

**ENDING THE “DRONE WAR” OR
EXPANDING IT? ASSESSING THE LEGAL
AUTHORITY FOR CONTINUED U.S.
MILITARY OPERATIONS AGAINST AL-
QA’IDA AFTER AFGHANISTAN**

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INTRODUCTION

The Obama Administration has long struggled with an inherent contradiction at the core of its national security and defense policy. On the one hand, the Administration has always aspired to bring an end to America’s post-9/11 armed conflicts; President Barack Obama has even asserted that he “was elected to end [America’s] wars”¹ In a 2013 speech at the National Defense University, President Obama clarified his intentions with regard to the current conflicts:

The [Authorization for Use of Military Force (AUMF)] is now nearly [twelve] years old. The Afghan War is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don’t need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states.

So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.²

And yet, the Obama Administration “surged” in Afghanistan,³ dramatically escalated the “drone war” in Pakistan and Yemen,⁴

¹ Ben Wolfgang, *Obama: ‘I Was Elected to End Wars, Not Start Them,’* WASH. TIMES (Sept. 6, 2013), <http://www.washingtontimes.com/news/2013/sep/6/obama-i-was-elected-to-end-wars-not-start-them/>.

² Barack Obama, Remarks by the President at National Defense University (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

³ See Rajiv Chandrasekaran, *The Afghan Surge is Over*, FOREIGN POL’Y (Sept. 25, 2012), http://www.foreignpolicy.com/articles/2012/09/25/the_afghan_surge_is_over (Between January 2010 and September 2012, the United States added 33,000 troops to the 68,000 in Afghanistan. The objective of this “surge” was to halt Taliban advances in the south and east, defend Kabul from insurgent penetration, train and equip Afghan forces, and build critical infrastructure to allow for a subsequent withdrawal of U.S. forces).

⁴ Peter Bergen, *Drone is Obama’s Weapon of Choice*, CNN (Sept. 19, 2012, 10:37 AM), <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone/>.

and used force in Libya against the Qaddafi regime.⁵ Most recently, the Obama Administration began a new campaign in Iraq and Syria against the Islamic State in the Levant (ISIL),⁶ apparently as an extension of the war against al-Qa'ida.⁷

President Obama himself has pointed to this paradox, including in his Nobel Peace Prize lecture where he acknowledged the controversy of receiving a peace prize while presiding over multiple armed conflicts.⁸ Indeed, while aiming to end America's wars, the Obama Administration has during its time in office in fact increased the number and expanded the scope of armed conflicts to which the United States is or has been a party.⁹ Three of those conflicts were inherited from the previous administration: in Afghanistan; in Iraq; and, more controversially, against al-Qa'ida "occurring in Afghanistan *and elsewhere*["]¹⁰ But the current administration has also fought in

⁵ Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

⁶ See Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/09/10/remarks-president-barack-obama-address-nation>.

⁷ See Marty Lederman, *The Legal Theory Behind the President's New Military Initiative Against ISIL*, JUST SECURITY (Sept. 10, 2014, 9:12 PM), <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/>.

⁸ Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize> (President Obama addressed this controversy with a vigorous defense of using force to obtain peace when the circumstances demanded it: "But perhaps the most profound issue surrounding my receipt of this prize is the fact that I am the Commander-in-Chief of the military of a nation in the midst of two wars. . . . [W]e are at war, and I'm responsible for the deployment of thousands of young Americans to battle in a distant land. Some will kill, and some will be killed. And so I come here with an acute sense of the costs of armed conflict -- filled with difficult questions about the relationship between war and peace, and our effort to replace one with the other. . . . There will be times when nations -- acting individually or in concert -- will find the use of force not only necessary but morally justified. . . . I face the world as it is, and cannot stand idle in the face of threats to the American people. For make no mistake: Evil does exist in the world. . . . To say that force may sometimes be necessary is not a call to cynicism -- it is a recognition of history; the imperfections of man and the limits of reason.").

⁹ Peter L. Bergen, Op-Ed., *Warrior in Chief*, N.Y. TIMES, Apr. 29, 2012, at SR1; Peter Bergen, *America's Wartime President*, CNN (Sept. 29, 2014, 8:32 AM), <http://www.cnn.com/2014/09/23/opinion/bergen-obama-wartime-president/>.

¹⁰ Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm> (emphasis added).

Libya¹¹ and has expanded regular military operations against al-Qa’ida—including its affiliates, associated forces, and “successors”¹²—to Yemen, Somalia, Iraq, and Syria.¹³

To be sure, the Obama Administration has succeeded in ending the wars in Iraq¹⁴ and Libya,¹⁵ conflicts that had relatively conventional temporal markers, with identifiable end dates.¹⁶ And the Administration is working to end the United States’ other more conventional armed conflict in Afghanistan by the end of its second term.¹⁷ But an end to the broader war with al-Qa’ida will likely be more difficult to identify, let alone complete.

The United States’ war with al-Qa’ida began in Afghanistan and has long been understood to have Afghanistan as its center of

¹¹ Michael Cohen, *The Real Obama Scandal: Fighting Illegal Wars in Libya and Pakistan*, GUARDIAN (May 15, 2013, 3:26 PM), <http://www.theguardian.com/commentisfree/2013/may/15/irs-ap-benghanzi-not-real-scandals>.

¹² See *infra* Section II.C. for an explanation on the Administration’s designation of ISIL as a “successor” to the group that perpetrated the 9/11 attacks.

¹³ See Obama, *supra* note 6.

¹⁴ Barack Obama, Remarks by the President on Ending the War in Iraq (Oct. 21, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/10/21/remarks-president-ending-war-iraq>. But see Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES, Sept. 13, 2014, at A8 (It should be noted that while the United States withdrew its forces from Iraq in December 2011, it never repealed the 2002 Iraq AUMF. Moreover, because the government is now relying in part on the 2002 Iraq AUMF to conduct air strikes against ISIL in Iraq and Syria, the war in Iraq has arguably resumed).

¹⁵ See *UN Security Council Votes to End Libya Operations*, BBC NEWS AFRICA (Oct. 27, 2011, 10:28 PM), <http://www.bbc.co.uk/news/world-africa-15481143>.

¹⁶ The United States’ war with Iraq began in March 2003 and existed in various forms until December 2011 when U.S. forces left the country. Tom Vanden Brook, *U.S. Formally Declares End of Iraq War*, USA TODAY (Dec. 15, 2011, 4:33 AM), <http://usatoday30.usatoday.com/news/world/iraq/story/2011-12-15/Iraq-war/51945028/1>; Obama, *supra* note 14. The conflict in Libya began in March 2011 and ended in October 2011 with the suspension of U.S. airstrikes. Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the War Powers Resolution, WHITE HOUSE (Dec. 15, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/15/letter-president-speaker-house-representatives-and-president-pro-tempore>.

¹⁷ David Hudson, *Bringing the War in Afghanistan to a Responsible End*, WHITE HOUSE BLOG (May 27, 2014, 4:20 PM), <http://www.whitehouse.gov/blog/2014/05/27/bringing-war-afghanistan-responsible-end>; see *Two Years Since the End of the US-NATO War in Libya*, WORLD SOCIALIST (Oct. 31, 2013), <http://www.wsws.org/en/articles/2013/10/31/pers-o31.html>. The United States’ war in Afghanistan began shortly after the 9/11 attacks and will likely conclude by the end of 2016 when U.S. combat forces withdraw.

hostilities.¹⁸ Yet there is uncertainty as to whether the war against al-Qa'ida must end when the conventional war in Afghanistan concludes.¹⁹ That seems unlikely to be the U.S. government's position, given its legal positions involving the war with al-Qa'ida²⁰ and its dependence on law of war authority to conduct drone strikes to kill terrorists in countries around the world.²¹ Certainly, the resurgence of al-Qa'ida and other terrorist groups (including ISIL) throughout the Middle East should give Administration officials pause over "ending" wars before the enemy is either lastingly defeated or in agreement that the conflict is over. Yet, some commentators have already argued that an end to the war in Afghanistan will end all of America's current conflicts, and that the United States will then lack legal authority to use force against al-Qa'ida under the AUMF.²²

Moreover, if the United States adopts a new AUMF for the war against ISIL,²³ thereby eliminating for that separate conflict the

¹⁸ *See id.*

¹⁹ *See* Barack Obama, Statement by the President on Afghanistan (May 27, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/05/27/statement-president-afghanistan>; *see also* Obama, *supra* note 2 (The Obama Administration has encouraged some of the uncertainty surrounding the end of the war with al-Qa'ida. President Obama's May 2014 announcement regarding his plan for the United States to withdraw from Afghanistan came nearly one year to the day after the President famously told an audience at the National Defense University that "[t]he Afghan war is coming to an end[]" and that the war in Afghanistan "like all wars, must end." In that same 2013 NDU speech, the President called on Congress "to refine, and ultimately repeal, the AUMF's mandate[.]" asserting, "the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat. . . . Our troops will come home. Our combat mission will come to an end.").

²⁰ *See, e.g.,* Savage, *supra* note 14 (explaining that President Obama is relying in part on Congress' 2002 authorization of the Iraq war and the 2001 authorization to fight Al Qaeda as justification to fight ISIL).

²¹ Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 102 (2010).

²² *See generally* Jennifer C. Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SECURITY J. 115, 116, 128–29 (2014) (stating that the AUMF is outdated because the circumstances in Afghanistan and the Middle East at large have changed dramatically since 9/11, when the AUMF was developed).

