



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 48

Number 3 *Developments in the Law: Election
Law; Developments in the Law: Law of War*

Article 7

Spring 2015

The Boundless War: Challenging the Notion of a Global Armed Conflict Against al-Qaeda and Its Affiliates

Andrew Beshai

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [International Humanitarian Law Commons](#), [International Law Commons](#), [Military, War, and Peace Commons](#), [National Security Law Commons](#), [President/Executive Department Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Andrew Beshai, *The Boundless War: Challenging the Notion of a Global Armed Conflict Against al-Qaeda and Its Affiliates*, 48 Loy. L.A. L. Rev. 829 (2015).

Available at: <https://digitalcommons.lmu.edu/llr/vol48/iss3/7>

This Law of War Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

THE BOUNDLESS WAR: CHALLENGING THE NOTION OF A GLOBAL ARMED CONFLICT AGAINST AL-QAEDA AND ITS AFFILIATES

*Andrew Beshai**

The U.S. military response to the 9/11 attacks has expanded into a “global war” without a definite geographic scope. Both the Bush and Obama administrations have executed attacks in several countries including Somalia, Afghanistan, Pakistan, and Yemen under the “global war” paradigm. This Article challenges the concept of a global armed conflict, instead favoring the “epicenter-of-hostilities” framework for determining the legality of military action against Al-Qaeda, the Taliban, and other terrorist groups. This approach, rooted in established international law, measures the existence of specific criteria in each nation where hostile forces are present to determine if an armed conflict in that country is legally permissible. If such criteria are met, then the United States may engage in the conflict in that country under the laws of armed conflict. However, if such criteria are not satisfied, then the United States is limited to only law enforcement operations in that region. The “global war” paradigm has many negative consequences and does not adequately consider the nature of non-state actors involved in an armed conflict scattered throughout multiple countries. Shifting the basis for U.S. military actions away from a global war paradigm toward a more focused inquiry as to the presence and conduct of terrorist groups within a specific nation will ensure compliance with established international law and set a strong precedent in this developing and uncertain space.

* J.D. Candidate, May 2015, Loyola Law School, Los Angeles; M.Ed., University of Nevada, Las Vegas; B.A. English Literature, University of California, Irvine. I would like to thank Professor David Glazier for his guidance and feedback throughout the writing process. And thank you to the editors and staffers of the *Loyola of Los Angeles Law Review* for their work on this Issue.

TABLE OF CONTENTS

I. INTRODUCTION	831
II. BACKGROUND	834
A. The Law of Armed Conflict	835
B. International v. Non-International Armed Conflict	837
III. ANALYSIS	840
A. Legal Problems with the “Global War” Paradigm	840
B. Adverse Consequences of the Global War Paradigm	845
1. Fewer Protections for Civilians	846
2. Potential Prosecution of American Soldiers	847
3. Targeting “Affiliated” Groups Unconnected with the Original Conflict	848
IV. PROPOSED FRAMEWORK	850
A. The Epicenter-of-Hostilities Approach	851
1. Afghanistan	852
2. Pakistan	853
3. Yemen	856
4. Somalia	860
V. IMPLICATIONS	861
VI. CONCLUSION	864

I. INTRODUCTION

The violent sound of a missile pierced the placid sky, descending rapidly onto the field below.¹ Through dense billows of smoke, villagers approached the wreckage and discovered the body of Mamana Bibi, an elderly woman who had been gathering vegetables with her grandchildren when the missile decimated the field around them.² Reports indicate that she was killed by a drone strike launched by the United States.³ Recently, Bibi's son and grandchildren testified before Congress, describing the events in harrowing detail and demanding an explanation for the death of the family matriarch.⁴ Their testimony was a cry for help from a family caught in the crossfire of the United States' conflict with al-Qaeda and its affiliates.

What began as an attack on Manhattan and Washington, D.C. by a terrorist group in Afghanistan has expanded into a "global war" raining death on individuals in rural areas of Pakistan, Yemen, and Somalia. Assuming the United States was, and remains, entitled to use force in response to the 9/11 attacks, what is the permissible geographic scope of this conflict? This Article disputes the United States' classification of the fight against al-Qaeda and its affiliates as a global armed conflict, and instead looks to existing international law to provide the proper contours of the conflict and govern the spread of the fight. To that end, this Article proposes a new approach, the "epicenter-of-hostilities" framework, to clearly delineate the limits of the current conflict and ensure that the expansion of the fight against al-Qaeda and its affiliates is consistent with international law.

The events of September 11, 2001, in which al-Qaeda operatives hijacked four commercial jets and attacked the World Trade Center and the Pentagon, ignited the current conflict. The international

1. Amnesty Int'l, "*Will I Be Next?*" *US Drone Strikes in Pakistan*, ASA 33/013/2013, at 19–20 (Oct. 22, 2013) [hereinafter *Pakistan Drone Report*], available at <http://www.amnestyusa.org/sites/default/files/asa330132013en.pdf>.

2. *Id.*

3. Karen McVeigh, *Drone Strikes: Tears in Congress as Pakistani Family Tells of Mother's Death*, *GUARDIAN*, Oct. 29, 2013, <http://www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress>.

4. *Id.*

community responded by recognizing these events as an armed attack,⁵ and the United States commenced hostilities against the al-Qaeda organization and the Taliban government of Afghanistan.⁶ President George W. Bush, however, characterized the conflict as a global “war on terror” and declared that the war extended to “every terrorist group of global reach.”⁷

When Barack Obama became president in 2009, it appeared that the United States would take a new approach in the conflict.⁸ Early into his presidential tenure, President Obama retracted the incendiary rhetoric of his predecessor; instead, his administration has characterized the conflict as “an armed conflict with al-Qaeda as well as the Taliban and associated forces” and committed itself to comply with the Geneva Conventions and other relevant rules of international law.⁹ However, despite President Obama’s attempts to distance his administration from the “global war” paradigm espoused by President Bush, he ultimately expanded the scope of hostilities to include places such as Somalia¹⁰ and drastically increased the number of drone strikes in Pakistan¹¹ and Yemen.¹²

5. One day after 9/11, the United Nations Security Council recognized the United States’ right of self-defense. *See* S.C. Res. 1368, ¶ 8, U.N. Doc. S/RES/1368 (Sept. 12, 2001) [hereinafter U.N. Security Council Resolution]. In subsequent years, the Security Council continued to recognize the existence of the United States’ “Operation Enduring Freedom” in Afghanistan. *See* S.C. Res. 1776, ¶¶ 5, 25, U.N. Doc. S/RES/1776 (Sept. 19, 2007).

6. BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2013, at 22 (2013), available at <http://fas.org/sgp/crs/natsec/R42738.pdf>.

7. George W. Bush, U.S. President, Speech to Joint Session of Congress and the Nation (Sept. 20, 2001) [hereinafter Bush Speech], available at http://www.washingtonpost.com/wpsrv/nation/specials/attacked/transcripts/bushaddress_092001.html.

8. *See* Barack H. Obama, U.S. President, A Just and Lasting Peace, Nobel Lecture (Dec. 10, 2009) [hereinafter Obama Nobel Speech] (“I believe the United States of America must remain a standard bearer in the conduct of war . . . That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America’s commitment to abide by the Geneva Conventions.”).

9. Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Speech at Annual Meeting of the American Society of International Law (Mar. 25, 2010).

10. Mark Mazzetti & Eric Schmitt, *U.S. Expands Its Drone War Into Somalia*, N.Y. TIMES, July 1, 2011, <http://www.nytimes.com/2011/07/02/world/africa/02somalia.html?pagewanted=all>.

11. *Pakistan Drone Report*, *supra* note 1, at 12.

12. Human Rights Watch, *Between a Drone and Al-Qaeda: The Civilian Cost of US Targeted Killings in Yemen*, ISBN: 978-1-62313-0701, at 3 (Oct. 22, 2013) [hereinafter *Yemen Drone Report*]; *see also* Bill Roggio & Bob Barry, *Charting the Data for US Air Strikes in Yemen, 2002–2013*, LONG WAR J. (Nov. 29, 2013, 11:54 AM), <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php> (featuring a chart visually displaying the increase of airstrikes in Yemen since President Obama took office).

This Article challenges the notion of a global armed conflict against al-Qaeda and its affiliates. The problem with the “global war” paradigm is that waging a conflict that spans several national borders against a non-state actor and its affiliates does not fit within the established categories of armed conflict under international law. Additionally, adoption of the “global war” paradigm may lead to adverse consequences, such as fewer protections for innocent civilians, potential prosecution of American soldiers, and the risk of targeting “affiliated” groups that are completely disconnected from the core al-Qaeda group that attacked the United States on September 11.

This Article proposes a framework, rooted in existing law, to address the legal challenges posed by the “global war” paradigm. The epicenter-of-hostilities framework seeks to disaggregate the conflict against al-Qaeda and its affiliates and ensure that there is an independent legal basis for waging an armed conflict against each group. This is accomplished by analyzing each country where the conflict is occurring to determine if the legal criteria for armed conflict are satisfied. If the conditions in a certain country provide an independent legal basis to conduct an armed conflict, then it is an epicenter-of-hostilities, and the United States may proceed pursuant to the international law governing armed conflict. However, if the requisite legal criteria are not satisfied in a particular nation, then the United States may not legally engage in armed conflict within that country but is instead limited to law enforcement operations.

Part II provides background describing the law of armed conflict (LOAC)—the specific subset of international law rules that apply in cases of armed conflict.¹³ Part II will further explain the two types of armed conflict currently recognized within LOAC: international armed conflicts (IAC) and non-international armed conflicts (NIAC).¹⁴

Part III argues that the United States’ monolithic notion of a broad armed conflict against “al-Qaeda, the Taliban, and associated forces” is legally flawed because international law does not

13. LOAC is also referred to as the law of war or international humanitarian law, but this Article will use the term LOAC. See INT’L LAW ASS’N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 8 (2010), available at <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87>.

