INTRODUCTION

This section explores key concepts and stakes pertaining to the end of armed conflict under international law in relation to the United States’ War on Terror. The thumbnail version of the vision—as articulated, most recently, by the Obama Administration—is that the purported armed conflict will persist until a “tipping point” when terrorist organizations’ operational capacity is degraded and their supporting networks are dismantled “to such an extent that [those organizations’ forces] will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States.”

Amid the numerous and diverse issues that arise in relation to the “end” of the U.S.’s War on Terror, we focus on deprivation of liberty and on targeting in direct attack. Those are two key legal stakes in whether the U.S. government continues to maintain that it is in an armed conflict with al-Qaeda and certain other terrorist organizations. Significant confusion and concern have attended

355. On the term “war on terror,” see supra note 5.
357. Chesney argues that whether the U.S. government continues to maintain that it is in an armed conflict with al-Qaeda may not result in significant practical change for either the use of lethal force or military detention. See Robert M. Chesney, Postwar, 5 HARV. NAT’L SEC. J. 305 (2014). Concerning the former, Chesney’s argument is rooted in the fact that “[t]he Obama Administration has made clear that lethal force would remain on the table even under a postwar model, and more specifically that it would remain an option against ‘continuous’ terrorist threats.” Id. Regarding military detention, according to Chesney, “[t]he situation ... is different, but only marginally so.” Id. at 306. While “[t]he demise of the armed-conflict model will certainly matter for the dwindling legacy population at Guantánamo (and, perhaps, for a handful of legacy detainees in Afghanistan),” he argues, “[i]t will not matter nearly so much.

these issues. For instance, with respect to deprivation of liberty, following President Obama's December 2014 proclamation on the impending end of United States' “combat operations” in Afghanistan, individuals held by the U.S. at Guantánamo Bay, Cuba under justifications arising out of armed conflict in Afghanistan sought release.\footnote{358}{Statement by the President on the End of the Combat Mission in Afghanistan, Dec. 28, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan <https://perma.cc/A7GY-N866>.} In a series of cases that, at times, conflated international-legal concepts concerning different types of armed conflict, U.S. courts held that release was not compelled because, despite the President’s statement on the impending end of “combat operations,” the relevant armed conflict had not terminated.\footnote{359}{See infra this section.}

This section aims to distill some key considerations with respect to the stakes in discerning the “end” of the purported armed conflict(s) between the U.S. and certain terrorist organizations. We first outline the concept of armed conflict against terrorist networks and the related concept of the end of that conflict that are emerging in U.S. practice. We then turn to the two focus areas.

**Concept of Armed Conflict and the End of Such Conflict**

Broadly conceived, the U.S.‘s War on Terror combines traditional elements of war (such as targeting the enemy in direct attack and sanctions directed against the enemy) with conventional criminal-justice measures (such as criminal prosecution and international cooperation in intelligence matters). The U.S. does not consider that all the operations forming part of its general War on Terror are conducted in the context of an armed conflict as a matter of international law. In certain respects, the U.S.‘s approach has made drawing those legal boundaries challenging. That is in part because the U.S.‘s approach appears to blend, at various times and with respect to different geographic areas and seemingly different sets of enemy targets, international-legal frameworks pertaining to the use of force, to armed conflict, and to law-enforcement operations.

**Relationship between International-Legal Frameworks and Domestic-Legal Frameworks**

It can be difficult to untangle the pertinent legal threads, in part, because domestic authorities invoked by the government for the conduct of military operations are not always couched in the same language or with the same underlying concepts as the purported international-legal authorities that are relied on for those operations. In this context, two distinct authorizations to use military force—one against the perpetrators of the 9/11 attacks, and another against the threat posed by Iraq—currently underpin assertions of domestic authorities.\footnote{360}{See Stephen W. Preston, “The Legal Framework for the United States’ Use of Military Force Since 9/11,” Am. Soc. Int’l L., Apr. 10, 2015, https://www.defense.gov/News/Speeches/Speech-View/Article/606662 <https://perma.cc/4JA6-WC4T> [hereinafter, “Preston, Legal Framework”] (stating
While some of the possibly-relevant U.S. practice precedes the attacks on September 11, 2001, the starting point for a legal analysis is often (though not always) anchored in the passage of the Authorization for Use of Military Force (2001 AUMF). The 2001 AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

Under the 2001 AUMF, the U.S. commenced military operations in Afghanistan against al-Qaeda and the Taliban on October 7, 2001. In 2002, Congress passed another AUMF (the 2002 AUMF). The 2002 AUMF authorizes the use of military force against Iraq to, among other things, “defend the national security of the United States against the continuing threat posed by Iraq.” According to Stephen W. Preston, then-U.S. Department of Defense (DoD) General Counsel, “[a]lthough the threat posed by Saddam Hussein’s regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related purposes of helping to establish a stable, democratic Iraq and addressing terrorist threats emanating from Iraq.”

that “[t]he name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF [Authorization for Use of Military Force] continuously since at least 2004. A power struggle may have broken out within bin Laden’s jihadist movement, but this same enemy of the United States continues to plot and carry out violent attacks against us to this day. Viewed in this light, reliance on the AUMF for counter-ISIL operations is hardly an expansion of authority.”


362. For an analysis of the legacy of the Obama Administration concerning the 2001 AUMF, see Curtis A. Bradley and Jack L. Goldsmith III, Obama’s AUMF Legacy (Social Science Research Network Working Paper Series, 2016), https://ssrn.com/abstract=2823701 (arguing that “[t]he transformation of the AUMF from an authorization to use force against the 9/11 perpetrators who planned an attack from Afghanistan into a protean foundation for indefinite war against an assortment of related terrorist organizations in numerous countries is one of the most remarkable legal developments in American public law in the still-young twenty-first century. … [T]his transformation largely occurred during the Obama presidency”). Id. at 2.


364. Preston, Legal Framework, supra note 360 (noting that the U.S. notified the “U.N. Security Council consistent with Article 51 of the UN Charter that the United States was taking action in the exercise of its right of self-defense in response to the 9/11 attacks”).


366. Preston, Legal Framework, supra note 360 (and stating further that, “[a]fter Saddam Hussein’s regime fell in 2003, the United States, with its coalition partners, continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against AQI [Al-Qaeda in Iraq], which then, as now, posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Accordingly, the 2002 AUMF authorizes military operations against ISIL in Iraq and, to the extent necessary to achieve these purposes, in Syria”). Id.
Armed Conflicts

At least as of early December 2016, the Obama Administration considered the U.S. to be engaged in armed conflict as a matter of international law in:

- Afghanistan (at least against ISIS and against al-Qaeda,\(^{367}\) and, possibly, against the Taliban and certain other terrorist or insurgent groups affiliated with al-Qaeda or the Taliban in Afghanistan\(^{368}\));
- Iraq (at least against ISIS\(^{369}\));
- Libya (at least against ISIS\(^{370}\) and, possibly, against individual members of al-Qaeda\(^{371}\));
- Somalia (against al-Qaeda “and its Somalia-based associated force, al-Shabaab”\(^{372}\));

\(^{367}\) See Legal and Policy Frameworks Report, supra note 356, at 15 (stating that “[a]lthough the United States has transitioned the lead for security to Afghan security forces, a limited number of U.S. forces remain in Afghanistan for the purposes of, among other things: … conducting and supporting U.S. counterterrorism operations against the remnants of core al-Qa’ida and against ISIL; and taking appropriate measures against those who directly threaten U.S. and coalition forces in Afghanistan” and that “U.S. military operations and support for Afghan military forces in the ongoing armed conflict in Afghanistan are now undertaken consistent with the Bilateral Security Agreement between the United States and Afghanistan and with the consent of the Government of Afghanistan.” Citation omitted.