²³ *See* Barack Obama, Remarks by the President in a Press Conference (Nov. 5, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/11/05/remarks-president-press-conference> ("I'm going to begin engaging Congress over a new Authorization to Use Military Force against ISIL"); MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: COMPARISON OF CURRENT PROPOSALS IN BRIEF (2014) (providing a summary of the various legislative proposals for an Authorization for Use of Military Force against ISIL).

strained dependence for authority on the 2001 AUMF, the war against al-Qa’ida could fall away with the end of the Afghanistan conflict without affecting ongoing operations against ISIL in Iraq and Syria. In addition, the Administration could further its claim that ISIL is the “true successor” of the group that perpetrated the attacks of 9/11 by dropping its armed conflict with al-Qa’ida completely and focusing its efforts on ISIL.²⁴

Either way, if the United States withdraws from Afghanistan in 2016, as President Obama has pledged it will,²⁵ there is a legitimate question as to whether the United States may lawfully continue its war against al-Qa’ida, or whether the war against al-Qa’ida, always a contested concept in and of itself,²⁶ is inexorably tied to the war in Afghanistan. And if a conflict against al-Qa’ida may continue after the close of the conventional conflict in Afghanistan, questions remain regarding whether al-Qa’ida’s affiliates, associated forces, and “successors” may be part of the continuing conflict and where that conflict may take place. The answers to these questions are fraught with significant operational effects—consider, for example, the effects on detention authority at Guantanamo Bay (GTMO) or drone strikes in Pakistan or Yemen—each based on the existence of an armed conflict with al-Qa’ida and conducted under the law of war. This article addresses each of these issues in turn.

I. LEGAL BASES FOR A CONTINUED ARMED CONFLICT

In order to answer the first question of whether the United States’ conflict with al-Qa’ida can continue after the United States withdraws from Afghanistan, this section assesses legal bases the United States might assert to demonstrate the existence of a continued armed conflict. This section first considers the initial international and domestic reactions to the

²⁴ This is not the position of this author, but the Administration has allowed for this option with the legal positions it has taken related to the campaign against ISIL.

²⁵ Obama, *supra* note 19.

²⁶ See, e.g., Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. OF NAT’L SECURITY L. & POL’Y 343, 368 (2010) (“On 9/11, the United States made a radical change in its choice of law in defending against terrorism. After a century of pursuing terrorists using criminal law and police methods, the United States invoked the law of armed conflict and military means. This article has presented evidence that the change was not – and is not – supported by international law. . . . Peacetime criminal law, not the law of armed conflict, is the right choice against sporadic acts of terrorist violence.”).

9/11 attacks as well as the consistent positions of the parties to the conflict throughout the past thirteen years. This section then turns to objective criteria from international law to determine whether a conflict with al-Qa'ida will continue to meet the threshold for a state of armed conflict after the end of the "hot" war in Afghanistan. Lastly, this section briefly examines potential alternative legal bases the United States could use to justify continued hostilities against al-Qa'ida after Afghanistan.

A. *Acts of War and Self-Defense*

Not many in the international law community took notice when Usama bin Laden and his fledgling terrorist organization, al-Qa'ida, "declared war" against the United States in 1996²⁷ and again in 1998.²⁸ States had typically approached terrorist groups as criminals to be dealt with through law enforcement means.²⁹ Even after al-Qa'ida attacked U.S. embassies in Kenya and Tanzania in 1998 and the U.S.S. Cole in 2000, most did not think of the increasing violence as significant enough to constitute acts of war and trigger a state of armed conflict between the United States and al-Qa'ida.³⁰ The attacks in New York, Washington,

²⁷ See Newsdesk, *Bin Laden's Fatwa*, PBS NEWSHOUR (Aug. 23, 1996, 12:21 PM), http://www.pbs.org/newshour/updates/military-july-dec96-fatwa_1996/.

²⁸ See Admin, *Al Qaeda's Second Fatwa* (Feb. 23, 1998, 12:13 PM), http://www.pbs.org/newshour/updates/military-jan-june98-fatwa_1998/ (Al Qaeda declaring war on the United States through a Fatwa: "[W]e issue the following fatwa to all Muslims: The ruling to kill the Americans and their allies — civilians and military — is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty God, 'and fight the pagans all together as they fight you all together,' and 'fight them until there is no more tumult or oppression, and there prevail justice and faith in God.' . . . We — with God's help — call on every Muslim who believes in God and wishes to be rewarded to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on Satan's U.S. troops and the devil's supporters allying with them, and to displace those who are behind them so that they may learn a lesson.").

²⁹ See, e.g., MARK S. HAMM, *TERRORISM AS CRIME* 82–83 (2007) (showing the different law enforcement means used to capture and convict terrorists).

³⁰ See John Callaway, *Learning the Hard Way: Force Protection 1983-2000*, 62 NAVAL WAR C. REV. 107, 114 (2009) (stating that some intelligence was alleged to have come from the embassy bombings, but that it wasn't enough to cause the FBI to pass on warnings to the military or those warnings were not heeded); CNN Library, *Fast Facts: The Embassy Bombings in Kenya and*

D.C., and Pennsylvania on September 11, 2001, however, started to change that thinking.³¹

By targeting civilian and military targets within the territory of the United States, and causing extreme damage to property and massive loss of life, al-Qa’ida’s attacks on 9/11 prompted an unparalleled international response. On September 12, 2001, the United Nations Security Council (UNSC) unanimously condemned the “horrificing terrorist attacks” of 9/11 and recognized the “inherent right of individual or collective self-defence in accordance with the [UN] Charter[.]”³² The North Atlantic Treaty Organization (NATO) also recognized a right of self-defense³³ and for the first time in its history invoked the mutual defense pact from Article 5 of the Washington Treaty.³⁴ Countries and organizations across the world responded similarly.³⁵ In recognizing the United States’ right of self-defense

Tanzania, CNN, <http://www.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/index.html?iref=allsearch> (last updated Oct. 6, 2013) (although the U.S. used tomahawk cruise missiles against certain terrorist targets, it ultimately indicted the terrorists responsible in an U.S. federal court); CNN Library, *USS Cole Bombing Fast Facts*, CNN, <http://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/index.html?iref=allsearch> (last updated Oct. 8, 2014) (showing that after the bombing, the United States’ primary response was to send in the FBI law enforcement agency to investigate the bombing).

³¹ See William K. Lietzau, *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, 8 U.N.Y.B. 383, 384 (2004).

³² S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); Press Release, Security Council, Security Council Condemns, ‘In Strongest Terms’, Terrorist Attacks on United States, U.N. Press Release SC/7143 (Sept. 12, 2001).

³³ *What Is Article 5?*, NATO OTAN, <http://www.nato.int/terrorism/five.htm> (last updated Feb. 18, 2005) (Article 5 of the Washington Treaty recognizes the right of a NATO member to exercise “the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations . . .”).

³⁴ *Invocation of Article 5 Confirmed*, NATO OTAN, <http://www.nato.int/docu/update/2001/1001/e1002a.htm> (last updated Oct. 3 2001); *What Is Article 5?*, *supra* note 33.

³⁵ See, e.g., Media Release, John Howard, Australian Prime Minister, Application of ANZUS Treaty to Terrorist Attacks on the United States (Sept. 14, 2001), *available at* <http://pmtrajectories.dpmc.gov.au/browse.php?did=12169>; Press Release, Statement From the OAS General Assembly (Sept. 11, 2001), *available at* http://www.oas.org/charter/docs/communi_eng/E_005.htm (on September 11, 2001, the General Assembly of the Organization of American States (OAS) “condemn[ed] in the strongest terms the terrorist acts . . . and reiterat[ed] the need to strengthen hemispheric cooperation to combat this scourge that has thrown the world and the hemispheric community into mourning.”); Press Release, Terrorist Attacks on United States Are an Attack on All Countries of the Americas, Foreign Ministers Declare (Sept. 21, 2001), *available at* <http://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm> (on

after 9/11 under international law, the international community endorsed the United States' right to use military force against the non-state armed group responsible—al-Qa'ida.

For the United States, too, 9/11 was a paradigm-shifting event. The severity of the attacks—massive casualty events carried out against powerful symbols of American economic and military power—and the common belief that more attacks were imminent, prompted the United States to change its primary approach with al-Qa'ida from a law enforcement framework to a wartime legal framework.³⁶ On September 18, 2001, the Congress passed the AUMF, which provides the president with authority to

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.³⁷

Notably, the AUMF does not impose temporal or geographical limitations on the application of force.³⁸ Instead, it gives the president a significant amount of discretion in identifying and fighting the enemy, with the key constraint being a required nexus between the opposing parties and the 9/11 attacks.³⁹ Two months after 9/11, President George W. Bush issued a Military Order wherein he formally identified al-Qa'ida as the responsible party for the attacks and clarified that the scale of al-Qa'ida's attacks on U.S. "diplomatic and military personnel and facilities abroad and on citizens and property within the United States" had indeed "created a state of armed conflict that requires the use

September 21, 2001, the OAS, recognized the 9/11 attacks as an "attack against all the states of the Americas as well").

³⁶ See George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>. It should be noted, however, that the United States has continued to use a bifurcated approach to terrorism generally, preferring law enforcement methods where the subject is a U.S. citizen or inside the United States. In fact, the military approach has been used primarily against non-U.S. citizens in the Middle East, East Africa, and Southwest Asia, even though terrorists have operated within the United States and throughout Europe. See NATIONAL STRATEGY FOR COUNTERTERRORISM 11–15 (2011), *available at* http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

³⁷ S. J. Res. 23, 107th Cong., 115 Stat. 224 (2001) [hereinafter AUMF].

