



2013

Targeted Killings in Yemen and Somalia: Can the United States Target Low-Level Terrorists?

John Odle

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

Recommended Citation

John Odle, *Targeted Killings in Yemen and Somalia: Can the United States Target Low-Level Terrorists?*, 27 Emory Int'l L. Rev. 603 (2013).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol27/iss1/13>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

TARGETED KILLINGS IN YEMEN AND SOMALIA: CAN THE UNITED STATES TARGET LOW-LEVEL TERRORISTS?

ABSTRACT

Since the tragic events of September 11, 2001, the use of unmanned aerial vehicles—more commonly known as drones—to target individual terrorists has become an important tool for U.S. counterterrorism efforts abroad. However, to use force abroad the United States must meet the requirements of international law, particularly the international law of self-defense. The United States has claimed that it is in an armed conflict with Al Qaeda and its associated forces, which would have to be conducted under the law of armed conflict. This Comment looks at a specific aspect of targeting—the targeting of low-level members of terrorist organizations—under the international law of self-defense and the international law of armed conflict. This Comment argues that while the international law of armed conflict would allow the United States to target low-level terrorists in an armed conflict, outside an armed conflict, the United States can only target low-level terrorists who constitute an imminent threat to the United States under the international law of self-defense.

INTRODUCTION	605
I. BACKGROUND	608
A. <i>Targeted Killing and Low-Level Terrorist Organization Members</i>	608
1. <i>Definition of Targeted Killings</i>	609
2. <i>Low-Level Terrorist Organization Members</i>	610
B. <i>U.S. Policy Statements</i>	612
1. <i>The United States Claims It Is in an Armed Conflict with Al Qaeda and Its Affiliates</i>	613
2. <i>The U.S. Claims That It Is Acting in Self-Defense</i>	616
C. <i>Yemen and Somalia</i>	619
1. <i>Yemen and AQAP</i>	619
2. <i>Somalia and Al-Shabab</i>	622
D. <i>U.S. Drone Strikes</i>	624
1. <i>U.S. Strikes</i>	626
II. LAW GOVERNING TARGETED KILLINGS	629
A. <i>Jus ad Bellum</i>	630
1. <i>Consent</i>	630
2. <i>Self-Defense</i>	631
a. <i>“Armed Attack” in Article 51</i>	632
b. <i>Armed Attacks Committed by Non-State Actors</i>	633
c. <i>Anticipatory Self-Defense</i>	635
d. <i>Self-Defense Requirements: Proportionality, Necessity, and Immediacy</i>	636
B. <i>International Humanitarian Law</i>	639
1. <i>Non-International Armed Conflicts</i>	640
a. <i>Armed Conflicts</i>	641
b. <i>Ability to Target Fighters in a NIAC</i>	642
c. <i>Terrorist Organizations in a NIAC</i>	644
III. ANALYSIS	645
A. <i>Analysis Under State Consent</i>	645
B. <i>Analysis Under Self-Defense</i>	646
1. <i>Has AQAP or Al-Shabab Conducted an Armed Attack Against the U.S.?</i>	647
2. <i>Do Targeted Killings in Yemen and Somalia Satisfy the Requirements of Proportionality, Necessity, and Immediacy?</i>	651
C. <i>Analysis Under the Law of Armed Conflict</i>	655
CONCLUSION	659

INTRODUCTION

During the course of the first Obama administration, the United States “assembled . . . a highly efficient machine for the targeted killing of suspected terrorists.”¹ The United States has officially acknowledged that it targets and kills terrorists using unmanned aerial vehicles (“UAVs”).² On May 23, 2013, U.S. President Barack Obama, in a speech at the National Defense University, stated that “the United States has taken lethal, targeted action against al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones.”³

On September 16, 2011, *The New York Times* reported that Obama administration officials were debating “whether the administration can escalate attacks if it wants to against rank-and-file members of Al Qaeda in the Arabian Peninsula, based in Yemen, and the Somalia-based Shabab.”⁴ The *New York Times* article depicted the debate as being between the views of the General Counsel of the Department of Defense, Jeh C. Johnson, who argued that “if a group has aligned itself with Al Qaeda against Americans, the United States can take aim at any of its combatants, especially in a country that is unable or unwilling to suppress them,”⁵ and U.S. State Department Legal Adviser Harold Koh, who argued that “[t]o kill people elsewhere . . . the United States must be able to justify the act as necessary for its self-defense—meaning it should focus only on individuals plotting to attack the United States.”⁶ John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, in a speech before Harvard Law School on September 16, 2011, described the debate as the administration doing its due diligence in determining the legality

¹ Greg Miller, *Under Obama, a Drone Network: Anti-Terror Force Kills in Secret*, WASH. POST, Dec. 28, 2011, at A1.

² John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Wilson Center: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012) [hereinafter Brennan: Ethics and Efficacy], available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>) (“[I]n full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones.”).

³ Barack Obama, President of the United States, Remarks by the President at the National Defense University (May 23, 2013) [hereinafter Obama, Remarks at the National Defense University], transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

⁴ Charlie Savage, *At White House, Weighing Limits of Terror Fight*, N.Y. TIMES, Sept. 16, 2011, at A1.

⁵ *Id.*

⁶ *Id.*

of the use of force.⁷ The legal principles underlying this debate are addressed in the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (“U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations”), which President Obama approved in 2013.⁸ A particular area on contention in the debate was whether targeted killing operations could be launched without knowing the identity of the targets.⁹ It has been reported that the Obama’s counterterrorism policy is more restrictive in this regard to operations in Yemen and Somalia.¹⁰ This Comment will address whether mere membership in a terrorist organization is enough to justify the use of lethal force against an individual.

After Anwar al-Aulaqi, a U.S. citizen and a member of Al-Qaeda in the Arabian Peninsula (“AQAP”),¹¹ was killed by a drone strike in Yemen, a *Washington Post* blog posting on September 30, 2011 cited an unnamed White House official as saying:

The essence of the drone-attack policy . . . is that the U.S. will target Al Qaeda affiliates if they are linked to the core group and pose a threat to the U.S. homeland. Group [sic] such as the Al-Shabab in

⁷ See John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) [hereinafter Brennan, Strengthening Our Security], available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

⁸ See *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, WHITE HOUSE 1 (May 23, 2013), http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf [hereinafter *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*] (“[T]he President has approved . . . written policy standards and procedures that formalize and strengthen the Administration’s rigorous process for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities.”); see also Greg Miller, Ellen Nakashima & Karen DeYoung, *CIA Drone Strikes Will Get Pass in Counterterrorism ‘Playbook,’ Officials Say*, WASH. POST (Jan. 19, 2013), http://articles.washingtonpost.com/2013-01-19/world/36474007_1_drone-strikes-cia-director-playbook.

⁹ Miller, Nakashima & DeYoung, *supra* note 8 (“One of the main points of contention . . . was the issue of ‘signature strikes.’ The term refers to the CIA’s practice of approving strikes in Pakistan based on patterns of suspicious behavior—moving stockpiles of weapons, for example—even when the agency does not have clear intelligence about the identities of the targets.”). CIA signature strikes, it was reported, resulted in more “deaths of more senior terrorist operatives” than strikes where the identity of the target was known ahead of the strike. *Id.*

¹⁰ *Id.*

¹¹ Obama, Remarks at the National Defense University, *supra* note 3; see also *Times Topics: Anwar al-Awlaki*, N.Y. TIMES (Oct. 19, 2012), http://topics.nytimes.com/topics/reference/timestopics/people/a/anwar_al_awlaki/index.html.

Somalia, which have loose links with Al Qaeda, will be targeted only if they pose an external threat; if their battles are purely internal, drone attacks aren't appropriate.¹²

In 2012, it was reported that the United States targeted “both AQAP leaders and foot soldiers” in Yemen, as Yemeni military operations against AQAP increased.¹³ If the reports are accurate, such a change in targeting policy might be the result of the United States' increased support of the Yemeni government in 2012.

Whether the United States can kill low-level terrorists is a legal issue that invokes international law, international humanitarian law, international human rights law, and U.S. domestic law. This Comment will only address international law and international humanitarian law because the United States primarily justifies the use of force against terrorist organizations outside of Iraq, Afghanistan, and Pakistan under international law and international humanitarian law.¹⁴

Part I of this Comment will discuss the definition of targeted killings, terrorism, and terrorist organization members. It will then look at how the United States justifies targeted killings. It will also provide background on Yemen and Somalia and the terrorist organizations, AQAP and Al-Shabab, which the United States is targeting in Yemen and Somalia, respectively. Next it will look at recent targeted killings that the United States has reportedly carried out in Yemen and Somalia. Part II will address two of the legal justifications of targeted killings: (1) international law of self-defense; and (2) international humanitarian law. Part III will address whether the United States legally can kill a low-level terrorist as well as what legal regime the United States appears to have adopted based on its actions and statements.

If the United States is in an armed conflict with Al Qaeda's affiliates, it can legally target lower-level terrorists. If the United States is not in an armed conflict with Al Qaeda affiliates, under international law, the law surrounding the use of force for self-defense would prohibit targeting lower-level terrorists not carrying out an armed attack against the United States or targeting any

¹² David Ignatius, *The Killing of Anwar al-Aulaqi: The White House's Drone Attack Policy*, WASH. POST (Sept. 30, 2011, 11:56 AM), http://www.washingtonpost.com/blogs/post-partisan/post/the-killing-of-anwar-al-aulaqui-the-white-houses-drone-attack-policy/2011/09/30/gIQAT3HAAL_blog.html.

¹³ Bill Roggio, *US Drone Strike Kills Local AQAP Commander, 2 Fighters in Central Yemen*, LONG WAR J. (Jan. 3, 2013), http://www.longwarjournal.org/archives/2013/01/us_drone_strike_kill_19.php.

¹⁴ See *infra* Part I.B.

terrorist who does not pose a direct threat to the United States. However, international law would not disallow targeting high-level terrorists planning to attack the United States. Therefore, while the United States may have some justification to target high-level terrorists, it cannot rely on self-defense to justify using force in another state to target low-level terrorists unless the low-level members constitute an imminent threat to the United States.

I. BACKGROUND

This Part will begin by addressing the definitions of “targeted killings” and “low-level terrorist organization members” in Part I.A. Second, Part I.B will look at the policy statements U.S. officials have made to justify targeted killings. Third, Part I.C will discuss Yemen and Somalia and AQAP and Al-Shabab. Lastly, Part I.D will address the major instances of the United States using drones in Yemen and Somalia.

A. *Targeted Killing and Low-Level Terrorist Organization Members*

In the United States, terrorism can generally be defined as violent actions against civilians done with politically coercive intent.¹⁵ The United States’ counterterrorism strategy increasingly has relied on missiles launched from UAVs to target and kill individual terrorists.¹⁶ Part I.A will address the definition of targeted killings in the counterterrorism context and who constitutes a low-level terrorist.

¹⁵ The United States defines terrorism in the Foreign Relations Act for Fiscal Years 1988 and 1989 as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2) (2006). The United States defines international terrorism as:

[V]iolent acts . . . that are a violation of the criminal laws of the United States or of any State . . . [and] appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily outside the territorial jurisdiction of the United States

18 U.S.C. § 2331(1) (2006). The Military Commissions Act of 2006 offers a definition which focuses on acts showing wanton disregard of human life with the intent to coerce the conduct of a government or civilians. Military Commissions Act of 2006 § 950v, 10 U.S.C. 47a § 950(t)(24) (2006) (defining a terrorist as someone “who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct . . .”).

¹⁶ See *infra* Part I.D.

1. *Definition of Targeted Killings*

There is not yet a clear legal definition of targeted killings in international law.¹⁷ The term “targeted killings” can be used to describe both government action in the context of armed conflict¹⁸ and when a state is acting in self-defense.¹⁹ The U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions defined targeted killings as “the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.”²⁰ Other international law scholars, such as Stephen David, have used a more functional approach, defining targeted killings as the “intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval.”²¹

Critics of targeted killings have described them as either an assassination or an extrajudicial killing, in that lethal force is used against individuals without any legal process.²² Although the United States, by executive order, bans the use of assassination,²³ it does not consider targeted killings to be assassinations or unlawful extrajudicial killings if the targeted killings occur during an armed conflict or when the United States is acting in self-defense.²⁴ For the purposes

¹⁷ GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 538 (2010); Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/intelligence/targeted-killings/p9627> (last updated Feb. 8, 2013).

¹⁸ SOLIS, *supra* note 17, at 538 (defining targeted killings as “the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non-international armed conflict”).

¹⁹ See Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L 319, 323–24 (2004).

²⁰ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, para. 1, at 3, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter *Study on Targeted Killings*].

²¹ Stephen David, *Israel’s Policy of Targeted Killing*, 17 ETHICS & INT’L AFF. 111, 112 (2003).

²² See, e.g., Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, para. 39, Comm’n on Human Rights, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003) (by Asma Jahangir) [hereinafter *Questions of Disappearances and Summary Executions*] (“In the opinion of the Special Rapporteur, the attack in Yemen constitutes a clear case of extrajudicial killing.”).

²³ Exec. Order No. 12,333, 46 Fed. Reg. 59,952 (Dec. 8, 1981) (“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”).

²⁴ John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 69–70 (2011–2012) (“Killing an individual . . . is illegal when it is ‘assassination.’ But killing the enemy in wartime is legal.”); Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Address at the Annual Meeting of the

of this Comment, targeted killings will not be considered unlawful solely on the basis of whether they violate the law against assassinations or extrajudicial killings.

2. *Low-Level Terrorist Organization Members*

What distinguishes a low-level terrorist from a high-level terrorist? For the purposes of this Comment, the basic distinction is between the operational level—made up of those that plan the attacks—and the tactical level—made up of those who carry out the attacks—of terrorist organizations. Amos Guiora distinguishes between these two levels in the context of suicide bombings, writing that while foot soldiers may carry out an attack, “[t]he actual attack has been planned by terrorists who were responsible for the recruiting of the actual bomber, the preparation of the bombs, the identification of the target and the complicated logistics required to ensure that the suicide bomber is actually transported [to] . . . where the act will occur.”²⁵ During a speech before Harvard Law School, Assistant to the President for Homeland Security and Counterterrorism John Brennan also made a distinction between the two levels of terrorist threats in AQAP, based in Yemen, and Al-Shabab, based in Somalia. He stated that:

There are elements of [AQAP and Al-Shabab] that present a threat to [the United States]. . . . Sometimes those threats are because somebody is at the operational command, so the equivalent of a bin-Laden or somebody else, who is orchestrating that, engineering it, preparing materials, thinking about the plans. [Then] [t]here are the individuals, the operatives, the facilitators, [the ones] who are carrying [the threats] out, the suicide bombers.²⁶

While Brennan distinguishes between the operational/leadership level and those who facilitate and carry out the attacks, he does not say that the United States cannot or will not target terrorists on the lower level. Instead, he states

American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) [hereinafter Koh, Address at ASIL], available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (“[U]nder domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute ‘assassination.’”).

²⁵ Guiora, *supra* note 19, at 321.

²⁶ John O. Brennan, Ass’t to the President for Homeland Sec. & Counterterrorism, Remarks at Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws, (Sept. 16, 2011) [hereinafter Brennan, Q&A After Remarks at Harvard Law School], available at <http://www.lawfareblog.com/2011/09/video-of-john-brennans-speech/> (responding to a question from the audience after the speech).

the United States will “take actions to mitigate those threats that . . . terrorist groups and these individuals who are associated with Al Qaeda pose to [the United States].”²⁷ Thus, the assessment of which elements pose a threat to the United States is an important key to understanding whom the United States believes it is legally justified in targeting.

The United States also appears to distinguish between the elements of terrorist organizations that seek to commit international terrorism and those who have more local concerns. Brennan, in the same speech, made a distinction between the international-oriented and local elements of AQAP, saying:

[AQAP] is a group that carries out terrorist attacks, [and is also] involved in insurgency in the southern portion of Yemen. It has attacked our interests. It has tried to attack us here in the homeland, as well as [elsewhere]. There are elements of AQAP that are part-time members, some are tribal members who have aligned themselves with Al Qaeda for a particular period of time and for a particular purpose. Their agendas may be very local.²⁸

Brennan also made the same point with Al-Shabab:

Similarly, in Somalia, you have al-Shabab. There is a portion of al-Shabab that is trying to carry out attacks like they did in Uganda, against foreign interests, against Western interests, including against the United States. This is an element within Al-Shabab, which is a large collection of different tribal elements, warlords, groups that are engaged in an insurgency inside Somalia, which is basically a land that is ungoverned.²⁹

On May 23, 2013, the White House released a summary of the newly approved U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities that stated “there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.”³⁰ This language clearly illustrates the distinction between the

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2. On February 4, 2013, NBC News reported on a Department of Justice white paper discussing the legal reasoning of using lethal force in a foreign country against U.S. citizens who were also senior operational leaders of Al Qaeda. Michael Isikoff, *Justice Department Memo Reveals Legal Case*

operational level, referred to as senior operational leaders, and the tactical level, which is limited to “forces that organization *is using or intends to use* to conduct terrorist attacks.”³¹ Members of a terrorist organization that are being used to conduct terrorist attacks are specifically able to be targeted with lethal force. Thus, by inference, members of the organization *not being used* to conduct terrorist attacks are not targetable.

It was reported in 2011 that the United States determined³² it will not target fighters acting on a regional level³³—who are elements of a larger terrorist organization, but who are not engaged in international terrorism. This is likely because the United States does not consider those elements of the terrorist organizations as a part of its armed conflict with Al Qaeda.