\(^{368}\) In a December 2016 report, the Obama administration did not expressly characterize its military actions against the Taliban and against “certain other terrorist or insurgent groups affiliated with al-Qa’ida or the Taliban in Afghanistan” as being conducted in the context of an armed conflict, but rather discussed those actions in the context of activities undertaken under the 2001 AUMF. See Legal and Policy Frameworks Report, supra note 356, at 5.

\(^{369}\) See id. at 16 (stating that, “[a]s a matter of international law, the United States is using force against ISIL in Iraq at the request and with the consent of the Government of Iraq, which has sought U.S. and coalition support in its defense of the country against ISIL. U.S. operations against ISIL in Iraq are thus conducted in the context of an armed conflict and in furtherance of Iraq and others’ armed operations against the group and in furtherance of U.S. national self-defense.” Citation omitted.

\(^{370}\) See id. at 17 (stating that, “[a]s a matter of international law, airstrikes in Libya against ISIL are being conducted at the request and with the consent of the GNA [Government of National Accord] in the context of the ongoing armed conflict against ISIL and in furtherance of U.S. national self-defense”).

\(^{371}\) In a December 2016 report, the Obama administration did not expressly characterize its military actions against “individuals who are part of al-Qa’ida in Libya” as being conducted in the context of an armed conflict, but rather discussed those actions in the context of activities undertaken under the 2001 AUMF. See Legal and Policy Frameworks Report, supra note 356, at 5 (stating that, “[c]onsistent with the above, the 2001 AUMF does not authorize the President to use force against every group that commits terrorist acts. Rather, the U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001 AUMF: … individuals who are part of al-Qa’ida in Libya ….”). The accompanying footnote states that, “[f]or example, the United States conducted an airstrike against Mokhtar Belmokhtar, a long-time terrorist who maintained his personal allegiance to al-Qa’ida, pursuant to the authority conferred on the President by the 2001 AUMF. Under that same authority, the United States captured al-Qa’ida member Abu Anas al-Libi, accused of participating in the 1998 U.S. embassy bombings in Kenya and Tanzania.” Id. at 5 n.22.

\(^{372}\) See id. at 17 (and further stating that, “[a]s a matter of international law, U.S. counterterrorism operations in Somalia, including airstrikes, have been conducted with the consent of the Government of Somalia in support of Somalia’s operations in the context of the armed conflict against al-Shabaab and in furtherance of U.S. national self-defense”). Id.
• Syria (at least against ISIS and, possibly, against al-Qaeda); and
• Yemen (against al-Qaeda in the Arabian Peninsula (AQAP)).

In a December 2016 report, the Obama Administration did not expressly characterize U.S. military actions against “core” al-Qaeda in Pakistan as being conducted in the context of an armed conflict. Rather, the Administration discussed those actions in the context of activities undertaken under the 2001 AUMF, though that framing does not necessarily preclude an interpretation that those military actions formed part of an armed conflict.

Also, as discussed in more depth below, the Obama Administration adopted a set of policies concerning “direct action, which refers to lethal and non-lethal uses of force, including capture operations, against terrorist targets outside the United States and areas of active hostilities.” As used in that context, the phrase “areas of active hostilities” is not a legal term of art. And “[t]he determination as to whether a region constitutes an ‘area of active hostilities’ does not turn exclusively on whether there is an armed conflict under international law taking place in the country at issue, but also takes into account, among other things, the size and scope

373. See id. at 16 (stating that, “[a]s a matter of international law, the United States is using force in Syria against ISIL and providing support to opposition groups fighting ISIL in the collective self-defense of Iraq (and other States) and in U.S. national self-defense”) read in combination with Brian J. Egan, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign,” Am. Soc. Int’l Law, Apr. 1, 2016, https://www.state.gov/s/l/releases/remarks/255493.htm (hereinafter, “Egan, Counter-ISIL Campaign”) (stating that, “[b]ecause we are engaged in an armed conflict against a non-State actor, our war against ISIL is a non-international armed conflict, or NIAC”).

374. In a December 2016 report, the Obama Administration did not expressly characterize its military actions against al-Qaeda in Syria as being conducted in the context of an armed conflict, but rather discussed those actions in the context of activities undertaken under the 2001 AUMF. See Legal and Policy Frameworks Report, supra note 356, at 17 (stating that, “the United States is using force in Syria against al-Qa’ida in Syria in self-defense of the United States and in furtherance of the security of U.S. partners and allies”); see also Preston, Legal Framework, supra note 360 (stating that, “over the past year, we have conducted military operations under the 2001 AUMF against the Nusrah Front and, specifically, those members of al-Qa’ida referred to as the Khorasan Group in Syria”).

375. See Legal and Policy Frameworks Report, supra note 356, at 18 (stating that, “[a]s a matter of international law, the United States has conducted counterterrorism operations against AQAP in Yemen with the consent of the Government of Yemen in the context of the armed conflict against AQAP and in furtherance of U.S. national self-defense”).

376. See Legal and Policy Frameworks Report, supra note 356, at 5 (stating that, “[c]onsistent with the above, the 2001 AUMF does not authorize the President to use force against every group that commits terrorist acts. Rather, the U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001 AUMF: al-Qa’ida”); the accompanying footnote states that “Al-Qa’ida is used here to refer to what has at times been called ‘core al-Qa’ida,’ including the senior leaders and cadre of the organization based in Afghanistan and Pakistan who were primarily responsible for planning and carrying out the September 11th attacks in the United States. Since the degradation of those elements and the relocation of some senior leaders outside the region, the term ‘al-Qa’ida senior leaders’ is now used to refer to the overall emir and other senior figures of the group”). Id. at 5 n.21 (emphasis added).