³⁸ *Id.*

³⁹ *Id.*

of the United States Armed Forces.”⁴⁰

Throughout the following seven years, the Bush Administration consistently maintained that the United States was legally “at war” with al-Qa’ida—a conflict begun in self-defense and centered in Afghanistan, but global in reach.⁴¹ To the surprise of many, the Obama Administration adopted the same paradigmatic approach to the conflict with al-Qa’ida as the Bush Administration had, including the broader scope of that conflict in relation to the conflict in Afghanistan.⁴² In addition, Congress and the courts have accepted the Executive’s treatment of the situation with al-Qa’ida as a war throughout the past thirteen years.⁴³

Indeed, the parties to this conflict unquestionably agree that a war exists and that the conflict is not contingent upon the continuation of the conventional war in Afghanistan. There is no question that al-Qa’ida considers itself at war with the United States and has no intention of ending that war even if the United States withdraws from Afghanistan.⁴⁴ Likewise, the U.S. government—in all three branches and across party lines—has

⁴⁰ Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

⁴¹ See, e.g., Exec. Order No. 13234, 66 Fed. Reg. 57355 (Nov. 9, 2001); Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001); Exec. Order No. 13239, 66 Fed. Reg. 64907 (Dec. 12, 2001); Bush, *supra* note 36.

⁴² See, e.g., Barack Obama, *supra* note 2; Barack Obama, Remarks by The President on National Security (May 21, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09> (“We are indeed at war with Al Qaida and its affiliates.”); Eric Holder, U.S. Attorney General, Remarks at Northwestern University School of Law (Mar. 5, 2012), *available at* <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> (“In response to the attacks perpetrated – and the continuing threat posed – by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law.”); Koh, *supra* note 10 (“In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda . . .”).

⁴³ See, e.g., National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011); *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–29 (2006).

⁴⁴ See Ellie Buchdahl, *Al-Qaeda Calls for Fresh Wave of Terror Attacks Inside U.S. to ‘Bleed America Economically’*, DAILY MAIL (Sept. 13, 2013, 12:24 PM), <http://www.dailymail.co.uk/news/article-2419911/Ayman-Al-Zawahiri-Al-Qaeda-leader-calls-terror-attacks-America-boycott-U-S-goods-bleed-America-economically.html>.

repeatedly insisted that the United States is at war with al-Qa'ida.⁴⁵ Although the President has recently suggested that the political branches should revisit the AUMF and the state of war with al-Qa'ida that it authorizes,⁴⁶ it has not yet done so and the government continues to treat the situation as a war. Furthermore, with the recent expansion of the AUMF conflict to Iraq and Syria against ISIL, the United States has likely demonstrated its view that the war against al-Qa'ida is likely to continue after and outside of Afghanistan.

B. Meeting the Threshold of an Armed Conflict

The Charter of the United Nations prohibits member states from using or threatening to use force in their international relations with other member states.⁴⁷ Although the UN Charter is silent on the subject of use of force by non-state actors, the presumption under international law is that states have a monopoly on the lawful use of force,⁴⁸ with certain narrow exceptions to the rule when a non-state actor is acting as the rightful sovereign authority.⁴⁹ However, the UN Charter affirms that states always retain the inherent right to use force in individual or collective self-defense⁵⁰ or when authorized by the

⁴⁵ See Press Release, U.S. Senate, Terrorist Threat to Nation Persists (Sept. 13, 2011), available at <http://www.hsgac.senate.gov/media/terrorist-threat-to-nation-persists>; Press Release, Kevin McCarthy, U.S. House of Representatives Majority Leader, We Must Take This First Step Toward Destroying ISIL (Sept. 17, 2014), available at <http://www.majorityleader.gov/2014/09/17/leader-mccarthy-must-take-first-step-toward-destroying-isil/>; Obama, *supra* note 19.

⁴⁶ Obama, *supra* note 2.

⁴⁷ U.N. Charter art. 2, para. 4.

⁴⁸ See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 13, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (recognizing as "privileged" state armed forces and groups that operate under state authority, e.g., militias and volunteer corps, but accord no such status to non-state actors).

⁴⁹ Geneva Convention Relative to the Treatment of Prisoners of War art. 4, para. A(6), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, T.I.A.S. No. 3364; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1, para. 4, June 8, 1977, in force Dec. 7, 1978, 1125 U.N.T.S. 3, reprinted in 16 I.L.M. 1391 (1977) (Such instances could include situations in which fighters qualify as fighters in a *levee en masse* as described by Article 4(a)(6) of the Third Geneva Convention or situations "in which peoples are fighting against colonial domination and alien occupation and against racist regimes[.]" as described by Article 1(4) of Additional Protocol I to the Geneva Conventions.).

⁵⁰ See U.N. Charter, *supra* note 47, at art. 51.

UN Security Council.⁵¹ Once force is employed, the law of armed conflict governs the hostilities.⁵²

However, even after a violent event has triggered a state's right of self-defense, the situation must meet certain objective criteria in order to constitute an armed conflict.⁵³ Indeed, the law of armed conflict does not govern “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”⁵⁴ Such events or activities fall below the threshold of armed conflict and are governed by the normal peacetime legal framework, including human rights law.⁵⁵ In order to rise to the level of an armed conflict, a situation must exhibit a certain “intensity”⁵⁶ and the

⁵¹ *Id.* at art. 39.

⁵² See INT'L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 1, 3, 5 (2008), available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>. (International law recognizes two types of armed conflict: international armed conflicts (IACs) and non-international armed conflicts (NIACs). IACs are described in Common Article 2 of the 1949 Geneva Conventions and are those fought between or among states. International law, including the law of armed conflict, was developed primarily with IACs in mind. And yet, NIACs make up the vast majority of modern armed conflicts – including the United States' war with al-Qa'ida. NIACs are described in Common Article 3 of the 1949 Geneva Conventions and are those fought between or among states and non-state actors or between or among multiple non-state actors. Of course, the character of a conflict can change if the circumstances change, such as if a state or non-state party enters the conflict or if the parties' status changes during the armed conflict. Characterization can also be complicated if non-state actors fight as proxies for states).

⁵³ See Online Interview with Kathleen Lawand, Outgoing head of ICRC Legal Counsel (Oct. 12, 2012), available at <https://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>.

⁵⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 1, para. 2, June 8, 1977, in force July 12, 1978, 1125 U.N.T.S. 609, 611.

⁵⁵ See Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?* 19 EUR. J. OF INT'L L. 161, 162 (2008).

⁵⁶ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). For a detailed analysis of this criteria, see Prosecutor v. Limaj, IT-03-66-T, Judgment, ¶¶ 135–70 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); see also Online Interview with Kathleen Lawand, *supra* note 53 (according to Kathleen Lawand, the ICRC's former head of the ICRC unit that counsels on the law applying in the armed conflicts and other situations of violence in which the ICRC conducts its humanitarian activities, “[t]he level of intensity of the violence is determined in light of indicators such as the duration and gravity of the armed clashes, the type of government forces involved, the number of fighters and troops involved, the types of weapons used,

parties must be sufficiently “organized.”⁵⁷

But the Commentary to the Geneva Conventions indicates that the law governing non-international armed conflicts (NIACs), or armed conflicts with at least one side represented by a non-state actor, was intended to be liberally applied,⁵⁸ and courts have adhered to that intent by lowering these threshold requirements for recognizing the existence of an armed conflict.⁵⁹ For example, the International Criminal Court for the Former Yugoslavia (ICTY) found in *Prosecutor v. Fatmir Limaj* that:

some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation . . . [but may take] into account factors *including* the existence of headquarters, designated zones of operation, and the

the number of casualties and the extent of the damage caused by the fighting.”).

⁵⁷ *Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70. For a detailed analysis of this criteria see *Limaj*, IT-03-66-T, Judgment, at ¶¶ 94–134; see also Online Interview with Kathleen Lawand, *supra* note 53 (according to Kathleen Lawand, “[t]he level of organization of the armed group is assessed by looking at factors such as the existence of a chain of command, the capacity to transmit and enforce orders, the ability to plan and launch coordinated military operations, and the capacity to recruit, train and equip new fighters.”).

⁵⁸ INT’L COMM. OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (Jean S. Pictet ed., 1960), available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf (“[T]he scope of application of [this] Article must be as wide as possible.”); see also Message from the President of the United States Transmitting the Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977 (Jan. 29, 1987) (“The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence).”).

⁵⁹ Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INT’L REV. OF THE RED CROSS 95, 101 (2009).

ability to procure, transport, and distribute arms.⁶⁰

The ICTY further held that intensity could be established by considering factors such as:

the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.⁶¹

Thus, according to the *Limaj* criteria, in order to meet the threshold of an armed conflict, a situation only requires parties to have *some* degree of organization and some combination of serious and increased attacks, clashes, mobilization and distribution of weapons, and Security Council attention.⁶² Notably, these “objective criteria” have typically been used to determine whether an armed conflict has begun—an initial assessment of whether the violence is protracted and severe enough to differ from lesser situations of violence and whether the parties are organized enough to conduct adequate command and control—and not to determine whether a conflict, once decided to have begun, has been suspended or terminated for lack of intensity or organization.⁶³

The International Committee of the Red Cross (ICRC) uses these objective criteria to determine the existence of an armed conflict, and then assesses whether groups or states are sufficiently involved in the conflict to be considered parties.⁶⁴ Under this methodology, the ICRC has recognized that the United States and al-Qa’ida are engaged in not one, but a number of discrete non-international armed conflicts.⁶⁵ The ICRC opposes the “transnational NIAC” construct,⁶⁶ but likely considers the

⁶⁰ *Limaj*, IT-03-66-T, Judgment, at ¶¶ 89–90 (emphasis added).

⁶¹ *Id.* at ¶ 90.