B. U.S. Policy Statements

Brennan, in a speech introducing the U.S. National Strategy for Counterterrorism in 2011, stated that “the principal focus of . . . our

for Drone Strikes on Americans, OPEN CHANNEL (Feb. 4, 2013, 8:57 PM), http://openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans.

The white paper, which was posted on NBC’s website, states that “the United States retains its authority to use force against al-Qa’ida and associated forces outside the area of active hostilities when it targets a senior operational leader who is actively engaged in planning operations to kill Americans.” DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 3 (2011) [hereinafter DOJ WHITE PAPER], *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

³¹ *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2 (emphasis added). The summary lays out the following preconditions United States will take before using lethal force outside areas of active hostilities: 1) a legal basis for using force against senior operational leaders or forces of a terrorist organization being used to conduct terrorist attacks; 2) the target must pose a “continuing, imminent threat to U.S. persons”; and 3) near certainty that the target is present and non-combatants will not be injured or killed, after an assessment is made that capture is not feasible and that target is in a country where the government “cannot or will not effectively address the threat,” and no other reasonable alternatives exist. *Id.* The summary provided by the White House states that decisions on whether to use lethal force will look at “a broad analysis of an intended target’s *current and past role in plots threatening U.S. persons*; relevant intelligence information the individual could provide; and *the potential impact of the operation on ongoing terrorism plotting*, on the capabilities of terrorist organizations, on U.S. foreign relations, and on U.S. intelligence collection.” *Id.* at 3 (emphasis added).

³² Sudarsan Raghavan & Karen DeYoung, *Despite Death of Awlaki, U.S.–Yemen Relations Strained*, WASH. POST, Oct. 5, 2011, at A1 (stating that a senior U.S. official “drew a distinction between targeting individuals through counterterrorism measures and the more resource-intensive strategy of eliminating militant havens through counterinsurgency”).

³³ David Ignatius, *The Killing of Anwar al-Aulaqi: The White House’s Drone Attack Policy*, WASH. POST (Sept. 30, 2011), http://www.washingtonpost.com/blogs/post-partisan/post/the-killing-of-anwar-al-aulaqi-the-white-houses-drone-attack-policy/2011/09/30/gIQAT3HAAL_blog.html.

[counterterrorism] efforts since President Obama took office . . . is the network that poses the most direct and significant threat to the United States, and that is al-Qa'ida, its affiliates and its adherents. We use these terms deliberately."³⁴ The 2010 National Security Strategy states that the United States seeks to put pressure "wherever [Al Qaeda] or its terrorist affiliates attempt to establish a safe haven—as they have in Yemen [and] Somalia . . ."³⁵ On September 16, 2011, Brennan stated, that the United States' "ongoing armed conflict with [Al Qaeda] stems from [the] right—recognized under international law—to self defense."³⁶ The United States justifies its use of force against Al Qaeda as stemming from the international law of self-defense and continuing under international humanitarian law. The United States has also taken the position in the past that international human rights law does not apply to its use of force against Al Qaeda, in part, because it is engaged in an armed conflict.³⁷

1. The United States Claims It Is in an Armed Conflict with Al Qaeda and Its Affiliates

After the September 11, 2001, terrorist attacks carried out by Al Qaeda, former U.S. President George W. Bush declared in the days following that "[o]n September the 11th, enemies of freedom committed an act of war against our country."³⁸ President Bush declared that while the United States' "war on terror begins with Al Qaeda, . . . [i]t will not end until every terrorist group of global reach has been found, stopped and defeated."³⁹ President Bush

³⁴ John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at Paul H. Nitze School of Advanced International Studies: Ensuring al-Qa'ida's Demise (June 29, 2011) [hereinafter Brennan, Ensuring Al Qaeda's Demise], available at <http://www.whitehouse.gov/the-press-office/2011/06/29/remarks-john-o-brennan-assistant-president-homeland-security-and-counter>.

³⁵ WHITE HOUSE, NATIONAL SECURITY STRATEGY 21 (2010) [hereinafter 2010 NATIONAL SECURITY STRATEGY].

³⁶ Brennan, Strengthening Our Security, *supra* note 7.

³⁷ Econ. & Soc. Council, Letter dated April 14, 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva Addressed to the Secretariat of the Commission on Human Rights, Annex, at 4-5, U.N. Doc. E/CN.4/2003/G/80 (Apr. 22, 2003); see also Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came To Debate Whether There is a 'Legal Geography of War,'* FUTURE CHALLENGES—HOOVER INSTITUTION 8 (Apr. 2011), http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf ("The US government position rejects the frame that legal uses of force are necessarily regulated either as law enforcement under human rights law or as the law of armed conflict—and nothing else. . . . Not every resort to force in self-defense by a state is necessarily undertaken *through* the conduct of armed conflict.").

³⁸ George W. Bush, President of the United States, 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>.

³⁹ *Id.*

characterized the actions the United States would take as “defensive measures against terrorism.”⁴⁰ To that end, after September 11 the United States launched a “global war on terror,” in which the United States sent its military forces into Afghanistan and Iraq,⁴¹ and increased operations aimed at capturing and killing terrorists across the globe.⁴²

Critics have pointed out that a “global war on terror” is a misnomer because a country cannot be engaged in a war with a tactic.⁴³ Such a war could never end as long as the tactic was used. However, the 2010 U.S. National Security Strategy revised U.S. policy, stating that the United States is not engaged in a “global war against a tactic—terrorism or a religion,” but rather the United States is “at war with a specific network, al-Qa’ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners.”⁴⁴ U.S. policy has remained consistent in the three years subsequent to the 2010 National Security Strategy’s release. On May 23, 2013, President Obama characterized U.S. counterterrorism efforts as “a series of persistent, targeted efforts to dismantle specific networks of violent extremists . . .” instead of as a “boundless global war on terror.”⁴⁵

In response to the September 11 attacks, the United States passed the Authorization for Use of Military Force Act of 2001 (“AUMF”), which provides the President of United States the “authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”⁴⁶ The AUMF states that the September 11 attacks allow the United States to exercise its right to self-defense.⁴⁷ Even a decade removed

⁴⁰ *Id.*

⁴¹ See Amy Zalman & Jonathan Clarke, *The Global War on Terror: A Narrative in Need of a Rewrite*, 23 ETHICS & INT’L AFF. 101, 101 (2009) (“The war on terror narrative led directly to the invasions of Afghanistan and Iraq . . .”).

⁴² WHITE HOUSE OFFICE OF COMM’NS, POLICIES OF THE BUSH ADMINISTRATION: 2001–2009, at 1, 3–4 (2009).

⁴³ Guy Raz, *Defining the War on Terror*, NPR (Nov. 1, 2006), <http://www.npr.org/templates/story/story.php?storyId=6416780> (“It’s the possibility that terrorism cannot be conclusively defeated . . . that makes the phrase ‘war on terror’ a problematic term. ‘Terrorism is a tactic, . . . so it’s a bit like saying the Second World War was a war against Blitzkrieg.’” (quoting Michael Burleigh)).

⁴⁴ 2010 NATIONAL SECURITY STRATEGY, *supra* note 35, at 20.

⁴⁵ Obama, Remarks at the National Defense University, *supra* note 3 (internal quotation marks omitted).

⁴⁶ Authorization for Use of Military Force Act of 2001, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541); see also Obama, Remarks at the National Defense University, *supra* note 3 (“We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces.”).

⁴⁷ Authorization for Use of Military Force Act of 2001 § 2(a).

from the September 11 attacks, the AUMF provides the domestic authorization for the targeted killings of terrorists in Afghanistan and Pakistan.⁴⁸

Officials in the Obama administration have made similar claims that the United States is engaged in an armed conflict⁴⁹ with terrorist organizations that have attacked or attempted to attack the United States. On April 30, 2012, Brennan stated that “[a]s a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense.”⁵⁰ On March 25, 2010, Harold Koh said in a speech before the American Society of International Law that “in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.”⁵¹ Koh further stated that “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”⁵² In an armed conflict with a terrorist organization, it is arguable that a state would not be limited to targeting an area where that terrorist organization’s main base of operation was originally located.⁵³

⁴⁸ Koh, Address at ASIL, *supra* note 24.

⁴⁹ The use of the term “armed conflict” invokes international humanitarian law. *See infra* Part II.B.

⁵⁰ Brennan, Ethics and Efficacy, *supra* note 2; *see also* DOJ WHITE PAPER, *supra* note 30, at 2. Similarly, on March 4, 2012 in a speech before the Northwestern Law School, Attorney General Eric Holder stated that: “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.” Eric Holder, Att’y Gen., Attorney General Eric Holder Speaks at Northwestern University School of Law (Mar. 5, 2012) [hereinafter Holder, Northwestern Speech], *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

⁵¹ Koh, Address at ASIL, *supra* note 24; *accord* Holder, Northwestern Speech, *supra* note 50 (“[I]t is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces.”).

⁵² Koh, Address at ASIL, *supra* note 24.

⁵³ Holder, Northwestern Speech, *supra* note 50 (“[N]either Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country.”); *see also* DOJ WHITE PAPER, *supra* note 30, at 4 (“The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict”); Chris Whitlock, *After Yemen Attack, Little Comment*, WASH. POST, Oct. 23, 2011, at A3 (“The Obama administration has asserted the right to launch attacks against al-Qaeda members anywhere in the world, saying there is no difference between a battlefield in Afghanistan and a suspected terrorist hideout in Yemen or Somalia.”).

However, members of the Obama administration have also made statements indicating that the United States is limited to a smaller area than the entire world.⁵⁴ While the Obama administration deliberately extends its armed conflict with Al Qaeda to its affiliates, such as AQAP and Al-Shabab,⁵⁵ stating that “ultimately defeating al-Qa’ida also means addressing the serious threat posed by its affiliates and adherents operating outside South Asia,”⁵⁶ which “require[s] a focus on specific regions, including . . . the periphery—places like Yemen, Somalia, Iraq, and the Maghreb.”⁵⁷ Brennan made that position clear when he stated that “[t]here is nothing in international law that . . . prohibits us from using lethal force against our enemies outside an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.”⁵⁸ As this Comment will show, the United States claims it can strike terrorists in Yemen and Somalia.⁵⁹

2. *The U.S. Claims That It Is Acting in Self-Defense*

In a speech before the National Defense University, President Obama called the conflict with Al Qaeda and its associated forces “a war waged proportionally, in last resort, and in self-defense.”⁶⁰ President Obama made clear that the United States only “acts[s] against terrorists who pose a

⁵⁴ Holder, Northwestern Speech, *supra* note 50 (“This does not mean we can use military force whenever or wherever we want. International legal principles, including respect for another nation’s sovereignty, constrain our ability to act unilaterally.”); Jeh Johnson, Gen. Counsel of the Dep’t of Def., Address at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) [hereinafter Johnson, National Security Law], available at <http://ylsmediaserv.law.yale.edu/netcasts/2012/YLSThomasJohnson022212.mp3> (stating that while AUMF can be interpreted to apply to organizations “connected to the September 11th attacks—al Qaeda and the Taliban—without a geographic limitation,” he does not “believe we are in any ‘Global War on Terror’ . . .”); see also DOJ WHITE PAPER, *supra* note 30, at 5 (“If an operation . . . were to occur in a location where al-Qa’ida or an associated force has a significant and organized presence and from which al-Qa’ida or an associated for, including its senior operational leaders, plan attacks against U.S. persons and interests, the operation would be part of the non-international conflict between the United States and al-Qa’ida . . .”).

⁵⁵ See Holder, Northwestern Speech, *supra* note 50.

⁵⁶ Brennan, Ensuring Al Qaeda’s Demise, *supra* note 34 (“Nor would the destruction of its leadership mean the destruction of the al-Qa’ida network. AQAP remains the most operationally active affiliate in the network and poses a direct threat to the United States. From the territory it controls in Somalia, Al-Shabaab continues to call for strikes against the United States.”).

⁵⁷ *Id.*

⁵⁸ Brennan, Ethics and Efficacy, *supra* note 2; accord Holder, Northwestern Speech, *supra* note 50 (“But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.”).

⁵⁹ See *infra* Part I.C.

⁶⁰ Obama, Remarks at the National Defense University, *supra* note 3.

continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat.”⁶¹ The summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations makes the point that “not . . . all terrorists pose a continuing, imminent threat to U.S. persons” and reiterates that “if a terrorist does not pose such a threat, the United States will not use lethal force.”⁶² Under these standards, an assessment must be made “that no other reasonable alternatives exist to effectively address the threat to U.S. persons” before any lethal action can be taken.⁶³

The Obama administration has stressed its commitment that all operations involving the use of force against Al Qaeda and its associated forces be conducted in accordance with all applicable law.⁶⁴ Koh characterized the conflict with Al Qaeda as a “war of self-defense” in the same speech in which he stated that the conflict was an “armed conflict,” saying “[the United States] continue[s] to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States.”⁶⁵ Koh justified the use of force against Al Qaeda and its affiliates as “consistent with its inherent right to self-defense under international law.”⁶⁶ Koh also stated that “the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.”⁶⁷

Brennan also justified targeted killing as valid under the international law of self-defense⁶⁸ and specifically refers to Al Qaeda affiliates, such as AQAP and Al-Shabab as “direct threats.”⁶⁹ Brennan, however, made statements

⁶¹ *Id.*

⁶² *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2.

⁶³ *Id.*

⁶⁴ Koh, Address at ASIL, *supra* note 24; *see also Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2 (“[W]henver the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally – and on the way in which the United States can use force.”).

⁶⁵ Koh, Address at ASIL, *supra* note 24.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Brennan, *Ethics and Efficacy*, *supra* note 2.

⁶⁹ Brennan, *Ensuring Al Qaeda’s Demise*, *supra* note 34 (“Nor would the destruction of its leadership mean the destruction of the al-Qa’ida network. AQAP remains the most operationally active affiliate in the

stating the limiting those who could be targeted to those who actually pose a threat, stating, “We do not engage . . . in lethal action in order to eliminate every single member of al-Qaeda in the world. . . . Rather, we conduct targeted strikes because they are necessary to mitigate an *actual ongoing threat*, to stop plots, prevent future attacks, and to save American lives.”⁷⁰ Specifically, Brennan pointed to threats

posed by an individual who is an operational leader of al-Qaida or one of its associated forces[,] . . . [an] individual [who] is himself an operative, in the midst of actually training for or planning to carry out attacks against U.S. . . . interests[,] [o]r . . . [an] individual [who] possesses unique operation skills that are being leveraged in a planned attack.⁷¹

While the limitation may have practical considerations,⁷² the targeting limitation to those who pose an actual threat is also more in line with a justification under the international law of self-defense, as opposed to the international law of armed conflict, where any combatant can be targeted.⁷³ The U.S. definition of associated forces is critical to understanding the U.S. policy statements about targeted killing in this respect. On February 22, 2012, Jeh Johnson stated that the United States interprets the phrase “associated force” as having two characteristics: “(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.”⁷⁴

network and poses a direct threat to the United States. From the territory it controls in Somalia, Al-Shabaab continues to call for strikes against the United States.”).

⁷⁰ Brennan, *Ethics and Efficacy*, *supra* note 2 (emphasis added). Brennan characterized significant threats to the United States not as mere hypothetical threats or in other words, “the mere possibility that a member of al-Qa’ida might try to attack us at some point in the future.” *Id.*

⁷¹ *Id.*

⁷² It is likely to be more efficient and effective use of resources to focus on targeting leaders, apart from the legal justification. There is some research finding that “removing insurgent leaders increases governments’ chances of defeating insurgencies, reduces insurgent attacks, and diminishes overall levels of violence.” Patrick B. Johnston, *Does Decapitation Work?*, 36 INT’L SEC. J. 47, 77 (2012).

⁷³ See *infra* Part II. The Obama administration’s approach can be contrasted with the Bush administration, which justified targeted killings under international humanitarian law. See Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR, 346, 348 (Benjamin Wittes ed., 2009) (“[T]he Bush Administration . . . always sought to cast its killing targets as the killing of combatants in what it legally characterized as armed conflicts, governed by the laws of war . . .”).

⁷⁴ Johnson, *National Security Law*, *supra* note 54. Under the U.S. interpretation, “associated forces” would qualify as co-belligerents under the international law of armed conflict. DOJ WHITE PAPER, *supra* note 30, at 1 n.1 (citing *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74–75 (D.D.C. 2009)).

C. *Yemen and Somalia*

Al Qaeda has increased its affiliation with Yemen-based Al Qaeda in the Arabian Peninsula and Somalia-based Al-Shabab, both of which have controlled territory in countries with weak or no central government.⁷⁵ Regional affiliates of Al Qaeda like AQAP and Al-Shabab are increasingly becoming the drivers of global terrorism as the core of Al Qaeda has been severely weakened by the United States.⁷⁶

I. *Yemen and AQAP*

Yemen, which borders Saudi Arabia, Oman, the Red Sea, the Arabian Sea and the Gulf of Aden, is the poorest and most populous country in the Middle East.⁷⁷ Yemen's expanding population has put pressure on its declining water and oil resources, which account for a substantial percentage of its GDP.⁷⁸ In addition to its resources problems and poverty, Yemen is divided by tensions between its north and south, which had previously existed as two separate entities, only joining together as a united country in 1990.⁷⁹ Yemen's national government remained relatively weak as it struggled to unify north and south.⁸⁰

In 2011, a popular uprising began that would eventually lead to the demise of former Yemeni President Ali Abdullah Saleh's government.⁸¹ In September 2011, the United Nations Office of the High Commissioner for Human Rights released a report stating that the "Yemeni Government has lost effective control of parts of the country and the major cities, where armed opponents

⁷⁵ See Obama, Remarks at the National Defense University, *supra* note 3 ("Al Qaeda and its affiliates try to gain foothold in some of the most distant and unforgiving places on Earth. . . . In some of these places – such as parts of Somalia and Yemen – the state only has the most tenuous reach into the territory."); see also *infra* Part I.C.