378. See Egan, Counter-ISIL Campaign, supra note 373.
of the terrorist threat, the scope and intensity of U.S. counterterrorism operations, and the necessity of protecting any U.S. forces in the relevant location.\textsuperscript{379} At least as of December 2016, the Obama Administration considered Afghanistan, Iraq, Syria, and certain portions of Libya to constitute “areas of active hostilities” such that the PPG did not apply to “direct action” taking place in relation to those territories.\textsuperscript{380}

**General Indicia or Criteria concerning the End of Armed Conflict with Terrorist Organizations**

In 2013, President Obama stated that the United States’ “systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. That’s what our democracy demands.”\textsuperscript{381} Yet, at least according to the Obama Administration, that end (in the event that it arrives) is probably going to be unconventional because “[g]roups like al-Qa’ida are highly unlikely to disarm and sign instruments of surrender. And given their radical objectives, groups like al-Qa’ida are also highly unlikely ever to denounce terrorism and violence and to seek to address their perceived grievances through some form of reconciliation or participation in a political process.”\textsuperscript{382}

How, according at least to the Obama Administration, will the purported armed conflict with non-state terrorist organizations end? The basic theory is that, “[a]t a certain point, the United States will degrade and dismantle the operational capacity and supporting networks of terrorist organizations like al-Qa’ida to such an extent that they will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States.”\textsuperscript{383} At that “tipping point,”\textsuperscript{384} “there will no longer be an ongoing armed conflict between the United States and those forces.”\textsuperscript{385} That day had not yet come, in the view of the Obama Administration as of early December 2016, because al-Qaeda and ISIL “still pose a real and profound threat to U.S. national security. As a result, the United States remains in a state of armed conflict against these groups as a matter of international law...”\textsuperscript{386} Thus, the foundational concern is the capacity of a terrorist organization to launch a strategic attack against the U.S. coupled with the will to do so.\textsuperscript{387}

\textsuperscript{379} Legal and Policy Frameworks Report, supra note 356, at 25.
\textsuperscript{380} Id.
\textsuperscript{382} Legal and Policy Frameworks Report, supra note 356, at 11.
\textsuperscript{383} Id. at 11–12; see also Preston, Legal Framework, supra note 360.
\textsuperscript{384} See Johnson, How Will It End?, supra note 356.
\textsuperscript{385} Legal and Policy Frameworks Report, supra note 356, at 12 (citing to Johnson, How Will It End?); see also Preston, Legal Framework, supra note 360.
\textsuperscript{386} Legal and Policy Frameworks Report, supra note 356, at 12.
\textsuperscript{387} This theory is arguably similar to the view espoused by President George W. Bush in an address to Congress nine days after the attacks of September 11, 2001: “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.” Address to a Joint Session of Congress and the American People, Sept. 20, 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html <https://perma.cc/Z3K2-G4NL>.
**TWO KEY STAKES**

**Deprivation of Liberty**

The following series of cases sketches how U.S. courts have attempted to address the legality of the initial capture, ongoing deprivation of liberty, and possible release of individuals detained in relation to the War on Terror. In key respects, judicial imprecision in the interpretation and application of IHL has frustrated attempts to coherently determine as a matter of international law the existence—and, possibly, the termination—of a relevant armed conflict. In particular, in addressing capture, deprivation of liberty, and disposition in relation to the War on Terror, U.S. courts have largely failed to consistently and coherently ascertain the scope of application of IHL. That threshold-classification failure may matter in no small part because, as shown in Sections 4 and 5, international law lays down—in relation to various types of armed conflict—different provisions concerning modalities governing initial and ongoing deprivation of liberty, timing of release, and ultimate disposition.

*Hamdi*

*Hamdi v. Rumsfeld* (2004) is a Supreme Court case that concerned the President’s authority to detain “enemy combatants” as part of the conflict authorized by the 2001 AUMF. More specifically, *Hamdi* addressed the question of whether, in the circumstances, a detained American citizen, Yasser Hamdi, could seek independent review of the legality of his detention. Of the four separate opinions written, none received the support of a majority of justices. Nonetheless, as Jennifer Elsea and Michael Garcia summarize, “a majority of the Court recognized that, as a necessary incident to the 2001 AUMF, the President is authorized to detain persons captured while fighting U.S. forces in Afghanistan (including U.S. citizens), and potentially hold such persons for the duration of the conflict to prevent their return to hostilities.”

For the purposes of the case, the government had made clear that “the enemy combatant that it is seeking to detain is an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”

In a plurality opinion, Justice O’Connor held, among other things, that:

>There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the 9/11] attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”

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391. *Id.* at 518 (emphasis added).
A premise underlying this holding is that “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.” The plurality understood “Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict.” And that understanding, according to the plurality, “is based on longstanding law-of-war principles.”

Justice O’Connor did caution that, “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.” Still, she reasoned, “[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'

In holding that “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities,” Justice O’Connor cited provisions that are applicable as a matter at least of treaty law only to international armed conflicts—not to non-international armed conflicts. Yet she did not expressly classify the relevant conflict in Hamdi as an IAC.

Hamdan

In Hamdan v. Rumsfeld (2006), a 6–3 majority of the Supreme Court held that the military commissions established pursuant to a presidential order to try suspected terrorists of law-of-war violations did not comply with the Uniform Code of Military Justice (UCMJ) or with the law of war (as embodied in the 1949 Geneva Conventions and as incorporated into the UCMJ).

This case turned, in part, on the classification—whether as an IAC or a NIAC—of the purported armed conflict in which Salim Ahmed Hamdan, Osama bin Laden’s former chauffeur, had allegedly participated. That classification would help determine whether Hamdan could invoke the Geneva Conventions at all, and, if so,
which of provisions of them.

Earlier in the proceedings, “the Court of Appeals concluded that the [Geneva] Conventions did not in any event apply to the armed conflict during which Hamdan was captured.”400 Rather, the Court of Appeals “accepted the Executive’s assertions that Hamdan was captured in connection with the United States’ war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan.”401 The Court of Appeals “further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions.”402 In its 6–3 opinion, a majority of the Supreme Court expressly disagreed with the latter conclusion.403

The government had argued that “[t]he conflict with al Qaeda is not ... a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions ... renders the full protections applicable only to ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.’”404 Rather, according to the Government, “[s]ince Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a ‘High Contracting Party’ ..., the protections of those Conventions are not ... applicable to Hamdan.”405 A majority of the Supreme Court expressly held that they “need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.”406 That provision was held to be Common Article 3.407 The majority noted that certain provisions of Common Article 3 protect “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by ... detention.”408 In particular, “[o]ne such provision prohibits ‘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.”409

In that part of the judgment, the Supreme Court majority rejected the Government’s claim—which the Court of Appeals had accepted—that Common Article 3 does not apply to Hamdan “because the conflict with al Qaeda, being international in scope, does not qualify as a conflict not of an international character.”410 That Government reasoning, according to the majority, “is erroneous. The term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations. So much is demonstrated by the ‘fundamental logic

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400. Id. at 628.
401. Id. (emphasis added).
402. Id.
403. Id.
404. Id. at 628–29 (citations omitted).
405. Id. at 629 (emphasis added; citations omitted).
406. Id. (emphasis added).
407. Id. at 629–31.
408. Id. at 629–30 (citation omitted).
409. Id. at 630 (citation omitted).
410. Id. (internal quotation marks and citation omitted).
[of] the Convention’s provisions on its application.”

The majority went on to distinguish situations to which Common Article 2 (concerning IACs) applied from situations to which Common Article 3 (concerning NIACs) applied. “The latter kind of conflict,” the majority reasoned, “is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase ‘not of an international character’ bears its literal meaning.”

In support of its conclusion, the majority recited a portion of an ICRC Commentary on Common Article 3, which the majority characterized as making “clear that the scope of application of the Article must be as wide as possible.”

