HOW DO YOU LIKE ME NOW? HAMDAN V. RUMSFELD AND THE LEGAL JUSTIFICATIONS FOR GLOBAL TARGETING

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ABSTRACT

By interpreting Common Article 3 of the Geneva Conventions to apply in all conflicts not qualifying as international, the Supreme Court in *Hamdan v. Rumsfeld* closed the transnational warfare regulatory gap for the United States. This understanding and application of Common Article 3 ensured Salim Ahmed Hamdan and other al-Qaeda detainees held by the country received basic humanitarian protections. However, as later interpreted by the executive branch, the decision also laid the foundation for the government's legal justifications for wide-ranging and oft-criticized military activities abroad, including drone strikes far from the "hot battlefield." Ultimately, the *Hamdan* decision provided an unexpected legal basis for the United States to lethally target non-State adversaries spread across the globe.

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INTRODUCTION

Reporting on the outcome of *Hamdan v. Rumsfeld*,[1] the New York Times noted that the decision "was such a sweeping and categorical defeat for the [Bush] administration that it left human rights lawyers . . . almost speechless with surprise and delight..."[2] Indeed, the Supreme Court opinion appeared to present a heavy-handed check against the President by declaring the Guantanamo military commissions, as they stood at the time, to be unlawful. But the full import of the case—and *Hamdan*'s Janus face—would emerge only in the following years. The Court's decision to classify the war against al-Qaeda under the Geneva Conventions resulted in an unexpected and perhaps counterintuitive boon to the government's legal authority to conduct warfare. In fact, the opinion has become a central precedent for the executive branch in legally justifying its long-running and geographically-dispersed operations in the global war against non-State armed groups. This Article will trace the role of *Hamdan* in how the United States government currently justifies its overseas conduct of hostilities—both under international and domestic law.

Part I of this Article will explore the importance of conflict classification under the law of armed conflict and *Hamdan*'s essential holding regarding the conflict with al-Qaeda. Part II begins with an examination of how the executive branch has used *Hamdan* in both public statements and disclosed legal opinions. It then examines the far-reaching ways the United States has relied upon the opinion to strengthen its legal case for status-based targeting of individuals beyond the traditional "hot battlefield." Next, the Article will explain how the decision has been influential in justifying the nation's conduct of hostilities, compliance with the United Nations Charter, and conformity with domestic Congressional authority. Finally, in Part III, this Article offers some thoughts on the broader impacts and potential long-term effects of *Hamdan*'s legacy.

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[1] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[2] Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES (June 30, 2006), https://www.nytimes.com/2006/06/30/washington/30hamdan.html [https://perma.cc/NPQ7-X4NE].

1. *HAMDAN* AND CONFLICT CLASSIFICATION

1.1. Hamdan v. Rumsfeld

Almost immediately after the 9/11 attacks, the United States began capturing suspected al-Qaeda actors operating abroad.[3] With physical custody, however, came the question of the legal status and rights of the detainees.[4] The Bush Administration determined that the conflict with al-Qaeda did not fall under the legal auspices of the Geneva Conventions, and therefore the humanitarian precepts within those treaties did not apply to detainees.[5] With the understanding that the country was operating in a legal lacuna that fell beyond the international regulatory scheme, the President ordered detainees be tried by military commission—the procedures of which were established by the executive branch.[6]

Salim Hamdan, a Yemeni national, was captured by militia forces and turned over to the United States in the early weeks of the conflict in Afghanistan.[7] While detained at Guantanamo Bay, he was notified that he would face a military commission for a variety of charges stemming from his activities as bodyguard and chauffeur for Osama bin Laden.[8] Hamdan filed a petition in federal court

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[3] *See, e.g.*, Newsweek Staff, *Sept. 11 Terrorists: List of Captured and Killed,* NEWSWEEK (Sep. 4, 2011), http://www.newsweek.com/sept-11-terrorists-list-captured-and-killed-67357 [https://perma.cc/U3PC-9TA7] (noting that many of al-Qaeda's senior leadership were captured by January 2002).

[4] The debates preceding the *Hamdan* decision are well-documented and outside the scope of this paper. For an excellent discussion on the various legal debates immediately following 9/11, see generally Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions,* 79 NOTRE DAME L. REV. 1335 (2004).

[5] *See* Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 8 (Jan. 22, 2002) (stating that Common Article 3 of the Geneva Conventions does not apply to "an armed conflict between a nation-State and a transnational terrorist organization," as the non-State group could not be a party to the treaties).

[6] Hamdan v. Rumsfeld, 548 U.S. 557, 568-69 (2006); *see also* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (providing an overview of the U.S.'s understanding of the applicable legal framework in the War on Terror).

[7] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).

[8] *Id.* at 570.

making multiple challenges to the proposed military commissions—most notably that their procedures violated both domestic law and international law under the Geneva Conventions.[9]

In a landmark decision, the Supreme Court agreed with Hamdan on both counts. The Court held that the government violated domestic law because the procedures and rules of evidence for the commissions deviated substantially from those of military courts martial—contrary to the requirements of the Uniform Code of Military Justice.[10] Going further, the Court rejected the Bush Administration's contention that the Geneva Conventions did not apply in the case, and held that the humanitarian protections contained Common Article 3 of the Geneva Conventions—applicable to non-international armed conflicts—did indeed apply.[11] Therefore, Hamdan was entitled to a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[12] The Court held that the commissions failed to comply with this requirement, as they did not guarantee that detainees could be present during all parts of the proceedings, nor did they grant detainees the right to examine all evidence against them.[13]

By all accounts, the *Hamdan* holding appeared to be a victory for detainee rights and a rebuke against the Bush Administration's legal constructs surrounding the war on terror. However, in fact, the Court's conclusion regarding conflict classification opened the door for the executive branch's global application of the substantive law of armed conflict.

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[9] *Id.* at 624, 631–32.

[10] *Id.* at 620–624 (citing Article 36 of the UCMJ). Article 36 states: (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter; (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress. Uniform Code of Military Justice, 10 U.S.C. § 949(a) (2016).

[11] Hamdan v. Rumsfeld, 548 U.S. 557, 625–35 (2006).

[12] *Id.* at 633.

[13] *Id.* at 634.

1.2. Conflict Classification

1.2.1. When is the Law of Armed Conflict Applicable?

Seventeenth-century jurist Hugo Grotius wrote that in warfare, belligerents must "not believe that either nothing is allowable, or that everything is."[14] That violence in warfare is restricted to only that which is necessary is the foundational precept for the law of armed conflict.[15] This body of law attempts to "protect persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare"[16] by striking a balance between military necessity and humanity.[17] This equilibrium permeates the entire law of armed conflict thereby ensuring that force is applied in warfare in a manner allowing for mission accomplishment while simultaneously taking appropriate humanitarian considerations into account.[18] Only in an armed conflict does this specialized area of international law apply[19] with all other violence regulated by

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[14] HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 9 (Stephen C. Neff ed., 2012).

[15] *See* Brian J. Bill, *The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare*, 12 Y.B. INT'L HUMANITARIAN L. 119 (2009) (examining the principle of military necessity).

[16] Int'l Comm. of the Red Cross, Advisory Serv. on Int'l Humanitarian Law, *What is International Humanitarian Law?* (2004), https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf [https://perma.cc/H2VN-QVDS] [hereinafter ICRC, *What is International Humanitarian Law?*].

[17] The principle of military necessity states that a belligerent party may only apply the degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources. Similarly, the principle of humanity prohibits the employment of any kind or degree of force not necessary for the purpose of war. GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 112 (2012).

[18] *See* Shane R. Reeves & Jeffrey S. Thurnher, *Are We Reaching a Tipping Point? How Contemporary Challenges are Affecting the Military Necessity-Humanity Balance*, HARV. NAT. SEC. J. 1 (2013) ("This equilibrium permeates the entirety of that field of law, thereby ensuring that force is applied on the battlefield in a manner allowing for the accomplishment of the mission while simultaneously taking appropriate humanitarian considerations into account.").

[19] *See* ICRC, *What is International Humanitarian Law?*, *supra* note 16 ("International humanitarian law applies only to [international or non-international] armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.").

domestic legal authorities and, to some extent, human rights law.[20] Rules for the use of force and protection of civilian rights under international human rights norms differ in important ways from those within the law of armed conflict.[21]

While there is not a conclusive definition of the term "armed conflict,"[22] it is broadly understood to "exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[23] When an armed conflict does exist, the law applies in its entirety,[24] or in part, depending on whether the hostilities are classified as international or non-international. Characterizing an armed conflict is therefore the next critical step to determine the applicable regulatory framework.

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[20] Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, Y.B. INT'L HUMANITARIAN L. 13, 50–56 (Michael Schmitt et al. eds., 2010). The right to life, for example, is guaranteed by the International Covenant on Civil and Political Rights (ICCPR). *Id*. at 50. The U.S. position is that the ICCPR does not have extraterritorial application, however. *Id*. The U.S. has maintained that customary international human rights law does apply, regardless of location. Ryan Goodman, *Human Rights Law and U.S. Military Operations in Foreign Countries: The Prohibition on Arbitrary Deprivation of Life*, JUST SECURITY (Feb. 19, 2019), https://www.justsecurity.org/62630/international-human-rights-law-u-s-military-operations-foreign-countries-prohibition-arbitrary-deprivation-life/ [https://perma.cc/5UF8-D9GJ].

