from First Amendment standards, there is an argument to be made that the United States is conducting strikes in an unconstitutional manner. Further, because the United States has a large body of First Amendment case law there is a large body of jurisprudence to draw upon for guidance. Although the focus of this article is on United States policy and law, because freedom of speech is a universal human right recognized by the UN, the three proposed factors have been developed in such a way that they are adaptable to any liberal interpretation of free speech rights.

A. Possible First Amendment Violations

The focus of this article is not on domestic and foreign applications of First Amendment case law to United States citizens and non-citizens. There is a rich debate among scholars

¹⁰² Chayes, *Supra* note 7.

on this topic that is beyond the scope of this article.¹⁰³ Despite this, a brief discussion of how the First Amendment might apply to targeting decisions outside of the United States is required. This discussion is necessary to understand why speech-driven targeting decisions, regardless of location or nationality of the target, should be moored in First Amendment standards. While the First Amendment usually applies to actions by the government inside the United States, an argument exists that the First Amendment applies extraterritorially if: (1) a United States citizen is conducting the speech¹⁰⁴ or (2) a United States citizen is consuming the speech¹⁰⁵ and (3) the United States government is acting as a sovereign regulator (e.g., the government is taking action against the speech).¹⁰⁶ If condition (1) or (2) exists, and is accompanied by condition (3), then the First Amendment arguably applies, and there should be heightened scrutiny regarding the targeting.

These restrictions would be substantially diminished if the targeted speech fell into a category of speech that was “unprotected” by the First Amendment, such as fighting words, incitement, true threats, or solicitations to commit crimes. Current state practice, although vague and ill-defined, best aligns with the First Amendment body of law defining incitement to commit imminent lawless action. Understanding how the First Amendment arguably applies to United States targeting, and how certain forms of speech are “unprotected,” helps develop targeting criteria that would be supported by IHL, as well as United States laws and policy regarding the freedom of speech.

1. Is a United States citizen conducting the speech?—The protections and ideals enshrined in the First

¹⁰³ For an excellent discussion on how the First Amendment applies abroad see Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 287 (2009) (arguing that First Amendment protections may apply abroad depending on factors like “where the speech originated, where its intended audience was, and the location of detention and trial.”). Compare *id.*, with Kermit Roosevelt, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2066 (2005) (expressing doubt that communications abroad are protected under traditional First Amendment justifications).

¹⁰⁴ *Haig v. Agee*, 453 U.S. 280, 308 (1981); Zick, *supra* note 101, at 1549; Reid v. Covert, 354 U.S. 1, 5 (1957).

¹⁰⁵ *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

¹⁰⁶ Conduct by a government official is, as a general rule, government action if it is related to the official's governmental duties. *West v. Atkins*, 487 U.S. 42, 48, 54 (1988).

Amendment are at the zenith of their power when the United States government acts against a United States citizen speaking to United States citizens inside the United States. As the speaker, listener, and location of the speech move outside the borders of the United States, the constitutional protections diminish, but they never entirely disappear.¹⁰⁷ Action against a person conducting targetable speech inside the United States falls under the jurisdiction of domestic law, and the analysis would take place under a law enforcement paradigm and International Human Rights Law, and is beyond the scope of this article. For this reason, the analysis of First Amendment protections begins with speech-driven targeting of a United States citizen speaking beyond the borders of the United States.

If a United States citizen is conducting the speech, then the First Amendment may apply, regardless of the speaker's location.¹⁰⁸ The location is arguably irrelevant because the United States Supreme Court has largely rejected the idea that "when the United States acts against citizens abroad it can do so free of the Bill of Rights."¹⁰⁹ Furthermore, the Court has specifically held that other constitutional rights, including the Fourth, Fifth, and Sixth Amendments apply to United States citizens, regardless of location.¹¹⁰ Therefore, when the United States targets a United States citizen like Awlaki, case law supports the argument that the First Amendment, and its associated protections, would apply. Because the First Amendment arguably applies, any speech-driven targeting divorced of a First Amendment analysis could result in a Constitutional violation of free speech.

¹⁰⁷ *Haig*, 453 U.S. at 308; Zick, *supra* note 101, at 1549.

¹⁰⁸ Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 944–46 (2011); compare Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2076–77 (2005), with Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2066 (2005). Some commentators view the Constitution itself as a social compact with an extensive extraterritorial reach. They would presumably support a more robust extraterritorial First Amendment. See Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 34 (1985).

¹⁰⁹ *Reid*, 354 U.S. at 5.

¹¹⁰ DOJ WHITE PAPER ON LAWFULNESS OF LETHAL OPERATION AGAINST U.S. CITIZEN, *supra* note 3, at 5 (citing *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion)); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269–70 (1990); see also, In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 170 n.7 (2d Cir. 2008).

2. *Is a United States citizen consuming the speech?* — Even if the speaker is not a United States citizen, if a United States citizen is the *consumer* of the speech, some First Amendment constraints could apply. These protections would still apply because the First Amendment exists not only to protect speakers, but also to protect the free flow of speech within the marketplace of ideas.¹¹¹ First Amendment protections extend to speech consumption as well as production.¹¹² Because the First Amendment protects both United States speakers and United States consumers of speech, if the United States government acts to limit the speech available to United States citizens via speech-driven targeting, First Amendment principles may apply.¹¹³

The Supreme Court has stated that “in a variety of contexts, this Court has referred to a First Amendment right to ‘receive information and ideas.’”¹¹⁴ Furthermore, the Court has held that this right is transnational. Specifically, the Court has held that the First Amendment applies to the rights of United States citizens to exchange ideas with specific foreign speakers, as well as receive general information from foreign sources.¹¹⁵ This concept is of particular importance in the information age where American citizens can view videos posted on the internet by someone like bin-Laden, even if the videos are aimed at fighters in Afghanistan. The question of whether a single viewing by a United States citizen would be sufficient to trigger First Amendment standards is beyond the scope of the article. However, it is worth noting how far First Amendment standards could potentially extend based on current Supreme Court case jurisprudence.