With respect to the classification of the relevant armed conflict(s) as a matter of international law, the full import of the Hamdan majority’s analysis and holdings is difficult to pin down. On one hand, the majority clearly distinguishes between “international” and “non-international” armed conflicts. On the other hand, the majority expressly avoided deciding the merits of the argument that, “[s]ince Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a ‘High Contracting Party’ …, the protections of those Conventions are not … applicable to Hamdan.” Moreover, as part of its reasoning, the majority cited to authorities establishing that Common Article 3 protections are a minimum level of protection not only in relation to “non-international” armed conflicts but also in relation to “international” armed conflicts. And the majority expressly reserved the question of whether Hamdan’s “potential status as a prisoner of war independently renders illegal his trial by military commission.” (Recall that, at least as a matter of treaty law, IHL provisions concerning prisoner-of-war status are laid down only in relation to IACs.) In these respects, the majority opinion in Hamdan leaves open several important questions. The Supreme Court has not directly resolved those questions in subsequent decisions. Rather, attempts to answer those questions have fallen to lower courts.

In subsequent litigation, successive administrations and multiple lower courts

411.  Id. (citations omitted).
412.  Id. at 630–31 (citations omitted).
413.  Id. at 631 (citations omitted). In 2016, the ICRC articulated a slightly different approach:

While common Article 3 contains rules that serve to limit or prohibit harm in non-international armed conflict, it does not in itself provide rules governing the conduct of hostilities. However, when common Article 3 is applicable, it is understood that other rules of humanitarian law of non-international armed conflict, including those regarding the conduct of hostilities, also apply. Thus, while there may be no apparent need to discern possible limits to the scope of application of common Article 3, it is important that the rules applicable in armed conflicts apply only in the situations for which they were created. The existence of a situation that has crossed the threshold of an ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’ must therefore be neither lightly asserted nor denied. Humanitarian law standards must be applied only in the situation – armed conflict – for which they were intended and developed, carefully balancing considerations of military necessity and humanity.

GC I 2016 Commentary, supra note 68, at ¶¶ 398–390 (emphasis added; citation omitted).
415.  Id. at 631.
416.  Id. at 630.
have often interpreted and applied the majority’s Hamdan reasoning in ways that have confused whether—as a matter of international law—there are multiple, distinct purported armed conflicts (against the Taliban and against al-Qaeda, for instance) or a single purported armed conflict (against the Taliban, al-Qaeda, and “associated forces”). Though relatively few U.S. courts have extensively drawn on international-legal sources and methodologies to ascertain which IHL provisions and rules may be relevant, that confusion—as to whether there is one purported armed conflict or multiple purported armed conflicts—is at the root of much of the ensuing inconsistent and non-comprehensive reasoning regarding the application of IHL to any particular person deprived of liberty in relation to the War on Terror. That reasoning bears, in turn, on the question of how long such a detainee may be held for.

Al-Bihani

Al-Bihani v. Obama (2010) concerned a Yemeni citizen named Ghaleb Nassar Al-Bihani, who—in appealing the denial of his petition for a writ of habeas corpus—claimed that his detention at Guantánamo was not authorized by statute and that the procedures of his habeas proceeding were constitutionally infirm. On January 5, 2010, a three-judge panel on the Court of Appeals of the D.C. Circuit, in an opinion written by Judge Brown, denied Al-Bihani’s appeal.417

At the outset, as a matter of domestic law, the Court rejected “the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war.”418 Instead, according to the Court, “[w]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President’s war powers.”419 To resolve al-Bihani’s case, the Court looked to the text of the relevant statutes and controlling domestic law—it had, in its view, “no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles.”420

Having formulated its approach to relevant sources of law, the Court established the government’s detention authority under domestic law.421 In a nutshell, the Court interpreted the facts as showing that Al-Bihani was both part of and substantially supported enemy forces and was therefore detainable under applicable U.S. law.422 Those facts included, as acknowledged by Al-Bihani, that he accompanied the 55th Arab Brigade (in the Court’s words, “a paramilitary group allied with the Taliban, … which included Al Qaeda members within its command structure and which fought on the front lines against the Northern Alliance”)423 on the battlefield in Afghanistan, carried a brigade-issued weapon, cooked for the unit, and retreated

418. Id. at 871.
419. Id. (citation omitted).
420. Id. at 871–72.
421. Id. at 872–74.
422. Id. at 873–74.
423. Id. at 869.
and surrendered under brigade orders.\textsuperscript{424}

The Court then turned to Al-Bihani’s argument, rooted in \textit{Hamdi}, that he must be released according to “longstanding law-of-war principles”\textsuperscript{425} “because the conflict with the Taliban has allegedly ended.”\textsuperscript{426} The Court noted that “Al-Bihani offers the court a choice of numerous event dates—the day Afghans established a post-Taliban interim authority, the day the United States recognized that authority, the day Hamid Karzai was elected President—to mark the official end of the conflict.”\textsuperscript{427} According to the Court, “[n]o matter which [of those dates] is chosen, each would dictate the release of Al-Bihani if” the Court followed his reasoning.\textsuperscript{428} But, the Court ultimately concluded, Al-Bihani’s argument failed on factual and practical grounds.\textsuperscript{429}

First, the Court stated, “it is not clear if Al-Bihani was captured in the conflict with the Taliban or with Al Qaeda; he does not argue that the conflict with Al Qaeda is over.”\textsuperscript{430} Second, the Court noted, “there are currently 34,800 U.S. troops and a total of 71,030 Coalition troops in Afghanistan, with tens of thousands more to be added soon.”\textsuperscript{431} According to the Court, “[t]he principle Al-Bihani espouses—were it accurate—would make each successful campaign of a long war but a Pyrrhic prelude to defeat.”\textsuperscript{432} That would be because “[t]he initial success of the United States and its Coalition partners in ousting the Taliban from the seat of government and establishing a young democracy would trigger an obligation to release Taliban fighters captured in earlier clashes.”\textsuperscript{433} Accordingly, the Court held, “the victors would be commanded to constantly refresh the ranks of the fledgling democracy’s most likely saboteurs.”\textsuperscript{434}

In his response to that (in the words of the Court) “commonsense observation,” “Al-Bihani contends the current hostilities are a different conflict, one against the Taliban reconstituted in a non-governmental form, and the government must prove that Al-Bihani would join this insurgency in order to continue to hold him.”\textsuperscript{435} Yet, in the eyes of the Court, “even the laws of war upon which he relies do not draw such fine distinctions.”\textsuperscript{436} To sustain this reasoning, the Court stated that “[t]he Geneva Conventions require release and repatriation only at the ‘cessation of active hostilities.’”\textsuperscript{437} In this connection, the Court found it “significant” “[t]hat the [Geneva] Conventions use the term ‘active hostilities’ instead of the terms ‘conflict’ or ‘state of war’ found elsewhere in the

\begin{footnotes}
\textsuperscript{424}  Id. at 872–73.
\textsuperscript{425}  Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004); see supra this section.
\textsuperscript{426}  Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010) (emphasis added).
\textsuperscript{427}  Id.
\textsuperscript{428}  Id.
\textsuperscript{429}  Id.
\textsuperscript{430}  Id. (emphasis added).
\textsuperscript{431}  Id. (citations omitted).
\textsuperscript{432}  Id.
\textsuperscript{433}  Id. (emphasis added).
\textsuperscript{434}  Id. (emphasis added).
\textsuperscript{435}  Id. (emphasis added).
\textsuperscript{436}  Id.
\textsuperscript{437}  Id. (citing to Article 118 GC III).
\end{footnotes}
According to the Court, the use of the term “active hostilities” in Article 118(1) of GC III “serves to distinguish the physical violence of war from the official beginning and end of a conflict, because fighting does not necessarily track formal timelines.” Therefore, in the eyes of the Court, “[t]he [relevant Geneva] Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops.”