[21] *See* Chesney, *supra* note 20; Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUR. J. INT'L L. 161 (2008) (providing an examination of the relationship between human rights law and international humanitarian law—and the debates surrounding that relationship. Substantive differences between human rights law and the law of armed conflict will be discussed in section 2.2.5).

[22] "In U.S. practice (and international practice in general), the meaning of this term is based in large measure on the guidance offered by the Commentaries to the four Geneva Conventions" which propose "a number of factors to be assessed, in a totality-of-circumstances approach" to determine what "situations qualify as armed conflicts." Geoffrey S. Corn, *Legal Classification of Military Operations*, *in* U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 72 (Corn et al. eds., 2015) [hereinafter Corn, *Legal Classification of Military Operations*].

[23] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[24] However, the law of occupation—which is part of the law of armed conflict—only applies when a party exercises authority over another State's territory. Hague Convention No. IV, Respecting the Law and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2227 and Annex, 36 Stat. 2295 [hereinafter Hague Regulation IV].

1.2.2. International Armed Conflict, Non-International Armed Conflict, or Neither?

The law of armed conflict does not recognize a unitary concept of warfare and relies instead on a dual categorization.[25] Common Articles 2 and 3 to the 1949 Geneva Conventions establish the framework for these categories of armed conflict.[26] These articles, often called "Common Articles" as they are repeated verbatim in all four the Conventions, [27] dictate which parts of the Geneva Conventions are applicable.[28] Common Article 2 states that in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" the Conventions apply.[29] This situation is generally understood to constitute an international armed conflict.[30] With "armed conflict" as the initiating mechanism in Common Article 2, *de facto* hostilities between State actors, versus only situations of *de jure* war, are regulated.[31] Further, the intensity and duration of the fighting is generally considered to be irrelevant[32] as "[a]ny difference arising between two States and leading to the intervention of members of

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[25] *See* Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32 (Elizabeth Wilmshurst ed., 2012) ("[I]nternational humanitarian law does not recognize a unitary concept of armed conflict but, rather, recognizes two types of armed conflicts: international and non-international.").

[26] Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2–3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]. The law of armed conflict is also applicable in situations of occupation or partial occupation of the territory of a High Contracting Party. *Id*. art. 2.

[27] *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 84–85 (2010) (explaining that there are roughly twelve such articles found in the Geneva Conventions).

[28] Corn, *Legal Classification of Military Operations*, *supra* note 22, at 70.

[29] GC II, *supra* note 26, art. 2.

[30] Int'l Comm. of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper 1 (Mar. 2008), https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf [https://perma.cc/5DAE-4TK4] [hereinafter ICRC Armed Conflict].

[31] *See* 3 INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 23 (Jean S. Pictet et al. eds., 1960) [hereinafter COMMENTARY, GC III] (noting that "[t]he occurrence of *de facto* hostilities is sufficient" to satisfy the conditions established in Common Article 2).

[32] *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 69–70 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

the armed forces is an armed conflict within the meaning of Article 2."[33] Common Article 2 is therefore relatively easy to trigger, as even detaining a member of the enemy force may be enough to initiate an international armed conflict.[34]

In comparison, determining the existence of a non-international armed conflict is more complicated, as the line of demarcation between internal State violence and hostilities rising to a sufficient threshold level—thereby triggering international law—is often unclear.[35] At times called civil wars, rebellions, revolutions, guerilla warfare, resistance movements, internal uprisings, or wars of self-determination,[36] these conflicts are simply described in Common Article 3 as "not of an international character occurring in the territory of one of the High Contracting Parties."[37] The drafters of the Geneva Conventions, hoping to regulate as many of these internal struggles as possible,[38] avoided concretely describing a non-international armed conflict. Instead, the Commentary to Article 3[39] offers a number of non-binding criteria that, when looked at in totality, help assess the existence of a "genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection."[40] Despite the belief that these subjective factors

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[33] COMMENTARY, GC III, *supra* note 31, at 23. Again, it is important to note that Common Article 2 is triggered "even if one of the Parties denies the existence of a state of war." *Id*.

[34] *Id*. ("Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.").

[35] Corn, *Legal Classification of Military Operations*, *supra* note 22 , at 73–74.

[36] EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 5 (2008).

[37] GC II, *supra* note 26, art. 3.

[38] *See generally* COMMENTARY, GC III, *supra* note 31, at 36–37 (expressing the ICRC's view that "no Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules . . . under its own laws").

[39] Common Articles 2 and 3 also have identical commentary language in each of the four separate Commentaries.

[40] INT'L COMM. OF THE RED CROSS, CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR. GENEVA, 19 AUGUST 1949, COMMENTARY OF 1958, ART. 3, https://ihl-databases.icrc.org/ihl/COM/380-600006?OpenDocument [https://perma.cc/GDU7-2Q5R]. *See also* COMMENTARY, GC III, *supra* note 31, at 35–36. The non-binding criteria include that: the non-State armed group is an organized military force, is under responsible command, with control of territory, has the means to respect and ensure respect for the Geneva Convention, and the State actor responds with their regular armed forces. *Id*. Of these criteria, a State responding to a non-State threat with their armed forces "is a

would result in the broad application of the humanitarian protections embedded in Common Article 3, the opposite has typically occurred. The ambiguity creates a blurry line between "isolated and sporadic acts of violence"[41] and non-international armed conflicts. States, looking to "avoid the perception of having lost control of an internal situation,"[42] have often exploited this gray area by interpreting the non-binding criteria as indicating their particular internal disturbance as falling below the threshold of armed conflict. As a result, it has been historically rare for nations experiencing such conflicts to publicly acknowledge that a non-international armed conflict exists.[43]

Without a definitive description of what constitutes a "non-international armed conflict," various understandings of the phrase exist. Additionally, Protocol II describes these conflicts as those which are not covered by Additional Protocol I and:

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[44]

Controlling sufficient territory from which to launch military operations, a criterion to the Additional Protocol II definition, is

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significant indicator that the situation has most likely crossed the threshold into the realm of armed conflict." Corn, *Legal Classification of Military Operations*, *supra* note 22, at 74.

41 Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(2), June 8, 1977, 1125 U.N.T.S. 609, 611 [hereinafter AP II]. AP II "supplements Article 3 common to the Geneva Conventions." *Id.* AP II has not been ratified by the United States. However, the United States views much of AP II as customary international law and therefore obligates itself to follow those specific provisions when an armed conflict is triggered. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, *in* 2 AM. U.J. INT'L L. & POL'Y 419, 430–31 (Jan. 22, 1987).

42 Corn, *Legal Classification of Military Operations*, *supra* note 22, at 73–74.

43 JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., INT'L & OPERATIONAL L. DEP'T, OPERATIONAL L. HANDBOOK 15 (William Johnson & David Lee eds., 2014), http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2014.pdf [https://perma.cc/H4WC-ME2P]. This is especially the case for armed conflicts occurring before 9/11. *Id.*

44 AP II, *supra* note 41, at 611.

rarely satisfied by non-State armed groups.[45] Further, according to this definition, hostilities exclusively between non-State armed groups do not qualify as a non-international armed conflict.[46]

The two factors noted in the *Prosecutor v. Tadić*[47] case are more widely accepted as establishing the existence of a non-international armed conflict.[48] Under the first factor, hostilities must rise to a minimum level of intensity and duration, which amounts to protracted armed violence.[49] Under the second factor, the non-State armed groups must achieve a requisite level of organization—to include a chain of command and "the capacity to sustain military operations."[50] This two-part definition has been adopted by the International Criminal Court[51] and the International Committee of the Red Cross (ICRC),[52] as well as many States.[53]

In terms of geographic scope, non-international armed conflicts were historically envisioned as civil wars in which hostilities are fought exclusively within the internal borders of a single State.[54] While the term "internal" is not used within Common Article 3,[55]

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45 SOLIS, *supra* note 27, at 131.

46 ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 79–80 (2008).

47 Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997).

48 ICRC Armed Conflict, *supra* note 30, at 3.

49 Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 562, 567–68 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997).

50 ICRC Armed Conflict, *supra* note 30, at 3.

51 Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 98 [hereinafter Rome Statute]. Even qualification under non-controversial criteria, such as the need for an organized non-State armed group, is open to debate. *See, e.g.,* Akande, *supra* note 25, at 51 (giving a number of factors that indicate that a group is organized).

52 ICRC Armed Conflict, *supra* note 30, at 5.

53 MINISTRY OF DEF., JOINT SERV. MANUAL OF THE L. OF ARMED CONFLICT 386–87 (2004), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf [https://perma.cc/5HD3-7CSM].

54 *See, e.g.,* Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts,* 91 INT'L REV. OF THE RED CROSS 35, 39 (Mar. 2009); Yoram Dinstein, *Concluding Remarks on Non-International Armed Conflicts*, *in* 89 INT'L L. STUD. 399, 400 (2013) [hereinafter Dinstein, Concluding Remarks] ("The first vital ingredient of NIAC relates to its internal nature, i.e., that it is waged within a State.").

55 *See* GC II, *supra* note 26, art. 3 ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting

the Commentary states that, "[s]peaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country."[56] Both the Rome Statute and Additional Protocol II seem to contemplate the internal nature of these hostilities by defining these conflicts as taking place within the territory of a single nation.[57]

1.2.3. What Substantive Parts of the Law of Armed Conflict Apply in Each Type of Conflict?

Armed conflicts are governed by a combination of treaty law and customary law.[58] According to the language of Common Article 2, the terms of the four Geneva Conventions apply in declared wars or any armed conflicts between High Contracting Parties as well as in cases of partial or total occupation.[59] Additionally, all customary law that comprises the law of armed conflict is applicable in international armed conflicts.[60]

A more limited body of positive law regulates non-international armed conflicts.[61] Common Article 3, called a "convention in miniature" by the Commentary, is the Geneva Conventions' exclusive regulatory provision applicable in non-international

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Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions….").