3. *Is the United States government acting as a sovereign regulator?* — Even though the First Amendment states, “*Congress shall make no law . . . abridging the freedom of speech, [emphasis added]*” the Supreme Court has applied the First Amendment to Executive Branch actions on numerous

¹¹¹ *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

¹¹² *Id.*

¹¹³ Zick, *supra* note 101, at 1549.

¹¹⁴ *Kleindienst*, 408 U.S. at 762.

¹¹⁵ *Id.* (regarding exchanges with a specific individual); *see also* *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 307 (1965) (regarding exchanges with foreign sources of information generally).

occasions.¹¹⁶ Deadly force, applied through speech-driven targeting is not the typical “governmental action” considered in most First Amendment cases. Regardless, under a First Amendment analysis, when the US government uses force against a speaker, the government is acting as a sovereign regulator, thereby satisfying the third and final prong to trigger First Amendment standards.

4. *Is the speech protected?* — Even though the First Amendment could apply to a wide range of scenarios, targeting restrictions imposed by the First Amendment principles would only apply if the speech were in a protected sub-class. While the First Amendment protects speech, it also recognizes that not all speech is equal and grants varying levels of protection to different forms of speech. In deciding what is considered unprotected speech, case law has distinguished between speech that presents a danger in the abstract, as opposed to speech which presents an imminent danger.¹¹⁷ As speech becomes more likely to present a tangible threat of violence, the protections diminish.¹¹⁸ In this regard, the First Amendment analysis is not dissimilar to the analysis in Part I, where it was established that only speech constituting an imminent attack could form the basis of speech-driven targeting. Part I also established, however, that speech-driven targeting lacked any meaningful standard of imminence. By mooring definitional standards of imminence in accepted First Amendment case law, vague concepts used in speech-driven targeting decisions such as “imminent threat” assume a meaningful definition that can be used in speech-driven targeting decisions.¹¹⁹

¹¹⁶ *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1047 (W.D. Wis. 2010) (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995)), *rev'd*, 641 F.3d 803 (2011); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 305, (1965); *see also McCreary County, Ky. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 877 (2005); *Sch. Dist. of Abington Township, Penn. v. Schempp*, 374 U.S. 203, 222 (1963).

¹¹⁷ While the Supreme Court has held that political and ideological speech can be regulated by the government, it came to the same conclusions as Part I, noting that US law does not “penalize mere association, but prohibits the act of giving foreign terrorist groups material support.” *Holder*, 561 U.S. at 6.

¹¹⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

¹¹⁹ Note that “imminent threat” was the language the Obama administration used to justify the targeting of Awlaki. DOJ WHITE PAPER ON LAWFULNESS OF LETHAL OPERATION AGAINST U.S. CITIZEN, *supra* note 3.

While there is an argument to be made that the First Amendment applies extraterritorially to targeting decisions, no court decision or United States policy has ever explicitly stated that this is the case. Thus, it is possible that First Amendment protections do not apply in some or all of the scenarios discussed above. However, even if the First Amendment does not apply directly, there are two compelling reasons why the United States should still comply with First Amendment principles extraterritorially. First, “the United States has historically characterized and sought to position the First Amendment as a universal human right.”¹²⁰ Second, the UN Universal Declaration of Human Rights recognizes the “right to freedom of opinion and expression.”¹²¹ Therefore, mooring speech-driven targeting principles to the principles of freedom of speech and expression is appropriate regardless of whether Constitutional protections strictly apply.

B. Proposed Factors for Speech-Driven Targeting

The First Amendment is a valuable starting point for establishing what kinds of speech constitute lawful targets under an imminent threat standard.¹²² However, the First Amendment exists for domestic applications in times of peace and must be modified slightly for applicability in armed conflicts abroad. The best First Amendment test to apply in assessing “imminent threat” is the *Brandenburg* test for incitement. In *Brandenburg v. Ohio*, the United States Supreme Court articulated a three-pronged test to determine whether speech fell outside of First Amendment protection.¹²³ To lose protection, the Court held that the speech must consist of language directed to incite or produce imminent lawless action and it must be likely to incite such action.¹²⁴

The three factors used to determine whether the speech is unprotected are: (1) the *likelihood* that the lawless action would occur, (2) whether there was *intent* to incite lawless action, and

¹²⁰ Zick, *supra* note 101, at 1549.

¹²¹ G.A. Res. 217(III) A, *supra* note 74.

¹²² Note that “imminent threat” was the language the Obama administration used to justify the targeting of Awlaki. DOJ WHITE PAPER ON LAWFULNESS OF LETHAL OPERATION AGAINST U.S. CITIZEN, *supra* note 3.

¹²³ *Brandenburg*, 395 U.S. at 447.

¹²⁴ *Id.* at 447.