14. *Infra* Part II.B.

recognize an armed conflict against a non-state actor and its affiliates scattered across the globe.¹⁵ Additionally, Part III discusses several adverse consequences of the “global war” paradigm.¹⁶

Part IV proposes a framework that conforms to international law to address this challenge: the epicenter-of-hostilities approach.¹⁷ Under the epicenter-of-hostilities approach, the overall conflict against al-Qaeda and its affiliates will be disaggregated into its constituent countries to ensure that there is an independent legal basis for engaging in armed conflict against each group. This part will illustrate this framework by examining the conflict zones in Afghanistan, Pakistan, Yemen, and Somalia to determine if each nation independently satisfies the requisite criteria for armed conflict.¹⁸

Finally, Part V discusses the implications of the framework presented in this Article.¹⁹ First, it will ensure that the United States’ actions conform to international law, thereby enhancing its image on the international stage. Second, this framework will affect the United States’ conduct proceeding against other groups that may choose to affiliate with al-Qaeda. Third, because this type of armed conflict against a transnational, non-state actor is entirely new on the international stage, the United States has an important role in shaping the future development of customary international law and affecting other states’ conduct in future conflicts.

II. BACKGROUND

To fully understand the salient issues implicated in the current conflict, it is important to locate the conflict within the larger context of international law. To that end, this section provides a concise overview of the specific subset of rules applicable in LOAC and concludes with a brief discussion of the two types of conflict currently recognized under international law.

15. *Infra* Part III.A.

16. *Infra* Part III.B.

17. *Infra* Part IV.A.

18. *Infra* Parts IV.A.1–4.

19. *Infra* Part V.

A. The Law of Armed Conflict

The two bodies of international law most pertinent to the analysis of the conflict against al-Qaeda are LOAC²⁰ and international human rights law (IHRL).²¹ Both LOAC and IHRL are directly applicable during times of armed conflict; however, when the two bodies of law conflict, LOAC takes priority pursuant to the principle of *lex specialis*,²² which dictates that the specialized rules prevail over the general rules.²³ For instance, IHRL and LOAC contain different provisions concerning the right to liberty.²⁴ Under IHRL, individuals may not be arrested or detained arbitrarily, must be provided with due process, and must be informed of the charges against them.²⁵ The provisions for detention under LOAC are more lenient for states: combatants may be detained without charge for the duration of hostilities,²⁶ and civilians may be interned as long as they

20. The main treaties governing LOAC are the Hague Conventions and the Geneva Conventions. *See* Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons During War on Land, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] [hereinafter collectively Geneva Conventions]; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

21. The major treaty governing IHRL is the International Covenant on Civil and Political Rights. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

22. Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2482 (2008).

23. Marco Sassoli & Laura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 603 (2008).

24. *Id.* at 601.

25. ICCPR, *supra* note 21, art. 9.

26. Geneva Convention III, *supra* note 20, art. 21 (“The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter.”).

pose a security threat to the detaining power.²⁷ Pursuant to the principle of *lex specialis*, the LOAC rules governing detention would displace the IHRL rules during an armed conflict; however, during peace time, the IHRL detention rules would apply.²⁸

The same friction occurs with respect to the right to life. According to IHRL, individuals have an inherent right to life, which cannot be deprived arbitrarily.²⁹ In contrast, LOAC permits states engaged in warfare to kill enemy combatants at any time in the course of armed conflict; furthermore, civilians may be killed as long as they are directly participating in hostilities.³⁰ In an armed conflict, the LOAC rules governing lethal force would supersede IHRL rules according to *lex specialis*.³¹

Of course, to trigger the provisions of LOAC, there must be a legally recognized armed conflict. According to the United Nations (U.N.) Charter, states are to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”³² There is an exception to this rule, found in Article 51 of the U.N. Charter, allowing states to resort to force for individual or collective self-defense “if an *armed attack* occurs against a Member of the United Nations”³³ This same language is repeated in the North Atlantic Treaty, which states:

The Parties [of the North Atlantic Treaty Organization] agree that an *armed attack* against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an *armed attack* occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked³⁴

27. Geneva Convention IV, *supra* note 20, art. 42 (“The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”).

28. Sassoli & Olson, *supra* note 23, at 603–04.

29. ICCPR, *supra* note 21, art. 6.

30. Additional Protocol II, *supra* note 20, art. 13.

31. Sassoli & Olson, *supra* note 23, at 601–04.

32. U.N. Charter art. 2, para. 4.

33. *Id.* art. 51 (emphasis added).

34. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (emphasis added).

As evidenced by the U.N. Charter and the NATO treaty, an armed attack is a requisite condition before a nation may declare a state of armed conflict and trigger the provisions of LOAC.

B. International v. Non-International Armed Conflict

Within LOAC, there is a further distinction between international armed conflicts (IAC) and non-international armed conflicts (NIAC). Both are governed by treaties, such as the Geneva and Hague Conventions,³⁵ and customary international law.³⁶ IACs are conflicts occurring between two or more states.³⁷ NIACs are conflicts between a state and a non-state actor occurring within the boundary of a single state.³⁸ Because of states' reluctance to allow international regulation of their domestic affairs, NIAC is a more recently recognized species of armed conflict.³⁹ Consequently, the treaty law and customary international law regulating NIACs are not as comprehensive as those governing IACs.⁴⁰

An examination of the two major treaty provisions governing NIACs, Common Article 3 to the Geneva Conventions of 1949 and Additional Protocol II, demonstrates that NIACs were intended to be

35. For a more exhaustive list of the numerous treaties governing armed conflicts, see THE JOINT DOCTRINE AND CONCEPTS CTR., U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 7–18 (2004) [hereinafter MANUAL ON LOAC], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf.

36. Customary international law is a set of rules that have become legally binding on all states as a result of state practice over a period of time. A rule of customary international law is created when there is extensive and uniform state practice accompanied by *opinio juris*—a belief by states that they have an obligation or a right to engage in a particular practice. *Id.* at 5. For a more comprehensive study of customary international law in armed conflict, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 857 (2005).

37. Geneva Conventions, *supra* note 20, art. 2 (“[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 of the High Contracting Parties* . . .”) (emphasis added).

38. *See id.* art. 3.

39. *See* Oscar M. Unler, et al., COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 31 (Jean S. Pictet ed., 1958) [hereinafter GENEVA COMMENTARY].

40. In IAC, all of the Geneva provisions apply. However, in NIAC, only Common Article 3 to the Geneva Conventions of 1949 and Additional Protocol II apply. INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 2–3 (2006) (“Express treaty law governing non-international armed conflict is rather limited.”).

internal conflicts confined to the boundaries of a single state.⁴¹ Common Article 3 begins with a statement framing the scope of its application: “In the case of armed conflict not of an international character *occurring in the territory of one of the High Contracting Parties . . .*”⁴² Similarly, Additional Protocol II begins with a similar provision setting out the scope of its application: “This Protocol . . . shall apply to all armed conflicts . . . which take place *in the territory of a High Contracting Party* between its armed forces and dissident armed forces or other organized armed groups . . .”⁴³ Thus, the text of the two major treaty provisions governing NIAC unambiguously states that these conflicts were meant to be restricted to the territory of a single state.

NIAC is distinguished from sporadic acts of domestic violence, which are neither considered armed conflict nor governed by LOAC.⁴⁴ The threshold to determine the existence of NIAC was originally set forth in the landmark decision, *Prosecutor v. Tadic*.⁴⁵ Issued by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the *Tadic* decision established that the existence of NIAC requires “protracted armed violence” (“intensity”) and the presence of “organized armed groups” (“organization”).⁴⁶ Although the decision is not directly binding on states, it is widely regarded as an accurate statement of current customary international law applicable to both IAC and NIAC.⁴⁷ In fact, the *Tadic* criteria have

41. The Vienna Convention on the Law of Treaties contains the official guidelines to interpret treaties. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 33 (“A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose.”) (emphasis added).

42. Geneva Conventions, *supra* note 20, art. 3 (emphasis added).

43. Additional Protocol II, *supra* note 20, art. 1(1) (emphasis added); INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4384 (Yves Sandoz et al. eds., 1987) (stating that Additional Protocol II would apply in all situations of non-international armed conflict in the sense of [Common] Article 3).

44. MANUAL ON LOAC, *supra* note 35, at 385.

45. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

46. *Id.* ¶ 70.

47. See INT’L LAW ASS’N, *supra* note 13, at 1–2; MANUAL ON LOAC, *supra* note 35, at 29.

even been codified in the Rome Statute, emphasizing their prominent role in LOAC.⁴⁸

Subsequent ICTY decisions have provided guidelines for determining whether the criteria of intensity and organization have been satisfied. Conditions that tend to indicate sufficient intensity include: “Seriousness of attacks . . . spread of clashes over territory and over a period of time . . . type of weapons used . . . the extent of destruction . . . and the number of casualties caused by shelling or fighting.”⁴⁹ When analyzing the organization criterion, the court considered the following factors:

The existence of a command structure and disciplinary rules . . . ability to plan, coordinate, and carry out military operations . . . ability to define a unified military strategy . . . and [ability] to speak with one voice and negotiate and conclude agreements such as cease-fire and peace accords.⁵⁰

One of the major differences between IAC and NIAC is the combatant’s privilege, which immunizes soldiers in armed conflict from facing prosecution under an enemy state’s domestic laws. It is a crucial aspect of armed conflict because without it soldiers would be subject to prosecution for violation of any domestic law, including, of course, the killing of enemy soldiers and the destruction of military objects.⁵¹ In IAC, the combatant’s privilege derives from the Hague Land Warfare Rules, which sets forth the following criteria to receive immunity: (1) being commanded by a person responsible for his subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) carrying arms openly; and (4) conducting operations in accordance with the laws and customs of war.⁵² In contrast, states

48. The Rome Statute created the International Criminal Court and established four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 3.

49. Prosecutor v. Boskoski & Tarculvoski, Case No. IT-04-82-T, Judgment, ¶ 177 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008).

50. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

51. Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 9 (2004) (“If a combatant follows [LOAC] during war, ‘combatant’s privilege’ applies and the combatant is immune from prosecution for lawful combat activities.”).

52. Convention Respecting the Laws and Customs of War on Land, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, art. 1, Oct. 18,

deliberately crafted the rules governing NIAC without any express treaty provision to grant non-state actors the combatant's privilege or prisoner of war status.⁵³ The reason for this difference between IACs and NIACs is that states wanted their own domestic laws to govern treatment of their adversaries, allowing states to prosecute non-state actors in NIAC as mere criminals under domestic law.⁵⁴

Because the United States has chosen to construe the conflict with al-Qaeda and its affiliates as an armed conflict, the United States must comply with existing international law. If the United States wishes to benefit from the broad powers granted to states during armed conflict, it must also respect the limitations imposed on states by the international law governing armed conflicts.

