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.
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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 “[i]f 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

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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-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-Qa’ida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones.”).
5 Id.
6 Id.
of the use of force. 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. A particular area on contention in the debate was whether targeted killing operations could be launched without knowing the identity of the targets. It has been reported that the Obama’s counterterrorism policy is more restrictive in this regard to operations in Yemen and Somalia. 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”), 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

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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.
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


\(^{14}\)  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. The United States’ counterterrorism strategy increasingly has relied on missiles launched from UAVs to target and kill individual terrorists. Part I.A will address the definition of targeted killings in the counterterrorism context and who constitutes a low-level terrorist.

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[Violent 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 § 950v(1)(v) (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. The term “targeted killings” can be used to describe both government action in the context of armed conflict and when a state is acting in self-defense. 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.” 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.”

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. Although the United States, by executive order, bans the use of assassination, 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. For the purposes

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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”).


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.” 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.

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.’”).

Guiora, supra note 19, at 321.

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].” 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.

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.

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.” This language clearly illustrates the distinction between the

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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.” 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 determined it will not target
fighters acting on a regional level—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...
[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.”

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 . . . .” 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.” 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.

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.” 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.” President Bush

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35 WHITE HOUSE, NATIONAL SECURITY STRATEGY 21 (2010) [hereinafter 2010 NATIONAL SECURITY STRATEGY].  
39 Id.
characterized the actions the United States would take as “defensive measures against terrorism.” 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 and increased operations aimed at capturing and killing terrorists across the globe.

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. 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-Qaeda, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners.” 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.”

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.” The AUMF states that the September 11 attacks allow the United States to exercise its right to self-defense. Even a decade removed

40 Id.
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.”).
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.” 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[as] 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 force, 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.
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.\footnote{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]henever 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.").} 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.”\footnote{Koh, Address at ASIL, supra note 24.} Koh justified the use of force against Al Qaeda and its affiliates as “consistent with its inherent right to self-defense under international law.”\footnote{Id.} 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.”\footnote{Id.}

Brennan also justified targeted killing as valid under the international law of self-defense\footnote{Brennan, Ethics and Efficacy, supra note 2.} and specifically refers to Al Qaeda affiliates, such as AQAP and Al-Shabab as “direct threats.”\footnote{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 region.”).} Brennan, however, made statements

continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat... 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.”\footnote{Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations, supra note 8, at 2.} 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.\footnote{Id.}
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.” 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.

While the limitation may have practical considerations, 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. 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.”

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 State 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 . . . .”).

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. 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.

1. 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. Yemen’s expanding population has put pressure on its declining water and oil resources, which account for a substantial percentage of its GDP. 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. Yemen’s national government remained relatively weak as it struggled to unify north and south.

In 2011, a popular uprising began that would eventually lead to the demise of former Yemeni President Ali Abdullah Saleh’s government. 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...
appear to have de-facto control.” In 2012, Saleh was replaced by Abdo Rabo Mansour Hadi. 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.”

While the United States has continued to profess its desire to avoid getting involved too deeply in military conflicts in Yemen, 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. 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. AQAP is organized into distinct wings that plan operations, create propaganda, and provide a religious justification for terrorist attacks. AQAP wings are “compartmentalized and hierarchical, with . . . a political leader who provides overall direction.” 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 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.”).
85 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 B ARAK 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.”).
88 Id.
against the U.S. Homeland and U.S. partners.”\textsuperscript{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,\textsuperscript{91} and Al Qaeda in Saudi Arabia merged.\textsuperscript{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,\textsuperscript{93} and the attempted bombing of two cargo planes en route to the United States in 2010.\textsuperscript{94} On January 19, 2010, the United States designated AQAP as a Foreign Terrorist Organization.\textsuperscript{95} In May 2012, the United States foiled a bomb plot on board a flight bound towards the United States.\textsuperscript{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.”\textsuperscript{97} AQAP was successful in establishing effective control of a string of towns in southern Yemen.\textsuperscript{98} However, AQAP was displaced from the south

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

\textsuperscript{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.”).

\textsuperscript{92} LINDO ET AL., supra note 87, at 1.