[56] 4 INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 36 (Jean S. Pictet et al. eds., 1958) [hereinafter COMMENTARY, GC IV].

[57] *See* Rome Statute, *supra* note 51, art. 8(2)(f) ("It applies to armed conflicts that take place in the territory of a State."); *see also* AP II, *supra* note 41, art. 1 (discussing how the Protocol applies "in the territory of a High Contracting Party").

[58] Corn, *Legal Classification of Military Operations*, *supra* note 22, at 70.

[59] GC II, *supra* note 26, art. 2.

[60] *See* U.S. ARMY, JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., INT'L & OPERATIONAL L. DEP'T, L. OF ARMED CONFLICT DESKBOOK 24–25 (5th ed., 2015) (noting that the entire law of armed conflict applies in an international armed conflict).

[61] *See* GC II, *supra* note 26, art. 3 (stating that "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum" the limited provisions found within the article); *see also* ICRC, *What is International Humanitarian Law?*, *supra* note 16 ("A more limited range of rules apply to internal armed conflicts and are laid down in Article 3 common to the four Geneva Conventions as well as in Additional Protocol II.").

armed conflicts.[62] While there are some treaties that regulate non-international armed conflicts, [63] this body of law is less comprehensive than that applicable to international armed conflicts.[64] In regards to customary international law,[65] however, States generally agree that most of the same rules apply regardless of the characterization of the conflict.[66] This expansive application of customary international law, combined with existing relevant treaties, results in a broad legal framework for regulating non-international armed conflicts.[67]

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[62] *See* COMMENTARY, GC III, *supra* note 31, at 34 ("Article 3 is like a 'Convention in miniature'. It applies to non-international armed conflicts only, and will be the only Article applicable" to the conflict participants.).

[63] Additional Protocol II to the 1949 Geneva Conventions and the Rome Statute regulate non-international armed conflict in certain situations. The United States is not a party to either of these treaties. Additionally, there are a number of treaties applicable to both international and non-international armed conflicts. *See, e.g.,* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163; Dinstein, Concluding Remarks, *supra* note 54, at 406–07 (listing treaties applicable in both types of conflicts).

[64] David Wallace et al., *Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict*, 25 MICH. ST. INT'L L. REV. 555, 577 ("As a matter of positive law, the differences between these two types of conflicts are significant with those characterized as international far more heavily regulated than those classified as non-international.") (citation omitted).

[65] RESTATEMENT (THIRD) OF THE FOREIGN REL. L. OF THE U.S. § 102(c)(2) (1987) ("Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation."). More specifically, for a State practice "to become a rule of customary international law it must appear that the States follow the practice from a sense of legal obligation (*opinion juris sive necessitates*); a practice that is generally followed but which States feel legally free to disregard does not contribute to customary law." *Id.* at cmt. c.

[66] *See*, *e.g.*, Corn, *Legal Classification of Military Operations, supra* note 22, at 75 (describing the law regulating non-international armed conflicts as "expanding"); Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 INT'L L. STUD. 119 (2012) (outlining many of the customary laws that apply in both international and non-international armed conflict).

[67] *See generally* Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 96–127 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999) (recognizing that non-international armed conflicts trigger a comprehensive body of international law).

1.2.4. Conflict Classification in Hamdan

The long-running war between the United States and al-Qaeda that began on September 11, 2001 appeared to escape traditional notions of conflict classification. [68] Sometimes called a "transnational war," [69] these hostilities between a sovereign State and a globally dispersed non-State actor [70] did not "satisfy the requisite inter-State dispute element" of an international armed conflict, nor the "traditional internal interpretation" of a non-international armed conflict.[71] Instead, having both international and non-international characteristics, the war appeared to occupy a gap between these two categories. This failure of the traditional classification paradigm gave rise to numerous legal controversies, including the issue of detainee treatment.[72]

In arguing *Hamdan*, the Bush administration maintained that the conflict against al-Qaeda and its associates was neither a traditionally understood international conflict, nor a non-international conflict under the Geneva Conventions.[73] Specifically,

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[68] NAT'L COMMISSION ON TERRORIST ATTACKS UPON THE U.S., 9-11 COMMISSION REPORT, 362 (2004) [hereinafter 9-11 COMMISSION REPORT] ("In this sense, 9/11 has taught us that terrorism against American interests 'over there' should be regarded just as we regard terrorism against America 'over here.' In this same sense, the American homeland is the planet.").

[69] Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46–79 (2009).

[70] 9-11 COMMISSION REPORT, *supra* note 68, at 362 (noting that transnational armed groups are not deterred like traditional hostile States or easily spotted like historic armed groups).

[71] *See* Corn, *Legal Classification of Military Operations*, *supra* note 22, at 77 (discussing how transnational armed conflicts have "been the most significant source of contemporary conflict classification uncertainty"); *see also* U.S. DEP'T OF DEF. QUADRENNIAL DEF. REV. REP. 8 (Feb. 2010) (discussing the difficulty in categorizing contemporary conflicts).

[72] *See* Shane R. Reeves & David Lai, *A Broad Overview of the Law of Armed Conflict in the Age of Terror,* THE FUNDAMENTALS OF COUNTERRORISM LAW 139, 142–44 (noting the importance of characterizing a conflict as either international or non-international).

[73] Brief for Respondent at 26, Hamdan v. Rumsfeld, 548 U.S. 547 (2006). The government argued that: The Convention seeks to *regulate* the conduct of warfare to which it applies with respect to nation-states that have entered the Convention and agreed to abide by its terms, but is does not purport to apply to every armed conflict that might arise or to crowd out the common law of war. Instead, as explained below, the Convention applies only to those conflicts identified in Articles 2 and 3. If an armed conflict, therefore, does not fall within the Convention, the Convention simply does not regulate it. *Id.*

the government argued that although the United States was engaged in an armed conflict "of an international character"[74] with al-Qaeda, Common Article 2 nonetheless did not apply because it is only applicable to conflicts between States, or High Contracting Parties to the Geneva Conventions.[75] Further, the government argued that Common Article 3 also did not apply because that Article is applicable only "[i]n the case of armed conflict *not of an international character* occurring the territory of *one* of the High Contracting Parties."[76] As the conflict with al-Qaeda was "of an international character," taking place in multiple countries, the definition was inapplicable.[77] Thus, it argued, the treatment of detainees taken from the battlefield escaped regulation under the Geneva Conventions.[78]

The Court disagreed with the government's interpretation, however, finding that the basic humanitarian protections, as outlined in Common Article 3 of the 1949 Geneva Conventions, were in fact applicable.[79] The exact legal reasoning behind this finding, however, is unclear from the text of the opinion.[80] The Court failed to state outright that the United States was involved in a non-international armed conflict—as defined by the Geneva Conventions—with al-Qaeda. Instead, it responded to the government's argument that the war against al-Qaeda was an international armed conflict by stating that it:

> [n]eed not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3 . . . provides that in a "conflict not of an international character occurring in the territory of one of

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74 *Id*. at 48.

75 *Id*. at 38–39. The Government noted, in contrast, that Common Article 2 may apply to the U.S.'s engagement with Afghanistan's Taliban regime. *Id*. at 40.

76 *Id*. at 48 (citing the Geneva Conventions; emphasis added in brief).

77 *Id*. According to the Government's argument, the United States could still choose to apply the (presumably customary) law of war, in the absence of applicable treaty law, but was not bound to the provisions of the Geneva Conventions in relation to detainee treatment. *Id*. at 26.

78 *Id*. at 26.

79 Hamdan v. Rumsfeld, 548 U.S. 547, 629 (2006).

80 *See* Marko Milanovic, *Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case*, 89 INT'L REV. RED CROSS 373, 375–81 (2007) (criticizing the U.S. Supreme Court for its claim that there are "armed conflicts which are governed by the law of war but are not regulated by it").

> the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention."[81]

Legal scholars have struggled to make sense of this holding—specifically in how precisely the Court determined why Common Article 3 was applicable.[82] One understanding is that as a matter of treaty law, Common Article 3, at a minimum, applies even in a conflict that may be considered international.[83] As is most commonly understood, however, the Court seems to be stating that the United States is, indeed, engaged in a non-international armed conflict with al-Qaeda, as defined by Common Article 3.[84] The *Hamdan* majority decided "the term 'conflict not of an international character' is used in 'contradistinction to a conflict between nations.'"[85] The Court therefore took the view that Common Article 3 applied to any armed conflict not otherwise meeting the definition of international.[86]

The Court's analysis has been strongly criticized by some scholars.[87] Notably, the Court did not expressly state its reasoning

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[81] Hamdan v. Rumsfeld, 548 U.S. 547, 629 (2006).

[82] *See* Milanovic, *supra* note 80, at 377 (saying that there are several possibilities for the Court's conclusion, including that it rested on the belief that the requirements of Article 3 may apply as a matter of customary law); *see also* Fionnuala Ni Aolain, *Hamdan and Common Article 3: Did the Supreme Court Get It Right?*, 91 MINN. L. REV. 1525, 1542 (2007) (stating that Justice Stevens' use of negative inferences in the opinion leaves an open question as to the actual legal reasoning behind the application of Common Article 3).