III. ANALYSIS

This section analyzes the “global war” paradigm under LOAC to argue that there is no legal basis for a global conflict against al-Qaeda and its affiliates. The section closes with several adverse consequences that result from the “global war” paradigm.

A. Legal Problems with the “Global War” Paradigm

The problem with the “global war” paradigm is that it does not fit within the established definitions of armed conflict under LOAC, making it difficult to ascertain the extent or geographical limits of the conflict. The conflict against al-Qaeda and its affiliates is not IAC because it is not conducted between two states.⁵⁵ Nor is the conflict NIAC, because it is not confined to the territory of a single state even though it involves a state battling a non-state actor.⁵⁶ Instead of providing a clear picture of how the United States is

1907, 36 Stat. 2277. These same requirements are repeated in the Third Geneva Convention as the criteria for prisoner of war status. Geneva Convention III, *supra* note 20, art. 4.

53. Neither Common Article 3 nor Additional Protocol II contains any provisions for combatant's privilege in NIAC.

54. GENEVA COMMENTARY, *supra* note 39, at 44 (“Consequently, the fact of applying Article 3 . . . does not limit in any way the Government's right to suppress a rebellion by all the means—including arms—provided by its own laws; nor does it in any way affect that Government's right to prosecute, try and sentence its adversaries for their crimes, according to its own laws.”).

55. Geneva Conventions, *supra* note 20, art. 2.

56. Geneva Conventions, *supra* note 20, art. 3. The United States has engaged with al-Qaeda and its affiliates in Afghanistan, Pakistan, Somalia, and Yemen, which means the conflict against al-Qaeda and its affiliates cannot properly be classified as NIAC, as it spans several national borders. *Supra* Part II.B.

conducting this conflict within the constraints of LOAC, both the Bush and Obama administrations have failed to articulate a coherent legal position about the scope of the conflict that complies with existing international law.

Originally, the international community recognized the events of 9/11 as an armed attack giving rise to the United States' right of self-defense under Article 51 of the U.N. Charter.⁵⁷ This right of self-defense was limited to those groups responsible for the 9/11 attacks⁵⁸: al-Qaeda, the organization that had orchestrated the attacks, and the Taliban, which had harbored and supported al-Qaeda.⁵⁹ In October 2001, the Bush administration launched Operation Enduring Freedom (OEF) in Afghanistan against al-Qaeda and the Taliban government, and posited that the unconventional conflict fell outside the bounds of current international law.⁶⁰ In fact, President Bush initiated the "global war" rhetoric by proclaiming that the conflict was a concerted effort to "defeat . . . the global terror network."⁶¹ He reiterated this notion at the outset of OEF by referring to the hostilities in Afghanistan as a "campaign against terrorism."⁶²

The first effort to legally classify the conflict with al-Qaeda occurred in 2006, when the Supreme Court, in *Hamdan v. Rumsfeld*, held that the United States was engaged in an NIAC against al-Qaeda.⁶³ The Supreme Court reached this decision primarily on the basis that al-Qaeda, a non-state actor, was engaged in armed conflict with the United States, a state, but the Supreme Court did not address the legally permissible scope of the conflict.⁶⁴ While the Obama administration has purported to accept the Supreme Court's

57. U.N. Security Council Resolution, *supra* note 5; Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

58. U.N. Security Council Resolution, *supra* note 5.

59. Koh, *supra* note 9.

60. Memorandum for the Vice President et al., Humane Treatment of al-Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Memo] ("[N]one of the provisions of Geneva apply to our conflict with al-Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al-Qaeda is not a High Contracting Party to Geneva.").

61. Bush Speech, *supra* note 7.

62. Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters, 2 PUB. PAPERS 1211, 1211-12 (Oct. 9, 2001).

63. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-31 (2006).

64. *Id.*

classification of the conflict with al-Qaeda as NIAC,⁶⁵ the administration's conduct has been paradoxical, extending the conflict to target affiliated groups in various countries outside Afghanistan⁶⁶ and confirming a "war against al-Qaeda, the Taliban, and associated forces."⁶⁷ What the Obama administration has failed to recognize is that NIACs are confined to the boundaries of a single state,⁶⁸ meaning that the United States may not rely on the NIAC as a legal basis to attack affiliated groups outside the boundaries of Afghanistan.

Several scholars have advanced arguments rooted in existing law, claiming that the current NIAC may be used as a legal premise to extend the conflict against affiliated groups beyond the borders of Afghanistan.⁶⁹ However, these legal arguments are rife with problems.

Some have argued that if there is an NIAC occurring within a state, the expansion of that armed conflict should not be governed by geography but rather by the status of the parties involved.⁷⁰ Echoing this rationale, former State Department Legal Advisor Harold Koh, has argued that a transnational conflict between a state and a non-state actor may meet the definition of NIAC regardless of where the fighting occurs.⁷¹ Applied to the conflict with al-Qaeda, this

65. Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., *The Conflict Against al-Qaeda and Affiliates: How Will It End?*, Speech at the Oxford Union (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/> ("In 2006, our Supreme Court also endorsed the view that the United States is in an armed conflict . . . We detain those who are part of al-Qaeda, but in a manner consistent with *Common Article 3 of the Geneva Conventions* and all other applicable law.") (emphasis added); Koh, *supra* note 9 (acknowledging the applicability of Common Article 3 and Additional Protocol II to the conflict against al-Qaeda).

66. The Obama administration has drastically increased the use of drones in Yemen and Pakistan as well as expanding the conflict into Somalia. *Infra* Part IV.

67. Barack H. Obama, U.S. President, Remarks at the National Defense University, Washington, D.C. (May 23, 2013) [hereinafter Obama National Security Speech] ("Moreover, America's actions are legal. 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.").

68. *Supra* Part II.B.

69. See Koh, *supra* note 9.

70. This view was expressed by John Dehn in a debate with Kevin Jon Heller. John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 190 (2011) ("The key to the applicability of [LOAC] is not the location of the attack, but the status of the attacker and target.").

71. Harold Hongju Koh, Professor, Yale Law School, *How to End the Forever War?*, Speech at the Oxford Union (May 7, 2013), available at <http://www.law.yale.edu/documents/pdf/Faculty/KohOxfordSpeech.pdf> ("But September 11 made clear that the term 'non-international

interpretation would allow the United States to attack any militants affiliated with al-Qaeda regardless of their geographic location by predicating that attack on the existence of NIAC in Afghanistan.⁷² While this legal theory would justify the actions of the United States, it is problematic because it departs substantially from the intended scope of NIAC dictated by Common Article 3 and Additional Protocol II.⁷³ Moreover, this position would unduly extend the armed conflict into locations that had remained conflict-free, permitting the United States to engage in conduct pursuant to LOAC, which contains more lenient provisions for the use of lethal force, rather than IHRL.⁷⁴ For example, LOAC provides authority to kill civilians as long as their deaths are not disproportionate to the military advantage to be gained, while IHRL does not contain such a provision; thus, adopting this position results in fewer protections for innocent civilians.⁷⁵

Other scholars, premising their arguments on the law of neutrality, contend that al-Qaeda affiliates in countries outside Afghanistan have breached their duties of neutrality by aligning with and furthering al-Qaeda's agenda.⁷⁶ Pursuant to the law of neutrality, these affiliated groups in other territories would be considered co-belligerents, and the United States would be permitted to use force against them.⁷⁷ According to the law of neutrality, neutral states not involved in a conflict have a duty to refrain from providing support or allowing their territories to be used for operations by any party to a conflict.⁷⁸ If a state violates these duties and assists a party

armed conflicts' can include transnational battles that are not between nations: for example, between a nation-state (the United States) and the transnational non state armed group (al-Qaeda) that attacked it."). Koh made these comments in his personal capacity after he resigned his post at the Department of State and returned to academia. *Id.*

72. See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK INT'L HUMANITARIAN L. 3, 37–38 (2010) [hereinafter *Who May Be Killed?*].

73. *Supra* Part II.B.

74. *Supra* Part II.A.

75. The reduced humanitarian protections are discussed *infra* Part III.B.1.

76. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2112–13 (2005); Karl Chang, *Enemy Status and Military Detention in the War Against al-Qaeda*, 47 TEX. INT'L L.J. 1, 68 (2011).

77. Bradley & Goldsmith, *supra* note 76, at 2113.

78. Chang, *supra* note 76, at 32.

to a conflict, the violating state becomes a co-belligerent and may be targeted by the opposing party.⁷⁹

This argument suffers from two major flaws. First, the law of neutrality assumes that states are sovereign entities responsible for their own actions when choosing to violate neutrality and enter a conflict,⁸⁰ but non-state actors do not have a duty to remain neutral and may lawfully assist either party to a conflict.⁸¹ Second, because the law of neutrality only applies to conflicts where both parties are legitimate belligerents, the United States would have to recognize al-Qaeda as a legitimate belligerent to invoke this body of law.⁸² Recognizing al-Qaeda as a legitimate belligerent would have the collateral consequence of granting the combatant's privilege to al-Qaeda fighters.⁸³ Currently, al-Qaeda militants may be prosecuted for any acts committed in warfare because they do not have the combatant's privilege.⁸⁴ However, the unintended result of invoking the law of neutrality would be to confer the combatant's privilege on al-Qaeda fighters, effectively immunizing them from prosecution for killing American soldiers in the course of warfare.⁸⁵

Finally, some commentators have contended that any conflict not falling within the category of IAC automatically becomes a NIAC.⁸⁶ Essentially, the term "NIAC" becomes a broad label describing all armed conflict that is not waged between two states.⁸⁷ Under this view, the United States' conflict with al-Qaeda would

79. Bradley & Goldsmith, *supra* note 76, at 2112–13.

80. See Pardiss Kebriaei, *The Distance Between Principle and Practice in the Obama Administration's Targeted Killing Program: A Response to Jeh Johnson*, 31 YALE L. & POL'Y REV. 151, 162 (2012) ("[T]he law of neutrality . . . originated in the nineteenth century to regulate the conduct of states during international armed conflict.").

81. Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict Against Al Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 TEX. INT'L L.J. 115, 132–33 (2011).

82. *Id.* at 124.

83. *Id.*

84. The combatant's privilege does not apply in NIAC. *Supra* Part II.B.

85. See Heller, *supra* note 81, at 124. Of course, al-Qaeda fighters would still be subject to prosecution for war crimes.

86. Roy S. Schondorf, *Extra-State Armed Conflicts: Is There a Need For a New Legal Regime*, 37 N.Y.U. J. INT'L L. & POL. 1, 50 (2004) ("Recent scholarship offers an alternative interpretation of common article 3, according to which it applies to all armed conflicts not falling under common article 2, regardless of whether they occur within or outside the territory of the high contracting party.").

87. Chang, *supra* note 76, at 35 ("International armed conflict occurs between nations. Non-international armed conflict is everything else, including wars between non-state actors and wars by states against insurgents or terrorists.").

automatically be considered NIAC wherever it occurs because al-Qaeda is not a state and is therefore incapable of engaging in IAC. While the administration's expansion of the conflict with al-Qaeda would be warranted under this theory, it suffers from several flaws. Interpreting "NIAC" as a default position encompassing all forms of conflict that do not qualify as "IAC" is semantically convenient but legally inaccurate because this view overlooks the fact that the term "NIAC" has a specific legal definition.⁸⁸ Under international law, NIACs are defined as those conflicts occurring between a state and a non-state actor within the boundaries of a single state,⁸⁹ meaning there is a geographic constraint inherent in the definition that prevents a construal of NIAC as any conflict occurring anywhere in the world that does not squarely fit within the IAC definition. Furthermore, this view is problematic as it excludes the possibility that another regime altogether, IHRL, could govern the fight against al-Qaeda.

There is no legal support for construing the fight as a "global war" with al-Qaeda and its affiliates. Rather, under current international law, the most that the United States could be involved in is a series of NIACs with non-state groups, with each conflict confined to the territory of a single state. Thus, compliance with international law requires an individual assessment of each country where the United States is engaging in the conflict to determine whether there are independent legal grounds for NIAC.⁹⁰ Instead of premising the use of LOAC on a broad, monolithic notion of a global conflict with al-Qaeda and "associated forces,"⁹¹ this Article proposes a framework that seeks to disaggregate the overall fight and analyze each country independently to determine whether the conditions satisfy the legal requirements for armed conflict.⁹²

B. Adverse Consequences of the "Global War" Paradigm

Beyond the legal objections discussed above, there are practical consequences that arise when the conflict against al-Qaeda is classified as a "global war." These consequences include: (1) fewer

88. The legal definition of NIAC is discussed *supra* Part II.B.

89. Geneva Conventions, *supra* note 20, art. 3.

90. The legal requirements for NIAC are: an armed attack and the existence of sufficient organization and intensity (*Tadic* requirements). *Supra* Part II.B.

91. Obama National Security Speech, *supra* note 67.

92. *Infra* Part IV.

protections for civilians; (2) potential prosecution of American soldiers; and (3) the target of “affiliated” groups that are unconnected with the original conflict.

1. Fewer Protections for Civilians

One consequence that flows from treating the fight against al-Qaeda as a global conflict is wider latitude for states to use lethal force. The legal framework applicable during armed conflict, LOAC, permits a more robust use of lethal force for states.⁹³ Such latitude does not exist in the law enforcement paradigm governed by IHRL. For instance, a state engaged in armed conflict may target and kill civilians directly participating in hostilities.⁹⁴ Moreover, while civilians who are not participating in hostilities may not be intentionally targeted, they may be lawfully killed as “collateral damage” from an attack, as long as the military advantage gained by that attack is not excessively disproportionate to the amount of civilian deaths.⁹⁵

Outside the context of an armed conflict, none of the above actions are legally permissible because IHRL applies.⁹⁶ Under IHRL, there is no provision for collateral damage, and the state generally may not kill a civilian without first attempting arrest.⁹⁷ When the United States expands the conflict into new territories, it automatically triggers the application of LOAC, providing fewer protections for individuals.⁹⁸ Numerous families and children have been killed in Yemen,⁹⁹ Pakistan,¹⁰⁰ and Somalia¹⁰¹ because of the

93. The differences between LOAC and IHRL are discussed *supra* Part II.A.

94. See Additional Protocol II, *supra* note 20, art. 13(3) (“Civilians shall enjoy the protection afforded by this [treaty], unless and for such time as they take a direct part in hostilities.”).

95. See MANUAL ON LOAC, *supra* note 35, at 25 (“The principle of proportionality requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage.”).

96. *Supra* Part II.A.

97. *Pakistan Drone Report*, *supra* note 1, at 44.

98. The more lenient provisions of LOAC are triggered when the conflict is expanded into other territories because under the principle of *lex specialis*, LOAC, as the specific subset of rules applicable in armed conflict, supersedes HRL when the two conflict. *Supra* Part II.A.

99. Civilian death estimates in Yemen range from eighty-four to one hundred. *Compare Drone Wars Yemen: Analysis*, NEW AM. FOUND. (Nov. 25, 2013), <http://natsec.newamerica.net/drones/yemen/analysis>, with Roggio & Barry, *supra* note 12.

100. Civilian death estimates in Pakistan range from 258 to 600. *Compare Drone Wars Pakistan: Analysis*, NEW AM. FOUND. (Nov. 29, 2013), <http://securitydata.newamerica.net/drones/pakistan/analysis>, with *Statement of the Special Rapporteur Following Meetings in Pakistan*,

extension of the conflict against al-Qaeda and its affiliates into those regions—these deaths are lawful as collateral damage only under LOAC. Thus, the United States’ theory of a global conflict is problematic because wherever the conflict extends, it is accompanied by LOAC, which offers substantially less protection for innocent civilians and increases the level of violence in territories that would have otherwise remained free from hostilities.

2. Potential Prosecution of American Soldiers

Another consequence of the “global war” paradigm stems from the concept of the combatant’s privilege. As discussed above, there is no express treaty provision granting the combatant’s privilege to fighters in NIAC.¹⁰² This raises the question: where do soldiers acting on behalf of a state draw their authority to engage in acts of warfare against non-state actors in NIAC? The answer is domestic law; as a sovereign entity, the state operating within its own national territory may immunize its own soldiers while also prosecuting the “enemy” fighters under its domestic law.

Of course, this has implications for the United States, which is engaged in NIAC in Afghanistan; as the sovereign state on whose territory the conflict is taking place, only the government of Afghanistan may immunize U.S. military personnel from domestic prosecution for acts committed in the course of warfare.¹⁰³ The United States acquired this authorization in Afghanistan through the 2002 Status of Forces Agreement, in which the Afghan government provided immunity for U.S. military personnel, granting permission for the United States to exercise exclusive criminal jurisdiction over its service members.¹⁰⁴ But what happens when the United States extends the conflict into other countries? Unless the United States has similar agreements with the governments of these other

OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (Mar. 14 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E./analysis>.

101. Civilian death estimates in Somalia range from seven to forty-seven. *US Covert Actions in Somalia*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/drones-somalia/> (last visited Dec. 12, 2013).

102. *Supra* Part II.B.

103. *See id.*

104. R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 7–8 (2012), available at <http://fas.org/sgp/crs/natsec/RL34531.pdf> (citing T.I.A.S. Exchange of notes September 26 and December 12, 2002 and May 28, 2003. Entered into force May 28, 2003).

countries, American soldiers could potentially face prosecution under the domestic law of these countries for any act of violence they commit.¹⁰⁵ Currently, the United States has a Status of Forces Agreement with Somalia, the scope of which is classified, but there is no such agreement with either Pakistan or Yemen.¹⁰⁶

3. Targeting “Affiliated” Groups Unconnected with the Original Conflict

One final consequence arising from the “global war” paradigm is that it can be used to justify the United States targeting so-called “affiliated” groups with no connection to the original nexus of the conflict against al-Qaeda. Just because an organization facially appears to have ties to al-Qaeda does not mean it is sufficiently associated to justify targeting in the current conflict.¹⁰⁷ While it is tempting to classify all groups preaching Islamic jihad as part and parcel of al-Qaeda, that would be erroneous because many of these groups had no role in the 9/11 attacks and do not share al-Qaeda’s global outlook.¹⁰⁸ In fact, since the conflict began, many of the “affiliated” organizations that have sprouted actually maintain local objectives directed at regional governments and are distinct from the core al-Qaeda organization that launched attacks against the United States on 9/11.¹⁰⁹

Targeting groups that are ostensibly affiliated with al-Qaeda, but have no connection to the nexus of the original conflict, gives rise to two potential concerns—one legal and one practical. Legally, under international law, the only armed attack justifying the United States’ resort to self-defense was perpetrated on 9/11 by al-Qaeda originating in Afghanistan, which means that the legal justification for engaging in armed conflict is inextricably linked to the 9/11

105. Interview with David Glazier, Int’l Law Professor, Loyola Law School, in L.A., Cal. (Oct. 3, 2013).

106. See MASON, *supra* note 104, at 21–29.

107. DANIEL L. BYMAN, BREAKING THE BONDS BETWEEN AL-QA’IDA AND ITS AFFILIATE ORGANIZATIONS 11 (2012) (“When a group begins to cooperate with al-Qa’ida, and even when a group goes so far as to change its name to include the al-Qa’ida label, it does not automatically become a branch of the core organization.”).

108. *Id.* at 34–35.