Ultimately, the Court did not rest its resolution of the issue of when release is required on such common sense or on international law. Rather, in the Court’s view, “[t]he determination of when hostilities have ceased is a political decision,” and the Court therefore deferred “to the Executive’s opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war.” In short, the Court reasoned, “[i]n the absence of a determination by the political branches that hostilities in Afghanistan have ceased, Al-Bihani’s continued detention is justified.”

The above-highlighted elements of the Court’s reasoning in Al-Bihani might be significant here for four reasons. First, Article 118(1) of GC III underpins an important part of the reasoning. As a matter of international law, that provision is applicable only in relation to IACs. The Court, however, does not expressly classify the relevant armed conflict as international in character. It is not clear why the Court points to Article 118(1) of GC III—the Court never, for example, states that the provision is applicable as a matter of international law (which would imply that Al-Bihani qualifies as a prisoner of war under GC III), nor does it state that the provision provides a useful (if non-applicable) analogy.

Second, the Court noted that, in principle, there may be two separate conflicts—one with the Taliban, and another with al-Qaeda. Yet, with respect to the issues raised by Al-Bihani, including the legal parameters concerning release, the Court seemed to draw no relevant international-legal distinctions between those conflicts. Nor did the Court expressly classify either of those purported conflicts—whether as being international or non-international in character—as a matter of international law.

Third, the Court might be seen as misapprehending the “laws of war” upon which purportedly Al-Bihani depended, at least to the extent that IHL does make certain “fine distinctions”—some of which might be relevant to release—between IACs and NIACs. That said, it is not clear from the Court’s decision whether

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438. Id.
439. Id. (citing to Articles 2 and 118 GC III).
440. Id.
441. Id.
442. Id. (citations omitted).
443. Id. at 875.
444. Id. at 874 (stating that, “it is not clear if Al-Bihani was captured in the conflict with the Taliban or with Al Qaeda”). Emphasis added.
445. Assuming that at least one of the “fine distinctions” the Court was referring to concerned the alleged (by Al-Bihani) change in conflict classification (from IAC to NIAC). The text of the opinion is unclear, however, as to whether the referenced “fine distinctions” might concern only whether “the government must prove that Al-Bihani would join this insurgency in order to continue to hold him.” Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010).
Al-Bihani argued that the relevant conflict transformed from an IAC into a NIAC as a matter of international law, though Al-Bihani did apparently argue that he was captured in an international conflict between the U.S. and the Government of Afghanistan. For its part, the government had argued that the relevant conflict was “the conflict against the joint forces of al-Qaida, the Taliban, and associated forces, and hostilities in that conflict continue,” but that, “[r]egardless of whether the nature of the conflict changed, the time at which hostilities are at an end is a matter for the political branches and not the courts.”

Fourth, the Al-Bihani Court interprets the “cessation of active hostilities” phrase laid down in Article 118(1) of GC III as being triggered at the point where “the fighting stops.” The Court does not expressly discuss whether that “fighting” includes hostilities involving only the Taliban or also al-Qaeda.

Al Warafi

On July 30, 2015, Judge Lamberth of the D.C. District Court rejected the challenge to the legality of Mikhtar Yahia Naji al Warafi’s detention at Guantánamo. Al Warafi had argued that recent statements by President Obama proved that the hostilities that justified his detention—hostilities between the U.S. and the Taliban in Afghanistan—had ended. The government argued that Al Warafi’s detention is authorized under the 2001 AUMF because the U.S. remains engaged in active hostilities with the Taliban in Afghanistan.

As part of his reasoning, Judge Lamberth recited the holding in Al-Bihani that “release is only required when the fighting stops.” Judge Lamberth held that the government had “offered convincing evidence that U.S. involvement in the fighting...” (citations omitted).

Assuming for the sake of argument that the relevant conflict did so transform, such a change in character, as Sassoli explains, may matter significantly from an international-legal perspective because “[t]his [change] could trigger the obligation to repatriate POWs, as only a minority opinion argues that in a NIAC the members of adverse armed forces or groups may be detained until the end of active hostilities without further procedures.” Sassoli, Prisoners of War, supra note 13, at 1048 (internal cross-reference omitted).


448. Id. (internal citations omitted).


451. Id.

452. Id.

453. Id. at 5 (citation omitted).
In Afghanistan, against al Qaeda and Taliban forces alike, has not stopped.”

In one of his responses, Al Warafi had argued “that any engagements between U.S. forces and the Taliban ‘would at most be collateral effects of pursuing al Qaeda or assisting the Afghan security forces, and do not represent a war by the United States against the Taliban.” But, according to Judge Lambert, “war is not required here; all the [2001] AUMF detention authority demands is that the fighting continue. The government has shown that the fighting in fact continues, and [Al Warafi] does not dispute this.”

Al Warafi had asserted “that one rationale for wartime detention (the fear of replenishing the enemy’s ranks) would not be implicated by his release” for two reasons. First, because Al Warafi “is not an Afghan and has no current connection with the Taliban or Afghanistan,” and second, because the U.S. government “could simply not release him to Afghanistan.” Regarding the first point, Judge Lamberth ruled that “that did not stop [Al Warafi] from assisting the Taliban in the first place.” And, as to the second point, according to Judge Lamberth, “Al Warafi does not say how [the Executive] could, having released him to somewhere besides Afghanistan, stop him from returning there.”

Judge Lamberth’s decision in Al Warafi is relevant to our analysis here for two reasons. First, following the reasoning of some earlier courts, Judge Lamberth held that the factual existence of fighting—and not merely the statements of political authorities—matters in discerning whether the 2001 AUMF continues to provide a basis to detain Al Warafi. And second, Judge Lamberth does not link Al Warafi’s detention to a particular IAC or NIAC. Rather, Judge Lamberth emphasized the fact that the government had “offered convincing evidence that U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped.” Yet, as detailed in Sections 4 and 5, there are, in many respects, significant differences—including in terms of number and specificity—between, on one hand, IHL treaty provisions pertaining to IAC and, on the other, IHL treaty provisions pertaining to NIAC as to grounds for detention and disposition of those deprived of liberty in connection with an armed conflict.