(3) whether the speech called for *imminent* lawless action.¹²⁵ These *Brandenburg* factors are similar to those in IHL guidance on when a civilian has lost their protected status by directly participating in hostilities (DPH). In assessing whether a civilian's actions constitute DPH, and justify targeting, United States guidance on IHL uses a non-exhaustive list of factors as guidance. The following three US factors in particular find parity in the *Brandenburg* standard: (1) is the act *likely* to adversely affect a party to the conflict, (2) is the act *intended* to advance the war aims of a party to the conflict, and (3) is the act the *proximate cause* of the attack. This article proposes a modification of the *Brandenburg* factors for *jus in bello* application, as follows: (1) the *likelihood* that the speech will cause an attack to occur; (2) whether there was *intent* to incite an attack; and (3) whether the speech called for an *imminent* attack. These three modified factors from *Brandenburg* provide a metric for assessing what speech is targetable.

1. *Is the speech likely to cause an attack?* — The first factor in assessing whether an individual has participated in hostilities is whether or not their actions meet the “threshold of harm.” In providing clarity to this factor, the DoD Law of War Manual states that threshold of harm is determined by, “the degree to which the act is *likely to adversely affect* the military operations or military capacity of a party to an armed conflict.”¹²⁶ This requirement finds parity in the *Brandenburg* likelihood factor, which measures whether the speech is “*likely to incite or produce* lawless action.”¹²⁷ Both of these tests emphasize how likely the action or speech is to bring about a violent act. The more likely the speech is to cause an attack, the more imminent the danger, and the less protected the speech. In this respect, the *Brandenburg* likelihood factors finds parity and provides guidance to the IHL factors for speech-driven targeting.

In *Brandenburg*, the words in question were uttered by a Ku Klux Klan (KKK) leader who encouraged violence against Black and Jewish people and urged the taking back of states' rights by force. In protecting the KKK leader's words, the Court

¹²⁵ *Id.*

¹²⁶ LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8.3.

¹²⁷ *Brandenburg*, 395 U.S. at 447.

found the likelihood of incitement was low and that, “a mere abstract teaching . . . for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”¹²⁸ Although *Brandenburg*’s words were reprehensible and inflammatory, the Court found that because they were abstract and general, they were unlikely to incite or produce lawless action. Applying this standard to speech-driven targeting would mean that before speech could be targeted it would have to be *likely* to produce an attack.

In the context of an armed conflict, if an extremist leader were to generally encourage violence against American forces in Iraq and to take the Iraqi government back by force, the analysis from *Brandenburg* is insightful in deciding whether this speech is targetable. Under a *Brandenburg* analysis, the language in question is unlikely to produce an imminent attack because the speech is abstract and does not prepare a specific person or group for violent action against a particular target. As a result, the speaker would maintain their protected civilian status, just as the Court found the speech to be protected in *Brandenburg*.

In contrast to the exercise of speech noted above, if *Brandenburg* or the extremist leader had gone beyond advocacy and been more direct, the likelihood of violence would have increased. As the likelihood of violence increases, so does the imminence of an attack. In determining the line between protected and unprotected speech, *Brandenburg* states that the more specific the language is in preparing a group for an attack the more imminent the threat.¹²⁹ In the above example of the extremist leader, his speech would fall outside *Brandenburg*’s standards and only become targetable if the leader made specific calls for violence against specific targets. Language that could make the speech targetable could include directing particular followers to attack at a certain time, location, or against specific units or individuals. Thus, *Brandenburg* is instructive in considering how likely an attack is and provides granularity in defining likelihood. Regardless of how likely an attack is to occur based on speech, there must also be an assessment of whether the speaker *intended* to incite an attack. If the speaker was merely careless and did not

¹²⁸ *Id.* at 448.

¹²⁹ *Id.*

intend to incite an attack, then it is unlikely that the speaker possesses the requisite intent to be considered a lawful target.

2. *Is the speech intended to incite an attack?* — According to *Brandenburg*, not only must the speech be *likely* to produce lawless action, but the speech must also be *intended* to produce lawless action.¹³⁰ The DoD Law of War Manual contains a similar requirement, stating there should be an assessment of the “specific purpose underlying the act, such as, whether the activity is *intended to advance the war aims* of one party [emphasis added].”¹³¹ With the DoD Law of War Manual’s intent requirement in mind, the *Brandenburg* standard provides amplifying guidance in line with state practice.

In 1989, the United States Supreme Court provided clarification to *Brandenburg*’s intent standard in *Texas v. Johnson*.¹³² In *Johnson*, a man was convicted of burning the American flag at a political rally while onlookers chanted, “America, the red, white, and blue, we spit on you.”¹³³ In overturning the conviction and clarifying the intent prong of *Brandenburg*, the Court held that not only must the speech be likely to cause violence, but that the speaker must also *intend* to cause violence. Specifically, the Court stated,

We have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression is directed to inciting or producing imminent lawless action To accept Texas’ arguments that it need only demonstrate “the potential for a breach of the peace . . . would be to eviscerate our holding in *Brandenburg*. This we decline to do.¹³⁴

Reading the holding in *Johnson* in conjunction with *jus in bello* standards in order to comply with First Amendment protections, a

¹³⁰ *Id.* at 447.

¹³¹ LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8.3.

¹³² *Texas v. Johnson*, 491 U.S. 397 (1989).

¹³³ *Id.* at 399.