109. Peter Bergen, Op-Ed., *From Benghazi to Boston: The State of Jihad*, CNN (July 16, 2013, 2:15 PM), <http://edition.cnn.com/2013/07/16/opinion/bergen-jihad-status/index.html>.

attacks.¹¹⁰ The concern is that the United States will rely on the “global war” paradigm to target “affiliated” groups that are disconnected from the nexus of the conflict, thereby exceeding the original authorization to engage in armed conflict. For example, when Syrian President Bashar al-Assad was rumored to have used chemical weapons, some urged for United States intervention in Syria predicated on the conflict with al-Qaeda.¹¹¹ The proffered legal rationale was that al-Qaeda militants had joined in the Syrian civil war; therefore, the United States was authorized to attack in Syria pursuant to its “global war” with al-Qaeda.¹¹² The flaw in this reasoning is that al-Qaeda’s activities in Syria, supporting the rebels against the Assad regime, were completely disconnected from the original nexus of the United States’ conflict.¹¹³

The practical concern is that targeting an “affiliated” group without a connection to the original conflict might actually provide incentive for that group to take up arms against the United States where it otherwise would have remained focused on local objectives.¹¹⁴ For instance, the United States has targeted, and continues to target, the Somali organization al-Shabaab—a group that maintains a predominantly regional agenda, that has no connection to the 9/11 attacks, and that did not even exist when al-Qaeda attacked the United States in 2001.¹¹⁵ Before a U.S. drone

110. In authorizing the United States to respond in self-defense, both the U.N. Security Council Resolution and the NATO press release specifically refer to the 9/11 attacks. U.N. Security Council Resolution, *supra* note 5; Press Release, NATO, *supra* note 57.

111. Marc Thiessen, Op-Ed., *Don't Just Bomb Assad. Bomb al-Qaeda, Too*, WASH. POST (Sept. 9, 2013), http://www.washingtonpost.com/opinions/marc-thiessen-dont-just-bomb-assad-bomb-al-qaeda-too/2013/09/09/5de2436a-195f-11e3-86855021e0c41964_story.html?wprss=rss_opinions.

112. *Id.* (“[S]triking al-Qaeda in Syria would be lawful. We are already at war with al-Qaeda and its associated forces around the world, and Congress has authorized the use of military force against al-Qaeda.”).

113. Tim Lister, *Al-Qaeda Advancing in Syria, One Town at a Time*, CNN (Nov. 24, 2013, 9:08 AM), <http://www.cnn.com/2013/11/24/world/meast/syria-al-qaeda-advances/> (demonstrating that al-Qaeda’s goals in Syria are primarily local and focused on the takeover of the current regime).

114. BYMAN, *supra* note 107, at 39 (“By lumping an unaffiliated group with al-Qa’ida, the United States can drive it into [al-Qaeda’s] arms.”).

115. *Hearing to Receive Testimony on The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for the Use of Military Force Before the S. Comm. On Armed Services*, 112th Cong. 31 (2013) [hereinafter AUMF Hearing] (statement of Rosa Brooks, Professor of Law, Georgetown University Law Center) (“[W]e now appear . . . to be using armed force against such entities as Somalia’s al Shabaab, which not only appears to have no connection to the September 11 attacks, but does not appear, according to our own Director of National

strike killed al-Shabaab's leader in 2008, the group focused only on regional objectives; however, since the 2008 attack, al-Shabaab has engaged in numerous attacks against U.S. targets in Somalia and its surrounding region.¹¹⁶

Overall, the consequences and legal analysis discussed above reveal the practical risks and legal flaws inherent in a "global war" paradigm. The proposed framework, presented in the next section, seeks to disaggregate the conflict into its constituent parts and ensure that there is an independent legal basis for engaging in armed conflict within each region.

IV. PROPOSED FRAMEWORK

Politicians and scholars have put forth various proposals to address the "global war" against al-Qaeda and its affiliates. One such proposal is the "smart power" approach endorsed by former Secretary of State Hillary Clinton.¹¹⁷ This approach seeks to harness the power of diplomacy in a collaborative international effort to address the root issues behind terrorism.¹¹⁸ In fact, there are indications that a strategic diplomatic approach could play a large part in deterring potential al-Qaeda affiliates from joining the fight against the United States.¹¹⁹ However, this is a long-term solution with its implementation still far off in the future.¹²⁰ Additionally, the United Nations is considering a comprehensive convention on international terrorism.¹²¹ Such a convention could potentially

Intelligence, to pose any particular threat to the United States insofar as its ambitions are primarily local."); BYMAN, *supra* note 107, at 6–7.

116. *Hearing to Receive Testimony on Al-Shabaab Recruitment in America Before the S. Comm. On Homeland Security and Governmental Affairs*, 111th Cong. 2 (2009) [hereinafter *Al-Shabaab Hearing*] (statement of Ken Menkhaus, Professor, Political Science, Davidson College, North Carolina).

117. Howard LaFranchi, *Hillary Clinton: More 'Smart Power' Needed in Terrorism Fight*, CHRISTIAN SCI. MONITOR (Sept. 9, 2011), <http://www.csmonitor.com/USA/Foreign-Policy/2011/0909/Hillary-Clinton-more-smart-power-needed-in-terrorism-fight>; *see also* Koh, *supra* note 71, at 7 (outlining diplomatic efforts in the Middle East).

118. LaFranchi, *supra* note 117; *see also* Koh, *supra* note 71, at 7.

119. *See* BYMAN, *supra* note 107, at 38–45 ("The United States and its allies should call attention to al-Qa'ida's repeated and bitter critiques of democracy, and more than this, should advocate for political systems to be open to communities from which jihadists draw.").

120. The U.N. Global Counterterrorism Forum was launched in September 2011, meaning that the project is still relatively young and any meaningful change is still far off in the future. LaFranchi, *supra* note 117.

121. INT'L COMM. OF THE RED CROSS, REPORT: INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 4, 48 (Oct. 2011) [hereinafter

prescribe the rules for armed conflict against transnational non-state groups; however, as this proposal has been under consideration for the past decade and the treaty is yet to be concluded, any hope of ratification or implementation is still in the distant future.¹²² Finally, there are scholarly proposals to create a new type of conflict referred to as “transnational” or “extra-state” armed conflict; this novel legal regime would supplement IAC and NIAC.¹²³ Once again, this final proposal is still merely theoretical, and it remains to be seen when, or if, such a concept will gain traction.

In due time, each of these proposals could potentially provide an effective solution to the dangers raised by the “global war” paradigm. However, until then, these dangers are urgent and require an immediate approach rooted in existing law.

A. *The Epicenter-of-Hostilities Approach*

The solution is not to declare a “global war” as the Bush administration did.¹²⁴ Nor is the solution to target militants all across the globe based on a monolithic notion of a broad armed conflict against “al-Qaeda, the Taliban, and associated forces” as the Obama administration has done.¹²⁵ Instead, the “global war” must be disaggregated into its constituent countries to determine if there is an independent legal basis for the United States to engage in armed conflict in each nation. An independent legal basis to engage in armed conflict means there must have been an armed attack against the United States,¹²⁶ and the *Tadic* criteria of intensity and organization must be satisfied.¹²⁷ If all of these requirements are satisfied in a specific nation, then it qualifies as an epicenter-of-hostilities, and the United States may use force

CHALLENGES OF CONTEMPORARY ARMED CONFLICTS], available at <http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>.

122. *Id.*

123. See Geoffrey Corn and Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL L. REV. 46 (2009); Schondorf, *supra* note 86, at 5 (“[This] article calls for the creation of a new category of armed conflict in international law for such situations—‘extra-state armed conflict.’”).

124. Bush Memo, *supra* note 60, ¶ 2.a.

125. Obama National Security Speech, *supra* note 67.

126. U.N. Charter art. 51.

127. See Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

consistent with LOAC against al-Qaeda or its affiliates in that nation, so long as the *Tadic* conditions continue to be satisfied. This approach will be illustrated by analyzing the four countries where the United States is currently waging the conflict against al-Qaeda and its affiliates: Afghanistan, Pakistan, Yemen, and Somalia.

1. Afghanistan

In October 2001, the United States launched OEF Operation Enduring Freedom in Afghanistan against the Taliban and al-Qaeda.¹²⁸ Originally, this conflict began as an IAC between the United States and the Taliban, but by December 9, 2001, the Taliban government had toppled.¹²⁹ The dismantling of the Taliban government did not automatically transform the conflict from IAC to NIAC. Because NIAC takes place between a state and a non-state actor in the sovereign territory of that state, there must be a sovereign Afghan regime before the conflict can legally be deemed NIAC.¹³⁰ The establishment of the Karzai regime as the sovereign government¹³¹ functioned to convert the conflict from IAC to NIAC, pitting the United States and the Afghan government against the Taliban and al-Qaeda.¹³²

The requisite legal criteria were satisfied in Afghanistan to declare the situation an armed conflict. First, the 9/11 events constituted an armed attack sufficient to allow the United States to respond in self-defense.¹³³ Second, the *Tadic* requirements were also satisfied. Both the Taliban and al-Qaeda were sufficiently organized with command structures and the ability to plan and execute military operations.¹³⁴ The intensity requirement was satisfied as evidenced by the use of military weapons, spread of clashes over large expanse

128. KENNETH KATZMAN, CONG. RESEARCH SERV., RL30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 8 (2013).

129. *Id.*

130. Geneva Conventions, *supra* note 20, art. 3.

131. KATZMAN, *supra* note 128, at 10.

132. CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 121, at 10 (explaining that the conflict in Afghanistan originated as IAC but morphed into NIAC).

133. Both NATO and the United Nations Security Council recognized the events of 9/11 as an armed attack. U.N. Security Council Resolution, *supra* note 5; Press Release, NATO, *supra* note 57.

134. See MARK DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 16 (2005) (explaining the organization of the Taliban); BYMAN, *supra* note 107, at 11–13 (explaining the organizational structure of al-Qaeda in Afghanistan).

of territory, and thousands of fatalities.¹³⁵ Furthermore, after the Taliban government was ousted, the United States received authorization from the new Karzai regime in 2002 to operate “in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities.”¹³⁶ This authorization was crucial because the United States was now engaged in an NIAC on the sovereign territory of another state, with Afghanistan functioning as the lead legal actor.¹³⁷ Thus, Afghanistan clearly qualifies as an epicenter-of-hostilities because the conditions indicate an independent legal basis to conduct an armed conflict within the state.