[83] Milanovic, *supra* note 80, at 377.

[84] *Id.* at 377–78 (noting that it is "remarkable how little support the Court actually invokes for such an ahistorical position" as non-international armed conflicts have traditionally been limited to internal conflicts occurring in a single State).

[85] Hamdan v. Rumsfeld, 548 U.S. 547, 630 (2006).

[86] *See* Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict*, 21 EMORY INT'L L. REV. 601, 608 (2007) (describing the Court's approach as adopting a "residual view" of Common Article 3).

[87] *See, e.g.*, Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 190 (2006) (asserting that the Court's reasoning in its conclusion was "weak"). Some have argued that in its reasoning behind the applicability of Common Article 3, the *Hamdan* Court appears to gloss over important historical precedents and, at some points, possibly misinterpret cited authorities. Milanovic, *supra* note 80, at 379–81.

in determining, first, that an armed conflict was in existence[88]—although the government had not contested this fact in their brief.[89] The Court also avoided a traditional analysis of the conflict according to the *Tadić* factors—including an examination of the relative duration and intensity of hostilities and specific characteristics of al-Qaeda, including level of organization and command structure—which made it sufficient to trigger Common Article 3.[90] Additionally, the Court left unresolved the fundamental underpinning of their decision on the applicability of Common Article 3: is this conflict classification limited to the United States' engagement with al-Qaeda in Afghanistan, or is the conflict status applicable on a global scale?[91] As will be discussed below, the United States government itself has generally given the broadest reading to this holding.

2. THE U.S. GOVERNMENT'S USE OF *HAMDAN*

2.1. Immediate Response and Enduring Influence

The *Hamdan* decision had direct and timely effects on the U.S. military's legal positions regarding the war on terror. One week after the opinion was announced, the acting Secretary of Defense mandated that military leaders uphold the requirements of Common Article 3 of the Geneva Conventions with regards to the

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S*ee also* Michael W. Lewis, *International Myopia: Hamdan's Shortcut to "Victory,"* 42 U. RICH. L. REV. 687, 706 (2008) ("The *Hamdan* court defined armed 'conflict not of an international character,' determined the requirements of a regularly constituted court, and decided what judicial guarantees are recognized as indispensable by civilized people in just over five pages . . . without significantly reviewing the drafting history of Common Article 3 and the Additional Protocols."). *But see* Corn, *Legal Classification of Military Operations*, *supra* note 22, at 78 (stating that *Hamdan* validated the D.C. Circuit Court's concurrence by Judge Stephen Williams). Under this view, "it is fundamentally inconsistent with the logic of the [law of armed conflict] to detach the applicability of regulation from de facto hostilities." *Id*.

88 *See* Brief of Respondent, *supra* note 73, at 26 (discussing the standards for establishing an "armed conflict" under international law).

89 *Id*.

90 *See supra* notes 47–53 and associated text (discussing the wide consensus that the *Tadić* case articulated the proper test for application of Common Article 3). The Court did not indicate why it omitted a consideration of those factors in its analysis.

91 Milanovic, *supra* note 80, at 377.

conflict with al-Qaeda, in compliance with *Hamdan*.[92] The memorandum did not articulate a geographical limit to this now-categorized conflict.[93] Other administration officials appeared to take similar views, indicating that the laws of armed conflict—applicable to non-international conflicts—applied to the hostilities with al-Qaeda, without noting State-border limitations.[94] Statements subsequently made by other government officials—both in the Bush and Obama administrations—indicated that the classification of the conflict with al-Qaeda had some importance in the conduct of hostilities, but the exact legal import of the case was unclear.[95]

The critical status of *Hamdan* in the military's legal construct on the war on terror became more discernable with forthcoming publications, including the United States Army Judge Advocate General's Legal Center and School's Law of Armed Conflict Deskbook[96] and the Department of Defense's Law of War Manual.[97] These reference books for military law practitioners and commanders were notable in several respects as to their treatment of *Hamdan*. In the *Law of Armed Conflict Deskbook*, the authors continued to define a "non-international armed conflict" in terms of the *Tadić* factors.[98] Confusingly, it also referenced *Hamdan* in a

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[92] *See* Gordan England, Memorandum for Secretaries of the Military Departments et al., Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (July 7, 2006) (noting that the Department of Defense generally complied with other aspects of the Geneva Conventions even before the ruling).

[93] *Id.* ("The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with al-Qaeda.").

[94] For example, in a statement regarding the *Hamdan* decision, former Legal Adviser to the State Department John Bellinger stated that "the Administration reads the *Hamdan* decision to accept that the U.S. is in an armed conflict—and therefore that the laws of war are appropriate to apply—but that the armed conflict is not of an international character." Legal Adviser John B. Bellinger, III, Postings on Opinio Juris blog (Jan. 2007), https://www.State.gov/s/l/2007/116111.htm [https://perma.cc/E2FF-S5Y5].

[95] *See, e.g.*, Speech of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Annual Meeting of the American Society of International Law, Washington, D.C. (Mar. 25, 2010), https://2009-2017.State.gov/s/l/releases/remarks/index.htm [https://perma.cc/WQB5-AK4U] ("As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda…. ").

[96] RICHARD P. DIMEGLIO ET AL., LAW OF ARMED CONFLICT DESKBOOK (Andrew D. Gillman & William J. Johnson eds., 2012) [hereinafter LOAC Deskbook].

[97] OFF. OF GEN. COUNSEL, DEP'T OF DEF., DEP'T OF DEF. LAW OF WAR MANUAL (June 2015) (updated Dec. 2016) [hereinafter Law of War Manual].

[98] LOAC Deskbook, *supra* note 96, at 26.

footnote describing a Common Article 3 classification by stating that *Hamdan* stood for the proposition that a non-international armed conflict was in contradistinction to a conflict between nations.[99] The footnote also noted that "*Hamdan* is significant because the Court recognized that a Common Article 3 conflict can expand beyond the territory of one particular state."[100] The Court in *Hamdan* did not expressly do this, however—although the holding also did not seem to preclude this understanding of a Common Article 3 conflict. The U.S. Department of Defense Law of War Manual articulated a more faithful reading of *Hamdan*, stating that Common Article 3 reflected "minimum standards for humane treatment that apply to all military operations."[101] The Law of War Manual also more obviously adopted the "contradistinction" view of non-international armed conflicts espoused by the decision.[102]

The use of *Hamdan* as precedent for legally justifying military activities was further illuminated by the Department of Justice's (DOJ) White Paper on Targeted Killing[103] and associated Office of Legal Counsel's (OLC) memorandum on the strike on Anwar al-Awlaki.[104] The White Paper outlined the DOJ's legal position

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[99] *Id*. at 25, n. 21.

[100] *Id*. The same concept of a non-international armed conflict was retained in subsequent versions. *See* DEAN L. WHITFORD ET AL., INT'L AND OPERATIONAL L. DEP'T, THE JUDGE ADVOC. GEN. LEGAL CTR. & SCH., L. OF ARMED CONFLICT DESKBOOK 25–27 (William J. Johnson & David H. Lee eds., 2014), https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2014.pdf [https://perma.cc/8JHG-8G2H]; RYAN DOWDY ET AL., INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOC. GEN. LEGAL CTR. & SCH., L. OF ARMED CONFLICT DESKBOOK 25–26 (Rachel S. Mangas et al. eds., 2016).

[101] Law of War Manual, *supra* note 97, ¶ 8.1.4.1.

[102] *Id*. ¶ 3.3.1. "If two or more States oppose one another, then this type of armed conflict is known as an 'international armed conflict' because it takes place between States. However, a state of war can exist when States are not on opposite sides of the conflict. These other types of conflict are described as 'not of an international character' or 'non-international armed conflict.'" *Id*. (citing Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006)).

[103] U.S. DEP'T OF JUST., *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* (Nov. 8, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dept-white-paper.pdf [https://perma.cc/72SS-S363] [hereinafter DOJ White Paper].

[104] Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the Att'y Gen., Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010) [hereinafter OLC Memo]. The White Paper was drafted for Congressional lawmakers after they had requested access to the al-

regarding the use of lethal force against an American citizen located in a foreign State, outside the primary area of active hostilities.[105] Similarly, the OLC Memorandum contemplated using lethal force against a specific al-Qaeda leader located in Yemen—who was also an American citizen.[106] The OLC Memorandum cited *Hamdan* eight times in its unredacted text to support legal justifications for the strike.[107]

According to the DOJ White Paper:

> . . . [T]he United States retains its authority to use force against al-Qa'ida and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with al-Qa'ida and its associated forces. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006) (holding that a conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations"). Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities.[108]

This legal opinion shows that the United States government applied the *Hamdan* holding to a broad, global context, in which conflict classification "attached" to members of the non-State armed group, irrespective of location.

Awlaki memo, which, at that time, was classified. The White Paper was officially released by the DOJ in 2013 shortly after it was leaked to NBC News. *See* Charlie Savage, *DoJ White Paper on Killing Citizens Deemed Terrorists*, N.Y. TIMES (June 24, 2014), https://www.nytimes.com/interactive/2014/06/24/us/killingcitizenswhitepaper.html [https://perma.cc/P9WL-6PSY]. The redacted OLC memorandum was later released as a result of litigation. Thomas Earnest, *DOJ OLC Targeted Killing Memo Released*, JUST SECURITY (June 23, 2014), https://www.justsecurity.org/12078/doj-olc-targeted-killing-memo-released/ [https://perma.cc/LZG8-CFR5].