¹³⁴ *Id.* at 409 (quotations and citations omitted).

speech-driven targeting test would require that the speaker demonstrate an intent to incite an attack.

For example, if during an armed conflict, an Afghan civilian burned an American flag, this speech would not be targetable. Even if disparaging language towards United States troops accompanied the burning of the flag, the speech is protected by both a First Amendment and *jus in bello* analysis. Furthermore, even if the act of burning the flag emboldened others to attack American troops, the flag burning in isolation demonstrates insufficient intent to be targetable speech. On the other hand, if specific calls for violence accompanied the flag burning, the speech expressed by burning the flag would be targetable. *Johnson*, clarifies that not only must an attack be likely, but the speaker must also intend for an attack to occur.¹³⁵

The first two factors focus on how likely the speech is to cause an attack, and whether the speaker intended to cause an attack. First Amendment case law, however, requires a third factor be present before speech is considered unprotected. The speech must be linked to the lawlessness or attack in some way. This final factor again finds parity in First Amendment case law and IHL.

3. *Does the speech call for an imminent attack?* — Under traditional targeting standards, in order to decide what actions constitute an imminent threat and warrant targeting under DPH standards, the United States looks at whether an action is the proximate cause of an attack. In assessing whether an act meets this standard, the DoD Law of War Manual states that an act must be “the proximate or ‘but for’ cause of death, injury, or damage to persons or objects belonging to an opposing party.”¹³⁶ This language, requiring a proximate causal link, mirrors the *imminent lawlessness* factor from the *Brandenburg* test.¹³⁷

The Court clarified the imminence prong of the *Brandenburg* test in the 1973 case *Hess v. Indiana*. In *Hess*, after the police forcibly removed the defendant and other protestors from the street, Hess yelled, “we’ll take the [expletive] street later.”¹³⁸ In protecting the speech, the Court held that “there was

¹³⁵ *Id.*

¹³⁶ LAW OF WAR MANUAL, *supra* note 8, ¶ 5.8.3.

¹³⁷ Martha A. Field, *Holder v. Humanitarian Law Project: Justice Breyer, Dissenting*, 128 HARV. L. REV. 434, 442 (2014).

¹³⁸ *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (per curiam).

no evidence that [Hess' words were] . . . likely to produce imminent disorder."¹³⁹ Because Hess' speech was not directed at a specific person or group of persons and only advocated illegal action at some indefinite time, the speech remained within First Amendment protections.¹⁴⁰

Similarly, in 2015, members of the Islamic State Hacking Division posted a list of Americans working in the military and government, stating that the information was provided "to the soldiers of the khilafah [caliphate], who soon with the permission of Allah will strike at your necks in your own lands!"¹⁴¹ Although the group called for action by soldiers of the caliphate, they were not speaking to an actual group of individuals, but rather a notional group of radicalized individuals in the West. Furthermore, the call for action was not accompanied by specifics.

Much like Hess' use of the words "take the street later," the verbiage, "soon will strike," is a "the mere abstract teaching [and] is not the same as preparing a group for violent action and steeling it to such action."¹⁴² While this speech is close to being targetable, because it is not directed towards a specific action or a specific group, it is too many casual steps removed to be deemed the proximate cause of an attack. A would-be attacker would have to find the list online, locate individuals on the list, plan an attack, then commit an attack. Thus, there are too many intervening steps to make the posting of the list the proximate cause or "but for" cause of the attack. Therefore, the speech would not represent an imminent attack and would not be targetable.

However, if the group had communicated the list of names to specific individuals *and* provided instructions for people on the list to be attacked, the hackers would have demonstrated a clear intent to incite an imminent attack. By calling on specific individuals the hacker's speech would be "preparing a group for violent action and steeling it to such action,"¹⁴³ and the hackers would become lawful targets. However, without this specificity in

¹³⁹ *Hess*, 414 U.S. at 109.

¹⁴⁰ *Id.*

¹⁴¹ Dugald McConnell & Brian Todd, *Purported ISIS Militants Post List of 1,400 U.S. Targets*, CNN (Aug. 13, 2015), <https://www.cnn.com/2015/08/13/world/isis-militants-american-targets/index.html>.

¹⁴² *Brandenburg*, 395 U.S. at 448.

¹⁴³ *Id.*

the hacker's language, United States guidance on IHL, coupled with amplification from *Brandenburg* and *Hess*, demonstrates that this kind of speech would not be targetable.

4. Utilization of the factors beyond United States standards.— In developing the factors above, alternative interpretations from commentators such as the ICRC were considered, but United States interpretation of IHL were used exclusively for the analysis. This exclusive use of United States standards, however, should not be interpreted to mean that standards proposed by this article would only apply to United States interpretations of IHL. Although every State has unique interpretations of IHL, there is consensus that IHL principles apply in an armed conflict, specifically the Geneva Conventions and the sections of the Additional Protocols that are considered customary international law.¹⁴⁴ Therefore, the differences are not in the foundational standards of IHL, but rather differences in interpreting those foundational standards. Because the differences are based in interpretation, as opposed to standards, this means that the guidelines developed above could apply to a wide variety of interpretations of IHL.