⁷⁶ *Current and Projected National Security Threats to the United States: Hearing Before the Select Comm. on Intelligence*, 112th Cong. 13 (2012) [hereinafter *Current and Projected National Security Threats to the United States*] (statement of James Clapper, Director of National Intelligence) ("As long as [the United States] sustain[s] the pressure on it, we judge that core al-Qa'ida will be of largely symbolic importance to the global jihadist movement. But regional affiliates, and, to a lesser extent, small cells and individuals, will drive the global jihad agenda.").

⁷⁷ U.N. High Commissioner for Human Rights, *Rep. of the United Nations High Commissioner for Human Rights on the Visit by the Office of the High Commissioner for Human Rights to Yemen*, para. 8, U.N. Doc. A/HRC/18/21 (Sept. 16, 2011).

⁷⁸ CIA, *THE WORLD FACTBOOK 2011*, at 721 (2011).

⁷⁹ *U.S. Relations with Yemen*, U.S. DEP'T ST. (Aug. 21, 2012), <http://www.state.gov/r/pa/ei/bgn/35836.htm>.

⁸⁰ See *id.* In 1994, a short civil war broke out in Yemen as southern Yemen tried to secede. *Id.*

⁸¹ *Id.*

appear to have de-facto control.”⁸² In 2012, Saleh was replaced by Abdo Rabo Mansour Hadi.⁸³ Previously, Obama administration officials had “express[ed] little interest in the insurgency in Yemen” saying U.S. “counterterrorism efforts are limited to . . . a minority within al-Qaeda’s Yemeni affiliate that is focused on U.S. attacks.”⁸⁴ While the United States has continued to profess its desire to avoid getting involved too deeply in military conflicts in Yemen,⁸⁵ during Hadi’s government, the United States has increased its cooperation with the Yemeni government’s fight against AQAP, launching counterterrorism operations and supporting Yemeni-government forces.⁸⁶ The increased U.S. involvement in fighting AQAP in Yemen in 2012 and cooperation with the Hadi government is particularly important because it shows that United States is operating inside Yemen with the consent of the Yemeni government and may indicate that it is becoming involved in the conflict between Yemen and AQAP.

Al Qaeda in the Arabian Peninsula is considered one of the most active Al Qaeda affiliates.⁸⁷ AQAP is organized into distinct wings that plan operations, create propaganda, and provide a religious justification for terrorist attacks.⁸⁸ AQAP wings are “compartmentalized and hierarchical, with . . . a political leader who provides overall direction.”⁸⁹ The 2011 U.S. National Strategy for Counterterrorism states that the “United States faces a sustained threat from Yemen-based AQAP, which has shown the intent and capability to plan attacks

⁸² U.N. High Commissioner for Human Rights, *supra* note 77, para. 76, at 16.

⁸³ *U.S. Relations with Yemen*, *supra* note 79.

⁸⁴ Raghavan & DeYoung, *supra* note 32, at A1.

⁸⁵ Interview by Jake Tapper with Leon Panetta, U.S. Sec’y of Def. Dep’t of Def., in Washington, D.C. (May 27, 2012), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5041> (“[W]hat we’re targeting, the operations we’re conducting [in Yemen], require the kind of capabilities that don’t necessarily involve boots on the ground, but require the kind of capabilities that target those that we’re after who are threats to the United States.”).

⁸⁶ Eric Schmitt, *U.S. Teaming with New Yemen Government on Strategy to Combat Al Qaeda*, N.Y. TIMES, Feb. 27, 2012, at A6 (“The plan’s two-pronged strategy calls for the United States and Yemen to work together to kill or capture about two dozen of Al Qaeda’s most dangerous operatives, who are focused on attacking America and its interests. At the same time, the administration will work with Saudi Arabia and other Persian Gulf allies to train and equip Yemeni security forces to counter the organization’s wider threat to destabilize the country”); Obama, Remarks at the National Defense University, *supra* note 3 (“In Yemen, [the United States is] supporting security forces that have reclaimed territory from AQAP.”); see also JEREMY M. SHARP, CONG. RESEARCH SERV., RL34170, YEMEN: BACKGROUND AND U.S. RELATIONS 9–11 (2012); Dana Priest, *U.S. Playing a Key Role in Yemen Attacks*, WASH. POST, Jan. 27, 2010, at A1.

⁸⁷ SAMUEL LINDO ET AL., AL QAEDA IN THE ARABIAN PENINSULA 2 (2011).

⁸⁸ BARAK BARFI, YEMEN ON THE BRINK? 2 (2010) (“[AQAP] has a political leader who provides overall direction, a military chief to plan operational details, a propaganda wing that seeks to draw in recruits, and a religious branch that tries to justify attacks from a theological perspective while offering spiritual guidance.”).

⁸⁹ *Id.*

against the U.S. Homeland and U.S. partners.”⁹⁰ AQAP was created in 2009 when the Al Qaeda branches, Al Qaeda in Yemen, the branch that participated in the 2000 USS Cole bombing off the coast of Yemen,⁹¹ and Al Qaeda in Saudi Arabia merged.⁹²

AQAP has repeatedly attempted to attack U.S. airlines and flights bound to the United States. AQAP planned the attempted bombing of a U.S. airline on December 25, 2009,⁹³ and the attempted bombing of two cargo planes en route to the United States in 2010.⁹⁴ On January 19, 2010, the United States designated AQAP as a Foreign Terrorist Organization.⁹⁵ In May 2012, the United States foiled a bomb plot on board a flight bound towards the United States.⁹⁶

In addition to its international terrorist activities, AQAP has involved itself in local concerns in Yemen. A CSIS report states that AQAP has “exploited the political and economic grievances of local tribes against the Saleh regime, receiving funding, protection, and recruits in return for supporting tribal causes.”⁹⁷ AQAP was successful in establishing effective control of a string of towns in southern Yemen.⁹⁸ However, AQAP was displaced from the south

⁹⁰ WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM 14 (2011) [hereinafter 2011 COUNTERTERRORISM STRATEGY].

⁹¹ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 190 (2004) (“[O]n October 12, 2000, al Qaeda operatives in a small boat laden with explosives attacked a U.S. Navy destroyer, the USS *Cole*. The blast ripped a hole in the side of the *Cole*, killing 17 members of the ship’s crew and wounding at least 40.”).

⁹² LINDO ET AL., *supra* note 87, at 1.

⁹³ Adam Entous, *Attempted Bombing Spotlights al Qaeda Growth in Yemen*, REUTERS, Dec. 28, 2009, available at <http://www.reuters.com/article/2009/12/28/us-security-airline-intelligence-idUSTRE5BR0KU20091228>; see also Obama, Remarks at the National Defense University, *supra* note 3 (“[W]hile none of AQAP’s efforts approach the scale of 9/11, they have continued to plot acts of terror, like the attempt to blow up an airplane on Christmas Day in 2009.”).

⁹⁴ *Al Qaeda Yemen Wing Claims Parcel Plot, UPS Crash*, REUTERS, Nov. 25, 2010, available at <http://www.reuters.com/article/2010/11/05/us-usa-yemen-bomb-idUSTRE6A44PU20101105>.

⁹⁵ Press Release, U.S. Dep’t State, Designations of Al-Qa’ida in the Arabian Peninsula (AQAP) and Senior Leaders, (Jan. 19, 2010), <http://www.state.gov/r/pa/prs/ps/2010/01/135364.htm>; *Foreign Terrorist Organizations*, U.S. DEP’T ST. (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

⁹⁶ Scott Shane & Eric Schmitt, *Qaeda Foiled in Plot To Plant Redesigned Bomb on Plane*, U.S. Officials Say, N.Y. TIMES, May 8, 2012, at A12.

⁹⁷ LINDO ET AL., *supra* note 87, at 8.

⁹⁸ *Qaeda Fighters Agree To Pull Out of Yemen’s Rada*, AFP, Jan. 24, 2012, available at <http://www.google.com/hostednews/afp/article/ALeqM5h3InIAkIWxooV7jQz4nQla2UDkiQ?docId=CNG.2c5698bba19618937cd65fc66c5fc038.141>.

and “as a result . . . trickled back into the [Yemeni] capital and continue to fight asymmetrically.”⁹⁹

2. *Somalia and Al-Shabab*

Located on the Horn of Africa, straddling the Indian Ocean and the Gulf of Aden, Somalia has been subject to poor economic conditions and famine.¹⁰⁰ Since its collapse of its central government in 1991, Somalia “existed in a state of perpetual anarchy.”¹⁰¹ The anarchic conditions in Somalia created a haven for terrorist organizations and pirates.¹⁰² The lack of a central government led Somalia’s neighbors, Kenya and Ethiopia, to intervene in Somalia in 2011 and 2012, primarily to combat Al-Shabab.¹⁰³

While relatively few of the core al Qaeda members actually operate in Somalia,¹⁰⁴ Al-Shabab has “an al Qaeda presence throughout [its] organization.”¹⁰⁵ Al-Shabab is the radical former youth militia of the Islamic Courts Union, which was a collection of neighborhood Sharia courts attempting to restore order in Somalia and was later destroyed after Ethiopia invaded Somalia in 2006.¹⁰⁶ Al-Shabab was driven into southern Somalia where it began staging a guerrilla campaign against the Ethiopian military.¹⁰⁷ In 2008, Al-Shabab began expanding its connections to Al Qaeda and its affiliates.¹⁰⁸ In February 2012, Al-Shabab formally joined Al Qaeda.¹⁰⁹

Al-Shabab began portraying its efforts in Somalia as part of a larger struggle against the West, recruited foreign fighters and “incorporated a

⁹⁹ SHARP, *supra* note 86, at 12. The Hadi government has continued to wage offensives against militant strongholds, while AQAP has retaliated with bombings and assassinations. *Suicide Bomber Kills 11 Yemeni Soldiers*, REUTERS, Jan. 28, 2013, available at <http://www.reuters.com/article/2013/01/28/us-yemen-violence-idUSBRE90R0EQ20130128>.

¹⁰⁰ *Somalia*, U.S. DEP’T ST. (Apr. 20, 2012), <http://www.state.gov/outofdate/bgn/somalia/200320.htm>.

¹⁰¹ ROB WISE, *AL SHABAAB* 2 (2011).

¹⁰² John Davis, *Confronting Disaster: Terrorist Safe Havens in Africa*, in *TERRORISM IN AFRICA* 161–62 (John Davis ed., 2010).

¹⁰³ *Ethiopia Invades Somalia in Fight Against Al-Shabab*, NPR (Jan. 11, 2012), <http://www.npr.org/2012/01/11/145046988/ethiopia-invades-somalia-in-fight-against-al-shabab>.

¹⁰⁴ Davis, *supra* note 102, at 162.

¹⁰⁵ *Id.*

¹⁰⁶ WISE, *supra* note 101, at 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 4.

¹⁰⁹ 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.

number of [Al Qaeda] core members into its leadership.”¹¹⁰ The 2011 U.S. National Strategy for Counterterrorism states that Al Qaeda’s “presence within al-Shabab is increasingly leading that group to pose a regional threat with growing transregional ties to other al-Qa’ida affiliates and ambitions on the part of some to participate more actively in al-Qa’ida-inspired violence.”¹¹¹ In July 2010, Al-Shabab carried out its first transnational terrorist attack by bombing civilian targets in Uganda;¹¹² however, there is thought to be a split among the small foreign terrorist faction, which is focused on transnational terrorist attacks and the larger faction focused on Somalia.¹¹³

The future of Somalia appears to be improving. A central government appears to be coming together¹¹⁴ and Al-Shabab has lost much of the territory it held.¹¹⁵ The port city of Kismayo, an Al-Shabab stronghold, was captured in October 2012.¹¹⁶ In January 2013, the United States formally recognized the new Somali government.¹¹⁷ Al-Shabab, however, like AQAP, appears to be continuing its terrorist actions.¹¹⁸

D. U.S. Drone Strikes

One of the earliest known uses of an UAV to kill a suspected terrorist occurred in Yemen in 2002, when a suspect of the USS Cole bombing was killed along with five other suspected militants.¹¹⁹ During the Bush administration, the United States primarily restricted its use of drones, armed with Hellfire missiles, to Pakistan, Yemen, and Afghanistan, targeting militants

¹¹⁰ WISE, *supra* note 101, at 4.

¹¹¹ 2011 COUNTERTERRORISM STRATEGY, *supra* note 90, at 14–15.

¹¹² WISE, *supra* note 101, at 4.

¹¹³ *Id.* at 10.

¹¹⁴ *Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting*, U.S. DEP’T ST. (Jan. 17, 2013), <http://www.state.gov/secretary/rm/2013/01/202998.htm>.

¹¹⁵ *It’s Not Over Yet*, ECONOMIST, Oct. 6th–12th, 2012, at 61, 61 (“After a year-long retreat, the Shabab has now abandoned nearly all the towns it once held. Kismayo’s loss denies the Shabab much of its last big source of revenue and its main port of supply. Its fighters are now either hiding in cities controlled by forces of the African Union (AU) or scattered across the countryside.”); *see also* Obama, Remarks at the National Defense University, *supra* note 3 (“In Somalia, [the United States] helped a coalition of African nations push al-Shabaab out its strongholds.”).

¹¹⁶ *It’s Not Over Yet*, *supra* note 115, at 61.

¹¹⁷ *Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting*, *supra* note 114.

¹¹⁸ *See Al-Shabab Claims Responsibility for Mogadishu Bombing*, VOICE OF AM. (Jan. 29, 2013), <http://www.voanews.com/content/al-shabab-claims-responsibility-for-somalia-bombing/1593030.html>.

¹¹⁹ Chris Downes, ‘Targeted Killings’ in the Age of Terror: The Legality of the Yemen Strike, 9 J. CONF. & SECURITY L. 277, 277 (2004); David Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Killings or Legitimate Means of Self Defence?*, 6 EUR. J. INT’L L. 171, 171–72 (2005).

and terrorist groups.¹²⁰ The Obama administration, in turn, has “decisively embraced the drone, along with small-scale lightning raids like the one that killed Osama bin Laden . . . as the future of the fight against terrorist networks.”¹²¹ Former U.S. CIA Director Leon Panetta called the drone strikes “the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership.”¹²² By 2011, the Obama administration carried out five times as many drone strikes in Pakistan alone than the Bush administration carried out in eight years.¹²³ In contrast to drone strikes in Pakistan, drone strikes in Yemen and Somalia, carried out by either the military’s Joint Special Operations Command (“JSOC”) or the CIA,¹²⁴ must have presidential approval.¹²⁵ Drone strikes have been highly effective in taking out Al Qaeda leadership.¹²⁶ In his 2012 State of the Union Address, President Obama stated that “[f]rom Pakistan to Yemen, the al Qaeda operatives who remain are scrambling, knowing that they can’t escape the reach of the United States of America.”¹²⁷ A *Washington Post* article, citing unnamed U.S. officials, revealed that “intended targets [of drone strikes in Yemen] must be drawn from an approved list of key members of al-Qaeda in the Arabian Peninsula deemed by U.S. intelligence officials to be involved in planning attacks against the West.”¹²⁸ Permission to add new targets to the CIA and JSOC lists is reportedly more difficult to get.¹²⁹

¹²⁰ Peter Bergen & Katherine Tiedemann, *Washington’s Phantom War*, FOREIGN AFF., July/Aug. 2011, at 12, 12.

¹²¹ Scott Shane & Thom Shanker, *Yemen Strike Reflects U.S. Shift to Drones as Cheaper War Tool*, N.Y. TIMES, Oct. 2, 2011, at A1.

¹²² *U.S. Airstrikes in Pakistan Called ‘Very Effective,’* CNN (May 18, 2009), http://articles.cnn.com/2009-05-18/politics/cia.pakistan.airstrikes_1_qaeda-pakistani-airstrikes?_s=PM:POLITICS; see also Kenneth Anderson, *Predators over Pakistan*, WKLY. STANDARD, Mar. 8, 2010, at 26, 26, available at <http://www.weeklystandard.com/articles/predators-over-pakistan> (“[I]n dealing with terrorist groups in ungoverned places in the world, [the United States has] few good options besides UAVs.”).

¹²³ Scott Wilson, *No Safe Haven Anywhere in the World*, WASH. POST, Oct. 1, 2011, at A1.

¹²⁴ Miller, *supra* note 1.

¹²⁵ Karen DeYoung, *U.S. Air Attacks in Yemen Intensify*, WASH. POST, Sept. 17, 2011, at A1.

¹²⁶ Greg Miller, *As al-Qaeda Shrinks, Drone Targets Dwindle*, WASH. POST, Nov. 23, 2011, at A1.

¹²⁷ Barack Obama, President of the United States, State of the Union Address (Jan. 24, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

¹²⁸ DeYoung, *supra* note 125.

¹²⁹ Cf. Adam Entous, Julian E. Barnes & Margaret Coker, *U.S. Doubts Intelligence That Led to Yemen Strike*, WALL ST. J., Dec. 29, 2011, at A8 (reporting that after the United States supposedly killed a Yemeni deputy governor with a missile launch after relying on Yemeni intelligence in May 2010, “the Pentagon and the CIA moved to bolster their intelligence capabilities in the region, repositioning surveillance satellites and moving Predator drones to a secret base closer to Yemen”).