Hamdullah

On March 29, 2016, Judge Kessler of the D.C. Circuit denied the motion of an Afghan citizen named Haji Hamdullah for a writ of habeas corpus seeking release from detention in Guantánamo. Hamdullah had raised two issues: whether “active hostilities” in Afghanistan are considered to have ended, and who makes that determination. Judge Kessler ruled that “active hostilities” in Afghanistan had not ceased, thus warranting the continued detention of Hamdullah.
Judge Kessler located “[t]he crux of the Parties’ disagreement” as “whether detention is authorized for the duration of ‘active combat’ or ‘active hostilities.’” She briefly outlined the history leading up to “the cessation of active hostilities” phrase laid down in Article 118(1) of GC III. Citing to the ICRC’s *Commentary on GC III*, Judge Kessler recalled that “the ‘cessation of active hostilities’ standard was first adopted in the 1949 Geneva Conventions following the delayed repatriation of prisoners of war in earlier armed conflicts.” Judge Kessler noted that “[t]he two predecessor multilateral law-of-war treaties to the 1949 Geneva Conventions required repatriation of prisoners of war only ‘after the conclusion of peace.’” “Repatriation delays arose after World Wars I and II,” she noted, “due to a substantial gap in time between the cessation of active hostilities and the signing of formal peace treaties.” In this historical context, Judge Kessler reasoned, “[t]he ‘cessation of active hostilities’ requirement sought to correct this problem, thereby making repatriation no longer contingent on a formal peace accord or political agreement between the combatants.”

Against that backdrop, Judge Kessler held that Hamdullah “correctly interprets [GC III’s] ‘cessation of active hostilities’ so that final peace treaties are no longer a prerequisite to mandatory release of prisoners of war.” That change is the basis Hamdullah’s argument, in the words of Judge Kessler, that GC III “contemplates the possibility that some degree of conflict might continue even after the core of the fighting has subsided.” Accordingly, Hamdullah “argues that cessation of active hostilities requires only an end to active combat,” and he “reaches this conclusion by comparing the language of [GC III] with language in Articles 6 and 133 of [GC IV].” Judge Kessler noted that “Article 133 of [GC IV] addresses the internment of civilians in wartime and provides that such internment ‘shall cease as soon as possible after the close of hostilities.’” In an attempt “to show that ‘close of hostilities’ could be a point in time that might occur after ‘cessation of active hostilities,’” Hamdullah relied on the ICRC’s *Commentary on GC IV*. But Judge Kessler was not convinced by that argument. Rather, she pointed out that the ICRC’s *Commentary on GC IV* that Hamdullah “cites acknowledges that the provisions are similar and ‘should be understood in the same sense.’”

Judge Kessler next addressed Hamdullah’s view of Article 6(2) of GC IV. (Recall that that provision provides that the application of GC IV “shall cease upon the close of military operations.”) Again citing the ICRC’s *Commentary on GC IV*, Judge Kessler held that “[t]he phrase ‘close of military operations’ [in Article 463.] Id. at 305 (citations omitted).
464. Id. (citation omitted).
465. Id. (citation omitted).
466. Id. at 305–06 (citation omitted).
467. Id. at 306 (citations omitted).
468. Id.
469. Id. (citation omitted).
470. Id. (citation omitted).
471. Id. (citations omitted).
472. Id. (citation omitted).
473. Id.
474. Id. (citation omitted).
6(2) of GC IV] was understood to mean ‘the final end of all fighting between all those concerned.’ The Court agreed with Hamdullah “that ‘cessation of active hostilities’ is distinct from ‘close of military operations,’ and that active hostilities can cease prior to the close of military operations.” Judge Kessler reasoned that “[t]his distinction is consistent with the differing purposes of Article 6 [of GC IV] (defining the period of time in which [GC IV], in its entirety, applies) and Article 118 [of GC III] (focusing on detention specifically).” Yet, she emphasized, “it does not necessarily follow that ‘cessation of active hostilities’ therefore requires only an end to combat operations,” as Hamdullah argues.

In sum, Judge Kessler concluded “that the appropriate standard is cessation of active hostilities and that active hostilities can continue after combat operations have ceased. But, cessation of active hostilities is not so demanding a standard that it requires total peace, signed peace agreements, or an end to all fighting.”

Judge Kessler’s analysis, in rejecting Hamdullah’s appeal, is relevant for our purposes for two reasons. The first concerns whether Hamdullah qualifies as a prisoner of war under GC III (and domestic implementing legislation). Judge Kessler never explicitly made that holding. Nonetheless, it might be notable that she did characterize Hamdullah as being “detained as a prisoner of war;” she assessed GC III as part of the legal analysis; and she concluded that the appropriate standard is “the cessation of active hostilities” (which she derived through analysis of Article 118 of GC III in comparison to Articles 6(2) and 133 of GC IV).

Second, upon holding that “the cessation of active hostilities” standard—which is laid down in Article 118(1) of GC III—is the relevant release-and-repatriation temporal formulation concerning Hamdullah, Judge Kessler held that active hostilities can continue after combat operations are over and that “the cessation of active hostilities” does not require total peace, signed peace agreements, or an end to all fighting. In respect of at least that last clause, Judge Kessler did not expressly adopt the portion of Al-Bihani that stated that “release [in the sense of Article 118 of GC III] is only required when the fighting stops.”

Targeting in Direct Attack
The second major stake concerns the international-legal parameters of targeting in direct attack. We first review key portions of a U.S. government legal memorandum that analyzes, among other things, elements of the scope of armed conflict against AQAP. We then outline portions of a presidential policy guidance

475. Id. (citation omitted).
476. Id. (emphasis added).
477. Id. (citation omitted).
478. Id. (emphasis added).
479. Id.
480. Id. at 301 (stating that “[p]etitioner Haji Hamdullah has been detained as a prisoner of war by the United States since his capture in 2003”) (citation omitted).
481. Id. at 304.
482. Id. at 306.
483. Id.
484. Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010).
pertaining to “direct action” against terrorist targets located outside the United States and “areas of active hostilities.”

Al-Aulaki Memorandum

A memorandum, dated July 16, 2010, addressing the “Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaki” (the memorandum) was prepared on the letterhead of the Office of the Legal Counsel (OLC) and was signed by David J. Barron. At the time, Barron was Acting Assistant Attorney General; later, he was appointed to the U.S. Court of Appeals for the First Circuit. Part of the memorandum—a redacted version of which was made available through litigation—reviewed whether a proposed lethal operation in Yemen against a U.S. citizen “would comply with the international law rules to which it would be subject.” Based on the combination of facts presented, the OLC concluded that the “DoD would carry out its [sic] operation as part of the [NIAC] between the United States and al-Qaida, and thus that on those facts the operation would comply with international law so long as DoD would conduct it in accord with the applicable laws of war that govern targeting in such a conflict.”

Part of the analysis underpinning that conclusion rested on the view that:

In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al-Qaida. In so holding, the Court … held … that a conflict between a transnational non-state actor and a nation, occurring outside that nation’s territory, is an armed conflict ‘not of an international character’ because it is not a ‘clash between nations.’

The fact that the contemplated DoD operation would occur in Yemen, “a location that is far from the most active theater of combat between the United States and al-Qaida,” did not affect the OLC’s conclusion pursuant to the view that “the combination of facts present here would make the DoD operation in Yemen part of the [NIAC] with al-Qaida.”