2. Pakistan

In Pakistan, the United States has focused the majority of its attacks in the North Waziristan region that borders Afghanistan.¹³⁸ Notably absent from the discussion of targeted groups in Pakistan is an al-Qaeda branch or a group carrying the “al-Qaeda” moniker.¹³⁹ Instead, the United States has primarily devoted its attention and resources to three main groups: Tehrik-e Taliban Pakistan (TTP), the Haqqani network, and Lashkar-e Taiba (LT).¹⁴⁰

TTP, also known as the Pakistani Taliban, formed in 2007 to unify various militant groups combating the Pakistani government.¹⁴¹ TTP has been responsible for attacks on domestic military and intelligence targets as well as two high-profile attacks: one attack in 2007 that killed former Pakistani Prime Minister Benazir Bhutto, and another in 2013 that seriously injured Malala Yousafazi, a teenager

135. *Casualties: Afghanistan*, CNN, <http://www.cnn.com/SPECIALS/war.casualties/> (last updated Dec. 12, 2013).

136. MASON, *supra* note 104, at 27 tbl.7.

137. In NIACs, only the state operating within its own national territory may immunize its own soldiers while also prosecuting the “enemy” fighters under its domestic law. Thus, in OEF, which was NIAC against al-Qaeda and the Taliban, only Afghanistan could provide immunity for U.S. soldiers under its domestic law. *Supra* Part III.B.2.

138. *Drone Wars Pakistan: Analysis*, *supra* note 100.

139. See *Hearing to Receive Testimony on the Homeland Threat Landscape and U.S. Response Before the S. Comm. On Homeland Security and Governmental Affairs*, 112th Cong. 2 (2013) [hereinafter *Homeland Threat Hearing*] (statement of Matthew G. Olsen, Director, National Counterterrorism Center); BYMAN, *supra* note 107, at 10 (accounting for the absence of an al-Qaeda branch in Pakistan).

140. See *Homeland Threat Hearing*, *supra* note 139, at 2–3;

141. *Tehrik-e Taliban Pakistan (TTP)*, NAT’L COUNTERTERRORISM CENTER, <http://www.nctc.gov/site/groups/ttp.html> (last visited Dec. 12, 2013).

advocating for the education of girls.¹⁴² In August 2009, a U.S. drone strike killed Baitullah Mehsud, then-leader of TTP, and approximately one year later, in September 2010, the United States designated TTP as a foreign terrorist organization.¹⁴³ In another instance, on November 1, 2013, the United States launched a drone strike killing Hakimullah Mehsud, TTP's newest leader.¹⁴⁴

LT has been active since 1993 and has claimed responsibility for numerous attacks on the India-Pakistan border.¹⁴⁵ In 2002, LT was banned from Pakistan and, since that time, has not admitted responsibility for any attacks.¹⁴⁶ However, officials believe that LT was responsible for the deadly Mumbai attacks of 2008 that claimed hundreds of lives.¹⁴⁷ Overall, LT's goals are primarily focused on the South East Asian region; specifically, the group opposes improving relations between India and Pakistan.¹⁴⁸ The group has been suspected of supporting the Afghan al-Qaeda organization in various capacities.¹⁴⁹

The Haqqani network has been in existence since the mid-1970s, with a major presence in both Pakistan and Afghanistan.¹⁵⁰ The group is one of the most dangerous and capable fighting units in Afghanistan, and it has carried out numerous attacks against United States and coalition forces in Afghanistan.¹⁵¹ On November 21, 2013, the United States launched a drone strike in Pakistan, killing the Haqqani network's second in command.¹⁵²

142. Carlotta Gall and Declan Walsh, *How the Pakistani Taliban Became a Deadly Force*, N.Y. TIMES (Nov. 2, 2013), http://www.nytimes.com/2013/11/02/world/asia/how-the-pakistani-taliban-became-a-deadly-force.html?_r=0.

143. *Id.*

144. M Ilyas Khan, *What Next for Pakistani Taliban After Hakimullah Death?*, BBC NEWS (Nov. 1, 2013), <http://www.bbc.co.uk/news/world-asia-24781033>.

145. Jayshree Bajoria, *Lashkar-e Taiba*, COUNCIL ON FOREIGN REL. (Jan. 14, 2010), <http://www.cfr.org/pakistan/lashkar-e-taiba-army-pure-aka-lashkar-e-tayyiba-lashkar-e-toiba-lashkar--taiba/p17882>.

146. *Id.*

147. *See id.*

148. *Homeland Threat Hearing*, *supra* note 139, at 3.

149. Bajoria, *supra* note 145.

150. *See* DON RASSLER & VAHID BROWN, COMBATING TERRORISM CTR. AT W. POINT, THE HAQQANI NEXUS AND THE EVOLUTION OF AL-QAI'DA 1-2 (July 14, 2011).

151. *See* Jeffrey Dressler, INST. FOR THE STUDY OF WAR, THE HAQQANI NETWORK: A STRATEGIC THREAT 15-18 (Mar. 2012), available at http://www.understandingwar.org/sites/default/files/Haqqani_Network_0.pdf.

152. Mushtaq Yusufzai, *Drone Strike Kills Haqqani Network's No. 2, Other Taliban Commanders*, NBC NEWS (Nov. 21, 2013, 8:35 AM), http://worldnews.nbcnews.com/_news

Between 2004 and 2014, the United States carried out between 354¹⁵³ and 370¹⁵⁴ strikes against these groups in Pakistan. Under the epicenter-of-hostilities analysis, the conditions in Pakistan must independently satisfy the legal criteria for armed conflict for the United States to conduct its activities pursuant to LOAC.¹⁵⁵ With three distinct groups in Pakistan, it is important to note that the existence of NIAC against one group does not provide authority for the United States to target the other groups.¹⁵⁶ Hypothetically, if the legal criteria for armed conflict were satisfied against LT, the United States would be limited to conducting military operations only against LT and could not attack TTP premised on that NIAC.¹⁵⁷

The *Tadic* criteria of intensity and organization appear to be satisfied for all three groups: each group is sufficiently organized with a command structure and has demonstrated an ability to coordinate and execute military operations, causing substantial destruction and hundreds of deaths.¹⁵⁸ The final consideration is whether there has been an armed attack against the United States to justify an armed conflict in Pakistan. None of the aforementioned groups has attempted an attack on the United States' homeland. However, militants belonging to the Haqqani network have carried out high-profile attacks in Afghanistan and fled into remote Pakistani border regions.¹⁵⁹ Some scholars have argued that LOAC authorizes

/2013/11/21/21558669-drone-strike-kills-haqqani-networks-no-2-other-taliban-commanders-officials.

153. Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004–2014*, LONG WAR J. (Dec. 25, 2013, 11:54 AM), <http://www.longwarjournal.org/Pakistan-strikes.php>.

154. *Drone Wars Pakistan: Analysis*, *supra* note 100.

155. *Supra* Part IV.A.

156. Under LOAC, parties to a conflict must adhere to the principle of distinction, which dictates that only combatants may be targeted in an armed conflict. MANUAL ON LOAC, *supra* note 35, at 24. If the United States were hypothetically engaged in NIAC against LT, the principle of distinction would mandate that only members of LT may be targeted as combatants.

157. If, however, TTP or the Haqqani network decided to join the hypothetical NIAC between the United States and LT, there is ample legal authority allowing the United States to attack the additional group. *See* Additional Protocol II, *supra* note 20, art. 4(1) (providing authority to target individuals directly participating in hostilities in NIAC); CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 121, at 9 (explaining that NIAC can occur between a state and multiple non-state actors).

158. *See* Gall & Walsh, *supra* note 142 (describing TTP's organization structure and violent attacks); Bajoria, *supra* note 145 (describing LT's organization structure and violent attacks); Dressler, *supra* note 151 (describing the Haqqani network's organization structure and violent attacks).

159. Dressler, *supra* note 151, at 15–17.

the United States to extend the armed conflict into Pakistan to avoid a situation where non-state actors fighting in Afghanistan simply cross the border into Pakistan and are no longer subject to targeting.¹⁶⁰ As a practical matter, international law allows only for extremely limited uses of force against actually imminent threats where a state is unable or unwilling to enforce its obligation to prevent its territory from being used to the detriment of another state.¹⁶¹ So if the Pakistani government is unwilling to deal with the spillover from the Afghanistan conflict, the United States may respond with force against imminent threats, but may not use that as a premise to extend the armed conflict. Thus, because Pakistan does not satisfy the requisite legal criteria for armed conflict, the United States is limited to law enforcement operations when operating in this region, with the caveat that military force may be used in response to imminent threats.

3. Yemen

In Yemen, the United States is combating the group al-Qaeda in the Arabian Peninsula (AQAP). AQAP is a blend of the Saudi and Yemeni branches of al-Qaeda. The Saudi branch of al-Qaeda was established after 9/11 and began attacking Western and local targets in 2003, but the group was ousted from Saudi Arabia in 2006 after falling out of favor with the local Muslim population.¹⁶² In Yemen, another group, known as al-Qaeda Yemen (AQY), was established in 1998.¹⁶³ AQY was responsible for the attack on the USS Cole in 2000 and multiple attacks on foreign tourists and Western targets between 2006 and 2008.¹⁶⁴ In 2009, the remnants of the banished Saudi group merged with AQY to form the present-day AQAP.¹⁶⁵

AQAP's agenda has been predominantly regional, with attacks directed mainly at local government and Western targets within

160. See Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165, 1174 (2013).

161. See Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 248 (2011) (explaining the limited authority states have in the absence of armed conflict to respond in self-defense to imminent threats).

162. BYMAN, *supra* note 107, at 5–6.

163. *Yemen Drone Report*, *supra* note 12, at 12.

164. *Id.* at 12–13.

165. *Id.* at 13.

Yemen.¹⁶⁶ Despite its primarily local aims, AQAP has attempted several attacks on the United States' homeland.¹⁶⁷ In 2009, AQAP claimed responsibility for a foiled terror attack where a Nigerian man unsuccessfully attempted to detonate explosives in his underwear aboard a flight carrying 289 people en route to Detroit.¹⁶⁸ In October 2010, parcel bombs were found on cargo planes destined for the United States—an attack that was attributed to AQAP.¹⁶⁹ Most recently, in May 2012, the CIA thwarted an attempt by AQAP to attack another flight bound for the United States using an enhanced version of the 2009 underwear bomb.¹⁷⁰ The United States has carried out between eighty-three¹⁷¹ and ninety-six¹⁷² strikes against AQAP in Yemen by drones, warplanes, or cruise missiles. Only one of these attacks was launched in 2002 by the Bush administration, while the remaining strikes have occurred since 2009 at the direction of the Obama administration.¹⁷³

Under the epicenter-of-hostilities approach, the situation in Yemen must be examined to determine whether the conditions independently satisfy the legal criteria for armed conflict. AQAP appears to be sufficiently organized, as it maintains a command structure¹⁷⁴ and has demonstrated an ability to coordinate and execute military operations.¹⁷⁵ The intensity criterion also seems to be satisfied. Although every attack against the United States' homeland has been derailed, AQAP's campaign within Yemen has

166. Jonathan Masters and Zachary Laub, *Al-Qaeda in the Arabian Peninsula (AQAP)*, COUNCIL ON FOREIGN REL. (Aug. 22, 2013), <http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369>.