In September 2011, *The Washington Post* reported that “[t]he Obama administration [was] assembling a constellation of secret drone bases for counterterrorism operations in the Horn of Africa and the Arabian Peninsula as part of a newly aggressive campaign to attack al-Qaeda affiliates in Somalia and Yemen.”¹³⁰ It has been reported that the CIA created a counterterrorism unit called the Yemen–Somalia Department where “dozens of targeting specialists comb over raw intelligence and other data searching for clues to the whereabouts of al-Qaeda figures.”¹³¹ In a small flurry of strikes in 2010–2011, several leaders of AQAP and Al-Shabab were killed.¹³² The use of drones for surveillance has also apparently increased as “Somalis in central and southern Somalia regularly report drones flying overhead.”¹³³ By the end of 2011, the United States under the Obama administration is thought to have launched fifteen strikes against AQAP in Yemen and a “handful” of strikes against Al-Shabab in Somalia.¹³⁴ The next year saw a dramatic increase in the number of drone strikes, particularly in Yemen, where there were reportedly forty-two strikes carried out in 2012.¹³⁵ It has been reported that during that period the United States “has targeted both senior AQAP operatives who pose a direct threat to the US, and low-level fighters and local commanders who are battling the Yemeni government.”¹³⁶

¹³⁰ Craig Whitlock & Greg Miller, *U.S. Creating a Ring of Secret Drone Bases*, WASH. POST, Sept. 21, 2011, at A1.

¹³¹ Greg Miller, *Joint Strike is Latest Example of CIA–Military Convergence*, WASH. POST, Oct. 1, 2011, at A1.

¹³² Bill Roggio, *U.S. Predators Killed 5 AQAP Fighters in Southern Yemen*, LONG WAR J. (Oct. 6, 2011), http://www.longwarjournal.org/archives/2011/10/us_predators_kill_fi.php (“The US is known to have carried out at least 14 air and cruise missile strikes against al Qaeda in the Arabian Peninsula leaders and fighters since mid-December 2009.”).

¹³³ Abdi Sheikh & Feisal Omar, *Somalia’s Shabaab Says Air Strike Kills Foreign Fighter*, REUTERS, Jan. 21, 2012, available at <http://uk.reuters.com/article/2012/01/21/uk-somalia-kenya-idUKTRE80KORI20120121>.

¹³⁴ Miller, *supra* note 1, at A1.

¹³⁵ Bill Roggio & Bob Barry, *Charting the Data for US Air Strikes in Yemen, 2002–2013*, LONG WAR J., <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php> (last updated Jan. 23, 2013); *accord U.S. Drone Kills Six al Qaeda Members in Yemen: Sources*, REUTERS, Jan. 23, 2013, available at <http://www.reuters.com/article/2013/01/23/us-yemen-qaeda-idUSBRE90M1H520130123>. However, the number of reported strikes pales in comparison with the number to the drone strikes in Pakistan from 2008 to 2012. Karen DeYoung, *U.S. Airstrike Targets al-Qaeda in Yemen*, WASH. POST, Feb. 1, 2012, at A10. Compare Roggio & Barry, *supra* note 135, with Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004–2013*, LONG WAR J., <http://www.longwarjournal.org/pakistan-strikes.php> (last updated Jan. 10, 2013).

¹³⁶ Bill Roggio, *US Drones Strike Again in Yemen, Killing 6 AQAP Fighters Near Capital*, LONG WAR J. (Jan. 23, 2013), http://www.longwarjournal.org/archives/2013/01/us_drones_strike_aga_5.php.

1. U.S. Strikes

Compilations of reports of U.S. strikes in Yemen estimate that close to 200 AQAP members were killed in Yemen in 2012.¹³⁷ Yet only six senior AQAP members were reported to have been killed in 2012.¹³⁸ In April 2012, it was reported that the CIA has become increasingly involved in conducting drone strikes in Yemen, using signature strikes, a practice where the identity of the target might be unknown.¹³⁹ While the signature strikes in Yemen are not supposed to be targeted towards “low-level fighters,”¹⁴⁰ it is arguable that given the low numbers of senior-level AQAP reported to have been killed in relation to the number of AQAP members reported killed¹⁴¹ that the practice is not discriminating enough to target only high-level targets.

Prior to the reported CIA involvement, the practice in Yemen and Somalia seemed to be one that focused on high-level targets—and any low-level fighters that were killed seemed to be incidental to the primary target. For example, in 2011, the United States was reported to have launched several drone strikes primarily targeting AQAP and Al-Shabab leaders.¹⁴² While

¹³⁷ Roggio & Barry, *supra* note 135.

¹³⁸ Mark Mazzetti, *No. 2 Leader of Al Qaeda in Yemen is Killed*, N.Y. TIMES, Jan. 25, 2013, at A12; Bill Roggio, *US Drone Strikes Kill Jordanian, Yemeni AQAP Operatives*, LONG WAR J. (Dec. 24, 2012), http://www.longwarjournal.org/archives/2012/12/us_drone_strike_kill_17.php.

¹³⁹ Eric Schmitt, *Yemen to Face More Drones*, N.Y. TIMES, Apr. 26, 2012, at A1; *see also supra* note 8.

¹⁴⁰ Schmitt, *supra* note 139.

¹⁴¹ *See supra* notes 137–138 and accompanying text.

¹⁴² On January 31, 2012, close to a dozen AQAP members were killed in southern Yemen by a targeted strike by the U.S. military. DeYoung, *supra* note 125; *accord* Bill Roggio, *US Drone Strike Kills 11 AQAP Leaders, Fighters: Report*, LONG WAR J. (Jan. 31, 2012), http://www.longwarjournal.org/archives/2012/01/us_drone_strike_kill.php. Abdul Monem al-Fahtani, reportedly a mid-level AQAP leader who may have participated in the USS Cole bombing was said to have died in the strike. *Id.* On January 22, 2012, Bilal al-Barjawi, a Lebanese Al Qaeda senior member fighting alongside Al-Shabab, was killed by a drone strike while driving outside of Mogadishu. Mohammed Ibrahim, *U.S. Drone Strike Kills Foreign Commander Fighting for Militants in Somalia*, N.Y. TIMES, Jan. 23, 2012, at A4. According to news reports, Barjawi “was a close associate of Fazul Abdullah Mohammed, Al Qaeda’s leader in East Africa and the mastermind of the American Embassy bombings in Kenya and Tanzania.” *Id.* On November 1, 2011, *The Wall Street Journal* reported that United States was targeting Ibrahim Hassan Tali al-Asiri, a bomb maker for AQAP who designed the bomb for the Christmas Day attempted bombing in 2009. Siobhan Gorman, *U.S. Targets Bomb Maker in Yemen for Terror Ties*, WALL ST. J., Nov. 1, 2011, at A11. A U.S. official was quoted as saying that al-Asiri “is a greater operational threat than al-Awlaki.” *Id.* On October 14, 2011, a U.S. drone targeted the media chief of AQAP, Ibrahim al-Banna, in Yemen. Peter Finn & Greg Miller, *Family Condemns Death of Awlaki’s Son*, WASH. POST, Oct. 18, 2011, at A1; Chris Whitlock, *After Yemen Attack, Little Comment*, WASH. POST, Oct. 23, 2011, at A3 (citing two unnamed U.S. officials). Also killed in the strike was al-Aulaqi’s 16-year old son, but U.S. officials said he was not the target of the attack and was an unintended casualty. *Id.* On October 5, 2011, five AQAP fighters were killed by a drone strike in Yemen. Bill Roggio, *US Predators Kill 5 AQAP Fighters in Southern Yemen*, LONG WAR J. (Oct. 6, 2011), <http://www.longwarjournal.org/archives/2011/10/>

lower-level fighters may die in the attacks, the United States may not be targeting them specifically. This can be contrasted with the U.S. practice in Pakistan in 2011, where the use of drones was more prevalent and far more lower-level terrorists were killed than senior leaders.¹⁴³

One well-reported example of U.S. targeting practices was when a U.S. drone strike killed Anwar al-Aulaqi in 2011. On September 30, 2011, a U.S. drone, operated by the CIA over north Yemen, fired missiles at a car carrying al-Aulaqi, a member of AQAP and radical cleric who gave English-language online sermons exhorting others to attack the United States.¹⁴⁴ *The Washington Post* reported that the CIA used four drones to carry out the attack, one of which circled the target to ensure that “no civilians wandered into the cross hairs.”¹⁴⁵ Also killed in the attack on al-Aulaqi was Samir Khan, editor of the English-language jihadist magazine *Inspire*.¹⁴⁶ Although the CIA was not aware that Khan was with al-Aulaqi, an unnamed Obama administration official stated that Khan was considered “a belligerent whose presence near the target would not have stopped the attack.”¹⁴⁷

U.S. officials have confirmed that al-Aulaqi was the intended target of the strike.¹⁴⁸ Unlike al-Aulaqi, however, the United States has stated that it was not

us_predators_kill_fi.php#ixzz1c7b3OS5H. On September 21, 2011, four AQAP fighters were killed by an airstrike, thought to be carried out by U.S. military aircraft. Bill Roggio, *US Airstrikes Kill AQAP Fighters in Southern Yemen*, LONG WAR J. (Sept. 22, 2011), http://www.longwarjournal.org/archives/2011/09/us_airstrikes_kill_a.php.

The intended targeted is thought to have been Fahd al Quso, “a top operational commander of AQAP.” *Id.* In mid-June 2011, the United States targeted and wounded two senior leaders of al-Shabab with a drone-fired missile. *Id.* An unnamed U.S. official was quoted as saying that “[the Al-Shabab leaders] were planning operations outside of Somalia.” Greg Jaffe & Karen DeYoung, *U.S. Drone Targets Somali Militants Tied to al-Qaeda*, WASH. POST, June 30, 2011, at A1. On June 3, 2011, a U.S. airstrike in Yemen “killed Abu Ali al-Harithi, a midlevel Qaeda operative, and several other militant suspects . . .” Mark Mazzetti, *U.S. Is Intensifying a Secret Campaign of Yemen Airstrikes*, N.Y. TIMES, June 9, 2011, at A6.

¹⁴³ Bergen & Tiedemann, *supra* note 120, at 12 (“[L]ess than two percent of those killed by U.S. drone strikes in Pakistan have been described in reliable press accounts as leaders of al Qaeda or allied groups.”).

¹⁴⁴ Mark Mazzetti, Eric Schmitt & Robert Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

¹⁴⁵ Miller, *supra* note 1, at A1 (“Two Predators pointed lasers at Awlaki’s vehicle, and a third circled to make sure that no civilians wandered into the cross hairs. Reaper drones, which are larger than Predators and can carry more missiles, have become the main shooters in most strikes.”).

¹⁴⁶ Mazzetti, Schmitt & Worth, *supra* note 144, at A8.

¹⁴⁷ Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, at A9.

¹⁴⁸ Obama, Remarks at the National Defense University, *supra* note 3; *see also* Mark Hosenball, *Secret Panel Can Put Americans on ‘Kill List,’* REUTERS, Oct. 5, 2011, available at <http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005>. Al-Aulaqi had previously been the target of a drone strike that failed to kill him in May 2011, which was the first U.S. drone strike in Yemen since 2002. Mark Mazzetti, *American Drone Strike Was Aimed at Awlaki*, N.Y. TIMES, May 7, 2011, at A11.

specifically targeting Khan in the attack.¹⁴⁹ In a letter from U.S. Attorney General Eric Holder to Senator Patrick Leahy, Holder wrote that “high-level U.S. government officials appropriately concluded that al-Aulaqi posed a continuing and imminent threat of violent attack against the United States.”¹⁵⁰ Holder stated that “al-Aulaqi was not just a senior leader of AQAP—he was the group’s chief of external operations.”¹⁵¹ Holder wrote that the lethal operation against al-Aulaqi was justified because al-Aulaqi clearly intended to attack the United States, as he was “intimately involved in detailed planning and putting in place plots against U.S. persons,” including the attempted bombing on Christmas Day 2009 and the two attempted bombings in 2010 on cargo flights.¹⁵² President Obama stated that al-Aulaqi had “the lead role in planning and directing the efforts to murder innocent Americans.”¹⁵³

On February 10, 2012, the United States filed a sentencing memorandum in the Eastern District of Michigan in *United States v. Abdulmutallab*.¹⁵⁴ The government’s sentencing memorandum details interactions between Umar Farouk Abdulmutallab, otherwise known as the Christmas Day bomber, and AQAP leading up to the attempted bombing.¹⁵⁵ The government alleged that Abdulmutallab met with al-Aulaqi who gave Abdulmutallab operational instructions on how to carry out the attempted bombing.¹⁵⁶ While al-Aulaqi’s and Khan’s deaths were a major blow to AQAP propaganda efforts, they have had an uncertain impact on AQAP operations.¹⁵⁷

Although the United States’ legal justification in regard to the international law of armed conflict leaves open the possibility for targeting more than just high-level terrorists, the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations seem to limit lethal action to members of terrorist organizations who pose a direct threat—mainly senior operational

¹⁴⁹ Letter from Eric Holder, Att’y Gen., to Senator Patrick Leahy, Chairman, Comm. on the Judiciary 3 (May 22, 2013), available at <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2.

¹⁵² *Id.* at 2–3.

¹⁵³ Mazzetti, Schmitt, & Worth, *supra* note 144, at A1; accord Obama, Remarks at the National Defense University, *supra* note 3.

¹⁵⁴ Government’s Sentencing Memorandum, *United States v. Abdulmutallab*, No. 2:10-cr-20005 (E.D. Mich. Feb. 10, 2012).

¹⁵⁵ *Id.* app. at 12–14.

¹⁵⁶ *Id.* app. at 13–14.

¹⁵⁷ Jason Ukman, *Former U.S. Official: Al-Qaeda in Yemen Still Nimble*, WASH. POST (Jan. 17, 2012, 3:21 PM), http://www.washingtonpost.com/blogs/checkpoint-washington/post/former-cia-official-al-qaeda-in-yemen-still-nimble/2012/01/17/gIQAjD285P_blog.html.

leaders—under the international law of self-defense.¹⁵⁸ While the increase in reported drone strikes in 2012 seems to indicate that the United States moved to targeted strikes of both the terrorist and regional militant wings as it increased its engagement with the new Yemeni and Somali governments, President Obama’s counterterrorism speech in May 2013 indicates that the United States will seek to “discipline [its] thinking, . . . definitions, [and] actions” in the future.¹⁵⁹ Part II of this Comment will examine the law governing targeted killings.

II. LAW GOVERNING TARGETED KILLINGS

The United States’ use of drone strikes to kill members of terrorist organizations in another country must be justified under international law for the use of inter-state force and the law of armed conflict. Part II.A will address the law for the international use of force, which governs when one state may use force in the territory of another state, known as *jus ad bellum*.¹⁶⁰ Part II.B will address international humanitarian law, which governs how that state may use force during an armed conflict, known as *jus in bello*.¹⁶¹ If the use of force does not occur in the context of an armed conflict, human rights law can apply to the use of force.¹⁶² Some U.S. scholars argue, however, that the use of force can be governed solely under the international law of self-defense.¹⁶³

A. Jus ad Bellum

Jus ad bellum governs when a state may legally use force under international law. Article 2(4) of the U.N. Charter prohibits a state from using force against the territorial integrity or political independence of another

¹⁵⁸ See Finn, *supra* note 147, at A9; Brennan: Q&A After Remarks at Harvard Law School, *supra* note 26; *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2; see also *supra* Part I.B.

¹⁵⁹ Obama, Remarks at the National Defense University, *supra* note 3.

¹⁶⁰ *What Are Jus Ad Bellum and Jus in Bello?*, INT’L COMM. RED CROSS [ICRC] (Jan. 1, 2004), <http://www.icrc.org/eng/resources/documents/misc/5kzjjd.htm>.

¹⁶¹ *Id.*

¹⁶² See *Study on Targeted Killings*, *supra* note 20, para. 31, at 10–11.

¹⁶³ See, e.g., Anderson, *supra* note 73, *passim*. The view of “robust” self-defense is criticized for conflating the separate spheres of *jus ad bellum* and *jus in bello* to justify targeted killings without resorting to international humanitarian law or international human rights law. See, e.g., *Study on Targeted Killings*, *supra* note 20, paras. 42–43, at 13–14.

state.¹⁶⁴ Article 2(4) is usually interpreted “as outlawing any trans-boundary use of military force” against another state.¹⁶⁵ While Article 2(4) strongly prohibits the use of force that would violate the sovereignty of other states, there are recognized exceptions, such as self-defense.¹⁶⁶ In addition, there is the preliminary issue of whether there is state consent. If there is state consent to the use of force, then “a self-defense justification is not required” as to the state in which the force is being used.¹⁶⁷

I. Consent

Under customary international law, a state may consent to another state’s use of force within its own territory.¹⁶⁸ If a state consents to another state’s use of force against a non-state group within the consenting state’s territory, Article 2(4) does not apply because such a situation does not involve states using force against another state.¹⁶⁹ A state that consents to another state’s use of force in its territory does not write a blank check to the state using force. The state using force is bound to use only the force within the parameters of a state’s consent,¹⁷⁰ and the consenting state can withdraw its consent at any

¹⁶⁴ U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

¹⁶⁵ Sean Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 42 (2002).

¹⁶⁶ LINDSAY MOIR, REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, *JUS AD BELLUM* AND THE WAR ON TERROR 9 (2010). Another exception is force authorized by the U.N. Security Council. *Id.*; see also Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 889 (2002).