⁶² *Id.* at ¶¶ 89–90.

⁶³ INT’L COMM. OF THE RED CROSS, 31ST INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT: INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 7 (2011), *available at* <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

⁶⁴ INT’L COMM. OF THE RED CROSS, *supra* note 52, at 3.

⁶⁵ *See id.* at 10.

⁶⁶ *Id.*

United States and al-Qa'ida to be parties to the NIACs occurring in Afghanistan-Pakistan, Yemen, and Iraq-Syria.⁶⁷

Of course, no one, including the ICRC, knows what the conflict with al-Qa'ida will look like in two years. Hostilities could be so intermittent that the intensity element might not be met, particularly when the Afghan theater of war is closed. Members of al-Qa'ida may choose to join or be forcibly subsumed by other more active groups, such as ISIL, or regionally focused organizations, such as al-Qa'ida in the Arabian Peninsula (AQAP) or al-Qa'ida in the Islamic Maghreb (AQIM). Al-Qa'ida's core leadership might also continue to be decimated by drone strikes, resulting in diminishment of the organization element. Homeland Security Secretary, then the General Counsel of the Department of Defense, Jeh Johnson, addressed this issue in a 2012 speech at Oxford University, referring to a "tipping point" at which al-Qa'ida would be sufficiently diminished to allow for an end to the war against al-Qa'ida and a return to the law enforcement framework.⁶⁸

On the other hand, al-Qa'ida might return to Afghanistan and flourish after the United States leaves the country, and ISIL might continue its rampage through Iraq, Syria, and the surrounding region. Either way, under the lenient *Limaj* criteria, the United States' war with al-Qa'ida will likely continue, at least for the near term, to meet both the organization and intensity requirements needed to establish the existence of an armed conflict even after U.S. forces withdraw from Afghanistan.

Both the United States and al-Qa'ida will likely continue to

⁶⁷ See *id.* at 9–10.

⁶⁸ Jeh Johnson, Gen. Counsel of the U.S. Dep't of Def., Oxford University: The Conflict Against Al Qaeda and its Affiliates: How Will it End? (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>. (Secretary Johnson commented, "I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed. At that point, we must be able to say to ourselves that our efforts should no longer be considered an 'armed conflict' against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community – with our military assets available in reserve to address continuing and imminent terrorist threats.").

satisfy the organization test. The United States inarguably meets and will continue to meet the organization requirement, regardless of whether regular armed forces are used or Special Forces or even CIA personnel. In addition, al-Qa'ida also currently meets the non-cumulative criteria of organization: (1) al-Qa'ida maintains “headquarters” in Pakistan and Yemen from which it coordinates activities;⁶⁹ (2) al-Qa'ida operates within designated zones in Afghanistan, Pakistan, Yemen, and elsewhere;⁷⁰ and (3) al-Qa'ida has demonstrated a persistent ability to procure, transport, and distribute arms to countries across the globe.⁷¹ Politicians, policy-makers, and commentators have been quick to predict the imminent demise of al-Qa'ida,⁷² and the terrorist organization may eventually experience incapacitating defeat, dysfunction, and defection. But al-Qa'ida has been surprisingly resilient through the past two decades and will likely continue to meet *Limcaj's* less than demanding criteria required to be a party to a continuing armed conflict with the United States.⁷³

The question of whether hostilities will remain sufficiently “protracted” once U.S. forces leave Afghanistan is the more difficult one. By ending the war in Afghanistan, the primary battleground in the greater war with al-Qa'ida will be gone. As a result, attacks on al-Qa'ida members in Afghanistan and Pakistan will likely greatly decline—if not halt altogether. As a result, acts of violence between the parties to the conflict may not reach a level normally associated with an active armed conflict. And yet, much like the criteria required to establish the organizational element, the criteria needed to establish the intensity of the conflict are ambiguous and permissive. While it

⁶⁹ See U.S. DEP'T OF STATE, COUNTRY REPORTS OF TERRORISM 2012: CHAPTER 6 FOREIGN TERRORIST ORGANIZATIONS (2013), *available at* <http://www.state.gov/j/ct/rls/crt/2012/209989.htm>.

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² See, e.g., Leon Panetta, Sec'y of Def., The Fight Against Al Qaeda: Today and Tomorrow (Nov. 20, 2012), *available at* <http://www.cfr.org/defense-strategy/panettas-speech-al-qaeda-november-2012/p29547>; Kenneth Roth, *The War Against Al-Qaeda is Over*, WASH. POST (Aug. 2, 2013), http://www.washingtonpost.com/opinions/the-war-against-al-qaeda-is-over/2013/08/02/3887af74-f975-11e2-b018-5b8251f0c56e_story.html.

⁷³ See, e.g., Panetta, *supra* note 72 (“[T]he threat from al-Qaeda has not been eliminated. We have slowed a primary cancer, but we know that the cancer has also metastasized to other parts of the global body.”); U.S. DEP'T OF STATE, *supra* note 69 (identifying regions where al-Qa'ida was still active in 2011 and 2012).

is unclear how many of the non-cumulative criteria must be met in order to satisfy the intensity requirement, it seems likely that the conflict with al-Qa'ida will at least satisfy a majority of them—i.e., that both sides will continue to regularly conduct or attempt serious attacks from and in multiple states' territories, that government forces will continue to be involved, and that the parties will continue to mobilize and distribute weapons. Additionally, the UNSC has passed resolutions pertaining to the conflict already, and as at least one permanent member of the UN Security Council will continue to be a party to the conflict, the UNSC will likely remain interested in the conflict.⁷⁴

C. Alternative Legal Bases for Continued Hostilities Against al-Qa'ida

While the United States' NIAC with al-Qa'ida will likely continue, at least for the near term, to meet the objective criteria for the existence of an armed conflict even after U.S. forces leave Afghanistan, the United States may have at least two additional legal bases at its disposal for continued military operations against al-Qa'ida. First, the United States could choose to abandon the wartime legal framework altogether but continue to conduct military operations against al-Qa'ida on a case-by-case basis using a pre-9/11 approach to terrorism.⁷⁵

The Obama Administration has already laid some of the groundwork for this legal approach.⁷⁶ In essence, this option would require the U.S. government to make a self-defense claim under Article 51 of the UN Charter for each and every attack against an al-Qa'ida member, as opposed to using self-defense once as an initial trigger to initiate a state of armed conflict.⁷⁷ This option could be appealing since the administration is able to “end the war” and still conduct lethal strikes against dangerous militants. However, law of war detention would not be

⁷⁴ See *UN Moves to Rein in Islamic State Group*, ALJAZEERA, <http://www.aljazeera.com/news/middleeast/2014/08/un-moves-rein-islamic-state-group-2014815191831901897.html> (last updated Aug. 16, 2014).

⁷⁵ See BENJAMIN WITTES, *LAW AND THE LONG WAR* 21 (2008); see also O'Connell, *supra* note 26, at 347.

⁷⁶ See, e.g., John Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy* (Apr. 30, 2012), <http://www.lawfareblog.com/2012/04/brennanspeech>.

⁷⁷ See U.N. Charter, *supra* note 47, at art. 51; see also Koh, *supra* note 10 (describing the war in Afghanistan as one of self-defense arising from one single event, 9/11).

permissible under this framework. And with the consequent reduction in access to intelligence, the United States would arguably have less successful targeting operations, and would likely receive greater scrutiny from the international community and civil society.

Alternatively, the United States might also consider adopting a liberally applied version of the ICRC’s approach to recognizing an armed conflict as a more palatable option for the international community.⁷⁸ Under this approach, the United States could continue to wage war against al-Qa’ida outside of its territory as long as hostilities were attached to another existing conflict, such as the NIACs in Afghanistan/Pakistan, Somalia, Yemen, and Iraq/Syria.⁷⁹ In practice, this is almost always how the United States has engaged with al-Qa’ida anyway, while approaching al-Qa’ida primarily through law enforcement means in non-warzone states.⁸⁰ But this method of determining the existence of an

⁷⁸ See INT’L COMM. OF THE RED CROSS, *supra* note 52, at 7–8.

⁷⁹ See generally, *Afghanistan – Applicable International Law*, GENEVA ACAD., http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=1 (last updated June 14, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Afghanistan); *Iraq – Applicable International Law*, GENEVA ACAD., http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=110 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Iraq); *Pakistan – Applicable International Law*, GENEVA ACAD., http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=166 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Pakistan); *Somalia – Applicable International Law*, GENEVA ACAD., http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=204 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Somalia); *Syria – Applicable International Law*, GENEVA ACAD., http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=211 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Syria); *Yemen – Applicable International Law*, GENEVA ACAD., http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=234 (last updated July 18, 2012) (stating that the provisions of customary international humanitarian law applicable to a NIAC are applicable to the conflict in Yemen).

⁸⁰ See generally Glenn Greenwald, *Chilling Legal Memo from Obama DOJ Justifies Assassination of US Citizens*, GUARDIAN (Feb. 5, 2013), <http://www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj->

armed conflict would have to be conditioned on a liberal application of the objective criteria—finding an armed conflict whenever possible—as international courts have traditionally applied Common Article 3 [hereinafter CA3].⁸¹

II. POTENTIAL PARTIES TO THE CONTINUING ARMED CONFLICT

As long as the United States' war against al-Qa'ida continues to satisfy the objective criteria required to establish an armed conflict, the United States will have to identify which groups are party to the conflict.⁸² The U.S. government has long asserted that it is at war against three groups under the AUMF: the Taliban, al-Qa'ida, and associated forces.⁸³ An end to the war in Afghanistan will have different effects on the conflict with each of these groups.