To demonstrate how these factors could apply to various interpretations of IHL, it is useful to apply the ICRC's factors for DPH to the factors developed above. In determining whether an individual's actions constituted DPH, the ICRC uses three factors: (1) the *likelihood* that the act will adversely affect the enemy's military capacity, (2) whether there is a *direct causal link* between the action and the harm, and (3) whether the act is specifically *intended* to cause the required threshold of harm.¹⁴⁵ Despite the slight differences between the ICRC and United States factors, it is apparent that the ICRC factors also find parity in the speech-driven standards developed above. This shared parity means that the ICRC's targeting factors could be translated into the same three factors developed for United States targeting.

While these three factors developed for the ICRC would be identical in language to those developed for the United States,

¹⁴⁴ ARMED CONFLICT DESKBOOK, *supra* note 26, at 7–8, 21 (2016).

¹⁴⁵ NELS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL LAW 46 (2009).

the ICRC could interpret the factors differently to provide the higher level of protection desired by ICRC standards. In particular, the second factor requiring the speech to call for an "imminent attack" could be narrowly interpreted to meet the ICRC standard of direct causation. To satisfy this narrow interpretation, the ICRC, and States more aligned with the ICRC's interpretation, could require speech to directly cause an attack before it could be targeted. For example, under an ICRC interpretation, an individual would have to directly order someone to attack before the imminence standard would be satisfied. In this manner, the factors developed by this article could be applied to a wide variety of interpretations of IHL, while still providing enhanced guidance to speech-driven targeting.

As with any normative approach that attempts to transform a nebulous standard into a robust factor-based rule, there is the critique that it unnecessarily constrains States' ability to use force in a timely manner and, degrades the *jus ad bellum* inherent right to self-defense. While a valid critique, this is a trade that liberal societies like the United States must accept and have accepted in the past in the area of free speech. The duty of the law is "to patrol the fine line between vital national security concerns and forbidden encroachments on constitutionally protected freedom of speech."¹⁴⁶ Without clear rules-based parameters, the law cannot patrol this line. While there are drawbacks to a more rigid rules-based standard, the benefits of protecting speech and providing clear guidelines will lead to more coherent and uniform decisions when States choose to target speech.

IV. APPLYING THE ENHANCED FACTORS

Part IV applies the factors outlined in Part II to the real-world case of Anwar al-Awlaki, an American Muslim cleric and a self-proclaimed leader in al-Qaeda on the Arab Peninsula (AQAP).¹⁴⁷ Awlaki's case is important for several reasons. First, because Awlaki was a United States citizen, there was a heightened sense of scrutiny surrounding his strike, producing a

¹⁴⁶ United States v. Mehanna, 735 F.3d 32, 40 (1st Cir. 2013).

¹⁴⁷ Obama, *supra* note 1; *Anwar al-Awlaki Ties to Extremists*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/anwar-al-awlaki> (last visited Feb. 16, 2020).

plethora of declassified documents to analyze. Second, there is no evidence that Awlaki participated in hostilities via traditional action-based means; all of his participation was via speech. Finally, Awlaki was a prolific speaker who engaged in a wide range of rhetoric, which allows for an analysis of his role as a propagandist, leader, and recruiter and trainer.¹⁴⁸ This Part concludes that had the United States utilized the enhanced factors from Part III, the United States justification for the strike and international reaction would have been on ostensibly solid legal and policy grounds thereby engendering a more positive international reaction. Specifically, the use of the factors from Part III would have allowed the United States to justify targeting specific portions of Awlaki's speech based on the category the speech fell into. This approach would have allowed the United States to articulate a more coherent rationale for targeting Awlaki's speech. A more articulate and coherent rationale would have in turn, structured the international response and led to international discussion and acknowledgment of standards for targeting speech under international law.

A. Nature of Awlaki's Speech

As noted, Awlaki was a prolific speaker. In order to systemically examine his various types of speech, the analysis will be limited to his speech conducted inside of Yemen from 2004-2011. During this period, Awlaki's speech can be placed into one of four categories. The first is declaratory speech, which he used to profess membership and secure a leadership role in AQAP.¹⁴⁹ The second is propaganda speech with which Awlaki generally preached inflammatory rhetoric aimed at the West.¹⁵⁰ The third is Awlaki's speech as a recruiter encouraging others to join AQAP.¹⁵¹ Finally, Awlaki also used speech to plan attacks against the United States.¹⁵² While President Obama cited all of the above reasons as the basis for the United States targeting Awlaki, he did

¹⁴⁸ Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES (Aug. 27, 2015), <https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html>.

¹⁴⁹ See *Anwar al-Awlaki Ties to Extremists*, *supra* note 147; Shane, *supra* note 148.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

not distinguish between them.¹⁵³ For the purposes of the analysis each type of speech will be treated as a discrete category. In doing so, it becomes apparent that only Awlaki's speech in planning attacks could serve as a lawful basis for targeting.

B. Awlaki's Declaratory Speech Proclaiming Status in AQAP

On many occasions, Awlaki declared that he was a member and leader in AQAP. Because the United States is in a non-international armed conflict with al-Qaeda, Awlaki could be targeted as a member of an organized armed group under status-based targeting. Part I, however, elucidated that status-based targeting cannot exist without a conduct-based foundation. Therefore, before Awlaki's declaratory speech can form the basis for speech-driven targeting there must be a finding that some of his speech constituted an imminent attack. The United States found that Awlaki's speech as a planner and organizer constituted an imminent attack.