¹⁶⁷ Craig Martin, *Going Medieval: Targeted Killing, Self-Defense and the Jus ad Bellum Regime*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 223, 234 (Claire Finkelstein et al. eds., 2012).

¹⁶⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 20, Annex, U.N. Doc. A/RES/56/83, at 5 (Jan. 28, 2002) (“Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”).

¹⁶⁹ YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 119 (5th ed. 2011); Martin, *supra* note 167, at 234.

¹⁷⁰ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J.168, para. 52 (Dec. 19) (“Even had consent to the Ugandan military presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted.”); DINSTEIN, *supra* note 169, at 121.

time, absent a treaty.¹⁷¹ Consent must be given by competent state authorities who are able to give valid consent.¹⁷²

2. *Self-Defense*

If a state does not consent to another state using force in its territory, the state wishing to use force may be able to justify its use of force as self-defense. Article 51 of the U.N. Charter provides an exception for self-defense to Article 2(4)'s prohibition of the use of force.¹⁷³ Article 51 states, in part, that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”¹⁷⁴

The right of self-defense does not allow states to use force punitively,¹⁷⁵ but rather the force must be directed towards defending a state from armed attack.¹⁷⁶ The right of self-defense is also limited temporally—it can only be used until action is taken by the Security Council.¹⁷⁷ Article 51 has been the subject of long-simmering academic debate as to whether a state may use force before an armed attack occurs.¹⁷⁸ The September 11 attacks brought that debate to the forefront when President George W. Bush formulated a doctrine of preventative war based on the concept of anticipatory self-defense, otherwise known as the Bush Doctrine.¹⁷⁹

¹⁷¹ *Armed Activities on the Territory of the Congo*, 2005 I.C.J. para. 47 (“[C]onsent could thus be withdrawn at any time by the [consenting state], without further formalities being necessary.”); DINSTEIN, *supra* note 169, at 121.

¹⁷² Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 53 INT’L & COMP. L.Q. 211, 215 (2004).

¹⁷³ MOIR, *supra* note 166, at 9; Murphy, *supra* note 165, at 44.

¹⁷⁴ U.N. Charter art. 51.

¹⁷⁵ *Addendum to the Eighth Report on State Responsibility*, by Mr. Roberto Ago, [1980] 2 Y.B. Int’l L. Comm’n 13, para. 121, U.N. Doc. A/CN.4/318/Add.5–7 [hereinafter *Eighth Report on State Responsibility*]; O’Connell, *Lawful Self-Defense to Terrorism*, *supra* note 166, at 893 (“Lawful self-defense cannot be a mere act of punishment of revenge.”).

¹⁷⁶ See U.N. Charter art. 51.

¹⁷⁷ See *id.*; accord MOIR, *supra* note 166, at 10; see also TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE U.N. CHARTER 58 (2010).

¹⁷⁸ MOIR, *supra* note 166, at 12–14; see RUYS, *supra* note 177, at 58.

¹⁷⁹ WHITE HOUSE, NATIONAL SECURITY STRATEGY 6 (2002) [hereinafter 2002 NATIONAL SECURITY STRATEGY] (“[The United States] will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.”); DINSTEIN, *supra* note 169, at 194–95.

a. “Armed Attack” in Article 51

Under Article 51, a state acting in self-defense may use force when an armed attack occurs.¹⁸⁰ While “armed attack” is not defined in the U.N. Charter, it does not have the same definition as the “use of force” prohibited in Article 2(4).¹⁸¹ Thus, not all uses of force against a state are necessarily armed attacks.¹⁸² In *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice (“ICJ”) looked to international customary law to set a threshold for what constituted an armed attack.¹⁸³ While the ICJ did not explicitly define the threshold level,¹⁸⁴ it did find that the “most grave forms of the use of force” were clearly armed attacks, while less grave forms were not.¹⁸⁵ For example, the ICJ stated in *Nicaragua* that “assistance to rebels in the form of the provision of weapons or logistical or other support” was a use of force, but did not rise to the level of an armed attack.¹⁸⁶ The precise level of gravity necessary to justify the use of force is subject to debate. Yoram Dinstein, an international law scholar, states “an armed attack presupposes a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties, or considerable destruction of property.”¹⁸⁷

To determine whether the threshold has been reached for an armed attack, some argue in favor of the “accumulation of events” method, where several smaller attacks against a state, which individually would not rise to the level of an armed attack, can, taken together as a chain of events, pass the requisite

¹⁸⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 249 (June 27) (“In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack.”); RUY, *supra* note 177, at 127. The question of whether a state can use justified and proportionate use of force to counter uses of forces which are not considered armed attacks is not resolved by the ICJ. See RUY, *supra* note 177, at 140–41; see also *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, para. 195.

¹⁸¹ DINSTEIN, *supra* note 169, at 207–08.

¹⁸² *Id.* (stating that a state may use force against another without that use of force being an armed attack).

¹⁸³ *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, para. 191.

¹⁸⁴ RUY, *supra* note 177, at 140.

¹⁸⁵ *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, para. 191 (“As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”); RUY, *supra* note 177, at 140.

¹⁸⁶ *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, para.195; RUY, *supra* note 177, at 140.

¹⁸⁷ DINSTEIN, *supra* note 169, at 208.

threshold to constitute an armed attack.¹⁸⁸ This chain of related attacks still retains the temporal restrictions of self-defense,¹⁸⁹ so the window to respond is not held open indefinitely. This theory would allow a state that is being bled with “a thousand cuts” strategy or that is experiencing a crescendo of attacks to legally respond with force before it is too late.¹⁹⁰

b. Armed Attacks Committed by Non-State Actors

Some international law scholars argue that the term “armed attack” in Article 51 was intended to limit the right of self-defense to armed attacks by states.¹⁹¹ Professor Mary Ellen O’Connell wrote in 2002 that “[e]stablishing the need for taking defensive action can only justify fighting on the territory of another state if that state is responsible for the on-going attacks.”¹⁹² In 2004, the ICJ also took such a position in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, when it found that Article 51 was inapplicable because Israel did not claim that terrorist attacks against it were “imputable to a foreign State.”¹⁹³ Under this view, self-defense could not be used against terrorists in another state when that state did not have a connection with the terrorist group.¹⁹⁴

However, others have argued that self-defense can be used against non-state actors because Article 51 does not explicitly state that an armed attack can only be conducted by state actors.¹⁹⁵ The lack of a specific inter-state restriction of armed attacks in Article 51 is more apparent when contrasted with Article 2(4), which clearly restricts the use of force between two states.¹⁹⁶ Because an armed attack is not explicitly restricted to be carried out by states,

¹⁸⁸ JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 146 (2004); MOIR, *supra* note 166, at 122; RUYS, *supra* note 177, at 168 (“[I]ncidents that would in themselves merely constitute ‘less grave uses of force’, can, when forming part of a chain of events, qualitatively transform into an ‘armed attack’ triggering the right of self-defence.”).

¹⁸⁹ See GARDAM, *supra* note 188, at 167 (“A response that may initially satisfy the requirements of proportionality may lose that character if it continues past the point in time that is necessary to deal effectively with the armed attack . . .”).

¹⁹⁰ See RUYS, *supra* note 177, at 168.

¹⁹¹ MYRA WILLIAMSON, TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE IN AFGHANISTAN IN 2001, at 108–09 (2009); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 139 (July 9).

¹⁹² O’Connell, *supra* note 166, at 899.

¹⁹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, para. 139.

¹⁹⁴ O’Connell, *supra* note 166, at 902; see MOIR, *supra* note 166, at 61.

¹⁹⁵ DINSTEIN, *supra* note 169, at 224; Murphy, *supra* note 165, at 50.

¹⁹⁶ Murphy, *supra* note 165, at 50.

whether non-state actors can conduct armed attacks on states is governed by customary international law.¹⁹⁷

The September 11 attacks reignited the argument and many scholars now agree that non-state actors, such as terrorist groups, can commit an armed attack that triggers Article 51.¹⁹⁸ The scale of the September 11 attacks, which resulted in a high civilian death toll and extensive property damage, was arguably grave enough to rise to the level of an armed attack.¹⁹⁹ After the September 11 terrorist attacks, the international community has increasingly accepted that non-state actors can commit armed attacks that are unattributable to any state.²⁰⁰ U.N. Security Council Resolution 1373 condemned the September 11 attacks and reaffirmed the right to self-defense and the “need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”²⁰¹ In 2005, in *Armed Activities on the Territory of the Congo*, ICJ Judge Bruno Simma wrote a separate opinion criticizing the ICJ’s adherence to the requirement that armed attacks be attributable to a territorial state, stating that in the wake of September 11, “claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community.”²⁰² Judge Simma reasoned that “if armed attacks are carried out by irregular forces from [a state having almost complete absence of governmental authority in its territory] against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State.”²⁰³ In summary, the weight of international opinion has swung increasingly towards the view that non-state actors, such as Al Qaeda, can commit armed attack on states that triggers an Article 51 response.

¹⁹⁷ MOIR, *supra* note 166, at 22–25.

¹⁹⁸ See, e.g., DINSTEIN, *supra* note 169, at 227; Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, MARSHALL CENTER PAPERS, Nov. 2002, at 25.

¹⁹⁹ DINSTEIN, *supra* note 169, at 227; Murphy, *supra* note 165, at 47.

²⁰⁰ DINSTEIN, *supra* note 169, at 227–28 (“[E]ven those who regard as problematic the categorization of terrorist action *qua* an armed attack (within the meaning of Article 51) are compelled to concede that the response of the international community to 9/11 has left its mark on customary law.”).

²⁰¹ S.C. Res. 1373, U.N. SCOR, 56th Year, U.N. Doc. S/RES/1373, at 1 (Sept. 28, 2001).

²⁰² *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, para. 11 (Dec. 19) (Simma, J., separate opinion).

²⁰³ *Id.* para. 12.

c. *Anticipatory Self-Defense*

The United States asserted its right to exercise self-defense against terrorist groups before such groups could attack the United States again in its 2002 National Security Strategy.²⁰⁴ While it is clear that there is at least a right for a state to respond to an armed attack with force, there is no strong consensus on whether the state can strike first to prevent an armed attack from occurring.²⁰⁵ Striking before another actor has actually launched an attack is known as anticipatory self-defense.²⁰⁶ Arguably, a strict reading of the text of Article 51 appears to prohibit any kind of anticipatory self-defense because self-defense can only be invoked “if an armed attack occurs,” suggesting that a state may only respond to an armed attack that has already occurred.²⁰⁷ However, a strict interpretation of Article 51 in this respect would require a state to allow an armed attack to be completed before responding, a naturally unappealing thought for almost all state actors.²⁰⁸

A looser interpretation of Article 51 would be that a state does not have to wait until an armed attack has occurred before using self-defense because Article 51 incorporates international customary law.²⁰⁹ Proponents of this view look to the Caroline doctrine, which was first articulated by U.S. Secretary of State Daniel Webster in 1841, as part of existing international customary law.²¹⁰ The Caroline doctrine holds that a state using force must first show “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”²¹¹ However, under the Bush doctrine²¹² the

²⁰⁴ 2002 NATIONAL SECURITY STRATEGY, *supra* note 179, at 6 (“[The United States] will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.”).

²⁰⁵ David Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT’L L. 523, 579 (2009).

²⁰⁶ DINSTEIN, *supra* note 169, at 194. Anticipatory force is not the same as, but has a similar meaning to, preventive or preemptive force. All three terms refer to force responding to an attack that has not yet occurred, but is close to occurring. *See id.*; MARK TOTTEN, *FIRST STRIKE: AMERICA, TERRORISM, AND MORAL TRADITION* 6 (2010).

²⁰⁷ TOTTEN, *supra* note 206, at 23; *see also Study on Targeted Killings*, *supra* note 20, para. 45, at 15.

²⁰⁸ *See* DINSTEIN, *supra* note 169, at 204.

²⁰⁹ *See* MOIR, *supra* note 166, at 12–15.

²¹⁰ Proponents of a less restrictive view of Article 51 argue that the U.N. Charter incorporated international customary law on self-defense existing at the time. TOTTEN, *supra* note 206, at 23.

²¹¹ *British–American Diplomacy: The Caroline Case*, AVALON PROJECT, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Feb. 19, 2013).

²¹² 2002 NATIONAL SECURITY STRATEGY, *supra* note 179, at 15 (“The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend

time requirement articulated in the Caroline doctrine would be lengthened so that the United States would be able to use force to respond to possible threats of terrorist attacks rather than planned terrorist attacks.²¹³

A middle position called interceptive self-defense has been put forward by scholars such as Dinstein, where a state can use force to stop an armed attack that is in progress.²¹⁴ An armed attack is in progress when it has moved beyond mere threat into an irrevocable act.²¹⁵ This approach acknowledges that preventing a state from using force to stop an armed attack is unreasonable, but also limits the time period of when a state may use self-defense to the early stages of an armed attack that has moved beyond mere threat.²¹⁶

d. Self-Defense Requirements: Proportionality, Necessity and Immediacy

Although the U.N. Charter does not include the principles of proportionality, necessity, or immediacy in Article 51, under customary international law, these principles must be adhered to when using force under the right to self-defense.²¹⁷ The ICJ noted in *Nicaragua* that the state-parties before it did not dispute the fact that a lawful response to an armed attack “depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”²¹⁸ The requirements of necessity, proportionality, and immediacy apply to self-defense in response to an armed attack, as well as to any kind of anticipatory self-defense.²¹⁹

Proportionality, in the self-defense context, is the measure of the amount of force that is reasonably necessary to achieve self-defense.²²⁰ It is generally accepted that “there is no need for the defensive action to be restricted to exactly the same weapons or the same number of armed forces as the armed

ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.”).

²¹³ *Study on Targeted Killings*, *supra* note 20, para. 45, at 15; DINSTEIN, *supra* note 169, at 195.

²¹⁴ DINSTEIN, *supra* note 169, at 203–04.

²¹⁵ *Id.* at 204–05.

²¹⁶ *Id.* at 206.

²¹⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, paras. 176, 194 (June 27); DINSTEIN, *supra* note 169, at 230–31.

²¹⁸ *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, para. 194.

²¹⁹ See HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 162–63 (2005) (“These factors, which (unlike the armed attack requirement) are prospective as opposed to retrospective, are critical in distinguishing self defence from reprisals.”).

²²⁰ DINSTEIN, *supra* note 169, at 232–33; TOTTEN, *supra* note 206, at 28–29; Sadoff, *supra* note 205, at 527.

attack.”²²¹ Proportionality in self-defense does not concern the “forms, substance and strength” of the state response,²²² but rather, requires that the amount of force used must be limited to the amount necessary to achieve the object of repelling an attack.²²³ For self-defense in response to an imminent armed attack, the amount of force used has to be proportional to threat posed by the armed attack.²²⁴

Necessity in the self-defense context means that a state may only use force if there are no other means available²²⁵ and the use of force is required to halt an armed attack.²²⁶ If a state had “been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force.”²²⁷ Thus, it is only necessary to use force when “peaceful means have reasonably been exhausted.”²²⁸

The exhaustion of peaceful means requirement is particularly important for using self-defense when an armed attack has not yet been fully carried out.²²⁹ For example, in 1981 Israel was condemned by the U.N. Security Council for bombing an Iraqi nuclear reactor that Israel claimed would construct nuclear weapons.²³⁰ Achieving a peaceful result, such as capture of a terrorist, is considerably more difficult when a non-state actor is located in a failed state or a state with a weak government.²³¹ If a member of a terrorist organization is located in a state that has the law enforcement capacity to apprehend that terrorist and is willing to do so, then the necessity requirement is not satisfied.²³² But when a terrorist group is located in a state that is unable or

²²¹ RUY, *supra* note 177, at 111.

²²² *Eighth Report on State Responsibility*, *supra* note 175, para. 121.

²²³ See TOTTE, *supra* note 206, at 172.

²²⁴ Downes, *supra* note 119, at 288; Sadoff, *supra* note 205, at 527.

²²⁵ *Eighth Report on State Responsibility*, *supra* note 175, para. 120; RUY, *supra* note 177, at 95; TOTTE, *supra* note 206, at 27.

²²⁶ DINSTEIN, *supra* note 169, at 232.

²²⁷ *Eighth Report on State Responsibility*, *supra* note 175, para. 120.

²²⁸ RUY, *supra* note 177, at 95.

²²⁹ *Id.*

²³⁰ See S.C. Res. 487, para. 1, U.N. SCOR, 36th Year, U.N. Doc. S/RES/487, at 10 (June 19, 1981); W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense*, 15 VAND. J. TRANSNAT'L L. 417, 418, 428 (1982) (“In the circumstances claimed by Israel, it had ample time to present a complaint to the Security Council, which would not be expected to react with indifference to a nuclear menace.”).

²³¹ See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in International Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN LAW 3, 26 (2010).

²³² *Id.*

unwilling to prevent terrorists from attacking other states, the necessity requirement is more readily satisfied because exhaustion of peaceful means is easier to demonstrate.²³³

The requirement of necessity also involves the concept of immediacy in its formulation because force can only be used as a last resort when the attack is imminent.²³⁴ It is difficult to determine when an attack is imminent,²³⁵ but traditionally an imminent attack connoted a visual mobilization of armed forces.²³⁶ This narrow interpretation of imminence has been criticized by states because waiting until the last moment to stop an attack from occurring, increases the likelihood of the attack succeeding.²³⁷

A looser interpretation of the requirement of immediacy, as discussed above, appeared in the 2002 U.S. National Security Strategy, where the United States declared that it would “no longer solely rely on a reactive posture” but would instead “adapt the concept of imminent threat to the capabilities and objectives of [rogue states and terrorist organizations].”²³⁸ The Bush doctrine stated that the United States could use force preemptively “even if uncertainty remains as to the time and place of the enemy’s attack.”²³⁹ Under an interceptive self-defense view, a state can only use force when there is an actual armed attack developing, and not just on the basis of “assumptions, expectations or fear” of threats of an armed attack.²⁴⁰ Thus, under the middle position of interceptive self-defense the immediacy is tighter than anticipatory defense, but looser than the traditional view.