The OLC addressed some commentators’ view “that the conflict between the [US] and al-Qaida cannot extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself.” The OLC found “little judicial or other authoritative, [sic] precedent that speaks directly to the question of the geographic scope of a [NIAC] in which one of the parties is a

485. For a recent analysis of international-legal elements of the approach of the United Kingdom to targeted killing outside armed conflict, see Christine Gray, *Targeted killing outside armed conflict: a new departure for the UK?*, 3 J. USE OF FORCE INT’L L. 198 (2016).

486. OLC–DOD Memorandum after appropriate redactions and deletion of classification codes, July 16, 2010, as reproduced as Appendix A in N.Y. Times Co. v. U.S. Dep’t of Justice, 756 F.3d 100, 124 (2d Cir.), opinion amended on denial of reh’g, 758 F.3d 436 (2d Cir. 2014), supplemented, 762 F.3d 233 (2d Cir. 2014) [hereinafter, “Al-Aulaki Memorandum”].

487. *Id.* at 137.

488. *Id.* (citations omitted).

489. *Id.* (citations omitted).

490. This view, according to the memorandum, is grounded in the *Tadić* formula “that for purposes of international law an armed conflict generally exists only when there is ‘protracted armed violence between governmental authorities and armed groups.’” *Id.* at 138 (citation omitted).
transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict.” 491 The OLC therefore looked “to principles and statements from analogous contexts, recognizing that they were articulated without consideration of the particular factual circumstances of the sort of conflict at issue here.” 492 In doing so, the OLC did not come across 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 can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. That does not appear to be the rule, or the historical practice, for instance, in a traditional international conflict. 493

Nor did the OLC “see any obvious reason why that more categorical, nation-specific rule should govern in analogous circumstances in this sort of [NIAC].” 494 Instead, the OLC thought that “the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case,” emphasizing that “[s]uch an inquiry may be particularly appropriate in a conflict of the sort here, given that the parties to it include transnational non-state organizations that are dispersed and that thus may have no single site serving as their base of operations.” 495

The OLC found “some support for this view in an argument the [U.S.] made to the [ICTY] in 1995.” 496 That is because “in that case the [U.S.] argued that in determining which body of humanitarian law applies in a particular conflict, ‘the conflict must be considered as a whole,’ and that ‘it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically, in an attempt to exclude the application of [the relevant] rules.’” 497 The OLC conceded that “the basic approach that the [U.S.] proposed in Tadić, and that the ICTY may be understood to have endorsed, was advanced without the current conflict between the U.S. and al-Qaida in view.” 498 Nonetheless, the OLC argued, “that approach reflected a concern with ensuring that the laws of war, and the limitations on the use of force they establish, should be given an appropriate application.” 499 And, the

491. Id.
492. Id.
493. Id. at 138–39 (citations omitted).
494. Id. at 139 (citation omitted).
495. Id. (citation omitted).
497. Id. (emphasis original; citations omitted).
498. Id. at 140 (citation omitted).
499. Id. (citations omitted).
OLC contended, “that same consideration, reflected in *Hamdan* itself ... suggests a further reason for skepticism about an approach that would categorically deny that an operation is part of an armed conflict absent a specified level and intensity of hostilities in the particular location where it occurs.”

Against this backdrop, the OLC reasoned that, “in applying the more context-specific approach to determining whether an operation would take place within the scope of a particular armed conflict, it is sufficient that the facts as they have been represented to us here, in combination, support the judgment that DoD’s operation in Yemen would be conducted as part of the [NIAC] between the [U.S.] and al-Qaida.” The OLC elaborated:

Specifically, DoD proposes to target a leader of AQAP, an organized enemy force that is either a component of al-Qaida or that is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict, in league with the principal enemy. Moreover, DoD would conduct the operation in Yemen, where, according to the [sic] facts related to us, AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the targeted individual himself, on behalf of that force, is continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. Taken together, these facts support the conclusion that the DoD operation would be part of the [NIAC] the Court recognized in *Hamdan*.

For our purposes here, this OLC memorandum may be relevant for four reasons. First, with respect to the scope of armed conflict, the OLC expressly rejected “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 can never be part of the original armed conflict ... unless and until the hostilities become sufficiently intensive and protracted within that new location.”

Second, the OLC characterized AQAP as “an organized enemy force that is either a component of al-Qaida or that is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict, in league with the principal enemy.”

In doing so, the OLC utilized a legal concept of “co-belligerency”—which has traditionally arisen only in relation to IACs—in relation to a purported NIAC. The OLC also thereby articulated notions of a “comprehensive armed conflict” and a “principal enemy.”

Third, it is not clear if, under the OLC’s analysis, the “significant and organized presence” of AQAP in Yemen is a prerequisite for the extension of the purported

500. *Id.* (citations omitted).
501. *Id.* (citations omitted).
502. *Id.* (emphasis original; citations omitted).
503. *Id.* at 138.
504. *Id.* at 140.
505. For an analysis of the concept, with a focus on its use in the U.S. context, see Rebecca Ingber, *Co-Belligerency*, 42 Yale J. Int’l L. 67 (2016).
506. *Al-Aulaki Memorandum*, supra note 486, at 140.
507. *Id.*
NIAC to Yemen. Nor is it clear whether the fact, as relayed to the OLC, that “AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States”\(^\text{508}\) is also a prerequisite for the extension of the purported NIAC to Yemen.

Fourth, in emphasizing that “the targeted individual himself, on behalf of [AQAP], is continuously planning attacks from that Yemeni base of operations against the [U.S.], as the conflict with al-Qaida continues,”\(^\text{509}\) the OLC raised the issue of whether someone who non-continuously plans attacks could (also), under this approach, be considered susceptible to lethal targeting in direct attack as part of the purported “comprehensive” NIAC with al-Qaeda.\(^\text{510}\)

These remaining questions regarding the OLC interpretation are thus relevant not only to the question of the scope of the purported NIAC with al-Qaeda and the relevant targeting authorities that such a NIAC would entail but also, and relatedly, to the stakes of determining when that NIAC ends.

*Presidential Policy Guidance (PPG) concerning Direct Action Against Terrorist Targets Located Outside the U.S. and “Areas of Active Hostilities”*

Three years after the Al-Aulaqi memorandum, the OLC produced a Presidential Policy Guidance (PPG)\(^\text{511}\) titled “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities.” Dated May 22, 2013 and released publicly\(^\text{512}\) (with redactions) on August 5, 2016 (pursuant to a court order\(^\text{513}\)), the PPG purports generally to “establish[ ] the standard operating procedures for when the United States takes direct action, which refers to lethal and non-lethal uses of force, including capture operations, against terrorist targets outside the United States and areas of active hostilities.”\(^\text{514}\)

The PPG claims to reflect, in light of existing legal obligations, the policy choices of the Obama Administration; thus, the PPG does not create any new legal obligation. The Trump Administration (or a subsequent administration) may therefore withdraw the PPG and adopt different policy choices, although any administration would still be bound to comply with rules and principles embedded

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\(^{508}\) *Id.*

\(^{509}\) *Id.* (emphasis original).