C. Awlaki's Speech as a Propagandist

During the nine years Awlaki spent in Yemen he produced countless sermons and lectures in written, audio, and video formats that were published via the internet. In these videos, Awlaki encouraged Muslims to attack the West and provided religious justifications for carrying out the attacks.¹⁵⁴ His speech in this regard was nothing short of prolific. The Counter Extremism Project counted 99 "extremists" who had been influenced by Awlaki.¹⁵⁵ Among these extremists are notorious individuals who either committed attacks or took substantial steps in preparation to do so. Notable individuals include the 7/7 London bombers, the Toronto 18, the Fort Dix shooter, the 2009 Little Rock recruiting office shooter, and the 2010 Times Square bomber.¹⁵⁶ While these individuals cited Awlaki's propaganda as

¹⁵³ See *Anwar al-Awlaki Ties to Extremists*, *supra* note 147.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ In 2005, Awlaki's lectures were found in the meeting house of the 7/7 London bombers. Philip Sherwell & Duncan Gardham, *Fort Hood Shooting: Radical Islamic Preacher Also Inspired July 7 Bombers*, TELEGRAPH (Nov. 23, 2009), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/6630555/Fort-Hood-shooting-radical->

an inspiration, none of them had individual contact with Awlaki either in person or via the internet.¹⁵⁷

In deciding whether propagandist speech can form the basis for speech-driven targeting, the normative factors developed in Part III are instructive. In addressing the first factor of likelihood, there is a high likelihood that this kind of propaganda would result in attacks. Both the content of the speech, and the fact that numerous extremists cited Awlaki as a source of inspiration, serve to provide sufficient evidence to meet the first factor.

Moving to the second factor of intent, it is also clear that Awlaki explicitly intended his propaganda to result in attacks. Awlaki used language such as “[d]on’t consult with anybody in killing the Americans, fighting the devil doesn’t require consultation or prayers seeking divine guidance. They are the party of the devils.”¹⁵⁸ The intent of the propaganda is self-evident, satisfying the second factor of the test.

In examining the causation factor, however, it is clear that Awlaki’s propaganda was not the proximate cause of the attacks. In conducting this general propaganda, Awlaki did not specifically target the individuals who carried out the attacks. Nor did Awlaki’s propaganda provide these individuals with specific targets. Much like the language used in *Hess* (“we’ll take the [expletive] street later”), Awlaki’s speech was inflammatory but insufficiently specific to constitute an imminent attack. There are too many intervening factors between Awlaki’s propaganda and

Islamic-preacher-also-inspired-July-7-bombers.html). In 2006, the Toronto 18 accessed Awlaki’s radical lectures via the internet. Michelle Shephard, *The Powerful Online Voice of Jihad*, THE TORONTO STAR (Oct. 18, 2009), https://www.thestar.com/news/world/2009/10/18/the_powerful_online_voice_of_jihad.html. In the 2007 Fort Dix attack, several of the attackers said they were inspired by Awlaki. *Killing of Awlaki is Latest in Campaign Against Qaeda Leaders*, N.Y. TIMES (Sept. 30, 2011), <https://archive.nytimes.com/www.nytimes.com/interactive/2011/09/30/world/middleeast/the-killing-of-anwar-al-awlaki.html>. In the 2009, Little Rock Recruiting Office Shooting the shooter had Awlaki’s literature in his car when he was arrested. Kristina Goetz, *Muslim Who Shot Soldier in Arkansas Says He Wanted to Cause More Death*, KNOXNEWS (Nov. 13, 2010), <http://archive.knoxnews.com/news/state/muslim-who-shot-soldier-in-arkansas-says-he-wanted-to-cause-more-death-ep-407169853-358338211.html>.

¹⁵⁷ Sherwell & Gardham, *supra* note 156; Shephard, *supra* note 156; *Killing of Awlaki is Latest in Campaign Against Qaeda Leaders*, *supra* note 156; Goetz, *supra* note 156.

¹⁵⁸ Robert Mackey, *Anwar al-Awlaki in His Own Words*, THE GUARDIAN (Sept. 30, 2011), <https://www.theguardian.com/world/2011/sep/30/anwar-al-awlaki-video-blogs>.

the attacks for the propaganda to be considered the proximate cause of the attacks. Due to these intervening factors, Awlaki's propaganda cannot serve as the basis for his targeting and justification must be found elsewhere.

D. Awlaki's Speech as a Recruiter

Awlaki also spoke individually to those he was trying to recruit or individuals who reached out to him. The most notorious of these individuals was the Fort Hood shooter, Nidal Hasan. In the year leading up to the shooting Hasan and Awlaki exchanged as many as 18e-mails between December 2008 and June 2009.¹⁵⁹ Again, it is important to understand that these exchanges were not specific directions or coordination, but rather general recruitment. Prior to the attack Hasan praised Awlaki's message and sought advice about topics such when jihad is warranted and when it is permissible to kill innocents in suicide attacks.¹⁶⁰ In an interview to the Washington Post after the attack, Awlaki described himself as Hassan's "confidant."¹⁶¹

The first two factors as to whether Awlaki's speech as a recruiter is targetable are met, as Awlaki's speech was likely to result in attack and was intended to result in attacks. This means that, the determinative factor is again whether Awlaki's speech was the proximate "but for" cause of the attack. Setting aside the fact that Hasan initiated the contact, thus demonstrating a predisposition to carry out an attack, there still appears to be insufficient justification to support the assertion that Awlaki's speech was the "but for" cause of the attack.