Scholars who advocate the theory of accumulation of events say that it applies particularly well to attacks staged by terrorist organizations, which are usually part of a series of attacks on a country.²⁴¹ Accumulation of events stretches the imminence requirement when the attacks are close enough in time because “[o]nce the first of the related attacks has been launched, the question becomes whether the victim State has sufficient reliable evidence to conclude that further attacks are likely, not whether those further attacks are themselves

²³³ DINSTEIN, *supra* note 169, at 231–32; Schmitt, *supra* note 184, at 33.

²³⁴ TOTTEEN, *supra* note 206, at 27, 173.

²³⁵ Schmitt, *supra* note 198, at 22.

²³⁶ See TOTTEEN, *supra* note 206, at 28.

²³⁷ *Id.* at 178.

²³⁸ 2002 NATIONAL SECURITY STRATEGY, *supra* note 179, at 15.

²³⁹ *Id.*

²⁴⁰ DINSTEIN, *supra* note 169, at 206.

²⁴¹ See, e.g., Schmitt, *supra* note 198, at 31.

imminent.”²⁴² Thus, the entire group of attacks (including future ones) is treated as a single armed attack for the purposes of the immediacy requirement.²⁴³

B. *International Humanitarian Law*

Jus in bello, also known as international humanitarian law, the law of armed conflict, or the law of war, applies when a state engages in an armed conflict. International humanitarian law is governed by the Geneva Conventions and customary international law. Unlike *jus ad bellum*, the law of armed conflict is not concerned with the legitimacy of using force against another state or armed group.²⁴⁴ Instead, international humanitarian law prescribes the methods in which states or other belligerents can use force in an armed conflict. International humanitarian law applies equally to all parties to an armed conflict regardless of whether a state formally declares war, a state is acting under United Nations authorization, or a state legally uses force as self-defense under Article 51.²⁴⁵ The main directive of international humanitarian law is “to minimize human suffering without undermining the effectiveness of military operations.”²⁴⁶

The implication of operating under the law of war “is that the US may employ military force aggressively against [a terrorist organization] with the purpose of destroying it, and not solely to pre-empt planned attacks.”²⁴⁷ If, on the other hand, targeted killings of terrorists by the United States do not occur in an armed conflict, they can only be justified under some other legal rubric such as international human rights law, where deadly force can only be used in extreme circumstances.²⁴⁸ Additionally, international humanitarian law allows for the targeting of individuals based on their status, as well as their participation in the hostilities. When status-based targeting is allowed, there is

²⁴² *Id.* at 25.

²⁴³ DINSTEIN, *supra* note 169, at 206–07.

²⁴⁴ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 3 (2d ed. 2010).

²⁴⁵ *Id.* at 3–4.

²⁴⁶ *Id.* at 5.

²⁴⁷ AVERY PLAW, *TARGETING TERRORISTS: A LICENSE TO KILL?* 137 (2008).

²⁴⁸ See *The Relevance of IHL in the Context of Terrorism*, ICRC (Jan. 1, 2011), <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> (“When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern.”).

no distinction between the ranks of individuals fighting in an armed conflict.²⁴⁹ Thus, any distinction between targeting high-level terrorists, who plan operations, and low-level terrorists, the foot-soldiers carry them out, is not dispositive under the law of war, provided that the terrorists can be targeted based on their status and are not classified as civilians.

1. *Non-International Armed Conflicts*

If international humanitarian law applies to the targeted killings of terrorist organization members, it would only apply in non-international armed conflicts (“NIAC”). An armed conflict between two states is termed an international armed conflict (“IAC”) and is governed by Common Article II of the Geneva Conventions.²⁵⁰ An armed conflict against a non-state actor such as a terrorist organization cannot be an IAC under the Common Article II of the Geneva Convention because international armed conflicts only exist between states.²⁵¹

Armed conflicts that are not IACs are classified as non-international armed conflicts. Common Article III of the Geneva Convention covers “armed conflict[s] not of an international character occurring in the territory of [a state]” and applies to each party in the conflict.²⁵² A NIAC arises if there is armed conflict within a state’s territory and one of the sides is not the armed force of another state.²⁵³ NIACs have specific protections outlined in Common

²⁴⁹ See MELZER, *supra* note 248, at 317 (“State practice suggests that, as far as the principle of distinction is concerned, members of organized armed groups belonging to a non-State party to the conflict are not regarded as civilians, but as approximately equivalent to State armed forces.”); Chesney, *supra* note 231, at 40–41 (“[A] combatant lacks immunity from targeting and thus, unlike a civilian, can be targeted without reference to whether he or she is directly participating in hostilities at the time.”).

²⁵⁰ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention Relative to the Protection of Civilian Persons in Time of War] (“[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more [states] . . .”).

²⁵¹ SOLIS, *supra* note 17, at 157 (“Terrorist attacks, no matter how organized the group violent or protracted the fighting, cannot be considered an international armed conflict [because] . . . [t]errorist attacks are conducted by nonstates.”).

²⁵² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 250, art. 3. Article 3 operates as a mini-Geneva Convention requiring all persons not taking active part in the hostilities to be treated humanely and prohibiting: “(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.*

²⁵³ SOLIS, *supra* note 17, at 152.

Article III, as the full force of the Geneva Conventions does not apply.²⁵⁴ NIACs have less protection for non-state belligerents because states do not wish to give organized non-state armed groups fighting against the government legitimacy by recognizing them as equal parties.²⁵⁵ When looking at NIACs, the first step is to determine if an armed conflict is occurring. An armed conflict must be distinguished from events like riots or crime because international humanitarian law only applies if there is an armed conflict.

a. Armed Conflicts

Armed conflicts “begin[] not with the attack, but with the counter-attack.”²⁵⁶ While there is not a precise definition of armed conflict in the Geneva Conventions, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) “articulated a basis for differentiating common Article 3 armed conflicts from other forms of internal violence,” which is considered by most as customary international law.²⁵⁷ In *Prosecutor v. Tadic*, the ICTY Appeals Chamber stated that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²⁵⁸ In applying the judgment of the Appeals Chamber, the ICTY trial court stated that the Appeals Chamber’s test, which looked at the intensity of the conflict and organization of the parties, was used for the purpose of “distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”²⁵⁹

In determining whether the intensity of the conflict rose to the level of an armed conflict necessary to trigger Common Article III, the ICTY looked at the following factors:

[T]he seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in

²⁵⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 250, art. 3.

²⁵⁵ *The Relevance of IHL in the Context of Terrorism*, *supra* note 248 (“States are not willing to grant members of armed opposition groups immunity from prosecution under domestic law for taking up arms.”).

²⁵⁶ Mary Ellen O’Connell, *Combatants and the Combatant Zone*, 43 U. RICH. L. REV. 845, 855 (2009).

²⁵⁷ SOLIS, *supra* note 17, at 153.

²⁵⁸ *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 5, 1995).

²⁵⁹ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, para. 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

the number of government forces, the 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 if so whether any resolutions on the matter have been passed.²⁶⁰

The standard for organization of the parties necessary to constitute an armed conflict is relatively low. In *Prosecutor v. Limaj*, the ICTY held the Kosovo Liberation Army (“KLA”) was sufficiently organized to constitute an organized armed group because the KLA appointed commanders, gave orders to subordinate units, and made public statements.²⁶¹ Additionally, the KLA was capable of engaging in constant armed clashes with Serbian forces.²⁶² The ICTY stated that “some degree of organization by the parties will suffice to establish the existence of an armed conflict.”²⁶³

b. Ability To Target Fighters in a NIAC

Unlike an IAC, where all lawful combatants have the privilege to kill any enemy combatant in any manner lawful under the Geneva Convention and who may in turn be targeted,²⁶⁴ the legal status of “combatant” is not applicable to NIACs.²⁶⁵ All individuals who are not members of the armed forces, members of armed organizations, or otherwise directly participate in hostilities are civilians.²⁶⁶ Civilians are legally protected from attack during any kind of armed conflict, but do not have the privilege of engaging in hostilities.²⁶⁷

Acts of violence committed by organized armed groups against the state and civilians are almost always prohibited under a state’s domestic law.²⁶⁸

²⁶⁰ *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-T, Judgement, para. 407 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007).

²⁶¹ *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgement, para. 171 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

²⁶² *Id.* para. 172.

²⁶³ *Id.* para. 89.

²⁶⁴ DINSTEIN, *supra* note 244, at 3; SOLIS, *supra* note 17, at 42.

²⁶⁵ Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 871 INT’L REV. RED CROSS 599, 606 (2008); *The Relevance of IHL in the Context of Terrorism*, *supra* note 236 (“In non-international armed conflict, combatant and prisoner of war status are not provided for, because States are not willing to grant members of armed opposition groups immunity from prosecution under domestic law for taking up arms.”).

²⁶⁶ DINSTEIN, *supra* note 244, at 34, 121.

²⁶⁷ DUFFY, *supra* note 219, at 230, 240.

²⁶⁸ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, at 50, ICRC Doc. 311C/11/5.1.2 (Oct. 2011).

However, the lack of a clear status for organized armed groups during non-international armed conflicts causes difficulty in terms of distinguishing such groups from civilians.²⁶⁹ Some scholars use the term “fighters” to distinguish between those directly participating in the armed conflict, such as a state’s armed forces and members of organized armed groups, and those who are clearly not, such as innocent civilians who are still protected from attack.²⁷⁰

In 2009, the International Committee of Red Cross (“ICRC”)²⁷¹ released guidance summarizing its recommendations on how to interpret international humanitarian law regarding direct participation in an armed conflict and also how to distinguish civilians from members of state armed forces and members of armed organized groups.²⁷² While the ICRC’s interpretive guidance is not universally accepted among scholars,²⁷³ it is useful to express how it is arguably lawful to target members of armed organized groups in a NIAC based on their status, when there is no definitive law. The ICRC interpretive guidance states, “[O]rganized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities”²⁷⁴ The “continuous combat function” requirement is used to distinguish members of armed organized groups from those individuals who may participate in “hostilities on a merely spontaneous, sporadic, or unorganized basis. . . .”²⁷⁵ To be a member of an organized armed group requires “lasting integration” into

²⁶⁹ *Direct Participation in Hostilities: Questions & Answers*, ICRC (June 2, 2009), <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> (“[C]ivilians cannot be regarded as members of an organized armed group unless they assume a ‘continuous combat function,’ i.e. unless they assume continuous function involving their direct participation in hostilities.”).

²⁷⁰ See, e.g., Michael Bothe, ICRC, *Direct Participation in Hostilities in Non-International Armed Conflict*, at 9–10 (Oct. 5, 2004), <http://www.icrc.org/eng/assets/files/other/2004-05-expert-paper-dph-icrc.pdf> (“[T]here exist, under the law of non-international armed conflict, two categories of persons: fighters and civilians”); Sassöli & Olson, *supra* note 265, at 606 (using the term “fighter” for “member[s] of an armed group with a fighting function and for members of government armed forces”).

²⁷¹ *The ICRC’s Mandate and Mission*, ICRC (Oct. 29, 2010), <http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm> (describing the ICRC as “an independent, neutral organization ensuring humanitarian protection and assistance for victims of armed conflict . . . [that] constantly urge[s] governments to adapt international humanitarian law to changing circumstances . . .”).

²⁷² The ICRC interpretive guidance states that during a non-international armed conflict, “all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.” ICRC, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 27 (2009).

²⁷³ See, e.g., Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SECURITY J. 5 (2010).

²⁷⁴ ICRC, *supra* note 272, at 27, 36.

²⁷⁵ *Id.* at 34.

the group and can include functions that involve “the preparation, execution, or command of acts or operations amounting to direct participation in hostilities”²⁷⁶ In addition, someone who has trained to participate in hostilities meets the requirement before he carries out an actual hostile act.²⁷⁷ The ICRC interpretative guidance specifically points out that “recruiters, trainers, financiers and propagandists” do not meet the continuous combat function requirement because of their support function.²⁷⁸

Membership in an organized armed group is mutually exclusive with civilian status;²⁷⁹ therefore, as long as members of organized armed groups maintain the continuous combat function, they lose any civilian status they might have and thus lose any protection from direct attack²⁸⁰ and may be targeted “simply due to [their] membership in the group.”²⁸¹ Thus, the “continuous combat function” requirement creates a threshold based on the role a member of an organized armed group plays; once an individual regularly performs a combat function, he becomes targetable based on his status as a “member of an organized armed group” in a NIAC. This standard would allow status-based targeting both of terrorist organization members regardless of whether they are operational leadership or lower-level foot soldiers, provided their function in the hostilities overcomes the threshold.

c. Terrorist Organizations in a NIAC

Some scholars have argued that there is “an emerging category of armed conflict relating to terrorism.”²⁸² Terrorist groups, it is argued, can be part of a non-international armed conflict provided the “terrorists have a sufficient organization and if [their] attacks are sufficiently violent and protracted. . . .”²⁸³ If the intensity and organization factors do not rise to the level of armed conflict, terrorist attacks are merely criminal acts.²⁸⁴ Organizations like Al Qaeda have a command structure and the ability to carry out large-scale violence against another state’s military and civilians, such as the 2000 USS Cole bombing and the September 11 attacks. Thus, arguably, an

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 28.

²⁸⁰ *Id.* at 16–17.

²⁸¹ DINSTEIN, *supra* note 244, at 149.

²⁸² SOLIS, *supra* note 17, at 159.

²⁸³ *Id.* at 157.

²⁸⁴ *Id.*

armed conflict can exist against non-state actor like Al Qaeda. Because AQAP and Al-Shabab have similar levels of organization and a strong affiliation with Al Qaeda, an armed conflict can exist with respect to them as well if the other requirements for an armed conflict are met.

Others have argued that global armed conflict against terrorist organizations cannot exist because armed conflicts cannot exist without reference to some territory. Mary Ellen O'Connell, a critic of targeted killings, argues that "[a]rmed conflicts inevitably have a limited and identifiable territorial or spatial dimension because human beings who participate in armed conflict require territory in which to carry out intense, protracted, armed exchanges."²⁸⁵ Thus, under this view, an amorphous worldwide armed conflict cannot exist because it is not bound to a specific territory. Others argue that terrorist organizations cannot be parties to the conflict because they are not sufficiently organized. For example, the International Committee of the Red Cross takes the position that "loosely organized groups (networks), or individuals that, at best, share a common ideology" and engage in terrorist acts should not be "characterised as party to any type of armed conflict, including 'transnational.'"²⁸⁶

III. ANALYSIS

Jus ad bellum can justify a state's use of force in another country, but it only gets a state over the border, so to speak. Even if a state is lawfully using force under international law, it must still satisfy the requirements of targeting found in the law of war if it is in an armed conflict.²⁸⁷ This Part will first look at how *jus ad bellum* applies to the United States' use of force in Somalia and Yemen in the self-defense context. Then this Part will address whether the United States is in an armed conflict in Somalia and Yemen and how that affects whom the United States can target.

A. *Analysis Under State Consent*

President Obama has made clear that under his administration's counterterrorism policy, "America cannot take strikes wherever [it] choose[s]; [America's] actions are bound by consultations with partners, and respect for

²⁸⁵ O'Connell, *supra* note 256, at 858.

²⁸⁶ *International Humanitarian Law and Terrorism: Questions and Answers*, ICRC (Jan. 1, 2011), <http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm#DoesIHLspecificallymentionterrorism>.

²⁸⁷ See *supra* Part II.B.

state sovereignty.”²⁸⁸ Under international law, the United States must meet an exception to Article 2(4) of the U.N. Charter to use force to engage in targeted killings of the members of AQAP in Yemen or Al-Shabab in Somalia.²⁸⁹ Valid consent to engage in targeted killings would avoid a possible violation of the Article 2(4) prohibition on the use of force.²⁹⁰

In the case of Somalia, a country without a functioning central government until 2012,²⁹¹ it would be difficult for the United States to show that it obtained valid consent to use force within Somalia’s borders. For Yemen, there is a better case that consent may have been obtained from the Hadi government. There is evidence in press accounts that the United States has been cooperating with Yemeni authorities in coordinating drone strikes against targets in Yemen.²⁹² If the Yemeni government gave its consent to U.S. counterterrorism operations in Yemen, then the United States would not need to justify its use of force in Yemen under self-defense.²⁹³ However, the law of war or international human rights law would still apply as necessary. Given the volatility that Yemen has experienced in recent years,²⁹⁴ even if the United States has validly obtained consent from Yemen in the past, there is no guarantee that a new regime in Yemen will not revoke any consent that it may have given. Thus, Part III.B will analyze targeted killings in Yemen and Somalia under a self-defense framework.

B. Analysis Under Self-Defense

In the case where the United States does not obtain consent to use force in Yemen or Somalia, the United States could justify its use of force against AQAP in Yemen or Al-Shabab in Somalia under the international law of self-defense.²⁹⁵ One of the main requirements of the U.S. counterterrorism policy that was approved in 2013 is that lethal force will only be used to stop “a continuing, imminent threat to U.S. persons . . . [when] the relevant governmental authorities in the country where action is contemplated cannot or

²⁸⁸ Obama, Remarks at the National Defense University, *supra* note 3.