105 DOJ White Paper, *supra* note 103, at 1.

106 OLC Memo, *supra* note 104, at 21. Al-Awlaki was a leader in al-Qaeda in the Arabian Peninsula (AQAP). *Id.*

107 *Id.* at 24, 26–28.

108 DOJ White Paper, *supra* note 103, at 3.

Likewise, the OLC Memorandum espoused an expansive view of the meaning of *Hamdan*:

> In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al-Qaida . . . Here, unlike in *Hamdan*, the contemplated DoD operation would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida. That does not affect our conclusion, however, that the combination of facts present here would make the DoD operation in Yemen part of the non-international armed conflict with al-Qaida. To be sure, *Hamdan* did not directly address the geographic scope of the non-international armed conflict between the United States and al-Qaida that the Court recognized, other than to implicitly hold that it extended to Afghanistan, where Hamdan was apprehended. The Court did, however, specifically reject the argument that non-international armed conflicts are necessarily limited to internal conflicts . . . The Court explained that this interpretation—that the nature of the conflict depends at least in part on the status of the parties, rather than simply on the locations in which they fight—in turn accords with the view expressed in the commentaries to the Geneva Conventions that "the scope of application" of Common Article 3, which establishes basic protections that govern conflicts not of an international character, "must be as wide as possible."[109]

This excerpt shows that the OLC read *Hamdan* permissively—allowing the conflict classification to reach beyond the borders of Afghanistan, although the Court did not directly state such.[110] The memorandum did acknowledge strong scholarly and international opposition for this position, but ultimately found it unconvincing.[111]

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[109] OLC Memo, *supra* note 104, at 24 (internal citations omitted). The opinion was careful to restrict its application to Yemen, however. *Id*. at n. 30.

[110] Later, the OLC Memo states that "[t]here is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-State actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict." *Id*. at 25.

[111] *Id*. at 25 (citing Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 857–59 (2009); Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 54 (U.N.H.R.C., Fourteenth Session, Agenda Item 3, May 28, 2010)).

The OLC Memorandum excerpt above also used *Hamdan* for the proposition that the status of the parties to the conflict is of greater importance than geographical location for purposes of conflict classification.[112] In effect, the *Hamdan* Court's highly inclusive categorization of what constitutes a non-international armed conflict was further widened and applied outside of the context of Afghanistan by the executive branch in both legal opinions. Nothing in the *Hamdan* Court's analysis limited this interpretation.

After establishing the operation was indeed a part of the larger non-international armed conflict with al-Qaeda, the OLC Memorandum then considered whether the proposed operation would comply with the applicable laws of war.[113] Admitting that the Geneva Conventions did not themselves establish robust restrictions on conduct for non-international armed conflicts, the memorandum went on to assert that the rules within the treaties were not "exclusive" since the "laws and customs of war also impose limitations on the conduct of participants..."[114] This statement is notable, as the government here specifically linked qualification of an armed conflict under Common Article 3, as categorized by *Hamdan,* and the resulting trigger of the customary rules of war, including targeting. The government thus made the treaty qualification of a "conflict not of an international character" and the associated application of base-line humanitarian protections of Common Article 3 congruent with the triggering of the customary *jus in bello*[115] rules of armed conflict. Although reflecting a long-understood view, this conclusion is not an entirely clear one under international law.[116] The assertion rationally extrapolated from the

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[112] The *Hamdan* Court did not discuss the qualities of al-Qaeda which made it a proper party to a non-international conflict in any detail. It did conclude, however, that the phrase "not of an international character" applied when one of the parties to a conflict was not a State. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

[113] OLC Memo, *supra* note 104, at 27–28.

[114] *Id*. at 28 (citing Submission of the Government of the U.S. (July 17, 1995) at 33, n. 53, Prosecutor v. Tadić, Case No. IT-94-1-1).

[115] Or, the laws that govern how hostilities are conducted. Int'l Comm. of the Red Cross, *Jus in bello – Jus ad bellum*, https://www.icrc.org/en/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum [https://perma.cc/66RL-YUTP].

[116] *See* Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict,* 40 VAND. J. TRANS. L. 295, 301 (Aug. 16, 2012) (stating that although Common Articles 2 and 3 do not explicitly state that they establish the triggers for the customary law of war, "they rapidly evolved to create such an effect") (internal citations omitted) [hereinafter Corn,

conclusion of the *Hamdan* Court, which ostensibly spoke to detainee treatment only, and not the concomitant application of the entire framework of customary laws that apply in non-international armed conflicts.[117]

Importantly, the *Hamdan* Court did not appear to contemplate that its reasoning would result in the broad application of this body of customary law.[118] In contrast, other international court decisions have specifically invoked the customary law of armed conflict in conjunction with the application of Common Article 3. In *Nicaragua*

Hamdan, Lebanon, and the Regulation of Hostilities]; s*ee also* Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT'L L. STUD. 696, 706 (2013) ("This article takes the position that the criteria triggering the application of Common Article 3 are the same as those required by customary international law to establish the existence of a [non-international armed conflict] . . . to conclude otherwise would create an additional category of conflict, an outcome that is generally rejected."). The precise threshold for triggering this area of customary international law is unclear. *See* Noëlle Quénivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 41 (Derek Jinks et al. eds., 2014) ("Regrettably for us there is not readily available answer to the question of whether international customary law provides for a single definition of non-international armed conflict."). In other words, while the substantive provisions in Common Article 3 are widely accepted as being grounded in customary law, the triggering mechanism for the article may not necessarily reflect customary law. In their landmark 2011 study of the customary rules applicable in warfare, the ICRC failed to address an issue of seeming central importance: what is the customary law understanding of "armed conflict"? *Id*. When asked about this oversight, an ICRC legal advisor responded that such an answer would have required a study of its own. *Id*. (citing Malcolm McLauren & Felix Schwendimann, *An exercise in the development of international law: the new ICRC study on customary international humanitarian law*, 6 GER. L. J. 1217, 1227 (2005)).

[117] *See* Corn, *Hamdan, Lebanon, and the Regulation of Hostilities, supra* note 116, at 325–26 ("[T]his holding is limited by one critical reality: the gap it filled related only to the principle of humane treatment. Nothing in that opinion addressed the applicability of the other foundational principles of the law of war to extraterritorial non-state armed conflicts."); *see also* Aolain, *supra* note 82, at 1548 (noting that the Court failed to address specifically what elements of the law of war apply to the conflict with al-Qaeda).

[118] It is unclear the extent to which the Court considered customary international law in arriving at its opinion. The majority did briefly discuss the customary norms encapsulated by Article 75 of Additional Protocol I and its impact on interpreting Common Article 3 (*see infra* note 123). Four justices, including Justice Stevens, also invoked customary international law in concluding that the conspiracy charge against Hamdan was not a law of war violation. Hamdan v. Rumsfeld, 548 U.S. 557, 610 (2006). Professors Julian Ku and John Yoo have categorized Justice Stevens's interpretation of customary international law in the opinion as "lack[ing] a consistent interpretive methodology." Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 194 (2006).

v. U.S.,[119] for example, the International Court of Justice concluded that Common Article 3 applied to the conflict at issue not by virtue of treaty law, but through the application of customary international law.[120] The court therefore included Common Article 3 within the broad set of customary rules that govern in the case of all conflicts.[121] In *Hamdan*, however, the Court did not seem to apply Common Article 3 by virtue of customary law, or make any meaningful determination about the status of customary law in the conflict.[122] Justice Stevens discussed the "laws of war" at several points, but never made a comprehensive assessment of what parts of the laws of war applied in the case specifically, or the conflict generally.[123] Some scholars question whether Justice Stevens, the author of the majority opinion, fully realized the expansive nature of customary law within the corpus of the law of war.[124] Despite the Court's decision to wade into the waters of international law, the Court gave neither a detailed nor comprehensive explanation of the limits or effects of its holding in terms of customary norms.

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119 Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, I.C.J. Reports 1986, 14 (June 27, 1986).

120 Aolain, *supra* note 82, at 1545.

121 *Id*.

122 *Id*. at 1548 (noting that Justice Stevens's approach leaves unanswered the fundamental question of "which elements of the law of war apply to the conflict?"). The Court did make mention of customary international law in conjunction with one of its specific conclusions regarding Common Article 3, stating that its requirement that trial procedures provide "all the judicial guarantees which are recognized as indispensable by civilized peoples" must be "understood to incorporate at least the barest of those trial protections that have been recognized by customary international law." Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006). The Court went on to note that many of those protections are contained in Article 75 of Additional Protocol I, which the United States has not ratified. *Id*. Despite the fact that the United States had not ratified that treaty, the Court concluded the provisions should be applicable nonetheless because the government did not express objections specifically regarding Article 75. *Id*. The Court, then, did specifically apply customary international law in conjunction with its application of Common Article 3 in this limited context. *Id*. at 634.

123 *Id*. at 634.

124 According to Professors Julian Ku and John Yoo, Justice Stevens' analysis "also demonstrates the majority's lack of capacity in a highly technical area long given to the political branches. Justice Stevens missed the fundamental point that much of the law of war is customary, not written." Ku & Yoo, *supra* note 118, at 194. It is not evident, then, that the Court was aware that by concluding that the triggering threshold was met for Common Article 3 of the Geneva Conventions, it was also implicitly invoking the entire body of customary law applicable to armed conflicts, including targeting rules.