\textsuperscript{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.”).


\textsuperscript{97} LINDO ET AL., supra note 87, at 8.

\textsuperscript{98} Qaedah Fighters Agree To Pull Out of Yemen’s Rada, AFP, Jan. 24, 2012, available at http://www.google.com/hostednews/afp/article/ALeqM5h3InlAK1fXxooV7jQz4nQla2UDksQ3bocId=CNG.2c5698ba19618937cd65fc66c6f038.141.
and “as a result . . . trickled back into the [Yemeni] capital and continue to fight asymmetrically.”\(^9^9\)

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.\(^1^0^0\) Since its collapse of its central government in 1991, Somalia “existed in a state of perpetual anarchy.”\(^1^0^1\) The anarchic conditions in Somalia created a haven for terrorist organizations and pirates.\(^1^0^2\) 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.\(^1^0^3\)

While relatively few of the core al Qaeda members actually operate in Somalia,\(^1^0^4\) Al-Shabab has “an al Qaeda presence throughout [its] organization.”\(^1^0^5\) 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.\(^1^0^6\) Al-Shabab was driven into southern Somalia where it began staging a guerrilla campaign against the Ethiopian military.\(^1^0^7\) In 2008, Al-Shabab began expanding its connections to Al Qaeda and its affiliates.\(^1^0^8\) In February 2012, Al-Shabab formally joined Al Qaeda.\(^1^0^9\)

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

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\(^9^9\) 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.


\(^1^0^1\) ROB WISE, AL SHABAAB 2 (2011).

\(^1^0^2\) John Davis, Confronting Disaster: Terrorist Safe Havens in Africa, in TERRORISM IN AFRICA 161–62 (John Davis ed., 2010).


\(^1^0^4\) Davis, supra note 102, at 162.

\(^1^0^5\) Id.

\(^1^0^6\) WISE, supra note 101, at 3.

\(^1^0^7\) Id.

\(^1^0^8\) Id. at 4.

number of [Al Qaeda] core members into its leadership.” 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.” In July 2010, Al-Shabab carried out its first transnational terrorist attack by bombing civilian targets in Uganda; 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.

The future of Somalia appears to be improving. A central government appears to be coming together and Al-Shabab has lost much of the territory it held. The port city of Kismayo, an Al-Shabab stronghold, was captured in October 2012. In January 2013, the United States formally recognized the new Somali government. Al-Shabab, however, like AQAP, appears to be continuing its terrorist actions.

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. During the Bush administration, the United States primarily restricted its use of drones, armed with Hellfire missiles, to Pakistan, Yemen, and Afghanistan, targeting militants

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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.
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.
and terrorist groups.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,\textsuperscript{124} must have presidential approval.\textsuperscript{125} Drone strikes have been highly effective in taking out Al Qaeda leadership.\textsuperscript{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.”\textsuperscript{127} A \textit{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.”\textsuperscript{128} Permission to add new targets to the CIA and JSOC lists is reportedly more difficult to get.\textsuperscript{129}

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\textsuperscript{120} Peter Bergen & Katherine Tiedemann, \textit{Washington’s Phantom War}, FOREIGN AFF., July/Aug. 2011, at 12, 12.
\textsuperscript{124} Miller, \textit{supra} note 1.
\textsuperscript{128} DeYoung, \textit{supra} note 125.
\textsuperscript{129} \textit{Cf.} Adam Entous, Julian E. Barnes & Margaret Coker, \textit{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”).
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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.”

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.” In a small flurry of strikes in 2010–2011, several leaders of AQAP and Al-Shabab were killed. The use of drones for surveillance has also apparently increased as “Somalis in central and southern Somalia regularly report drones flying overhead.”

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. 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. 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.”