This conclusion is supported by government findings both before and after the attack. The F.B.I was aware of and had access to Awlaki's correspondence with Hasan before the attack, and in reviewing the language of the e-mails before the attack the F.B.I found that they "did not suggest any threat of violence and conclude[ed] that no further action was warranted."¹⁶² Even after

¹⁵⁹ Brian Ross & Rhonda Schwartz, *Major Hasan's E-mail: 'I Can't Wait to Join You' in Afterlife*, ABC NEWS (Nov. 19, 2009), <https://abcnews.go.com/Blotter/major-hasans-mail-wait-join-afterlife/story?id=9130339>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² David Johnston & Scott Shane, *U.S. Knew of Suspect's Tie to Radical Cleric*, N.Y. TIMES (Nov. 9, 2009), <https://www.nytimes.com/2009/11/10/us/10inquire.html>.

the attack, with knowledge of the e-mails and the actual attack, the F.B.I. stated that “there is no information to indicate Major Nidal Malik Hasan had any co-conspirators or was part of a broader terrorist plot.”¹⁶³ The conclusions of the F.B.I. in reviewing Awlaki’s speech are in line with the amplifying guidelines from *Hess* on proximate cause and imminence. Even though Awlaki personally addressed Hasan, Awlaki never suggested a time, date, location, or method of attack. While Awlaki recruited Hasan in general terms, Awlaki did not use speech to direct the attack, and the lack of specific direction from Awlaki to Hassan prevents Awlaki’s speech from being described as the proximate cause of the attack.¹⁶⁴ Therefore, Awlaki’s speech as a recruiter cannot form the foundation for speech-driven targeting.

E. Awlaki’s Speech as a Planner and Organizer

Finally, Awlaki’s speech in his role as a planner and organizer within AQAP must be considered. Speaking immediately after the strike that killed Awlaki, President Obama cited two specific attacks that Awlaki planned and organized: a 2010 transatlantic cargo bomb plot and a 2009 bomb plot to blow up a United States passenger plane.¹⁶⁵ Little is known about Awlaki’s exact role in the 2010 plot, but in the 2009 plot, the bomber, Umar Farouk Abdulmutallab, was captured and interrogated by the F.B.I.¹⁶⁶ During this interrogation, Abdulmutallab outlined specific conversations he had with Awlaki providing a tremendous level of detail about Awlaki’s involvement and in particular, the speech Awlaki utilized in organizing the attack.¹⁶⁷ While large parts of the transcript remain classified, the publicly available portions provide a sufficient basis to justify the speech-driven targeting of Awlaki.

¹⁶³ Press Release, F.B.I., Investigation Continues into Fort Hood Shooting (Nov. 11, 2009), <https://archives.fbi.gov/archives/news/pressrel/press-releases/investigation-continues-into-fort-hood-shooting>.

¹⁶⁴ Johnston & Shane, *supra* note 162.

¹⁶⁵ Obama, *supra* note 1.

¹⁶⁶ Statement, U.S. Dep’t of Justice, Statement on the Interrogation and Prosecution of Umar Farouk Abdulmutallab, (Jan. 21, 2010), <https://www.justice.gov/archives/opa/blog/statement-interrogation-and-prosecution-umar-farouk-abdulmutallab>.

¹⁶⁷ Interview by F.B.I. with Umar Farouk Abdulmutallab at Milan Fed. Corr. Inst., Milan, Mich., 20 (Jan. 29, 2010).

In describing Awlaki's role in the bombing, Abdulmutallab made clear that someone other than Awlaki developed and presented the plan to him.¹⁶⁸ Furthermore, someone other than Awlaki trained Abdulmutallab for the mission.¹⁶⁹ While the planning and training that were conducted via speech would likely also be targetable, this section focuses on Awlaki's speech. Regarding Awlaki's specific role in the attack, Abdulmutallab stated that Awlaki "gave [him] final specific instructions: that the operation should be conducted on a U.S. airliner."¹⁷⁰ It is this interaction, conducted exclusively through speech, that makes Awlaki a lawful target.

As before, the first two factors under the enhanced test are met in that Awlaki's speech was both intended to result in an attack and, based on the training provided to Abdulmutallab, was likely to result in an attack. It is the level of specific direction that Awlaki provided, regarding the target of the attacks, that satisfy the definition of imminent and proximate "but for" cause under enhanced test standard. Because Awlaki's words were directed at a particular individual and were specific, his speech must be seen as an imminent attack or the "but for" cause of the attack that Abdulmutallab intended to carry out. Thus, Awlaki's speech as a planner and organizer meets all three prongs of the enhanced test, and his speech satisfies the basis for speech-driven targeting.

F. Awlaki as a Status-Based Target

At the beginning of the analysis on Awlaki, there was a determination that although he declared himself a leader and member of AQAP, this declaration was of no legal consequence without a foundational conduct-based determination. Because Awlaki's speech in planning and organizing Abdulmutallab's attack satisfies the factors of the enhanced test for lawful conduct-based targeting, his speech can support a status-based determination. Even though Awlaki began asserting his membership and leadership role in AQAP as early as 2007, it was not until he verbally participated in hostilities in late 2009 that he

¹⁶⁸ Interview by F.B.I. with Umar Farouk Abdulmutallab at University of Michigan Hospital, Ann Arbor, Mich., 3 (Dec. 25, 2009). (names of the planners and trainers are redacted and remain classified).