The outcome of *Hamdan*, of course, did not settle the issue of conflict classification or laws of targeting for other nations, or for many scholars.[125] Nonetheless, the opinion has since been heavily relied upon in the last dozen years by the United States government in legally justifying the use of lethal force. These documents assert that *Hamdan* serves as legal precedent for the proposition that the law of armed conflict's customary laws of targeting apply in situations where military forces engage with al-Qaeda, seemingly regardless of location or nature of hostilities in that location. This Article next examines targeting rules under the law of armed conflict and how *Hamdan* is essential in giving legal legitimacy to current combat activities.

2.2. Jus in Bello and the Law of Targeting

A foundational maxim of the law of armed conflict is that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[126] Ignoring this underlying principle results in arbitrary conduct on battlefields.[127] Consequently, the law of targeting provides parameters for parties to the conflict as they engage enemy personnel and property during armed conflict. Understanding this area of the law will further highlight the significance of *Hamdan*'s conflict classification determination and the resultant triggering of customary laws of war. Specifically, the law of armed conflict defines who may not be targeted with deadly force during non-international conflicts.

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[125] *See, e.g.*, Dinstein, Concluding Remarks *supra* note 54, at 400 ("The idea that a [non-international armed conflict] can be global in nature is oxymoronic: an armed conflict can be a [non-international armed conflict] and it can be global, but it cannot be both."); *see also* Jens David Ohlin, *Is Jus in Bello in Crisis?*, 11 J. INT'L CRIM. JUST. 27, 29–31 (2013); Jordan J. Paust, *Propriety of Self-Defense Targetings of Members of Al Qaeda and Applicable Principles of Distinction and Proportionality*, 18 ILSA J. INT'L & COMP. L. 565, 566–67 (2012); Pub. Comm. Against Torture in Israel v. Gov't of Israel, HCJ 769/02 (2006) (determining that the conflict between Israel and Palestinian terror organizations constituted an international armed conflict, in seeming disagreement with *Hamdan*). The ICRC has also consistently disagreed that a global non-international armed conflict exists. *See* Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT'L REV. RED CROSS 189, 196 (2011).

[126] Hague Regulation IV, *supra* note 24, at art. 22.

[127] *See* MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 391 (1959).

2.2.1. Origins of the Law of Targeting

The origins of this area of the law lie in the various treaties regulating the means and methods of warfare. The Lieber Code, drafted by Francis Lieber during the American Civil War, was one of the first compilations of existing laws and customs of war.[128] Although this code was domestic in nature, it significantly influenced subsequent international treaties including the 1899 and 1907 Hague Conventions.[129] Specifically, Convention IV, commonly referred to as Hague IV, codified principles such as military necessity and unnecessary suffering.[130] Many of these conventions were incorporated and clarified in the Additional Protocol I to the Geneva Conventions.[131] Additional Protocol I, also known as AP I, filled many of the gaps in the international law governing targeting and incorporated existing principles from previous treaties. Additionally, AP I defined principles and terms that are significant to the law of targeting.[132] While the United States is not a party to AP I, the basic principles of targeting are viewed as customary international law and applicable to not only international armed conflicts but also non-international armed conflicts.[133]

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128 *See* David Wallace & Shane Reeves, *Modern Weapons and the Law of Armed Conflict*, U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 172 (Corn et al. eds., 2015).

129 *See* Howard S. Levie, *History of the Law of War on Land*, INT'L REV. RED CROSS, No. 838 (2000).

130 *See* Annex to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295.

131 *See* SOLIS, *supra* note 27, at 122 ("With Additional Protocol I, the bulk of the customary law of war has become formalized.").

132 *See* 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 AP I].

133 *See* Prosecutor v. Tadić, Case No. IT-94-1-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 127 (Int'l Crim. Trib for the Former Yugoslavia Oct. 2, 1995); INT'L INST. OF HUMANITARIAN L., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT ¶ 1.2 (2006) [hereinafter NIAC MANUAL]; *see also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 63 (2009).

2.2.2. Targeting in Non-international Armed Conflicts

The basic principles of targeting include military necessity, distinction, proportionality, and the prevention of unnecessary suffering. These principles, along with the rules related to precautions in the attack, guide all targeting decisions during armed conflict. Of these, distinction, proportionality, and precautions have particular significance in armed conflicts against non-State actors such as al-Qaeda.[134] The principle of distinction requires parties to the conflict to "distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[135]

Under the principle of proportionality, "an attack is forbidden if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[136] The analysis is based on damage or injury that is anticipated, not the amount that actually occurs.[137]

Precautions in the attack, like proportionality, are focused on protecting the civilian population and require those who plan attacks to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection."[138] Also, planners are required to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian

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[134] Much of the debate surrounding the use of human shields by non-State actors in Iraq and Syria centers on distinction, proportionality and precautions. *See* Adil Ahmad Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, 92 INT'L L. STUD. 31 (2016); Marty Lederman, *Thoughts on Distinction and Proportionality in the December 2016 Revision to the Law of War Manual*, JUST SECURITY (Dec. 19, 2016), https://www.justsecurity.org/35617/thoughts-distinction-proportionality-december-2016-revision-law-war-manual/ [https://perma.cc/V7JG-H5U5].

[135] AP I, *supra* note 132, at art. 48.

[136] *See* MICHAEL N. SCHMITT ET AL., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 2.1.1.4; s*ee also* AP I, *supra* note 132, at art. 51(b).

[137] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 121 (2004).

[138] *See* AP I, *supra* note 132, at art. 57(2)(a).

objects." [139] As stated above, these principles and rules are customary international law and apply during Common Article 3 conflicts.[140]

2.2.3. Targeting Individuals in Non-international Armed Conflicts

Determining who may be lawfully targeted in a non-international conflict is not as simple as in an international armed conflict, where combatants are presumably distinguishable on the battlefield. Unlike international armed conflicts where the status of combatants and civilians is defined in AP I, the character of the parties is not defined in Common Article 3. In the case of non-international armed conflicts, [141] neither Common Article 3 nor Additional Protocol II[142] defines the term "civilian" or "combatant," but the protocol does mention organized armed groups.[143] Without a clear legal delineation of the status of individuals in non-

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[139] *Id*.

[140] *See* Prosecutor v. Tadić, Case No.IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 127 (Int'l Crim. Trib for the Former Yugoslavia Oct. 2, 1995); NIAC MANUAL, *supra* note 133, ¶ 1.2 (2006). *See* HENCKAERTS & DOSWALD-BECK, *supra* note 133, at 63.

[141] *See* Michael N. Schmitt, *The Status of Opposition Fighters in Non-International Armed Conflict*, 88 INT'L L. STUD. 119, 120 (2011) [hereinafter Schmitt, *Status of Opposition Fighters*]. Professor Schmitt writes, "Textually, the article merely refers to "persons taking no active part in hostilities," including "members of the armed forces" who are *hors de combat*. The reference is somewhat useful in that it suggests a normative distinction between those who actively participate in a non-international armed conflict and those who do not. Yet, the failure to address party status directly is unfortunate, for it begs the question of when non-State individuals or groups qualify as a party." *Id.*

[142] AP II, *supra* note 41. Protocol II also establishes robust and detailed parameters for the lawful conduct of hostilities in a non-international armed conflict. However, the United States has not ratified this treaty. Moreover, the trigger for Protocol II is not consistent with the threshold of application for Common Article 3. Additional Protocol II "has a much more narrow field of application than Common Article 3." DEREK JINKS, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 26 (2003) (citing the text of the two provisions, drafting history of Additional Protocol II, and history of State practice). For example, Protocol II requires the non-State armed group to exercise a degree of control over territory. *Id*.

[143] AP II, *supra* note 41, art 1.

international conflicts, [144] compliance with the principle of distinction becomes a challenge for military planners and commanders. Nevertheless, it is reasonable to conclude "that two broad categories of non-international armed conflict participants lie in juxtaposition: civilians and organized armed groups." [145] Furthermore, the ICRC's Interpretive Guidance states that "as the wording and logic of [Common Article 3] and Additional Protocol II reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict." [146] Consequently, given the language of Common Article 3 and the Interpretive Guidance, lethal force can only be lawfully directed against members of organized armed groups and civilians who take an active part in hostilities.

During a non-international armed conflict, then, a civilian directly participating in hostilities is not protected from lethal targeting. [147] This precept brings up several challenges of interpretation, however. One issue is dealing with individuals whose activities are categorized as "farmer by day, fighter by night." [148] The actual parameters of this debate[149] are beyond the scope of this Article, but it is well accepted that there are circumstances during armed conflicts where civilians may lawfully

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144 *See* SEAN M. WATTS, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, 88 INT'L L. STUD. 145, 146 (2012), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1058&context=ils [https://perma.cc/8QHR-DF3T] ("Whereas the protections and obligations of the law of [International Armed Conflicts] are premised almost entirely on the status of affected persons, the law of [Non-international Armed Conflicts] spurns such classifications, as well as the [International Armed Conflict] taxonomy of status-based protection generally.").

145 *See* Schmitt, *Status of Opposition Fighters*, *supra* note 141, at 120.

146 *Id.* at 128 (citing NILS MELZER, INT'L COMM. OF THE RED CROSS, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 32 (2009) [hereinafter Interpretive Guidance]).

147 *See* Common Article 3 provides protections for "[p]ersons taking no active part in the hostilities."; GC II, *supra* note 26, at art. 3 (stating that the law of armed conflict does not provide authorization to target, rather it provides legal protection for persons playing no active role in the conflict).