A. *The Taliban*

After the 9/11 attacks, the United States gave the Taliban regime in Afghanistan an ultimatum: turn over all senior al-Qa'ida members, including Usama bin Laden, shut down and give the United States access to all training camps in Afghanistan, and expel al-Qa'ida members from its territory, or share their fate.⁸⁴ The Taliban, which had given al-Qa'ida safe haven and allowed it to administer training camps in its territory since

memo (explaining the authority of the President to engage in assassination in areas other than active war zones); Obama, *supra* note 2 (The President discusses the existence of threats in Yemen, Afghanistan/Pakistan, Iraq, Somalia and North Africa and notes the success of law enforcement actions in neutralizing threats from other countries that involved cooperation with the United States).

⁸¹ See generally Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 INT'L REV. OF THE RED CROSS 189, 191–92 (2011) (explaining the criteria evaluated by international courts to apply Common Article 3 of the Geneva Convention).

⁸² *Id.*

⁸³ See, e.g., National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(1)–(2), 125 Stat. 1298, 1562 (2011); Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 3, (No. 08-442), (D.D.C. Mar. 13, 2009), available at <http://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf>.

⁸⁴ *Bush Delivers Ultimatum*, CNN (Sept. 21, 2001, 1:30 AM), <http://edition.cnn.com/2001/WORLD/asiapcf/central/09/20/ret.afghan.bush/>.

1996, refused the United States’ demand.⁸⁵ The United States then invaded Afghanistan on October 7, 2001.⁸⁶

In 2001, the Taliban fell under the “harbor” prong of the AUMF, as they were not the group or individuals that perpetrated the attacks of 9/11, but those that gave them safe haven.⁸⁷ Since October 2001, the United States has fought the Taliban in Afghanistan and Pakistan alongside its Afghan and International Security Assistance Forces (ISAF) partners and under a UNSC resolution.⁸⁸ However, around 2009 the Taliban began to show renewed interest in the political process and indicated its intent to participate in Afghanistan’s government again after the United States and ISAF forces leave the country.⁸⁹ The Taliban has even pledged to end any and all relations with terrorist groups.⁹⁰

Whether or not the Taliban keeps its word—because the United States’ war with the Taliban was always tied to the war in Afghanistan—the war with the Taliban will most likely end when

⁸⁵ Norman Kempster & Tyler Marshall, *Taliban Rejects Bush Ultimatum*, L.A. TIMES (Sept. 22, 2001), <http://articles.latimes.com/2001/sep/22/news/mn-48537>. See generally Bill Roggio & Daveed Gartenstein-Ross, *Pakistan Surrenders: The Taliban Control the Border with Afghanistan*, WEEKLY STANDARD (Oct. 2, 2006), <http://www.weeklystandard.com/print/Content/Public/Articles/000/000/012/738ijawx.asp?page=2> (stating that the Taliban and al Qaeda maintain control over the mountainous tribal region bordering Afghanistan); Matt Bennett & Scott Payne, *Disrupting the Taliban and Al Qaeda in Pakistan*, THIRDWAY, http://content.thirdway.org/publications/241/Third_Way_Module_-_Disrupting_the_Taliban_and_al_Qaeda_in_Pakistan.pdf (last visited Nov. 16, 2014) (stating that the Taliban was given the mountainous border regions between Pakistan and Afghanistan in 2006, which al Qaeda also uses as a safe haven).

⁸⁶ See *Bush Announces Opening of Attacks*, CNN (Oct. 7, 2001, 4:43 PM), <http://edition.cnn.com/2001/US/10/07/ret.attack.bush/>.

⁸⁷ AUMF, 115 Stat. 224.

⁸⁸ S.C. Res. 1386, para. 13, U.N. Doc. S/RES/1386 (Dec. 20, 2001). See generally *U.S.-Led Attack on Afghanistan Begins*, HISTORY (Oct. 7, 2001), <http://www.history.com/this-day-in-history/us-led-attack-on-afghanistan-begins> (stating that the U.S. led the war against Taliban-controlled Afghanistan beginning in 2001).

⁸⁹ See Yaroslav Trofimov, *Taliban Unveil Political Plan*, WALL ST. J., Dec. 21, 2012, at A9; Karen DeYoung, *U.S. to Launch Peace Talks with Taliban*, WASH. POST (Jun. 18, 2013), http://www.washingtonpost.com/world/national-security/us-to-relaunch-peace-talks-with-taliban/2013/06/18/bd8c7f38-d81e-11e2-a016-92547bf094cc_story.html.

⁹⁰ See Gareth Porter, *US Silent on Taliban’s Al-Qaeda Offer*, ASIA TIMES (Dec. 17, 2009), http://www.atimes.com/atimes/South_Asia/KL17Df02.html (“[T]he Taliban were interested in negotiating an agreement with the United States involving a public Taliban renunciation of ties with al-Qaeda . . .”).

the United States withdraws its forces from Afghanistan.⁹¹ The Taliban has not conducted attacks against the United States outside of Afghanistan and that does not appear to be its intent.⁹² The Taliban's war with the United States has been primarily about control of Afghan territory, and not global ideological ambitions.⁹³ Therefore, of the three parties covered by the AUMF, the Taliban is the most likely to fall off of a continued conflict after the war in Afghanistan ends.

B. *Al-Qa'ida, its Affiliates, and Associated Forces*

This is not the case for al-Qa'ida. The focus of the AUMF and the U.S. government's "global war on terror"⁹⁴ is and always has been al-Qa'ida.⁹⁵ Usama bin Laden's terrorist organization planned and executed the 9/11 attacks and has persistently fought the United States in the years since.⁹⁶ But al-Qa'ida looks far different as an organization than it did in 2001 and this may

⁹¹ See generally Trofimov, *supra* note 89 (expressing the reluctance of the Taliban to participate in reformation efforts when such efforts are "being planned under foreign occupation.").

⁹² *The Taliban*, MAPPING MILITANT ORGANIZATIONS, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367> (last updated Nov. 28, 2012) (stating the geographical locations of the Taliban's military operations and their targets and tactics).

⁹³ Hamdullah Mohib & Omar Mansoor Ansari, *The Taliban*, ISLAMIC MONTHLY (June 17, 2012), <http://www.theislamicmonthly.com/the-taliban/> (stating that the goals of the Taliban are to bring freedom to Afghanistan and to establish an Islamic government).

⁹⁴ The Bush Administration used the term "global war on terror" throughout its time in office to describe the transnational conflict with terrorist groups al-Qa'ida, the Taliban, and associated forces. Although the term was never meant to imply that the United States was at war with any terrorist group anywhere in the world, the Obama Administration wisely discontinued its use. The term now used—the war against al-Qa'ida—identifies the enemy specifically by name. However, even though the Obama Administration dropped the adjective "global" from the name of the conflict, it has continued to conduct a war in multiple non-contiguous states across the Middle East, Southwest Asia, and East Africa. See Ari Shapiro, *Obama Team Stops Saying 'Global War On Terror' But Doesn't Stop Waging It*, NPR (Mar. 11, 2013, 4:38 PM), <http://www.npr.org/blogs/itsallpolitics/2013/03/11/174034634/obama-team-stops-saying-global-war-on-terror-but-doesnt-stop-waging-it>.

⁹⁵ See Brian Whitaker, *Bin Laden Voice on Video, says TV Channel*, GUARDIAN (Sept. 9, 2002, 9:31 PM), <http://www.theguardian.com/media/2002/sep/10/alqaida.september11200> (acknowledging al-Qa'ida's claim of responsibility for the attacks).

⁹⁶ See Memorandum from Audrey Kurth Cronin, Specialist in Terrorism, Foreign Affairs, Def. and Trade Div. to the H. Gov't Reform Comm. (Mar. 31, 2004), available at <http://fas.org/irp/crs/033104.pdf>.

have some effect on whether it or some of its affiliates may be part of a continued armed conflict with the United States.

Most of “core” al-Qa’ida’s senior leadership has been killed or captured in the years since 9/11.⁹⁷ Most notably, the United States killed Usama bin Laden in a May 2, 2011 raid on his compound in Abbottabad, Pakistan, and has captured scores of senior leaders, including Khalid Sheik Mohammed, Ramzi Bin al Shibh, Abd al Rahim al Nashiri, Walid Bin Attash, Abu Zubaydah, and Abu Faraj al Libi.⁹⁸ These successes have led many to predict the imminent demise of al-Qa’ida—or at least its diminished ability to stage attacks against the territory of the United States.

Yet, in spite of these successes, as noted above, “core” al-Qa’ida has been frustratingly resilient. In fact, one of the remarkable revelations from the intelligence obtained at the bin Laden compound and made public was the surprising degree of command-and-control still coming from AQ Headquarters in Pakistan.⁹⁹ While Ayman al-Zawahiri has encountered more resistance than bin Laden did as leader of al-Qa’ida, he has helped al-Qa’ida continue to exercise this central organizational role.¹⁰⁰ Thus, if the United States chooses to continue its war against al-Qa’ida, it will have a solid basis to do so as “core” al-Qa’ida is still the party that perpetrated 9/11, it remains

⁹⁷ “Core” al-Qa’ida is a term typically used by U.S. government officials and other commentators to describe the central command element of the terrorist organization, led by Ayman al-Zawahiri, a likely resident in Pakistan. See Press Briefing, White House Press Secretary Jay Carney, Carney Statement on President Obama’s Foreign Policy (Aug. 5, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/08/05/press-briefing-press-secretary-jay-carney-08052013>; see also Mark Mazzetti, *A Terror Cell That Avoided the Spotlight*, N.Y. TIMES, Sept. 25, 2014, at A1 (describing how “core” al-Qa’ida made the decision to send a Kuwait man into Syria to establish a base of operations).