²⁸⁹ *See supra* Part II.A.

²⁹⁰ *See supra* Part II.A.1.

²⁹¹ *See supra* Part I.C.2.

²⁹² *See Priest, supra* note 86; Entous, Barnes & Coker, *supra* note 129; *see also supra* Part I.C.1.

²⁹³ *See supra* Part II.A.1.

²⁹⁴ *See supra* Part I.C.1.

²⁹⁵ *E.g., Koh, Address at ASIL, supra* note 24.

will not effectively address the threat to U.S. persons.”²⁹⁶ While requiring that the threat be continuing, imminent, and necessary would satisfy the international law of self-defense, under a self-defense analysis, the United States would not be justified in targeting low-level members of AQAP and Al-Shabab when the involvement of those low-level members in any future armed attacks is too attenuated to satisfy the necessity, proportionality and imminence requirements; the involvement of lower-level members is often too attenuated unless an attack is just about to occur and the United States knows that the lower-level members are participating.²⁹⁷ However, the United States can still target operational-level terrorist leaders, provided there is some intelligence that they planning actual terrorist attacks against the United States.²⁹⁸

The United States has previously asserted that it does not have to perform a new self-defense analysis each time it uses lethal force against the associated forces of Al Qaeda because such forces have joined the armed conflict between the United States and Al Qaeda.²⁹⁹ Arguably, under this view, the original self-defense justification that the United States invoked after the September 11 attacks obviate any need to perform a new self-defense analysis, as it is part of the same armed conflict. This view arguably could exist alongside the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations, which while conditioning the use of lethal force on whether the terrorist threat is continuing and imminent, only apply “outside areas of active hostilities.”³⁰⁰

1. Has AQAP or Al-Shabab Conducted an Armed Attack Against the U.S.?

To use self-defense lawfully, the United States must use force in response to an armed attack or an imminent armed attack.³⁰¹ It is arguable that the September 11 attacks constituted an armed attack on the United States by Al Qaeda, a non-state actor.³⁰² In response to that armed attack, the United States

²⁹⁶ *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2.

²⁹⁷ *See supra* Part II.A.

²⁹⁸ *See* Holder, Northwestern Speech, *supra* note 51.

²⁹⁹ *See* Brennan, Ethics and Efficacy, *supra* note 50.

³⁰⁰ *See Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2. *But see* DOJ WHITE PAPER, *supra* note 30, at 3 (“Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities.”).

³⁰¹ *See supra* Part II.A.2.a.

³⁰² *See supra* Part II.A.2.b. U.N. Security Council Resolution 1373 condemned the September 11 attacks and reaffirmed the right to self-defense and “the need to combat by all means, in accordance with the Charter

invaded Afghanistan, which was harboring Al Qaeda, under its right to self-defense.³⁰³ The United States engaged in targeted killings as part of that armed conflict against Al Qaeda in Afghanistan and Pakistan and reduced Al Qaeda to a shell in those countries.³⁰⁴

On September 16, 2011, Brennan stated that the United States takes the legal position that because it is “engaged in an armed conflict with [Al-Qaeda], the United States . . . [has] the authority to take action against [Al-Qaeda] and its associated forces without doing a separate self-defense analysis each time.”³⁰⁵ Brennan went on further to say that the United States “reserve[s] the right to take unilateral action [against Al-Qaeda and its associated forces] if or when other governments are unwilling or unable to take the necessary actions themselves.”³⁰⁶

This line of argument blurs the lines between *jus ad bellum* and *jus in bello*. The criteria that a country being unwilling or unable to arrest a suspected terrorist is relevant to a self-defense analysis regarding necessity, but largely irrelevant to an international humanitarian law analysis where an Al Qaeda members can be targeted as part of armed conflict occurring in some territory.³⁰⁷ It would be difficult to imagine the United States unilaterally using drone strikes against Al Qaeda associated forces in Canada as part of an armed conflict with Al Qaeda in Pakistan, as Canada is both willing and able to capture and prosecute terrorists.³⁰⁸

But under Brennan’s argument, the United States would not need to make a showing that an armed attack is about to occur to use force because its actions are already justified under self-defense, stemming from the September 11 attacks.³⁰⁹ Thus, under this view, the United States would be able to use force to target Al Qaeda and associated forces outside of Afghanistan and Pakistan, provided that the members were in countries that were unable or unwilling to capture them.³¹⁰

of the United Nations, threats to international peace and security caused by terrorist acts.” S.C. Res. 1373, *supra* note 201, at 1.

³⁰³ See *supra* Part I.B.1.

³⁰⁴ See *supra* notes 126–127.

³⁰⁵ Brennan, Strengthening Our Security, *supra* note 7.

³⁰⁶ *Id.*

³⁰⁷ Compare Part II.A.2.d, with Part II.B.

³⁰⁸ See GOV’T OF CAN., BUILDING RESILIENCE AGAINST TERRORISM: CANADA’S COUNTER-TERRORISM STRATEGY 10–11 (2011).

³⁰⁹ See *supra* note 50 and accompanying text.

³¹⁰ Brennan, Strengthening Our Security, *supra* note 7.

The issue with this approach is that it is bypassing international law by attaching associated forces to an ongoing armed conflict. Self-defense has a temporal limitation and must satisfy the imminence requirement.³¹¹ The theory of the accumulation of events allows the temporal window of self-defense to be kept open,³¹² but there still must be a temporal limit to self-defense.³¹³ The temporal window cannot be kept open indefinitely as this approach suggests. Even under an accumulation of events theory, however, it is doubtful that targeting low-level members of terrorist organizations outside of an armed conflict would be lawful if there is no intelligence that they are participating in specific attacks against the United States. In contrast, the United States has previously argued that the imminence requirement would be satisfied when an operational level terrorist has been recently “personally and continually involved in planning terrorist attacks” and there is no evidence that he has abandoned that involvement.³¹⁴ However, the summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations abides by this temporal limitation outside areas of active hostilities as it requires that a threat posed by an operational leader against the United States must be continuing and imminent before lethal action can be taken.³¹⁵

In many of its policy statements, U.S. officials usually use the phrase “Al Qaeda and its associated forces” when referring to use of force against terrorists.³¹⁶ Given Al Qaeda’s recent decline numbers, AQAP and Al-Shabab have garnered greater attention in U.S. counterterrorism efforts³¹⁷ and the United States identifies AQAP and Al-Shabab as direct threats to the United States.³¹⁸ Under the definition given by Johnson, an “associated force” to Al Qaeda must be an organized armed group that is a co-belligerent with Al

³¹¹ See *supra* note 177 and accompanying text.

³¹² See Part II.A.2.a; see also GARDAM, *supra* note 188, at 146–47 (stating that the United States used accumulation of events theory to justify its use of force against Al Qaeda); RUYSS, *supra* note 177, at 168.

³¹³ See GARDAM, *supra* note 188, at 167.

³¹⁴ DOJ WHITE PAPER, *supra* note 30, at 8.

³¹⁵ *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2.

³¹⁶ See, e.g., Brennan, Ethics and Efficacy, *supra* note 2; Holder, Northwestern Speech, *supra* note 50; Johnson, National Security Law, *supra* note 54; Koh, Address at ASIL, *supra* note 24.

³¹⁷ See, e.g., *Current and Projected National Security Threats to the United States*, *supra* note 68, at 13.; Brennan: Q&A After Remarks at Harvard Law School, *supra* note 26.

³¹⁸ Brennan, Ensuring Al Qaeda’s Demise, *supra* note 34 (“Nor would the destruction of its leadership mean the destruction of the al-Qa’ida network. AQAP remains the most operationally active affiliate in the network and poses a direct threat to the United States. From the territory it controls in Somalia, Al-Shabaab continues to call for strikes against the United States.”).

Qaeda against the United States.³¹⁹ This definition arguably would allow the United States to attach Al Qaeda associated forces to an international humanitarian law framework,³²⁰ avoiding the need to apply the law of self-defense by linking AQAP and Al-Shabab, the new “direct threats” to the United States, to the Al Qaeda core, which has conducted armed attacks in the past.³²¹ Any new potential attackers become part of the old armed conflict and targetable under the law of armed conflict. Thus, under this view, there is no need to analyze whether an attack for a terrorist organization is an “armed attack” if it “entered the fight” alongside Al Qaeda, a non-state actor, as co-belligerents.³²² Of course, there are links tying AQAP and al-Shabab to Al Qaeda. Al-Shabab has Al Qaeda members in leadership position and formally joined Al Qaeda in February 2012,³²³ while AQAP has looser ties to core Al Qaeda.³²⁴ But organizational links are not an exception to the prohibition to the use of force.³²⁵

Taken under a normal self-defense analysis, it is arguable that the elements of AQAP that are dedicated to terrorism operations have taken actions which could rise to the level of an armed attack against the United States, independent of any links to core Al Qaeda. AQAP is relatively active in launching terror attacks against the United States, such as the attempted Christmas Day bombing.³²⁶ For Al-Shabab it would harder to show an independent armed attack because Al-Shabab has not reportedly launched any major terrorist attacks against the United States.³²⁷ In addition, the United States would not be justified to use force under self-defense against elements of the organizations of AQAP and al-Shabab that are engaged in regional fighting because they are not engaging in an armed attack.³²⁸

³¹⁹ Johnson, National Security Law, *supra* note 54.

³²⁰ *See supra* Part II.B.1.b.

³²¹ *See supra* Part II.A.2.

³²² Johnson, National Security Law, *supra* note 54.

³²³ *See supra* note 109 and accompanying text.

³²⁴ Chesney, *supra* note 231, at 26.

³²⁵ *See* MOIR, *supra* note 166, at 9.

³²⁶ *See supra* Part I.D.1.

³²⁷ *See supra* Part I.C.2.

³²⁸ *See supra* Part I.C.

2. *Do Targeted Killings in Yemen and Somalia Satisfy the Requirements of Proportionality, Necessity and Immediacy?*

Under a self-defense analysis, because AQAP has arguably conducted armed attack against the United States, the United States would still need to demonstrate that AQAP are continuing to plan attacks to justify the continued use of force.³²⁹ Given the unpredictable nature of terrorism, the impact and time of a potential attack is often difficult to know in advance.³³⁰ The United States could use force under interceptive self-defense to stop a developing armed terror attack.³³¹ However, U.S. officials previously have stated that they have a broader interpretation of the immediacy requirement,³³² which would strengthen the United States ability to use anticipatory self-defense to target terrorists as the United States would not need “clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future” when using lethal force against an operational terrorist leader who is “continually planning” terrorist attacks.³³³ However, not knowing the full impact or time of the attack makes justifying the use of force under anticipatory self-defense difficult with respect to the proportionality, necessity, and immediacy requirements.

Targeted killings using drone strikes satisfy the requirement of proportionality as to self-defense. While targeted killings cannot be used to punish past terrorist actions, they can be used to deter future terrorist actions.³³⁴ One way to stop future terrorist actions is to kill those who plan them at an operational level.³³⁵ Killing terrorist leaders can disrupt the terrorist organization by creating a power vacuum, demoralizing its members, causing loss of operational knowledge, and diverting resources to hiding other

³²⁹ See GARDAM, *supra* note 176.

³³⁰ Downes, *supra* note 119, at 288.

³³¹ See DINSTEIN, *supra* note 169, at 203–04.

³³² Brennan, *Strengthening Our Security*, *supra* note 7 (“We are finding increasing recognition in the international community that a more flexible understanding of ‘imminence’ may be appropriate when dealing with terrorist groups.”); see also DOJ WHITE PAPER, *supra* note 30, at 7 (“[T]he threat posed by al’Qa’ida and its associated forces demand a broader concept of imminence in judging when a person continually planning terrorist attacks presents an imminent threat, making the use of force appropriate.”).

³³³ DOJ WHITE PAPER, *supra* note 30, at 7.

³³⁴ *Eighth Report on State Responsibility*, *supra* note 175, para. 121; see also O’Connell, *Lawful Self-Defense to Terrorism*, *supra* note 166, at 893 (“Lawful self-defense cannot be a mere act of punishment of revenge.”).

³³⁵ BOAZ GANOR, *THE COUNTER-TERRORISM PUZZLE* 102–05 (2005).

leaders.³³⁶ However, reducing the effectiveness of one terrorist cell may only have a short-term impact on the security of the United States, as new terrorist cells spring up.³³⁷ Still, it is arguable that there is a reasonable connection between targeted killings of terrorist leaders who belong to terrorist organizations who seek to attack the United States and the defense of the United States. Thus, targeted killings are proportional in the sense that they are used to stop future attacks that could result in great loss of life.

U.S. counterterrorism policy is focused on targeting those whose loss would cause significant disruption to a terrorist organization and looks at the target's "current and past role in plots threatening U.S. persons."³³⁸ It is unclear what the impact of killing low-level terrorists would have on a terrorist organization. While killing all the members of a terrorist organization would reduce its effectiveness to zero, killing lower-level terrorists might generally have a less substantial impact on the terrorist organization's ability to carry out attacks. In that sense, targeted killings of lower-level members of terrorist organizations has a more attenuated connection to the defense of the United States, particularly since "knowledge about the intentions of terrorists is often incomplete."³³⁹ While it is not clear what impact the killing lower-level terrorist members would have, it is clearer with regard to members of terrorist organizations that are involved in regional concerns, which would have little impact to the defense of the United States.

Targeted killings using drone strikes as a method of self-defense also satisfies the proportionality requirement of using no more force than necessary to achieve the defense of the state. Although the number of civilian deaths from drone strikes is greatly debated, U.S. government officials have stated that no civilians have been killed in drone strikes from May 2010 to late 2011.³⁴⁰ While others view the U.S. assertion that zero civilians deaths have

³³⁶ *Id.*; see also *supra* note 73 and accompanying text. For example, the targeted killings of core Al Qaeda leaders in Pakistan, has reduced the effectiveness of al Qaeda as an organization. Dina Temple-Raston, *In the Hunt for Al-Qaida, Drone Program Expands*, NPR (Sept. 26, 2011), <http://www.npr.org/2011/09/26/140807753/in-the-hunt-for-al-qaida-drone-program-expands>.

³³⁷ Yoo, *supra* note 23, at 67 ("[K]illing or capturing an ordinary al-Qaeda operative will cripple one cell, but al-Qaeda will only replace that cell with others. Even significant al-Qaeda facilitators eliminated one at a time will permit replacements to be trained or communications and contacts shifted to other leaders.").

³³⁸ See *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 3; see also *supra* notes 31, 69–70 and accompanying text.

³³⁹ Downes, *supra* note 119, at 288.

³⁴⁰ Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 12, 2011, at A11.

been killed with incredulity,³⁴¹ UAVs are precise weapons³⁴² and drone strikes usually occur after a “pattern of life” study of the area that will be targeted.³⁴³ While the law concerning proportionality for self-defense is not concerned with collateral damage per se, the amount of force must be the minimum necessary to achieve the defensive aim.³⁴⁴ Using weapons that kill a large number of nearby civilians who are unrelated to the defense objective of stopping a terrorist attack is greater than the minimum force necessary. Firing a guided missile at a target in a location that has been analyzed to minimize civilian casualties is more in line with the idea of using the minimum force necessary.³⁴⁵

Whether U.S. targeted killings in Yemen and Somalia meet the requirements of necessity and immediacy are much less clear. For necessity, in most countries, attempts should always be made to capture terrorists instead of killing them.³⁴⁶ The requirement of necessity was acknowledged as a precondition to the use of lethal force in the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations.³⁴⁷ In countries with effective law enforcement and the willingness to use it to apprehend terrorists, targeted killings are never a viable first alternative due to the availability of peaceful means to achieve self-defense.³⁴⁸ There is a strong case that Yemen and Somalia, which lack of a strong central government able to assert power over the remote areas of their countries where terrorists reside and are engaged in armed conflict with AQAP and Al-Shabab respectively,³⁴⁹ are unwilling or unable to arrest members of those organizations. The United

³⁴¹ *Id.* (quoting Bill Roggio) (“I believe the people conducting the strikes work hard to reduce civilian casualties. They could be 20 percent. They could be 5 percent. But I think the C.I.A.’s claim of zero civilian casualties in a year is absurd”).

³⁴² *Id.* (quoting an anonymous U.S. government official) (“Nobody is arguing that this weapon is perfect, but it remains the most precise system we’ve ever had in our arsenal . . .”).

³⁴³ *Id.* (“C.I.A. drone operators view their targets for hours or days beforehand, analyzing what they call a ‘pattern of life’ and distinguishing militants from others.”).

³⁴⁴ Guiora, *supra* note 19, at 322 (“According to international law, it is imperative that every effort be made to ensure that collateral damage is limited to an absolute minimum.”).

³⁴⁵ Signature strikes based on a pattern of suspicious activity, but without identifying a specific person to be targeted, would fall closer to the line because the uncertainty involved. *See supra* note 9.

³⁴⁶ *See supra* notes 225–228 and accompanying text.

³⁴⁷ *See Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations, supra* note 8, at 2 (stating that the U.S. must make an “assessment that capture is not feasible at the time of the operation” before lethal force can be authorized).

³⁴⁸ *See supra* Part II.A.2.d.

³⁴⁹ *See supra* note 75; *see also supra* Part I.C.2. *But see Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting, supra* note 114 (stating that “for the first time since 1991, the United States is recognizing the Government of Somalia”).

States does not have peaceful means of capture available in the more remote regions of Yemen and most of Somalia.³⁵⁰ Thus, targeted killings in those areas where capture is not feasible would meet the necessity requirement if killing the targeted terrorists was necessary to stop an armed attack.