148 Charles Garraway, *Direct Participation and the Principle of Distinction: Squaring the Circle*, *in* CONTEMPORARY CHALLENGES TO THE LAWS OF WAR 180 (Caroline Harvey et al. eds., 2014).

149 *Id.* at 181; *compare* Interpretive Guidance, *supra* note 146, at 78, *with* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis,* 1 HARV. NAT'L SEC'Y J. 5 (2010), https://harvardnsj.org/wp-content/uploads/sites/13/2015/01/Vol.-1_Schmitt_Final.pdf [https://perma.cc/GWQ5-U63Q].

be targeted based on their conduct alone, irrespective of membership in an armed group.[150] Such persons are subject to attack only for the limited time they are actually involved in hostilities.[151]

Individuals who are members of armed groups may also lose their protected status and be lawfully targeted under the law of armed conflict. There is serious disagreement, however, over whether *all* members of a non-State armed group may be targeted, or only a certain subset.[152] There are two approaches to this issue. One approach, asserted by the ICRC's Interpretive Guidance, permits the lethal targeting of members of organized armed groups who have a continuous combat function.[153] The Interpretive Guidance states that:

> [f]or the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.[154]

Under this perspective, an individual who is a member of an armed group may only be targeted if that person's specific activities fulfill the continuous combat function criteria. This approach has

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150 *See, e.g.* Interpretive Guidance, *supra* note 146, at 46–64 (stating that a person is considered to be directly participating in hostilities when the activity at issue is directly related to a particular harm, the harm reaches a requisite threshold, and there is a belligerent nexus).

151 *Id.* at 71.

152 Schmitt, *Status of Opposition Fighters, supra* note 141, at 120; E. Corrie Westbrook Mack & Shane R. Reeves, *Tethering the Law of Armed Conflict to Operational Practice: "Organized Armed Group" Membership in the Age of ISIS*, 36 BERKELEY J. INT'L L. 355, 337 (2018) ("What remains unsettled is when an individual is a targetable member of such a group.").

153 Interpretive Guidance, *supra* note 146, at 33.

154 *Id.*

been criticized by other scholars for its "inequity in the law"[155] as it appears to shield certain members of non-State armed groups from lethal attack, where similar members of State armed forces are valid targets in an international armed conflict.[156]

A different approach seeks to "comport[] with the underlying logic of the distinction between civilians and organized armed groups."[157] This approach proposes lethal targeting of members of organized armed groups "so long as they remain active members of the group, regardless of their function."[158] Such active membership can be confirmed through various sources of intelligence.[159] The United States military has adopted this second, broader, approach to combatant classification in its doctrine.[160] According to the American military understanding of this area of the law of war, an individual who has been identified as being a member of a non-State armed group may generally be targeted at any time, regardless of specific activities.[161] The United States' position on lethal targeting any member of a non-State armed group, coupled with its classification of the global conflict against al-Qaeda as a global non-international armed conflict is particularly critical when considering

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155 Schmitt, *Status of Opposition Fighters, supra* note 141, at 133 ("[B]y the proposed standard, direct attack on a member of an organized armed group without a continuous combat function is prohibited . . . , but a member of the State's armed forces who performs no combat-related duties may be attacked at any time.").

156 *Id*. For example, an individual performing duties as a cook in al-Qaeda would not be targetable under this framework, but a cook in the armed forces of a State may be targeted at any time in an international armed conflict.

157 *Id*.

158 *Id*.

159 *Id*.

160 Law of War Manual, *supra* note 97, at 220 ("Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities. This is because the organization's hostile intent may be imputed to an individual through his or her association with the organization."). According to the American military position, the fact that an individual is a member of such a non-State group may be ascertained by formal indicia, including that the person took an oath or wears a uniform, or may be gleaned by indirect criteria such as evidence that the person has followed orders, entered facilities operated by the non-State group, or, in some cases travelled with members of that group. *Id*. at 222.

161 *See id.* 220–24 (noting that this status-based targeting classification ceases when individuals have been placed *hors de combat*—are out of the fight because of injury, capture, or surrender—or ties with the armed group have been severed).

targeting individuals away from "central" battlefields such as Afghanistan.[162]

2.2.4. The Geographic Scope of Targeting Rules

Whether the laws of armed conflict should apply outside of State of most active hostilities—the "hot battlefield"—in the case of a non-international armed conflict, is an area of contention among scholars.[163] Some posit that the laws of armed conflict should only apply in limited areas, where armed groups are engaged in intense fighting.[164] The ICRC takes the position that the laws of armed conflict may extend beyond the hot battlefield into adjacent territories, to ensure actors are not able to evade the rules by crossing

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[162] It is not evident from the DOJ White Paper or OLC Memo whether this broad understanding of who may be lawfully targeted was relied upon. For example, the DOJ White Paper consistently describes the potential target as a "senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans." DOJ White Paper, *supra* note 103, at 3. It is unclear whether the conduct of this individual plays a role in the legal opinion authorizing attack, or whether the opinion rests on the individual's membership in an armed group. The paper does quote the ICRC Commentary on Protocol II in the paragraph immediately before this, stating "[t]hose who belong to armed forces or armed groups may be attacked at any time." *Id.* In the OLC memorandum, the legal reasoning authorizing the use of force on al Awlaki seems to be based somewhat on the fact that he has played a continuing role of planning attacks from his Yemeni base. OLC Memo, *supra* note 104, at 27. It is uncertain, though, whether this is meaningful in calculating whether al Awlaki is a valid target under the laws armed conflict, or whether the conflict classification attaches, geographically, to Yemen. It is possible that the emphasis on a continuing threat language is pertinent to a domestic authority to target, rather than an international one. *See* Wells Bennett, *A Clue About the Origins of "Imminence" in the OLC Memo,* LAWFARE (June 25, 2014, 10:37 AM), https://www.lawfareblog.com/clue-about-origins-imminence-olc-memo [https://perma.cc/TL5M-JJXE].

[163] Michael Schmitt, *Charting the Legal Geography of Non-international Armed Conflict*, 90 INT'L L. STUD. 1, 8–18 (2014) [hereinafter Schmitt, *Charting the Legal Geography*]. *See, e.g.,* 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, 1167–70 (highlighting the parameters of the debate); Al-Aulaqi v. Panetta, No. 12-1192 (D.D.C. July 18, 2012), 2012 WL 3024212 at 2 (discussing the risks of lethal targetings "outside the context of armed conflict, in countries including Yemen, Somalia, Pakistan, Sudan, and the Philippines").

[164] *See, e.g., Rise of Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the H. Subcomm. on Nat'l Sec. & Foreign Affairs*, 111th Cong. 3–5 (Apr. 28, 2010) (written testimony of Mary Ellen O'Connell, Professor, Notre Dame Law School), https://fas.org/irp/congress/2010_hr/042810oconnell.pdf [https://perma.cc/YCD4-FD9S] (asserting that this view also represented the position of the International Law Association).

a State border.[165] However, the group rejects an expansive application of these laws beyond such spill-over conflict.[166] Individuals acting in geographically dispersed States away from the main fighting do not "carry" the law of armed conflict with them, under this view.[167] Others take the view that the law of armed conflict does attach to individuals acting in non-central locations, as long as the parties to the conflict qualify under Common Article 3 and the conflict at issue, as a whole, is of sufficient intensity.[168]

Both the DOJ White Paper and OLC Memorandum appeared to espouse a version of this last view.[169] In discussing the geographic scope of the non-international armed conflict with al-Qaeda and the concern that the laws of war be given "appropriate application,"[170] the OLC Memo states "that same consideration, reflected in *Hamdan* itself . . . suggests a further reason for skepticism about an approach that would categorically deny that an operation is part of an armed conflict[,] absent a specified level and intensity of hostilities in the particular location where it occurs."[171]

Although the OLC Memorandum does not provide an entirely transparent framework of its understanding of the geographical application of the laws of war, it does indicate that the level of hostilities within the relevant location is not an important criterion.[172] The United States government, then, has used *Hamdan* to support its legal position that the laws of targeting apply even in

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165 *See* Schmitt, *Charting the Legal Geography*, *supra* note 163, at 11.

166 *Id*. at 15.

167 *Id*. (discussing the ICRC's view that operations that are conducted within the territory of a nonbelligerent state should be governed by rules concerning law enforcement operations).

168 *Id*. at 16.

169 *See supra* notes 108, 110 and accompanying text.

170 OLC Memo, *supra* note 104, at 26–27.

171 *Id*. *See also id*. at 24 (suggesting that the memo seems to be referencing an earlier statement that the *Hamdan* Court was concerned with giving the broadest possible application to Common Article 3).

172 On the other hand, the OLC Memorandum does indicate that the quality of the group's presence in an area may be a relevant consideration. *See* OLC Memo, *supra* note 104, at 27 (stating that "AQAP has a significant and organized presence" in Yemen); *see also* Ryan Goodman, *The OLC's Drone Memo and International Law's Ascendance*, JUST SECURITY (June 24, 2014), https://www.justsecurity.org/12142/olc-memo-drones-international-law-goodman/ [https://perma.cc/M6NP-PZGB] (stating that the memo suggests "that the authorization to use lethal force may apply only in areas with a significant presence and staging ground for enemy forces and from where attacks against the United States are launched.").

geographically dispersed areas, including Yemen, placing it at odds with groups such as the ICRC who would limit such application. This line of reasoning would presumably apply to other areas, such as Somalia and Pakistan, where the United States has conducted hundreds of drone strikes in recent years.[173] As the *Hamdan* Court did not articulate a geographic scope to its conflict classification holding, nor address the issues of necessary duration and intensity of hostilities, in order for Common Article 3 to apply in a given area—the decision does not clearly preclude the United States' legal position.