⁹⁸ Adrian Brown, *Osama Bin Laden’s Death: How It Happened*, BBC NEWS, <http://www.bbc.com/news/world-south-asia-13257330> (last updated Sept. 10, 2012); *Profile: Key US Terror Suspects*, BBC NEWS (Feb. 11, 2008, 3:51 PM), <http://news.bbc.co.uk/2/hi/5322694.stm>.

⁹⁹ See, e.g., Peter Bergen, *Bin Laden: Seized Documents Show Delusional Leader and Micromanager*, CNN (May 3, 2012, 7:33 AM), <http://www.cnn.com/2012/04/30/opinion/bergen-bin-laden-document-trove/>.

¹⁰⁰ See Barak Mendelsohn, *After Disowning ISIS, Al Qaeda is Back On Top*, FOREIGN AFF. (Feb. 13, 2014), <http://www.foreignaffairs.com/articles/140786/barak-mendelsohn/after-disowning-isis-al-qaeda-is-back-on-top>; see also *Al-Qa’ida*, NAT’L COUNTERTERRORISM CTR., http://www.nctc.gov/site/groups/al_qaida.html (last visited Oct. 16, 2014).

sufficiently organized and intent on fighting the United States, and its leaders continue to exercise a considerable degree of command-and-control¹⁰¹ over the vast network of terror groups allegiant to the al-Qa'ida flag.¹⁰²

That said, al-Qa'ida has also become increasingly splintered and diffuse—with a growing constellation of al-Qa'ida affiliates and associated forces, including AQAP, AQIM, al-Qa'ida in Iraq (AQI), al-Qa'ida in the Indian Subcontinent (AQIS), al Shabab, and the al Nusra Front.¹⁰³ Zawahiri continues to lead “core” al-Qa'ida located in Afghanistan and Pakistan, but these affiliates and associated forces have exhibited distinct territorial, political, and ideological ambitions and missions.¹⁰⁴ AQAP has attracted particular attention because of its attempted attack on an American airliner in 2009,¹⁰⁵ its attempt to send explosive packages to the United States through the mail in 2010,¹⁰⁶ and its persistent calls for attacks on Western targets in its online English language magazine, “Inspire.”¹⁰⁷ AQI also attempted attacks on U.S. targets, including one attempt within U.S. territory in 2011, and it appears that the group may now have completely merged with ISIL.¹⁰⁸ And al Shabaab and the al Nusra Front have been very public in their support and allegiance to “core” al-Qa'ida, including its war against the United States.¹⁰⁹ Other affiliates, including AQIM and the newly

¹⁰¹ *Al-Qa'ida*, *supra* note 100 (“Despite continued leadership losses, al-Qa'ida remains committed to conducting attacks in the United States and against American interests abroad.”). *But see* J.M. Berger, *The Islamic State vs. Al Qaeda*, FOREIGN POL'Y, (Sept. 2, 2014), http://www.foreignpolicy.com/articles/2014/09/02/islamic_state_vs_al_qaeda_next_jihadi_super_power (noting that “there have been signs for many months that al Qaeda’s command-and-control infrastructure is inadequate to respond to several internal problems . . .”).

¹⁰² *See* Berger, *supra* note 101.

¹⁰³ *Id.*

¹⁰⁴ *Id.* *See generally* JOHN ROLLINS, CONG. RESEARCH SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY (2011) (providing a summary of missions of Al Qaeda and its affiliates).

¹⁰⁵ *Al-Qa'ida in the Arabian Peninsula (AQAP)*, NAT'L COUNTERTERRORISM CTR., <http://www.nctc.gov/site/groups/aqap.html> (last visited Oct. 22, 2014).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Al-Qa'ida in Iraq (AQI)*, NAT'L COUNTERTERRORISM CTR., <http://www.nctc.gov/site/groups/aqi.html> (last visited Oct. 22, 2014).

¹⁰⁹ *See* Thomas Joscelyn, *Al Nusra Front Says It Will Comply with Zawahiri's Orders*, LONG WAR J. (May 4, 2014), http://www.longwarjournal.org/archives/2014/05/al_nusra_front_issu.php;

created AQIS, seem to have focused their hostilities on regional objectives and not (yet) on American targets.¹¹⁰

However, the terms “affiliate” and “associated forces” have been the source of confusion and controversy for years.¹¹¹ Jeh Johnson attempted to clarify how the United States approached this concept in a 2012 speech at Yale Law School:

An ‘associated force,’ as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners.¹¹²

Thus, the question of whether an associated force or an affiliate is or may be part of an armed conflict with the United States turns on whether that group fights with al-Qa’ida *against* the United States or its coalition partners, and not whether they are ideologically linked against the West or allied with al-Qa’ida against regional non-partner enemies. Of course, this is still an ambiguous definition and it is not clear how the United States would characterize groups such as Lashkar-e-Tayyiba or the Tehrik-e Taliban in Pakistan—which seem to be co-belligerents with al-Qa’ida and the Taliban against the United States in that region primarily due to the United States’ presence there—after U.S. forces leave Afghanistan.¹¹³ But it makes sense that to be at

Thomas Joscelyn & Bill Roggio, *Shabaab Formally Joins Al Qaeda*, LONG WAR J. (Feb. 9, 2012),

http://www.longwarjournal.org/archives/2012/02/shabaab_formally_joi.php.

¹¹⁰ See CHRISTOPHER S. CHIVVIS & ANDREW LIEPMAN, NORTH AFRICA’S MENACE: AQIM’S EVOLUTION AND THE U.S. POLICY RESPONSE 1 (2013); *Split with ISIL Not the Reason for Creation of Al Qaeda in India: US*, F. WORLD (Sept. 18, 2014), <http://www.firstpost.com/world/split-isil-reason-creation-al-qaeda-india-us-1717725.html> (AQIS has stated objectives that include attacks on the U.S., but has made no step beyond mere verbal threats and its leader has recognized the “intense international backlash” such an attack would have).

¹¹¹ See Daskal & Vladeck, *supra* note 22, at 122–25; Cora Currier, *Who Are We at War With? That’s Classified*, PROPUBLICA (July 26, 2013, 10:13 AM), <http://www.propublica.org/article/who-are-we-at-war-with-thats-classified> (discussing the difficulties lawmakers have had with defining the term).

¹¹² Jeh Charles Johnson, Gen. Counsel of Dept. of Defense, National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), *available at* <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>.

¹¹³ See Laurie R. Blank & Benjamin R. Farley, *Characterizing US Operations in Pakistan: Is the United States Engaged In An Armed Conflict?*, 34 FORDHAM

war with the United States, an associated force must continue to be engaged in or actively planning actual hostilities with the United States, and not merely ideologically supportive of al-Qa'ida's war with the United States.

Johnson's explanation also makes clear that other ideologically aligned but non-allied terrorists (such as the Boston bombers) and terrorist groups (such as Boko Haram) are not included within the Administration's definition. Johnson explains,

Nor is the concept of an 'associated force' an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context,¹¹⁴ and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more de-centralized, and relies more on associates to carry out its terrorist aims.

. . . [A]n 'associated force' is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.¹¹⁵

President Obama agreed, asserting, "I think there is a distinction between the capacity and reach of a bin Laden and a network that is actively planning major terrorist plots against the homeland versus jihadists who are engaged in various local power struggles and disputes, often sectarian."¹¹⁶ In other words, the United States does not and, after U.S. forces leave Afghanistan, likely will not lump all Islamist terror groups together under the broad "affiliate" or "associated force" label. Instead, the United States will likely continue to treat as co-belligerents with al-Qa'ida only those groups that directly fight the United States.

INT'L L.J. 151, 154, 159 (2011) (discussing the status of the Tehrik-e-Taliban and the group's conflict with the United States); see also *Protecting the Homeland Against Mumbai-Style Attacks and the Threat from Lashkar-e-Taiba: Hearing Before the Subcomm. On Counterterrorism and Intelligence of the H. Comm. on the Homeland Security*, 113th Cong. 5 (2013) (statement of Christine Fair, Assistant Professor, Georgetown University) (opining that an attack by the Lashkar-e-Tayyiba in the United States would ultimately be devastating to the organization).

¹¹⁴ See, e.g., *Barhoumi v. Obama*, 609 F.3d 416, 418 (D.C.C. 2010).

¹¹⁵ Johnson, *supra* note 112.

¹¹⁶ David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, NEW YORKER (Jan. 27, 2014), <http://www.newyorker.com/magazine/2014/01/27/going-the-distance-2?currentPage=all>.

This will probably include AQAP and al Shabab, and it may include the al Nusra Front in Syria if the group focuses more of its efforts on striking U.S. citizens or territory.