167. *Id.*

168. Chris Harnisch, *Christmas Day Attack: Manifestation of AQAP Shift Targeting America*, AEI CRITICAL THREAT (Dec. 29, 2009), <http://www.criticalthreats.org/yemen/christmas-day-attack-manifestation-aqap-shift-targeting-america>.

169. *Yemen Profile: Al-Qaeda in Action*, BBC NEWS (Oct. 26, 2013), <http://www.bbc.co.uk/news/world-middle-east-14704951>.

170. *CIA 'Foiled al-Qaida Bomb Plot' Around Anniversary of Bin Laden Death*, THE GUARDIAN (May 7, 2012), <http://www.theguardian.com/world/2012/may/07/cia-al-qaida-bomb-plot>.

171. *Drone Wars Yemen: Analysis*, *supra* note 99.

172. Roggio & Barry, *supra* note 12.

173. *Yemen Drone Report*, *supra* note 12, at 18.

174. *Id.* at 13–14; *Who May Be Killed?*, *supra* note 72, at 32.

175. This is evidenced not only by the three aforementioned attacks on the U.S. homeland, but also by the ongoing campaign against the Yemeni government.

utilized military weapons, caused substantial destruction, and resulted in hundreds of deaths.¹⁷⁶

The final consideration in the epicenter-of-hostilities analysis is whether there has been an armed attack against the United States to trigger the use of force pursuant to LOAC. AQAP has attempted three attacks against the United States.¹⁷⁷ At first glance, it is tempting to consider these attacks a sufficient legal premise to declare armed conflict against AQAP; however, historically only one terror attack in modern times has ever been deemed an armed attack sufficient to trigger the self-defense provision of the U.N. Charter¹⁷⁸—the 9/11 attack by al-Qaeda, which resulted in over 3,000 deaths.¹⁷⁹ Here, the combined potential casualty count of all three attacks by AQAP is in the low to mid hundreds,¹⁸⁰ which falls far below the devastating death toll of 9/11. Furthermore, since 9/11, similar terrorist attacks have not been construed as armed attacks sufficient to trigger an armed conflict but simply as terrorist attacks subject to IHRL law enforcement provisions.¹⁸¹ These attacks include the Madrid train bombing in 2004, which resulted in 192 deaths and over 1,400 injuries,¹⁸² and the London subway bombing in 2005, which resulted in fifty-two deaths and over 700 injuries.¹⁸³ Thus, AQAP's attacks against the United States do not satisfy the armed attack requirement, meaning that there is no independent legal basis for engaging in armed conflict against AQAP in Yemen.

176. *Yemen Drone Report*, *supra* note 12, at 15 (“Inside Yemen, AQAP’s primary targets are Yemeni government security and foreigners. The group’s attacks have killed hundreds of government military and intelligence personnel.”).

177. See Harnisch, *supra* note 168; *Yemen Profile: Al-Qaeda in Action*, *supra* note 169; CIA ‘Foiled al-Qaida Bomb Plot’ Around Anniversary of Bin Laden Death, *supra* note 170.

178. See INT’L LAW ASS’N, *supra* note 13, at 25.

179. *September 11 Anniversary Fast Facts*, CNN (Sept. 11, 2013, 11:01 AM), <http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/>.

180. The 2009 and 2012 attacks were directed against airliners carrying between 250–300 people each, whereas the 2010 attack was directed against a cargo plane. Had these attacks succeeded, the death toll would have been in the low to mid hundreds. See Harnisch, *supra* note 168; *Yemen Profile: Al-Qaeda in Action*, *supra* note 169; CIA ‘Foiled al-Qaida Bomb Plot’ Around Anniversary of Bin Laden Death, *supra* note 170.

181. INT’L LAW ASS’N, *supra* note 13, at 25.

182. Elaine Sciolino, *Spain Struggles to Absorb Worst Terrorist Attack in Its History*, N.Y. TIMES, Mar. 11, 2004, <http://www.nytimes.com/2004/03/11/international/europe/11CND-TRAI.html>.

183. *July 7 2005 London Bombing Fast Facts*, CNN (Nov. 6, 2013, 4:36 PM), <http://www.cnn.com/2013/11/06/world/europe/july-7-2005-london-bombings-fast-facts/>.

There is another basis on which the United States could premise its military operations in Yemen, which depends on the degree of connectedness between the al-Qaeda core and AQAP. If AQAP were part and parcel of the al-Qaeda core that attacked the United States on 9/11, then the United States would be entitled to consider the 9/11 attacks as the armed attack necessary to engage in hostilities against AQAP.¹⁸⁴ Examining AQAP's lineage lends strong support to this argument, as both the Saudi branch of al-Qaeda and AQY, the two groups that merged to form AQAP, were directly linked to the al-Qaeda core. Osama Bin Laden personally established the Saudi branch of al-Qaeda¹⁸⁵ and worked directly with Abd al Rahim al Nashiri, then head of AQY, to plan the 2000 USS Cole bombing.¹⁸⁶ Furthermore, Nasser Karim al-Wuhayish, the leader who oversaw the merger between the Saudi group and AQY to create AQAP, had served as the "personal assistant" to Osama Bin Laden in the 1990s.¹⁸⁷

Despite the interwoven histories of AQAP and the al-Qaeda core, the two organizations maintain differing agendas,¹⁸⁸ and it appears that the al-Qaeda core is not superior to AQAP in a command hierarchy.¹⁸⁹ Overall, it is unclear whether AQAP is an independent organization that merely collaborates with al-Qaeda's core, or part and parcel of the al-Qaeda core. However, there is enough evidence to make a plausible argument that AQAP is a branch of the al-Qaeda core, which would provide authority for the United States to conduct operations consistent with LOAC in Yemen based on 9/11 being the requisite armed attack.¹⁹⁰

184. Because the United States was authorized to declare armed conflict against al-Qaeda in response to the 9/11 attacks, it stands to reason that if AQAP was part and parcel of the al-Qaeda core, then the authorization for armed conflict would encompass AQAP as an enemy.

185. BYMAN, *supra* note 107, at 5, 12.

186. *Who May Be Killed?*, *supra* note 72, at 7.

187. *Id.*

188. See BYMAN, *supra* note 107, at 12 ("Even AQAP, often touted as the affiliate closest to al-Qa'ida because it has attempted attacks on American civil aviation . . . still concentrates primarily on targets within Yemen itself.").

189. *Who May Be Killed?*, *supra* note 72, at 8 ("AQAP appears to operate without direct lines of control running to bin Laden or other senior al Qaeda leaders.").

190. Because the NIAC against AQAP is occurring on Yemen's sovereign territory, Yemen is the lead legal actor, and the United States must seek authorization from the Yemeni government to engage in military operations. *Supra* Parts II.B, III.B.2.

4. Somalia

In Somalia, the United States has primarily targeted al-Shabaab, a terrorist group that originated as a military wing of a larger group known as the Islamic Courts Union (ICU), which took control of Somalia in 2006.¹⁹¹ After taking power, the ICU engaged in a devastating conflict with neighboring Ethiopia that lasted until 2009.¹⁹² In the course of this conflict, al-Shabaab broke away from ICU and emerged as the strongest militia force in southern Somalia, controlling a substantial amount of territory by mid-2008.¹⁹³ In March 2008, the United States designated al-Shabaab a terrorist organization and, three months later, launched a Tomahawk missile on a safe house in Somalia, killing al-Shabaab's leader.¹⁹⁴ This attack by the United States prompted the group to respond by announcing that it would begin targeting U.N. and U.S. targets within Somalia.¹⁹⁵ In October 2008, al-Shabaab launched five synchronized attacks against local government, Ethiopian targets, and U.N. compounds in northern Somalia.¹⁹⁶ The first attack perpetrated outside Somalia occurred in March 2010, when al-Shabaab executed coordinated suicide bombings that killed seventy-four spectators watching the World Cup in Uganda.¹⁹⁷ In February 2012, al-Shabaab officially swore allegiance to al-Qaeda.¹⁹⁸ Another al-Shabaab attack occurred in September 2013 in Nairobi, Kenya, where sixty-eight people were killed in a deadly assault.¹⁹⁹

Al-Shabaab's goals are primarily regional, and it has never attempted an attack on the United States.²⁰⁰ Under international law, the requisite conditions for armed conflict must be satisfied before the United States may apply LOAC against al-Shabaab in Somalia. Turning to the *Tadic* requirements, it appears that al-Shabaab is

191. Al-Shabaab Hearing, *supra* note 116, at 2.

192. *Id.* at 3–4.

193. Jonathan Masters, *Al-Shabab*, COUNCIL ON FOREIGN REL. (Sept. 23, 2013), <http://www.cfr.org/somalia/al-shabab/p18650#p3>.

194. Al-Shabaab Hearing, *supra* note 116, at 5–6.

195. *Id.* at 6.

196. *Id.*

197. *Q&A: Who Are Somalia's al-Shabab?*, BBC NEWS (Sept. 24, 2013, 7:06 PM), <http://www.bbc.co.uk/news/world-africa-15336689>.