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134 Miller, supra note 1, at A1.
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.\(^\text{137}\) Yet only six senior AQAP members were reported to have been killed in 2012.\(^\text{138}\) 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.\(^\text{139}\) While the signature strikes in Yemen are not supposed to be targeted towards “low-level fighters,”\(^\text{140}\) 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 killed\(^\text{141}\) 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.\(^\text{142}\) While

\(^\text{137}\) Roggio & Barry, supra note 135.
\(^\text{139}\) Eric Schmitt, Yemen to Face More Drones, N.Y. TIMES, Apr. 26, 2012, at A1; see also supra note 8.
\(^\text{140}\) Schmitt, supra note 139.
\(^\text{141}\) See supra notes 137–138 and accompanying text.
\(^\text{142}\) 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 Whittle, 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.\footnote{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.\footnote{144} The \textit{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.”\footnote{145} Also killed in the attack on al-Aulaqi was Samir Khan, editor of the English-language jihadist magazine \textit{Inspire}.\footnote{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.”\footnote{147}

U.S. officials have confirmed that al-Aulaqi was the intended target of the strike.\footnote{148} Unlike al-Aulaqi, however, the United States has stated that it was not
specifically targeting Khan in the attack. 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.” Holder stated that “al-Aulaqi was not just a senior leader of AQAP—he was the group’s chief of external operations.” 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. President Obama stated that al-Aulaqi had “the lead role in planning and directing the efforts to murder innocent Americans.”

On February 10, 2012, the United States filed a sentencing memorandum in the Eastern District of Michigan in United States v. Abdulmutallab. 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. The government alleged that Abdulmutallab met with al-Aulaqi who gave Abdulmutallab operational instructions on how to carry out the attempted bombing. 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.

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

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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.
155 Id. app. at 12–14.
156 Id. app. at 13–14.
leaders—under the international law of self-defense. 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. 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. 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. 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. Some U.S. scholars argue, however, that the use of force can be governed solely under the international law of self-defense.

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

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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.


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. Article 2(4) is usually interpreted “as outlawing any trans-boundary use of military force” against another state. 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. 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.

1. **Consent**

Under customary international law, a state may consent to another state’s use of force within its own territory. 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. 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, and the consenting state can withdraw its consent at any

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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.”).


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

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. 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.”

The right of self-defense does not allow states to use force punitively, but rather the force must be directed towards defending a state from armed attack. The right of self-defense is also limited temporally—it can only be used until action is taken by the Security Council. Article 51 has been the subject of long-simmering academic debate as to whether a state may use force before an armed attack occurs. 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.

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.


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

174 U.N. Charter art. 51.

175 See U.N. Charter art. 51.

176 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).

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

178 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

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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.”); RUYS, 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 RUYS, 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).


184 RUYS, 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.”); RUYS, supra note 177, at 140.

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

187 DINSTEIN, supra note 169, at 208.
threshold to constitute an armed attack.\textsuperscript{188} This chain of related attacks still retains the temporal restrictions of self-defense,\textsuperscript{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.\textsuperscript{190}

\textit{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.\textsuperscript{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.”\textsuperscript{192} In 2004, the ICJ also took such a position in \textit{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{196} Because an armed attack is not explicitly restricted to be carried out by states,

\textsuperscript{188} Judith Gardam, \textit{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.”).

\textsuperscript{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 . . . .”).

\textsuperscript{190} See Ruys, supra note 177, at 168.


\textsuperscript{192} O’Connell, supra note 166, at 899.

\textsuperscript{193} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, 2004 I.C.J. 136, para. 139.

\textsuperscript{194} O’Connell, supra note 166, at 902; see Moir, supra note 166, at 61.

\textsuperscript{195} Dinstein, supra note 169, at 224; Murphy, supra note 165, at 50.

\textsuperscript{196} Murphy, supra note 165, at 50.
whether non-state actors can conduct armed attacks on states is governed by customary international law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{201} In 2005, in \textit{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.”\textsuperscript{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.”\textsuperscript{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.

\textsuperscript{197} M OIR, \textit{supra} note 166, at 22–25.
\textsuperscript{199} DINSTEIN, \textit{supra} note 169, at 227; Murphy, \textit{supra} note 165, at 47.
\textsuperscript{200} DINSTEIN, \textit{supra} note 169, at 227–28 (“[E]ven those who regard as problematic the categorization of terrorist action \textit{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.”).
\textsuperscript{203} \textit{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

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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.”).
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.
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.\(^{216}\)

\(\text{d. Self-Defense Requirements: Proportionality, Necessity and Immediacy}\)

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
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attack.” Proportionality in self-defense does not concern the “forms, substance and strength” of the state response, but rather, requires that the amount of force used must be limited to the amount necessary to achieve the object of repelling an attack. 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.