C. *Al-Qa'ida's "Successors"*

In a truly unexpected development, the Obama Administration began arguing in September 2014 that the 2001 AUMF authorized force against ISIL because ISIL was *the* “true successor” of Usama bin Laden’s al-Qa’ida.¹¹⁷ The administration later clarified that it considers the AUMF to cover both ISIL and al-Qa’ida, as equal “successors” to the group that perpetrated the 9/11 attacks.¹¹⁸ In fact, ISIL emerged in part from the AQI affiliate and, as a result, has been classified by the UNSC as an “associated force” of al-Qa’ida.¹¹⁹ However, in a very public dispute in February 2014,¹²⁰ ISIL and “core” al-Qa’ida separated and ISIL has since used force in Syria against al-Qa’ida’s Syrian branch, the al Nusra Front.¹²¹

¹¹⁷ As noted earlier, the Administration is also relying on the 2002 Iraq AUMF. See Savage, *supra* note 14. According to senior Administration officials, in relying on the 2001 AUMF, the President is arguing that ISIL is the “true successor” to Usama bin Laden’s al-Qa’ida. See Marty Lederman, *The Legal Theory Behind the President’s New Military Initiative Against ISIL*, JUST SECURITY (Sept. 10, 2014, 9:12 PM), <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/>. Of course, if we took to its logical end the Administration’s argument that ISIL *is the true successor* to bin Laden’s al-Qa’ida, there might be a legitimate question as to whether the AUMF no longer covers Zawahiri’s “core” al-Qa’ida because it *is not the true successor*? The use of the term “true” here seems significant because it could denote exclusivity. And if al-Qa’ida is no longer the “true successor” to the al-Qa’ida contemplated by the AUMF, what effect would that determination have on “core” al-Qa’ida’s loyal affiliates (e.g., AQAP, AQIM, AQIS) and associated groups (e.g., al-Shabab, al Nusra Front)? Subsequent statements from the White House clarified that ISIL and al-Qa’ida are (at least for now) both the true successors to bin Laden’s al-Qa’ida. See Marty Lederman, *Tentative First Reactions to the 2001 AUMF Theory*, JUST SECURITY (Sept. 11, 2014, 10:42 AM), <http://justsecurity.org/14804/first-reactions-2001-aumf-theory/>.

¹¹⁸ Andrew Rudalevige, *Six Degrees of Al Qaeda?*, WASH. POST (Sept. 12, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/12/six-degrees-of-al-qaeda/>.

¹¹⁹ Martin Scheinin, *ISIS/ISIL Remains Associated with Al-Qaida Because the UN Security Council Says So?*, JUST SECURITY (Sept. 15, 2014, 10:15 AM), <http://justsecurity.org/15014/isisil-remains-al-qaida-security-council-so/>.

¹²⁰ *Al-Qaeda Disowns ISIL Rebels in Syria*, ALJAZEERA, <http://www.aljazeera.com/news/middleeast/2014/02/al-qaeda-disowns-isil-rebels-syria-20142385858351969.html> (last updated Feb. 3, 2014).

¹²¹ See *ISIL Says It Faces War with Nusra in Syria*, ALJAZEERA, <http://www.aljazeera.com/news/middleeast/2014/03/isil-says-it-faces-war-with->

Thus, ISIL cannot be co-belligerents with al-Qa'ida in its war against the United States, as long as they fight *against* al-Qa'ida and the United States, and not *alongside* al-Qa'ida against the United States.¹²² Consequently, even if one accepts the argument that ISIL is an AUMF successor to al-Qa'ida, ISIL must be characterized as a separate al-Qa'ida party to the conflict and not a "core" al-Qa'ida affiliate or associated force.¹²³ In addition, any affiliates or associated groups that ISIL has or will have that fight alongside ISIL against the United States will presumably be party to the conflict with al-Qa'ida.

Whatever ISIL's relation to al-Qa'ida in the conflict against the United States, the warfront with ISIL should have no dependence at all on the war in Afghanistan. If anything, ISIL's inclusion in the war, particularly under the authority of the AUMF, negates the effect that ending the war in Afghanistan has on the greater conflict with al-Qa'ida. ISIL's participation demonstrates the truly transnational character, since it adds a regular battlefield in Iraq and Syria to those already in existence in Afghanistan, Pakistan, Yemen, and Somalia.¹²⁴ By recognizing ISIL as the (or "a") successor to al-Qa'ida, including any co-belligerent affiliates and associated forces, the Administration has dramatically expanded the broader war against al-Qa'ida.

III. POTENTIAL LOCATION OF THE CONTINUING ARMED CONFLICT

If the United States determines that it may continue to legally wage war against al-Qa'ida and its co-belligerent affiliates, associated forces, and successors after it withdraws its forces from Afghanistan, the thorniest issue may still be *where* that conflict may be fought. With the military out of Afghanistan, the

nusra-syria-20143719484991740.html (last updated Mar. 8, 2014).

¹²² *Id.* (indicating that ISIL is considered to be an adversary of al-Qa'ida as opposed to an ally). *But see* Martin Chulov, *Isis Reconciles with Al-Qaida Group as Syria Air Strikes Continue*, GUARDIAN (Sep. 28, 2014, 12:56 PM), <http://www.theguardian.com/world/2014/sep/28/isis-al-qaida-air-strikes-syria> (reporting that segments of Nusra (al-Qa'ida's Syrian affiliate) have agreed with ISIL to cease fighting against each other to allow both parties to focus on other enemies, including the United States).

¹²³ *See* Amanda Taub, *Experts: Obama's Legal Justification for the War on ISIS is "a stretch"*, VOX, <http://www.vox.com/iraq-crisis/2014/9/12/6134159/is-obamas-new-isis-strategy-legal/in/5568955> (last updated Sept. 12, 2014).

¹²⁴ *See* David Hudson, *President Obama: "We Will Degrade and Ultimately Destroy ISIL"*, WHITE HOUSE BLOG (Sept. 10, 2014, 10:15 PM), <http://www.whitehouse.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isis>.

primary battlefield in the war with al-Qa’ida will be gone. Of course, al-Qa’ida will probably find Afghanistan and Pakistan to be more hospitable once the United States leaves and may attempt to re-establish new camps and headquarters in those countries from which to stage operations against the United States. The United States might then again use force against al-Qa’ida in those countries, likely relying on drones, conventional air strikes, and Special Forces.¹²⁵ And, depending on how long the United States conducts air strikes against ISIL, there may continue to be a more traditional battlefield for the war against al-Qa’ida in Iraq and Syria. Still, ending major combat operations in Afghanistan will place, front and center, the transnational nature of the conflict with al-Qa’ida.

As noted above, the AUMF does not prescribe geographical limitations on the war against al-Qa’ida and the United States has consistently argued that the war may take place wherever al-Qa’ida operates.¹²⁶ When the United States began its war with al-Qa’ida, it concluded that CA3 did not apply because “the relevant conflicts are international in scope[,]”¹²⁷ and are not the traditional internal civil wars contemplated by CA3.¹²⁸ In 2006

¹²⁵ A NATO conference on September 4–5, 2014 discussed a future counter-terrorism presence in Afghanistan after 2014. It is unclear what that might look like, or whether Afghanistan will consent to a continued international presence, but the United States and NATO allies seem to be anticipating the need for future operations against al-Qa’ida in Afghanistan and Pakistan after the end of the war in Afghanistan. See *Fact Sheet: Wales Summit – NATO’s Changing Role in Afghanistan*, WHITE HOUSE (Sept. 4, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/04/fact-sheet-wales-summit-nato-s-changing-role-afghanistan>; see also Ctr. for Foreign Policy and Sec., *Future of NATO and Atlantic Security After the 2014 Wales Summit*, HAZAR (Oct. 24, 2014), http://www.hazar.org/analizdetail/analiz/future_of_nato_and_atlantic_security_after_the_2014_wales_summit_942.aspx.

¹²⁶ See Memorandum from the U.S. Dep’t of Justice on Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi to the Attorney General 24–25 n.31 (July 16, 2010), available at https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf.

¹²⁷ Memorandum from President George W. Bush on Humane Treatment of Taliban and al Qaeda Detainees to the Vice President et al. (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

¹²⁸ Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel on Application of Laws and Treaties to al Qaeda and Taliban Detainees, to William J. Haynes II, General Counsel, Department of Defense 7 (Jan. 9, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf> (describing

however, the Supreme Court disagreed with the government's characterization of the conflict and decided in *Hamdan v. Rumsfeld* that CA3 applied to the war with al-Qa'ida because it was non-international in character.¹²⁹ The *Hamdan* court correctly dismissed the notion that non-international armed conflicts must be internal.¹³⁰

Indeed, international law does not require NIACs to be "confined within the borders of a single state"¹³¹—instead, the key feature of NIACs is the non-state identity of at least one side to the conflict.¹³² Countless examples exist of NIACs that have crossed borders and bled into surrounding states' territories.¹³³ It is already largely accepted that the United States is at war with al-Qa'ida in Afghanistan, with a spillover of that conflict into Pakistan.¹³⁴ In its 2011 IHL Challenges Report, the ICRC

the internal wars contemplated by CA 3).

¹²⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006).

¹³⁰ *See id.* at 631–35; *see also* SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 229 (2012) ("The law of non-international armed conflict does not require that the violence be of a purely internal character, that is to say confined within the borders of a single state.").

¹³¹ SIVAKUMARAN, *supra* note 130, at 229–30 (asserting that "[s]uch a conclusion is reached through a consideration of the drafting history of the provisions. The 1946 Preliminary Conference of National Red Cross Societies proposed the application of the Conventions '[i]n the case of armed conflict within the borders of a State', and the accompanying report likewise referred to civil wars 'within the frontiers of a State'. The rules were thus considered to apply to conflicts that were wholly internal in character. However, that scope of application was rejected. . . . [T]he fact that a civil war may cross an international border was expressly considered at the relevant time and it was not simply presumed that civil wars would be confined to the territory of a single state. . . . Importantly, the treaty rules do not refer to armed conflicts within a *single* High Contracting Party or within the territory of one High Contracting Party *alone*, both of which would suggest territorial limits.") (footnotes omitted).

¹³² *Id.* at 234 (explaining that the "key feature" of these conflicts is the nature and identity of a group, not the territory where they come from).

¹³³ *See* Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in *RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW* 1, 31 (Nigel White & Christian Henderson eds., 2013) (citing an ongoing NIAC between Al-Shabaab militants and the Transitional Federal Government of Somalia that is spilling over into Kenya).