198. *Id.*

199. *Id.*

200. See Harold Maass, *Could al-Shabab Launch a Terrorist Attack in the U.S.?*, THE WK. (Sept. 24, 2013), <http://theweek.com/article/index/250066/could-al-shabab-launch-a-terrorist-attack-in-the-us>.

sufficiently organized, as evidenced by its ability to launch coordinated strikes, speak with one voice when swearing allegiance to al-Qaeda, and maintain a command hierarchy.²⁰¹ The intensity requirement also appears to be satisfied, as the various attacks in Somalia, Uganda, and Kenya involved military weapons, resulted in high casualty counts, and caused substantial destruction.²⁰² However, al-Shabaab has never attacked the United States; in fact, to the extent that there is any armed conflict between al-Shabaab and the United States, the United States unilaterally initiated it²⁰³ and continues to perpetuate it by launching attacks in Somalia.²⁰⁴ Thus, it appears that there is no independent legal basis for engaging in armed conflict with al-Shabaab in Somalia, and the United States must comply with the rules of IHRL when operating in the region.

Countries that do not qualify as an epicenter-of-hostilities should be regulated by a law enforcement model.²⁰⁵ There is a robust array of options available for holding terrorists criminally liable under U.S. domestic law.²⁰⁶ In fact, hundreds of terrorists are currently held in federal prisons throughout the United States.²⁰⁷ Even the Obama administration has touted the efficacy of civilian courts to prosecute terrorism suspects.²⁰⁸

V. IMPLICATIONS

Overall, the epicenter-of-hostilities framework mitigates the adverse consequences of the “global war” paradigm.²⁰⁹ First, limiting LOAC to the epicenter-of-hostilities means that the United States will be operating pursuant to IHRL in all other countries. IHRL

201. BYMAN, *supra* note 107, at 6–7; Masters, *supra* note 193.

202. Q&A: *Who Are Somalia’s al-Shabab?*, *supra* note 197.

203. Masters, *supra* note 193.

204. *US Covert Actions in Somalia*, *supra* note 101.

205. David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 967–72 (2009) (explaining how terrorist acts can be prosecuted under criminal law).

206. See Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 675–87 (2009) (describing the different legal bases for prosecuting terrorists under U.S. domestic law).

207. Josh Gerstein, *Senate Panel Weighs Plans to Close Guantanamo*, POLITICO (July 24, 2013, 4:36 PM), <http://www.politico.com/story/2013/07/guantanamo-closing-plans-94693.html>.

208. Obama National Security Speech, *supra* note 67 (“Our courts have convicted hundreds of people for terrorism or terrorism-related offenses, including some folks who are more dangerous than most [Guantanamo] detainees. They’re in our prisons.”).

209. *Supra* Part III.B.

imposes more stringent requirements on the use of lethal force than LOAC,²¹⁰ which means innocent civilians, in the regions where groups affiliated with al-Qaeda operate, will receive more protection.²¹¹ Second, confining LOAC to the epicenter-of-hostilities narrows the scope of countries in which the United States will be conducting military operations, which reduces the likelihood that American soldiers will engage in NIAC in a territory without authorization from the government, thereby avoiding potential prosecution under the domestic laws of that state.²¹² Finally, the epicenter-of-hostilities approach eradicates the risk of targeting affiliated groups with no connection to the original conflict because each region must satisfy the requisite criteria for armed conflict, meaning there will be an independent legal basis for attacking that is not contingent on the original attack of 9/11.²¹³

Additionally, the epicenter-of-hostilities framework has three major implications for the United States. First and foremost, the adverse consequences of the “global war” paradigm have tarnished the United States’ image as a champion of human rights,²¹⁴ which in turn has alienated current allies²¹⁵ and incited terrorist groups—who would have otherwise remained focused on local objectives—to take up arms against the United States.²¹⁶ The road to restoring the United States’ image as a champion of human rights and rehabilitating its relationships with allies begins by complying with existing law. This Article’s proposal ensures that the United States’ conduct in the conflict with al-Qaeda and its affiliates will conform to existing law, thereby preventing the practices that have been the subject of international and domestic criticism.²¹⁷

210. CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, *supra* note 121, at 18–19.

211. *Supra* Part III.B.1.

212. *Supra* Part III.B.2.

213. *Supra* Part III.B.3.

214. Daskal, *supra* note 160, at 1232 (“[It] becomes difficult for the United States to [remain a champion of human rights] when viewed as supporting broad-based law-of-war authority that gives it wide latitude to employ force as a first resort and bypass otherwise applicable human rights and domestic law enforcement norms.”).

215. *AUMF Hearing*, *supra* note 115, at vii (“[A]t the moment we are risking alienating some of our key European allies whose view of the applicable international law is very different from ours”); Obama Nobel Speech, *supra* note 8 (explaining that certain aspects of the conflict against al-Qaeda have alienated key allies in the fight against terrorism).

216. Byman, *supra* note 107, at 39.

217. *Supra* Parts III.B.1–3.

The second implication is how the United States will treat other affiliated groups. For example, the United States recently designated the group Boko Haram as a foreign terrorist organization, alleging that it has ties to al-Shabaab and other militant jihadist groups.²¹⁸ Boko Haram formed in 2002 as a group promoting Islamic education and worship; however, since 2009, the group has committed a series of devastating attacks throughout the country of Nigeria.²¹⁹ Similarly, the United States has deemed the group al-Qaeda in the Islamic Maghreb (AQIM) as a foreign terrorist organization.²²⁰ AQIM operates primarily in North Africa, maintaining footholds in Niger and Mali.²²¹ In 2007, AQIM officially swore allegiance to al-Qaeda and began launching attacks against local and Western targets in the region, mainly in Algeria and Mauritania.²²² While the United States has not yet taken any military action against either group, the epicenter-of-hostilities approach provides a framework for determining the legality of any potential attacks directed against these groups. The United States may only engage in armed conflict and carry out operations pursuant to LOAC if the requisite legal criteria are satisfied such that each of these countries is considered an epicenter-of-hostilities—the group has attacked the United States and the *Tadic* requirements of intensity and organization are met.

The final implication is the United States' role in shaping customary international law.²²³ Because the conflict against al-Qaeda is the first time the international community has ever recognized an armed conflict against a modern terrorist organization, there is not much definitive state practice on the topic and certainly not enough to establish customary international law.²²⁴ The United States is on the forefront of state practice in these types of conflicts;

218. Moses Rono, *Boko Haram: Is Terror Designation a Badge of Honor?*, BBC NEWS (Nov. 15, 2013, 9:20 AM), <http://www.bbc.co.uk/news/world-africa-24959207>.

219. Farouk Chothia, *Who Are Nigeria's Boko Haram Islamists?*, BBC NEWS (Jan. 11, 2012, 11:30 AM), <http://www.bbc.co.uk/news/world-africa-13809501>.

220. Jonathan Masters, *Al-Qaeda in the Islamic Maghreb*, COUNCIL ON FOREIGN REL. (Jan. 24, 2013), <http://www.cfr.org/world/al-qaeda-islamic-maghreb-aqim/p12717>.

221. *Id.*

222. *Al-Qai'da in the Lands of the Islamic Maghreb (AQIM)*, NATIONAL COUNTERTERRORISM CENTER, <http://www.nctc.gov/site/groups/aqim.html> (last visited Dec. 11, 2013).

223. See Daskal, *supra* note 160, at 1174.

224. Schondorf, *supra* note 86, at 52–53 (“Compared to intra-state and inter-state armed conflicts there are relatively few historical examples of extra-state armed conflicts from which state practice can be drawn.”).

consequently, the administration's actions set a significant precedent that can mold state conduct in the future.²²⁵ The danger of setting a precedent based on a "global war" paradigm is that states in the future may abuse the wider latitude for lethal force and completely disregard humanitarian protections in the course of conducting hostilities against transnational, non-state enemies.²²⁶ Over time, if states continue to follow this lead, they may develop a belief that they are entitled to declare a "global war" in such situations, which could give rise to a disturbing, new customary international law.²²⁷ In fact, the United States would not have much standing to object to the development of such practices if it is perceived as the forerunner of the "global war" paradigm.²²⁸ There is still an opportunity, while these conflicts are relatively new, to set a course grounded in humanitarian guarantees and respect for existing law.

VI. CONCLUSION

The events of September 11 challenged the sufficiency of the established international/non-international armed conflict dichotomy to govern a novel conflict against an unprecedented enemy. In the words of one Obama administration official, the United States has endeavored to conduct this unconventional conflict using "conventional legal principles found in treaties and customary international law."²²⁹ Unfortunately, the United States has missed the mark, insisting on a "global war" paradigm that is not supported by existing law and pursuing a course of action that has resulted in adverse consequences for innocent civilians and could potentially subject American military personnel to prosecution in the conflict regions.²³⁰

225. Daskal, *supra* note 160, at 1174 ("[T]he United States is the first state to self-consciously declare itself at war with a non-state terrorist organization that potentially spans the globe.").

226. *AUMF Hearing*, *supra* note 115, at 38 (statement of Kenneth Roth, Exec. Dir., Human Rights Watch) ("I am concerned . . . about the precedents that the U.S. Government sets for other governments that may have much less attention to the rights of their citizens or others.").

227. Marco Sassoli, "Unlawful Combatants": *The Law and Whether It Needs to be Revised*, 97 AM. SOC'Y INT'L L. PROC. 196, 199 (2003) ("[L]ess scrupulous states may take advantage of such a new loophole in the carefully built-up protective system offered by the Geneva Conventions by, for example, denying protection to U.S. personnel.").

228. Obama Nobel Speech, *supra* note 8 ("America—in fact, no nation—can insist that others follow the rules of the road if we refuse to follow them ourselves. For when we don't, our actions appear arbitrary and undercut the legitimacy of future interventions, no matter how justified.").

229. Johnson, *supra* note 65.

230. *Supra* Part III.

Fortunately, it is not too late to change course and implement a framework rooted in existing law, which can be accomplished by applying the epicenter-of-hostilities approach.²³¹ The epicenter-of-hostilities approach seeks to determine whether a particular region satisfies the requisite criteria for armed conflict, providing an independent legal basis for the United States to engage in armed conflict.²³² Implementing this approach would ensure that the United States' conduct adheres to existing law, thereby preventing the conduct that has been the subject of criticism from the international community.²³³ The administration's actions today have wide-ranging implications for America's image in the immediate future and state practice in the distant future.²³⁴ The legacy of the conflict against al-Qaeda and its affiliates is presently being formed, and the United States has a closing window of time to leave a legacy of tempered, responsible military action and respect for existing law.

231. *Supra* Part IV.

232. *Id.*

233. *Id.*

234. *Supra* Part V.