Necessity in the self-defense context means that a state may only use force if there are no other means available and the use of force is required to halt an armed attack. 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.” Thus, it is only necessary to use force when “peaceful means have reasonably been exhausted.”

The exhaustion of peaceful means requirement is particularly important for using self-defense when an armed attack has not yet been fully carried out. 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. 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. 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. But when a terrorist group is located in a state that is unable or

221 RUYS, supra note 177, at 111.
222 Eighth Report on State Responsibility, supra note 175, para. 121.
223 See TOTTEN, 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; RUYS, supra note 177, at 95; TOTTEN, supra note 206, at 27.
226 DINSTEIN, supra note 169, at 232.
227 Eighth Report on State Responsibility, supra note 175, para. 120.
228 RUYS, supra note 177, at 95.
229 Id.
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 Totten, supra note 206, at 27, 173.
235 Schmitt, supra note 198, at 22.
236 See Totten, supra note 206, at 28.
237 Id. at 178.
239 Id.
240 Dinstein, supra note 169, at 206.
241 See, e.g., Schmitt, supra note 198, at 31.
Thus, the entire group of attacks (including future ones) is treated as a single armed attack for the purposes of the immediacy requirement.

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. Instead, international humanitarian law provides 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. The main directive of international humanitarian law is “to minimize human suffering without undermining the effectiveness of military operations.”

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.” 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. 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

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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.
no distinction between the ranks of individuals fighting in an armed conflict.\textsuperscript{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.

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{253} NIACs have specific protections outlined in Common

\begin{footnotes}
\item[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.").
\item[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] . . . .")
\item[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.").
\item[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.
\item[253] SOLIS, supra note 17, at 152.
\end{footnotes}
Article III, as the full force of the Geneva Conventions does not apply.\textsuperscript{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.\textsuperscript{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.

\textbf{a. Armed Conflicts}

Armed conflicts “begin[] not with the attack, but with the counter-attack.”\textsuperscript{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.\textsuperscript{257} In \textit{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{254} Geneva Convention Relative to the Protection of Civilian Persons in Time of War, \textit{supra} note 250, art. 3.

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

\textsuperscript{256} Mary Ellen O’Connell, \textit{Combatants and the Combatant Zone}, 43 U. \textit{RICH. L. REV.} 845, 855 (2009).

\textsuperscript{257} SOLIS, \textit{supra} note 17, at 153.

\textsuperscript{258} \textit{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).

\textsuperscript{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. Mrkić, 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. 31IC/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. 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.

In 2009, the International Committee of Red Cross (“ICRC”) 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. While the ICRC’s interpretive guidance is not universally accepted among scholars, 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 . . . .” 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 . . . .” To be a member of an organized armed group requires “lasting integration” into

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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.”).


271 The ICRC’s 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 ICRC, supra note 272, at 27, 36.

274 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 . . . .” In addition, someone who has trained to participate in hostilities meets the requirement before he carries out an actual hostile act. 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.

Membership in an organized armed group is mutually exclusive with civilian status; 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 attack and may be targeted “simply due to [their] membership in the group.” 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.” 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 . . . .” If the intensity and organization factors do not rise to the level of armed conflict, terrorist attacks are merely criminal acts. 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
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.” 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.’”

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. 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

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285 O’Connell, supra note 256, at 858.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{301} It is arguable that the September 11 attacks constituted an armed attack on the United States by Al Qaeda, a non-state actor.\textsuperscript{302} In response to that armed attack, the United States

\textsuperscript{296} Summary of the U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations, supra note 8, at 2.
\textsuperscript{297} See supra Part II.A.
\textsuperscript{298} See Holder, Northwestern Speech, supra note 51.
\textsuperscript{299} See Brennan, Ethics and Efficacy, supra note 50.
\textsuperscript{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.”).
\textsuperscript{301} See supra Part II.A.2.a.
\textsuperscript{302} See supra Part IX.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. 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.

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.” 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.”