¹⁶⁹ *Id.*

¹⁷⁰ Interview by F.B.I. with Umar Farouk Abdulmutallab, *supra* note 167, at 24.

became targetable for the duration of hostilities under a status-based justification.¹⁷¹ United States' legal opinions produced in mid-2010 support this conclusion that Awlaki was not targetable until he verbally participated in hostilities.¹⁷²

Awlaki was monitored by the United States since September 2001, and his name was associated with several terrorist plots in the United States, United Kingdom, and Canada in 2005, 2006, 2007 and 2009.¹⁷³ In all of these attacks, however, Awlaki's influence was no more than the general propaganda and recruiting as seen in the cases previously mentioned. While none of the United States government memos or white papers produced to support the targeting of Awlaki mention speech-driven targeting or any of the enhanced factors outlined in this article, the timing of their publication indirectly supports the conclusions developed above.¹⁷⁴ The first memo to support the targeting of Awlaki came five months after Abdulmutallab detailed the specific directions Awlaki gave in the failed 2009 attack.¹⁷⁵ Although Awlaki had generally inspired and recruited individuals to commit attacks before this, his language was never sufficiently specific or directed enough to be considered an imminent attack. Only after Awlaki's speech in Abdulmutallab's case came to light did the United States consider his actions targetable, thereby indirectly supporting the factors used and conclusions reached above.¹⁷⁶

G. Altering the Debate

The justifications for the strike against Awlaki were widely discussed in the media, among international law scholars, and within the United States government. Despite this widespread

¹⁷¹ Scott Shane, *The Anwar al-Awlaki File: From American Citizen to Imam to Terrorist to Drone Killing*, National Security Archive Electronic Briefing Book No. 529, NATIONAL SECURITY ARCHIVE (Sept. 15, 2015), <https://nsarchive2.gwu.edu/NSAEBB/N SAE529-Anwar-al-Awlaki-File/>.

¹⁷² Awlaki DoJ Memo, *supra* note 97, at 38.

¹⁷³ See Sherwell, *supra* note 156; Shephard, *supra* note 156; *Killing of Awlaki is Latest in Campaign Against Qaeda Leaders*, *supra* note 156; Goetz, *supra* note 156.

¹⁷⁴ The Awlaki DoJ memo was written on July 16, 2010, and the DOJ WHITE PAPER ON LAWFULNESS OF LETHAL OPERATION AGAINST U.S. CITIZEN was written on November 8, 2011. Awlaki DoJ Memo, *supra* note 97; DOJ WHITE PAPER ON LAWFULNESS OF LETHAL OPERATION AGAINST U.S. CITIZEN, *supra* note 3.

¹⁷⁵ See generally Awlaki DoJ Memo, *supra* note 97.

¹⁷⁶ *Id.*

discussion, much of the debate centered on Awlaki's actions, and status as a leader within AQAP, as opposed to his speech. However, as this article has shown, standard action-driven models are inadequate when considering speech-driven targeting. In particular, the debate surrounding Awlaki's targeting was lacking in two respects. First, because an action-driven model was used to target Awlaki, the imminence standard was incorrectly applied, thereby leading the United States to include his role as a propagandist and recruiter in their targeting analysis, which is incorrect. As seen throughout this article, neither propagandists nor recruiter's speech rises to the level of an imminent attack necessary to justify an attack. Second, even if the imminence standard was correctly applied, there remains a strong secondary argument that the basis and justifications for speech-driven targeting are inherently different than those in play in action centric-targeting.

Speech, as one of the fundamental human rights and most vigilantly guarded of United States freedoms, deserves a higher and more defined standard for imminence. If the United States had applied the enhanced factors outlined by this article in targeting Awlaki, the international community would have had a valuable starting point for discussing how to target speech in an armed conflict. More importantly, the United States, and other States, would have had a basis to object when other States exceeded the boundaries of targetable speech. By defining and defending this line, the United States could continue to protect what is one of the most fundamental rights in a free global society.

CONCLUSION

This article explored state practices and guidance from international law commentators to conduct a descriptive analysis of speech-driven targeting. In doing so, an argument developed that speech-driven targeting, as currently defined and practiced, lacks sufficient definitional guidance to be considered an international norm. To remedy this lack of guidance, this article laid out a normative approach to speech-driven targeting. This proposed normative approach used the First Amendment to demonstrate how speech centric targeting can be morally and lawfully justified.

An enhanced test is desperately needed at this point in the law of armed conflict. State and non-state actors are using new communication mediums and modalities via the internet to use speech as a weapon against people and governments. International law must set clear guidelines for when States can lawfully take retaliatory action against this kind of speech. If international law fails to establish these guidelines, the use of force against controversial speech will become the norm on the international stage. The use of the internet also means that an ever-increasing amount of speech is monitored and collected by governments. As governments collect, store, and archive massive amounts of speech, difficult questions arise. Questions such as whether only the original speaker is targetable, or whether those who forward and repost speech may be targeted, and for how long is speech targetable?

These questions are worth exploring, but they cannot be answered with any lucidity until basic definitional standards are established for speech-driven targeting. Finally, this article has focused on speech in the *jus in bello* context exclusively. A separate conversation must take place regarding what kinds of speech constitute an attack in the *jus ad bellum* context. This article represents only an initial effort to outline the discussion surrounding speech-driven targeting. When speech promotes violence tension forms between liberty and security. Only by creating clear definitions as to where the freedom of speech ends and the right to security begins, will States protect themselves and the freedoms they embody.