The immediacy requirement creates the main difficulty with targeting low-level terrorists. Under a narrow interpretation of imminence,³⁵¹ where a state must basically see the attack coming before it can respond with force, the use of force any time before that is not a justifiable use of self-defense. Even under a broader interpretation of when an attack is imminent,³⁵² there should still be knowledge that an armed attack is likely. The likelihood of an attack comes down to whether there was an attack in the past and whether terrorist organizations are engaged in planning new attacks. Even if the United States assumes that any terrorist at the operational level of a terrorist organization is constantly engaged in planning attacks, the same cannot be said of lower-level members. Brennan was quoted as saying that the number of AQAP fighters which the United States considers a direct threat is only “a couple of dozen.”³⁵³ While lower-level members of terrorist organization are necessary to carry out an attack, arguably, they are not necessary to any one specific attack, meaning killing a rank-and-file member may not stop the attack unless that member is in the process of carrying out the attack.

If the United States had knowledge that a member of a terrorist organization was engaged in carrying out a specific attack against the United States, then that member would be targetable under the international law of self-defense.³⁵⁴ The use of force under self-defense is limited to the amount of force necessary to defend against an armed attack.³⁵⁵ The immediacy requirement also restricts an open-ended justification to use of force.³⁵⁶ For terrorist organizations such as AQAP and Al-Shabab, some members are not engaged in international terrorism, but rather local concerns.³⁵⁷ Even if a lower-level terrorist is linked to the core of AQAP, such an individual is not a direct threat to the United States until the immediacy requirement is satisfied. Mere membership in a terrorist organization alone would not justify the use of

³⁵⁰ See *supra* Parts I.C.1–2.

³⁵¹ See *supra* Part II.A.2.d.

³⁵² See *supra* Part II.A.2.d.

³⁵³ Raghavan & DeYoung, *supra* note 32.

³⁵⁴ See *supra* Part II.A.2.

³⁵⁵ See *supra* Part II.A.2.d.

³⁵⁶ See *supra* Part II.A.2.d.

³⁵⁷ Brennan, Q&A After Remarks at Harvard Law School, *supra* note 26.

force under self-defense. Outside an armed conflict, if the United States cannot justify its use of force against lower-level terrorists under self-defense, the United States cannot lawfully target them.

The pattern of reported U.S. drone strikes in 2011 indicates that the United States was mainly targeting operational-level terrorists in Yemen and Somalia,³⁵⁸ which is consistent with self-defense. However, there are reports in 2012 that low-level members of AQAP and Al-Shabab were being targeted and killed and the frequency of drone strikes increased.³⁵⁹ Unless the United States is in an armed conflict in Yemen and Somalia, such targeting practices would not be legal under the law of self-defense unless the United States had knowledge that attacks were about to be carried out by the low-level members. The 2013 U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations indicate that the United States now recognizes that distinction—by requiring a legal basis to use force “against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.”³⁶⁰ It is important to note however that these policy standards and procedures only apply to the use of force “outside the United States and outside areas of active hostilities.”³⁶¹ Thus, the importance of what constitutes the area of hostilities in a non-international armed conflict with a non-state actor is of critical importance.³⁶²

C. Analysis Under the Law of Armed Conflict

If the United States is in an armed conflict with AQAP or Al-Shabab it may target even low-level members of the organization. The United States has claimed in the past that it is in an armed conflict with Al Qaeda and its affiliates.³⁶³ Even though the Obama administration has backed off from the assertion that the armed conflict is a global armed conflict,³⁶⁴ the United States

³⁵⁸ See *supra* Part I.D.

³⁵⁹ See *supra* note 132–135.

³⁶⁰ See *Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations*, *supra* note 8, at 2.

³⁶¹ *Id.* at 1.

³⁶² The United States has claimed in the past that an operation taking place outside of the area of hostilities would still be part of the non-international armed conflict with Al Qaeda. DOJ WHITE PAPER, *supra* note 30, at 3 (“The United States is currently in a non-international armed conflict with al-Qa’ida and its associated forces. Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities.” (citations omitted)).

³⁶³ Koh, Address at ASIL, *supra* note 24; see also Brennan, Ethics and Efficacy, *supra* note 2.

³⁶⁴ Brennan, Ensuring Al Qaeda’s Demise, *supra* note 34; see also Johnson, National Security Law, *supra* note 54.

has made statements saying that it views AQAP and Al-Shabab as part of the armed conflict with Al Qaeda.³⁶⁵ The United States, however, cannot be engaged in NIAC without any reference to territory.³⁶⁶ For the law of armed conflict to apply, the United States needs to demonstrate that it is fighting in NIAC in Yemen and Somalia independent of the NIAC in Afghanistan or Pakistan where it is fighting Al Qaeda, or that the NIAC in Afghanistan and Pakistan has shifted to Yemen and Somalia.

AQAP and Al-Shabab have the requisite amount of organization to participate in a NIAC, given the relatively low standard.³⁶⁷ They are both armed organized groups, as they have hierarchical structures and are capable of holding territory and planning attacks.³⁶⁸ For a NIAC to exist, the United States needs to show that the intensity of its conflict with AQAP and Al-Shabab rises to the level of an armed conflict.³⁶⁹ If the United States were engaged in such a NIAC, then under the ICRC interpretative guidance, it would be able to target any member of Al-Shabab which had a continuous combat function,³⁷⁰ including lower-level fighters engaged in terrorism operations against the United States.

The intensity of violence has not been very high in Somalia between the United States and Al-Shabab.³⁷¹ While the non-terror wing of Al-Shabab controlled territory and was armed, it was not fighting U.S. forces or forces that were a proxy for the United States.³⁷² The number of U.S. drone strikes in Yemen and Somalia is extremely small when compared to the armed conflict in Pakistan.³⁷³ The U.S. military force has been more active in Yemen than it

³⁶⁵ Brennan, Ensuring Al Qaeda's Demise, *supra* note 34 (arguing that both AQAP and Al-Shabab remain a major point of concern for the United States); Johnson, National Security Law, *supra* note 54 (stating that the United States will apply "the law of armed conflict" against Al Qaeda).

³⁶⁶ See *supra* Part II.B.1.c.

³⁶⁷ See SOLIS, *supra* note 17, at 152 (stating that "if there is armed conflict within a state and the government's opponents are not combatants of another state's armed force, it is a common Article 3 non-international conflict").

³⁶⁸ See LINDO ET AL., *supra* note 87, at 5; 2011 COUNTERTERRORISM STRATEGY, *supra* note 90, at 14–15; Wise, *supra* note 101, at 7–8; see also Benjamin R. Farley, *Targeting Anwar Al-Aulaqi: A Case Study in U.S. Drone Strikes and Targeted Killing*, 2 NAT'L SECURITY L. BRIEF 57, 64–68 (2011) ("AQAP is sufficiently organized to constitute a party to an armed conflict.").

³⁶⁹ See *supra* Part II.B.1.a.

³⁷⁰ See *supra* Part II.B.1.b.

³⁷¹ If the new Somali government is successful in maintaining its power, this may change in the future if the United States supports the new government against Al-Shabab.

³⁷² See *supra* Part I.C.2. President Obama did state that the United States "helped" the African coalition push Al-Shabab out of its strongholds in Somalia. See *supra* note 115.

³⁷³ DeYoung, *supra* note 135 and accompanying text.

has been in Somalia,³⁷⁴ but this military activity probably does not rise to the level of an armed conflict between AQAP and the United States. AQAP has attempted to attack the United States, usually via terror plots,³⁷⁵ but these plots are not frequent enough to rise to the intensity of violence necessary. Furthermore, the United States did not act as if it were engaged in an armed conflict with the terrorist organizations in Somalia and Yemen.³⁷⁶ But as noted above, the United States views the AQAP and al-Shabab as having an international-oriented terror wing and a locally-oriented militant wing.³⁷⁷ So the United States may distinguish between the two wings with targeted killings in an armed conflict.

Until 2012, when the United States appeared to step up its drone campaign in Yemen, the United States was not using targeted killings to destroy Al-Shabab or AQAP as an organization the same way it is attempting to do with Al Qaeda in Pakistan.³⁷⁸ Instead, the United States only targeted the part of the organization that constitutes a direct threat to the United States: the wing of terrorist organizations that plans and carries out transnational terror attacks.³⁷⁹ And from that group, the U.S. officials stated that the United States was only targeting high-level terrorists.³⁸⁰ Many of the reported airstrikes in Yemen and Somalia in 2011 resulted in a senior-level member of AQAP or al-Shabab being wounded or killed.³⁸¹ The use of targeting lists by JSOC and the CIA gives further weight to the idea that only senior-level or operational members were being targeted.³⁸² U.S. practice during this period is closer to the above *jus ad bellum* analysis where the lower-level terrorists cannot be targeted because they are not enough of a threat to trigger the international law of self-defense.

³⁷⁴ Compare *supra* Part I.C.1 (noting that there has been an growing involvement between the United States and AQAP in Yemen), with *supra* Part I.C.2 (noting that the state of unrest in Somalia seems to be improving with the development of a central government); see also Miller, *supra* note 1 (finding that drone strikes in Yemen far exceeded those in Somalia).

³⁷⁵ See *supra* Part I.C.1.

³⁷⁶ See *supra* Part III.B.1. But see Johnson, National Security Law, *supra* note 54 (stating that the United States is in an armed conflict with al Qaeda).

³⁷⁷ See *supra* Part I.A.2.

³⁷⁸ See *supra* Part I.D.

³⁷⁹ See Raghavan & DeYoung, *supra* note 32 (“U.S. officials, in turn, express little interest in the insurgency in Yemen and say their counterterrorism efforts are limited to what they describe as a minority within al-Qaeda’s Yemeni affiliate that is focused on U.S. attacks.”).

³⁸⁰ See *supra* Part I.B.

³⁸¹ See *supra* note 142 and accompanying text.

³⁸² See *supra* Part I.D.

If the United States were acting as if it were in NIAC with AQAP and Al-Shabab in Yemen and Somalia respectively, the rank of the members would be irrelevant if they could be shown to meet the continuous combat function requirement.³⁸³ However, the United States did not engage in the status-based targeting that is permissible under the law of war.³⁸⁴ The targeted killing of al-Aulaqi³⁸⁵ is instructive in this regard. The United States makes the point that al-Aulaqi had an operational role in AQAP,³⁸⁶ in addition to his main role of exhorting others to attack the United States. Khan, who had a smaller media position in AQAP, was classified as a belligerent by the Obama administration and thus would not prevent the strike from being carried out.³⁸⁷ However, Khan was also not actively being targeted by the United States.³⁸⁸ Like most low-level members of terrorist organizations who die alongside the high-level members in drone strikes, Khan was not being actively targeted; although if the United States were in an armed conflict, he could have been.

The United States could also potentially argue that it is targeting AQAP as part of the ongoing NIAC that AQAP is involved in with the Yemeni government. Given the increase in military support to the new Yemeni government and drone strikes in Yemen, this may be the case.³⁸⁹ The United States has stated, however, that it does not wish to become too closely involved in local conflicts in Yemen and Somalia.³⁹⁰ Both AQAP and Al-Shabab have held territory until recently and have clearly engaged in a NIAC in Yemen (with the central government)³⁹¹ and Somalia (with the factions in Somalia and Kenya and Ethiopia)³⁹² respectively. Brennan drew a clear line between elements of the organization that are involved in the conflicts in Yemen and Somalia and the elements of the organization that seek to commit terrorist attacks abroad.³⁹³ Brennan stated that the United States would not target those

³⁸³ See *supra* Part II.B.1.b.

³⁸⁴ See *supra* Part II.B.1.b.

³⁸⁵ See *supra* pp. 26–28.

³⁸⁶ See Mazzetti et al., *supra* note 144 and accompanying text.

³⁸⁷ See Finn, *supra* note 147, at A9 (After the strike on Anwar al-Aulaqi, “[a]n administration official said the CIA did not know Khan was with Aulaqi, but they also considered Khan a belligerent . . .”).

³⁸⁸ *Id.*; Letter from Eric Holder to Senator Patrick Leahy, *supra* note 149, at 3; see also Mazzetti et al., *supra* note 144; Miller & Fordham, *supra* note 151.

³⁸⁹ Farley, *supra* note 368, at 71 (concluding that U.S. actions in Yemen “constitute[d] an armed intervention into Yemen’s non-international armed conflict”).

³⁹⁰ See Brennan, Q&A After Remarks at Harvard Law School, *supra* note 26.

³⁹¹ See *supra* text accompanying note 98.

³⁹² See *supra* Part I.C.2.

³⁹³ Brennan, Q&A After Remarks at Harvard Law School, *supra* note 26.

parts of the organizations that are engaged in local conflicts.³⁹⁴ Both AQAP and Al-Shabab have wings of their respective organizations that are engaged in conducting terrorist operations abroad³⁹⁵ and much larger parts that are engaged in local fighting. If Yemen consented to the U.S. use of force in Yemen as part of its ongoing NIAC, in addition to the use of force in any armed conflict with Al Qaeda and its associated forces, it could account for the reports of low-level members of AQAP being targeted.³⁹⁶ The United States may have begun targeting low-level members of the local militant wing of AQAP, which would be acceptable if it were a NIAC in Yemen.

CONCLUSION

The U.S. Policy Standards and Procedure for the Use of Force in Counterterrorism Operations limit the use of lethal force outside areas hostilities to what is required by the international law of self-defense.³⁹⁷ However, the United States has previously stated that it is engaged in an armed conflict with AQAP and Al-Shabab as part of its armed conflict with Al Qaeda because those groups are affiliates of Al Qaeda. Arguably, the international law of self-defense does not prohibit the targeting of higher-level terrorists members because they pose a direct threat by planning terrorist attacks against the United States. However, once self-defense gets the United States over the border of another country, targeting is still subject to the law of war or international human rights law. In the case of Somalia, the United States is not engaged in an armed conflict and thus international humanitarian law would not apply. Yemen, however, is a closer case. But the fact that the United States has a stated policy of not targeting lower-level terrorists in Yemen³⁹⁸ suggests that while the United States says it is engaged in an armed conflict, it does not act as if it is engaged in an armed conflict.

³⁹⁴ *Id.*

³⁹⁵ *See supra* Part I.C.

³⁹⁶ *See* Roggio, *supra* note 13 (noting that the United States, “in an effort to support Yemeni military operations” against terrorist groups, has “carried out 52 airstrikes in Yemen” and has targeted AQAP, among others).

³⁹⁷ *See Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations, supra* note 8, at 1–2.

³⁹⁸ *See* Brennan, *Ensuring Al Qaeda’s Demise, supra* note 34 (noting that the Obama Administration is “focused on those individuals who are a threat to the United States, whose removal would cause a significant . . . disruption of the plans and capabilities of al-Qa’ida and its associated forces”).

U.S. officials state that the United States is acting under the law of armed conflict,³⁹⁹ which is more flexible in its targeting practices than the international law of self-defense. Blurring the legal justification leaves open the possibility of applying the law of armed conflict to the entire world in pursuit of terrorist organizations. While a separate self-defense analysis each time is not as necessary in the case of *continuous* armed attacks by a terrorist organization, it is quite a different thing all together to state that a self-defense is not required for affiliates of Al Qaeda, who might not have any intention of attacking the United States, just because they are affiliated. Eschewing a new self-defense analysis might be argued as an attempt to shoehorn the Al Qaeda affiliates into the self-defense justification that originated from Al Qaeda's September 11 attacks and which is perpetuated by a series of continuous attacks by Al Qaeda affiliates. Of course, judging whether a potential terrorist attack would constitute an armed attack necessary to trigger the international law of self-defense can be unwieldy and uncertain.

The legal theory the United States uses to justify using drones to target individuals in foreign countries is important for the future of counterterrorism and the law of nations. UAVs are cheaper alternatives to expensive fighter jets; other countries such as China, Russia, and Israel are starting to build their own drones.⁴⁰⁰ The United States' justification for using drones against terrorists in countries such as Somalia and Yemen are not made in vacuum and other countries might also use similar justifications to use drones abroad.⁴⁰¹

JOHN ODLE*

³⁹⁹ Johnson, National Security Law, *supra* note 54 (stating that the “[w]e must apply, and we have applied, the law of armed conflict” when dealing with al Qaeda).

⁴⁰⁰ William Wan & Peter Finn, *Global Race on To Match US Drones*, WASH. POST, July 5, 2011, at A1; see also Jim Michaels, *Experts: Drones Basis for New Global Arms Race*, USA TODAY, Jan. 9, 2013, at A4 (stating that China and Israel have developed drones).

⁴⁰¹ See Peter Singer, Op-Ed., *Do Drones Undermine Democracy?*, N.Y. TIMES, Jan. 22, 2012, at SR5 (“C.I.A. drone strikes outside of declared war zones are setting a troubling precedent that we might not want to see followed by the close to 50 other nations that now possess the same unmanned technology—including China, Russia, Pakistan and Iran.”).

* Executive Managing Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2013); M.A., George Washington University (2007); B.A., Johns Hopkins University (2003). The Author would like to thank his faculty advisor, Laurie Blank, for her help in developing this Comment, especially with regard to the subject of the international law of armed conflict. The Author is deeply grateful to Anne Berlow and her staff for the time and effort they have spent editing this Comment. The Author would also like to thank Bethanie Barnes, Kedar S. Bhatia, Trevor Brice, Casey Jo Cooper, Mithuna Sivaraman, and Sara Warren for their editing work, as well as Heather Greenfield, Danielle Viera, and Tommy Buck for their helpful comments and review. Finally, the Author would like to thank the entire staff of the *Emory International Law Review* for their time and dedication.