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 member can be targeted as part of armed conflict occurring in some territory. 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.

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. 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.


303 See supra Part I.B.1.
304 See supra notes 126–127.
306 Id.
307 Compare Part II.A.2.d. with Part II.B.
309 See supra note 50 and accompanying text.
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.\textsuperscript{311} The theory of the accumulation of events allows the temporal window of self-defense to be kept open,\textsuperscript{312} but there must still be a temporal limit to self-defense.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{316} Given Al Qaeda’s recent decline numbers, AQAP and Al-Shabab have garnered greater attention in U.S. counterterrorism efforts\textsuperscript{317} and the United States identifies AQAP and Al-Shabab as direct threats to the United States.\textsuperscript{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

\textsuperscript{311} See supra note 177 and accompanying text.

\textsuperscript{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); RUYS, supra note 177, at 168.

\textsuperscript{313} See GARDAM, supra note 188, at 167.

\textsuperscript{314} DOJ WHITE PAPER, supra note 30, at 8.

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

\textsuperscript{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.


\textsuperscript{318} Brennan, Ensuring Al Qaeda’s Demise, supra note 34 (“Nor would the destruction of its leadership mean the destruction of the al-Qaeda 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. This definition arguably would allow the United States to attach Al Qaeda associated forces to an international humanitarian law framework, 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. 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. 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, while AQAP has looser ties to core Al Qaeda. But organizational links are not an exception to the prohibition to the use of force.

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. 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. 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.
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.\footnote{See GARDAM, supra note 176.} Given the unpredictable nature of terrorism, the impact and time of a potential attack is often difficult to know in advance.\footnote{Downes, supra note 119, at 288.} The United States could use force under interceptive self-defense to stop a developing armed terror attack.\footnote{See Dinstein, supra note 169, at 203–04.} However, U.S. officials previously have stated that they have a broader interpretation of the immediacy requirement,\footnote{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.”).} 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.\footnote{DOJ White Paper, supra note 30, at 7.} 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.\footnote{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.”).} One way to stop future terrorist actions is to kill those who plan them at an operational level.\footnote{Boaz Ganor, The Counter-Terrorism Puzzle 102–05 (2005).} 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
leaders.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{340} While others view the U.S. assertion that zero civilians deaths have

\textsuperscript{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.

\textsuperscript{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.”).

\textsuperscript{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.

\textsuperscript{339} Downes, supra note 119, at 288.

been killed with incredulity, and UAVs are precise weapons and drone strikes usually occur after a “pattern of life” study of the area that will be targeted. 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. 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.

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. 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. 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. 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, are unwilling or unable to arrest members of those organizations. The United

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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. But see Remarks with President of Somalia Hassan Sheikh Mohamad 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. 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, 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, 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.”

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. The use of force under self-defense is limited to the amount of force necessary to defend against an armed attack. The immediacy requirement also restricts an open-ended justification to use of force. For terrorist organizations such as AQAP and Al-Shabab, some members are not engaged in international terrorism, but rather local concerns. 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

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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, 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. Unless the United States is 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.” 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.” 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.

C. Analysis Under the Law of Armed Conflict

If the United States is 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. Even though the Obama administration has backed off from the assertion that the armed conflict is a global armed conflict, the United States

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358 See supra Part I.D.
359 See supra note 132–135.
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. The United States, however, cannot be engaged in NIAC without any reference to territory. 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. They are both armed organized groups, as they have hierarchical structures and are capable of holding territory and planning attacks. 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. 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, 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. 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. The number of U.S. drone strikes in Yemen and Somalia is extremely small when compared to the armed conflict in Pakistan. 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”).
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.
373 DeYoung, supra note 135 and accompanying text.
has been in Somalia, 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, 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. 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. 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. 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. And from that group, the U.S. officials stated that the United States was only targeting high-level terrorists. 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. 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. 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.

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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-Aulaqi\(^{385}\) 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. Both AQAP and Al-Shabab have wings of their respective organizations that are engaged in conducting terrorist operations abroad 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. The United States may have begun targeting low-level members of the local militant wing of AQAP, which would 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. 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 Yemen 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, 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. 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.

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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.”).

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