¹³⁴ *See, e.g.*, SIVAKUMARAN, *supra* note 130, at 234 (The United States' "armed conflict with al-Qa'ida," occurring in non-adjacent states, has a "different *degree* of geographical proximity to the typical cross-border non-international armed conflict but it is not of a different *type* as to necessitate it being treated in an altogether different manner."). *But see* Michael N. Schmitt, *Classification in Future Conflict*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICT* 455, 465 (Elizabeth Wilmshurst ed., 2012) (noting that "Common Article 3 contains no such [geographical] restriction, but its mention of conflicts 'occurring

recognized this new reality, identifying six distinct types of NIACs—four of which had some external character.¹³⁵ Typically, the state involved in the NIAC will have its territory as the base of the conflict, but this is not deemed essential.¹³⁶

Thus, the question under the law is a factual one, based on the united character of the parties. As Sandesh Sivakumaran explains:

In such a situation, what needs to be established is whether Al-Qaeda in its various locations—Afghanistan, the Arabian Peninsula, and the like—constitutes different groups or whether they are parts of the same group. If it is the same group, then it is submitted that a single conflict exists, albeit the actor is located in different states, as there is a nexus between the violence in the different places.¹³⁷

While this seems like a prudent approach, it may make even more sense to approach a group like al-Qa’ida, which directs affiliates and associated forces in the far-flung reaches of the Middle East, Asia, and Africa, as a single group only to the extent that they are actually at war with the same enemy—in this case, the United States. For the present case, this would mean that a single conflict exists between the United States and the elements of al-Qa’ida that are co-belligerents against the United States, such as “core” al-Qa’ida and AQAP, but not AQIM or AQIS. If the conflict with ISIL becomes a long-term fixture in the war against al-Qa’ida, that conflict might be separated for these purposes because the parties are not a single group and do not fight (at least not yet) in cooperation with another against the common enemy. Thus, one front of the conflict against al-Qa’ida would exist against “core” al-Qa’ida, its affiliates, and associated forces and be centered in Afghanistan, Pakistan, and Yemen, although it could take place wherever the participants operated; and

in the territory’ of a party to the 1949 Geneva Conventions can be interpreted as excluding conflicts that cross national borders.”).

¹³⁵ INT’L COMM. OF THE RED CROSS, *supra* note 52, at 9–10. Notably, the ICRC indicated that some states recognized the existence of a seventh NIAC—“an armed conflict taking place across multiple states between Al Qaeda and its “affiliates” and “adherents” and the United States (“transnational”)—but that the ICRC did not accept this as a different type. *Id.* at 10.

¹³⁶ *See generally id.* (explaining that of the six types of NIAC’s recognized by the ICRC, most involve the host state fighting armed groups exclusively on their own territory while others involve the host state fighting armed groups in neighboring states).

¹³⁷ SIVAKUMARAN, *supra* note 130, at 233 (footnote omitted).

another front in the conflict would exist against ISIL and its affiliates and associated forces and be centered in Iraq and Syria, but could likewise take place wherever the participants operated.

Certainly, there is nothing in the law of armed conflict that proscribes the United States from conducting operations against enemy forces wherever the parties to the conflict operate against the United States. Yet, many have expressed concern with a truly “global” or “transnational” NIAC with a non-state terrorist group.¹³⁸ In a hearing before the Senate Armed Services Committee on the law of armed conflict, Department of Defense Deputy General Counsel Robert Taylor addressed this issue:

Some have also questioned the geographic scope of this conflict. The enemy in this conflict has not confined itself to the geographic boundaries of any one country. U.S. military operations on the territory of another state must comply with international law rules, including respect for another state’s sovereignty. This does not prevent us from using force against our enemies outside an active battlefield, at least when the country involved consents or is unable or unwilling to take action against a serious threat.¹³⁹

Taylor’s statement is consistent with previous positions from senior officials in the U.S. government.¹⁴⁰ The United States has certainly not used force in every state where al-Qa’ida operates.

¹³⁸ *Id.* at 234 (“[A] conflict must have a territorial base whether a single territory, a core territory plus overspill onto different territory, or multiple territories; a global non-international armed conflict does not exist, at least as a matter of law.”); see Mary Ellen O’Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SEC. L. 393, 399–400 (2009).

¹³⁹ *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the S. Comm. on Armed Servs.*, 113th Cong. 7 (2013) (statement of Robert Taylor, Acting General Counsel, Department of Defense) [hereinafter Taylor].

¹⁴⁰ John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *Strengthening Our Security by Adhering to Our Values and Laws* (Sept. 16, 2011) (“The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan.”); Johnson, *supra* note 112 (“[T]here is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the ‘hot’ battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks – al Qaeda and the Taliban — without a geographic limitation. The legal point is important because, in fact, over the last 10 years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.”).

Rather, the United States has used military force primarily in ungoverned spaces, such as the tribal regions of Pakistan or the remote villages of Yemen and Somalia.¹⁴¹ Yet, as Taylor noted,¹⁴² even if the law of armed conflict permits the United States to use force wherever al-Qa’ida operates, the United States is still obligated to respect a state’s sovereignty and territorial inviolability.¹⁴³ A state’s consent to use force within their territory can resolve this issue.¹⁴⁴ So, too, can a self-defense claim under Article 51 of the UN Charter, including where a state is “unable or unwilling” to prevent its territory from being used by a third party to conduct hostilities against another state.¹⁴⁵ But, the United States must request that state’s assistance, seek consent to use force within its territory, or make the case that its right of self-defense has been triggered by the state’s inability or unwillingness to take action itself.¹⁴⁶

What this means for the United States’ war against al-Qa’ida is that the United States may continue to conduct lethal operations against al-Qa’ida and its co-belligerent affiliates and associated groups as well as its successors after 2016 in the territories where these groups operate, so long as it is done with the cooperation or consent of the home state, or in its absence, out of self-defense. More than likely, this means that most U.S. operations against al-Qa’ida will still take place in Afghanistan, Pakistan, Yemen, Somalia, Iraq, Syria, and other unstable and ungoverned spaces from which al-Qa’ida operates.

CONCLUSION

President Obama has long talked about ending the war in Afghanistan, ending the war against al-Qa’ida, and not

¹⁴¹ See Helene Cooper & Eric Schmitt, *U.S. Troops Take Action On Militants in Somalia*, N.Y. TIMES, Sept. 2, 2014, at A7; Mark Mazzetti & Dexter Filkins, *U.S. Military Seeks to Expand Raids in Pakistan*, N.Y. TIMES, Dec. 21, 2010, at A1; *U.S. Escalates Clandestine War in Yemen*, L.A. TIMES (May 16, 2012, 5:15 PM), http://latimesblogs.latimes.com/world_now/2012/05/washington-escalation-american-clandestine-war-yemen-us-troops-.html

¹⁴² Taylor, *supra* note 139.

¹⁴³ See U.N. Charter, *supra* note 47.

¹⁴⁴ See Robert Ago, *Eighth Report on State Responsibility*, 1979 2 Y.B. Int’l L. Comm’n 3, 35, U.N. Doc. A/CN.4/318 (discussing the actions of foreign states that required the consent of the sovereign in which the actions were to occur).

¹⁴⁵ See U.N. Charter, *supra* note 47, at art. 51; Taylor, *supra* note 139, at 7.

¹⁴⁶ Armin Rosen, *Here’s How the US is Justifying Its Syria Strikes Under International Law*, BUS. INSIDER (Sept. 23, 2014, 4:52 PM), <http://www.businessinsider.com/the-syria-strikes-and-international-law-2014-9>.

expanding the scope of the AUMF.¹⁴⁷ Yet, the United States may need to use force against terrorists after that time. When the United States withdraws from Afghanistan in 2016, critics may argue that the war with al-Qa'ida was always a subset of the war in Afghanistan and cannot be sustained without regular hostilities in Afghanistan.¹⁴⁸ Others may argue that even if a separate conflict did exist, it does not anymore because it lacks the requisite organization and intensity.¹⁴⁹ But the United States finds itself in a conflict with a relentless and capable enemy that, although weakened in many respects, appears to have no intention of ending the war it declared in 1996.¹⁵⁰

It appears that the war in Afghanistan will close, but that the war against al-Qa'ida will continue. In addition, the war against al-Qa'ida may have a new front and conventional battlefield against ISIL in Iraq and Syria. To the extent that al-Qa'ida is capable of conducting viable attacks, the United States will continue to be in a position to lawfully defend itself under the UN Charter.¹⁵¹ Moreover, even without Afghanistan as a center of hostilities, the conflict between the United States and al-Qa'ida will likely continue to meet the *Limaj* criteria for establishing "intensity" and "organization."¹⁵² As a legal matter, if the parties to the conflict continue to approach the situation as a war, and if the objective criteria continue to reflect the existence of a war, then the United States may choose to continue its campaign against al-Qa'ida and its co-belligerent affiliates and associated forces, as well as its successors, under a wartime framework. That conflict may also continue to take place in the territories where the parties to the conflict operate, subject to the limitations imposed by international law.

¹⁴⁷ President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

¹⁴⁸ See Michael A. Sheehan, *After Afghanistan: Our war with Al Qaeda Continues*, N.Y. DAILY NEWS (May 11, 2014), <http://www.nydailynews.com/opinion/afghanistan-war-al-qaeda-continues-article-1.1786743>.

¹⁴⁹ See *supra* Part I.B.

¹⁵⁰ Newsdesk, *supra* note 27.

¹⁵¹ See U.N. Charter, *supra* note 47, at art. 51.

¹⁵² See *supra* Part I.B.