\(^{510}\) *Id.*

\(^{511}\) *PPG, supra note 377.*

\(^{512}\) The Government had already publicly disclosed, in a “Fact Sheet” that was released in May 2013, certain information contained in the PPG. Before it was released publicly (with redactions), the PPG had been characterized by Judge McMahon of the U.S. District Court of the Southern District of New York as “a fairly comprehensive outline of the procedures that the Administration goes through and the factors it analyzes when deciding whether to target for killing a terrorist suspect located outside this country but not in a so-called ‘hot war’ zone.” Am. Civil Liberties Union v. Dep’t of Justice, No. 15 CIV. 151 (CM), 2016 WL 889739, at 1–2 (S.D.N.Y. Mar. 4, 2016). Not specific to any particular decision, the Fact Sheet, according to Judge McMahon, “is more like a primer, or in legal terms, a hornbook or treatise, outlining considerations that would go into making a decision about whether to target a particular person or entity.” *Id.* (citation omitted).


\(^{514}\) *PPG, supra note 377, at 1.*
in the PPG that are reflective of legal obligations. Even before the PPG was made public (in redacted form), in April 2016 State Department Legal Adviser Brian Egan stated that “[t]he phrase ‘areas of active hostilities’ is not a legal term of art—it is a term specific to the PPG. For the purpose of the PPG, the determination that a region is an ‘area of active hostilities’ takes into account, among other things, the scope and intensity of the fighting.” At that time, Egan noted that “[t]he Administration currently considers Afghanistan, Iraq, and Syria to be ‘areas of active hostilities,’ which means that the PPG does not apply to operations in those States.” Concerning the substance of the PPG, Egan emphasized that “the PPG imposes certain heightened policy standards that exceed the requirements of the law of armed conflict for lethal targeting.” President Obama established the PPG, according to Egan, “out of a belief that implementing such heightened standards outside of hot battlefields is the right approach to using force to meet U.S. counterterrorism objectives and protect American lives consistent with our values.” Egan also stated that, “[o]f course, the President always retains authority to take lethal action consistent with the law of armed conflict, even if the PPG’s heightened policy standards may not be met.” The PPG generally holds that “international legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on the ability of the [U.S.] to act unilaterally – and on the way in which the [U.S.] can use force – in foreign territories.” Operationally, the PPG states that “[c]apture operations offer the best opportunity for meaningful intelligence gain from counterterrorism (CT) operations and the mitigation and disruption of terrorist threats.” Consequently,” under the PPG, “the United States prioritizes, as a matter of policy, the capture of terrorist suspects as a preferred option over lethal action and will therefore require a feasibility assessment of capture options as a component of any proposal for lethal action.” The PPG states, in general terms, that “[l]ethal action should be taken in an effort to prevent terrorist attacks against U.S. persons only when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat.” In addition, under the PPG, “[l]ethal action should not be proposed or

515.  See Presidential Memorandum, Plan to Defeat the Islamic State of Iraq and Syria § 2(ii)(B), Jan. 28, 2017, https://www.whitehouse.gov/the-press-office/2017/01/28/plan-defeat-islamic-state-iraq <https://perma.cc/K24E-XLDL> (stating that, “[w]ithin 30 days, a preliminary draft of the Plan to defeat ISIS shall be submitted to the President by the Secretary of Defense” and that that “[t]he Plan shall include: ... recommended changes to any United States rules of engagement and other United States policy restrictions that exceed the requirements of international law regarding the use of force against ISIS”) (emphasis added).
516.  Egan, Counter-ISIL Campaign, supra note 373.
517.  Id.
518.  Id.
519.  Id.
520.  Id.
521.  PPG, supra note 377, at 1–2.
522.  Id. at 1.
523.  Id.
524.  Id.
pursued as a punitive step or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission.” 525 Capture, according to the PPG, “is preferred even in circumstances where neither prosecution nor third-country custody are available disposition options at the time.” 526

“Non-combatants,” for purposes of the PPG, are expressly “understood to be individuals who may not be made the object of attack under the law of armed conflict.” 527 In defining who those are, the PPG states, somewhat confusingly, that “[t]he term ‘non-combatant’ does not include an individual who is targetable as part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense.” 528 Consider that:

- “[A]n individual who is targetable as part of a belligerent party to an armed conflict” is an IHL concept;
- “[A]n individual who is taking a direct part in hostilities” is an IHL concept; yet
- “[A]n individual who is targetable in the exercise of national self-defense” 529 is not, on its terms, an IHL concept. Rather, that category seems to mix a purported law-enforcement concept under IHRL (in the sense that the category focuses on an individual not expressly connected with a party to, or directly participating in hostilities in, an armed conflict—though, it bears emphasis, it is not clear on what basis an individual could be targetable under IHRL) with a use-of-force concept under the jus ad bellum (in the sense of exercising national self-defense). This category thus runs the risk of expanding the list of possible targets of direct lethal operations beyond what IHL permits.

Section 1.C.8. of the PPG details more specific guidelines for operational plans. That section states that “[a]ny operational plan for taking direct action against terrorist targets [redacted] shall, among other things, indicate with precision” certain enumerated elements. 530 One set of those elements is framed as follows:

[O]perational plan for taking direct action against terrorist targets include at a minimum the following: (a) near certainty that an identified HVT [high-value terrorist] or other lawful terrorist target other than an identified HVT is present; (b) near certainty that non-combatants will not be injured or killed: (c) [redacted] and (d) if lethal force is being employed: (i) an assessment that capture is notfeasible at the time of the operation; (ii) an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (iii) an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons. 531

525. Id.
526. Id.
527. Id. (emphasis added).
528. Id.
529. Id. (emphasis added).
530. Id. at 3.
531. Id. (citation omitted).
There is a potential that, in practice, the PPG might be operationalized in a way that results in a desirable outcome, possibly including fewer “non-combatant”—as that term is defined through a concerning mixture of concepts drawn from distinct fields of international law—deaths. Yet the PPG raises potential risks as well. Perhaps the biggest is that the PPG might be operationalized in a way that results in unlawful harm—even death—from an attack directed against an individual who is not susceptible to lethal targeting in direct attack under international law.\textsuperscript{532} Another risk concerns the introduction of the new category of “areas of active hostilities” (even though it was subsequently recognized as not constituting a “legal term of art”\textsuperscript{533}). That category might lead to further confusion (and, possibly, unlawful harm due to that confusion) regarding when, where, and against whom, exactly, the U.S. considers itself to be engaged—and, as a matter of international law, when, where, and against whom, exactly, it is engaged—in individual or collective national self-defense, in armed conflict, or in law-enforcement operations (or in some combination thereof).

Spanning out, we see that, through recent U.S. jurisprudence, practice, and doctrine, a complicated mixture has arisen: various purported armed conflicts against terrorist organizations interwoven with “direct action” against terrorist threats outside the United States and “areas of active hostilities.” This mixture has made it difficult to identify what constitutes an armed conflict, to classify relevant purported conflicts, to discern who the parties to those conflicts are, to delimit the geographical scope of those conflicts, and to ascertain the end of those conflicts.


\textsuperscript{533} Egan, \textit{Counter-ISIL Campaign}, supra note 373.