Another issue that seems to be assumed in the government's position in the DOJ White Paper and OLC Memorandum is the cohesiveness of groups belonging under the al-Qaeda organizational umbrella. One critique is that they assume that "al-Qaeda and its associated forces" qualify as a single armed group.[174] Scholars point out that the splinter terror groups that have allegiances with al-Qaeda do not clearly exhibit a unifying command structure which would be sufficient to qualify them as a part of the global non-international armed conflict.[175] At least one former Department of Defense official has articulated a robust set of requirements for "associated forces" to be considered as such.[176] The articulated position does not require a unified chain of command with al-Qaeda, however. Again, because the specific qualities of al-Qaeda—including organizational structure—were not addressed in *Hamdan*, the decision does not seem to restrain a broad reading here by the executive branch.

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[173] *See* Micah Zenko, *Obama's Final Drone Strike Data*, COUNCIL ON FOREIGN RELATIONS (Jan. 20, 2017), https://www.cfr.org/blog/obamas-final-drone-strike-data [https://perma.cc/CZ45-7LR6].

[174] *See* Kevin Jon Heller, *The DoJ White Paper's Fatal International Law Flaw—Organization*, OPINIO JURIS (Feb. 5, 2013), http://opiniojuris.org/2013/02/05/the-doj-white-papers-fatal-international-law-flaw/ [https://perma.cc/828E-7RNR].

[175] *Id.* ("The assumption that 'al-Qa'ida and its associated forces' constitute a single organized armed group for purposes of [international law] . . . deeply problematic."). *But see* Peter Margulies, *Networks in Non-International Armed Conflicts: Crossing Borders and Defining "Organized Armed Group,"* 89 INT'L L. STUD. 54, 55 (2013) (stating that al-Qaeda exhibits a "surprising degree of organization," considering the unconventional factors endemic to terrorist networks—creating a sufficient justification for targeting affiliates).

[176] *See* Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., National Security Law, Lawyers, and Lawyering in the Obama Administration, Dean's Lecture at Yale Law School (Feb. 22, 2012) *in* 31 YALE L. & POL'Y REV., 141, 146 (2012) (noting that the Department of Defense requires that the armed group be organized, have fought alongside al-Qaeda, and be considered a co-belligerent with al-Qaeda in order to qualify under this phrase).

2.2.5. The Law of Armed Conflict versus Human Rights Law

The United States government's reliance on *Hamdan* in its assertion that it is engaged in a global non-international armed conflict against al-Qaeda is therefore of critical importance. In the absence of an "armed conflict" classification, more restrictive customary international human rights law would apply, [177] specifically to areas away from the central battlefield. The limits regarding the targeting of individuals are quite different between the two paradigms. International human rights law limits the targeting of individuals only when "strictly unavoidable to protect life."[178] Further, "it is never permissible for killing to be the *sole objective* of an operation" under human rights law.[179] This law enforcement framework is thus significantly more restrictive in terms of the use of force than the law of armed conflict. Further, rules for detention are more tolerant under the law of armed conflict.[180]

With the use of *Hamdan*, however, the United States government maintains it is operating lawfully under the more permissive laws of armed conflict, including status-based targeting rules. The executive branch has stretched the inclusive holding of *Hamdan* to apply the Common Article 3 classification to geographic locations outside of Afghanistan. The nature of hostilities in those locations is irrelevant, as long as an individual is a member of al-Qaeda or an associated force. Thus, according to its view, the customary laws of war apply to the conflict with al-Qaeda and its associates on a global scale. This understanding indicates that individuals may be lawfully attacked based on their status as members of al-Qaeda or an associated group, at any time, worldwide.

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[177] Schmitt, *Charting the Legal Geography*, *supra* note 163, at 2–3. *See generally* Ohlin, *supra* note 125, at 32–36 (explaining the different positions regarding the relationship between the *lex specialis* of international humanitarian law and the *lex generalis* of international human rights law).

[178] Schmitt, *Charting the Legal Geography*, *supra* note 163, at 2 (quoting EIGHTH UNITED NATIONS CONG. ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS BY LAW ENFORCEMENT OFFICIALS, at 114, U.N. Doc. A/CONF.144/28/Rev.1, Sales No. E.91.IV.2 (1990)).

[179] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 33, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010), https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf [https://perma.cc/2MHQ-QQ7A].

[180] Schmitt, *Charting the Legal Geography, supra* note 163, at 2.

2.3. Jus ad Bellum: Sovereignty and the Global Targeting Paradigm

The above discussion centers on the United States government's use of *Hamdan* in asserting that rules of targeting apply in any global operation involving a member of al-Qaeda or its associated forces—the *jus in bello*. Interestingly, the government has also appeared to rely on the decision indirectly when justifying its use of force within the sovereign borders of other States—the *jus ad bellum*.[181] The United Nations Charter, which regulates the use of force by party nations, expressly states that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[182] This prohibition on the use of force is absolute with only two exceptions:[183] if the United Nations Security Council authorizes military action[184] or if a State is acting under its inherent right of individual or collective self-defense.[185] Host States, who are authorized to internally handle domestic matters,[186] may also

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[181] *Jus ad bellum* outlines the framework for when a State actor may resort to armed conflict and is "governed by an important, but distinct, part of international law set out in the United Nations Charter." GEOFFREY BEST, WAR AND LAW SINCE 1945 5 (2002); *see* Robert Kolb, *Origin of the Twin Terms* Jus Ad Bellum/Jus In Bello, 320 INT'L REV. RED CROSS 533, n.1 (Oct. 31, 1997) ("*Jus ad bellum* refers to the conditions under which one may resort to war or to force in general; *jus in bello* governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well.").

[182] U.N. Charter art. 2, ¶ 4.

[183] There is an ongoing debate about whether a humanitarian intervention can act as a third exception to the United Nations prohibition on the use of force. *See generally* Shane Reeves, *To Russia With Love: How Moral Arguments For A Humanitarian Intervention in Syria Opened The Door For An Invasion Of The Ukraine*, 23 MICH. ST. INT'L. L. REV. 199, 199–229 (2014) (discussing the question of whether the use of force is justified for humanitarian interventions). However, the concept of "humanitarian intervention" has not emerged as customary international law or a broadly accepted use of force exception. *See* Michael Schmitt & Chris Ford, *The Use of Force in Response to Syrian Chemical Attacks: Emergence of a New Norm?*, JUST SECURITY (Apr. 8, 2017), https://www.justsecurity.org/39805/force-response-syrian-chemical-attacks-emergence-norm/ [https://perma.cc/5EM8-46GQ].

[184] *See* U.N. Charter, *supra* note 182, at art. 42 (discussing when the Security Council will consider taking measures that are required to "restore international peace and security").

[185] *Id.* art. 51.

[186] *Id.* art. 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter…. ").

consent to a State using force within its sovereign territory.[187] As the territorial integrity or political independence of the host State is not violated in these circumstances, a "use of force" exception is not required.[188] As a result, if a nation requests assistance from another State, that State may lawfully use force within the borders of the requesting country.[189]

The United States relies heavily on the consent of a host nation to gain access to territory for targeting purposes. For example, since 2002, the conflict between the Afghan government and the Taliban has been non-international; the United States takes part by invitation.[190] As a consensual participant in this territorial civil war, the United States targets the Taliban, al-Qaeda, and associates on behalf of the Afghanistan government. In 2011, Yemen gave the United States permission for the drone strike that killed Anwar al-Awlaki.[191] Taken together with the *jus in bello* analysis, as described in the previous section, the United States may, therefore, lethally target a member of al-Qaeda anywhere a host nation gives consent. Thus, the United States could kill a member of al-Qaeda sitting in a café in Paris, assuming the French consent and the strike is otherwise in compliance with the law of armed conflict.[192]

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187 *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, art. 20, UN Doc. A/56/10 (2001).

188 LOAC DESKBOOK, *supra* note 96, at 31 n.7.

189 *See* CORN, *supra* note 17, at 17.

190 When the United States launched the military campaign against the de facto government of Afghanistan—the Taliban—on October 7, 2001, the conflict was international. *See* Robin Geib & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?*, 93 INT'L REV. RED CROSS 11, 13–15 (Mar. 2011). However, the June 19, 2002 establishment of a new Afghan Transitional Administration transitioned the continuing conflict with the Taliban from international to non-international. *See id.* at 15–16.

191 *See* Shane Reeves & Jeremy Marsh, *Bin Laden and Awlaki: Lawful Targets,* HARV. INT'L REV., (Oct. 26, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297061 [https://perma.cc/QH4E-W3HA]. The strike on al-Awlaki preceded the ongoing Yemeni civil war that began in March 2015. Joseph Hincks, *What You Need to Know About the Crisis in Yemen,* TIME (Nov 3, 2016), http://time.com/4552712/yemen-war-humanitarian-crisis-famine/ [https://perma.cc/V7YR-FCJB].

192 Aside from compliance with the law of targeting, the status of the al-Qaeda member would also need to be assessed. *See generally* Schmitt, *Status of Opposition Fighters*, *supra* note 141 (discussing the different statuses that may apply to opposition fighters).

In conjunction with the self-defense justification, the United States has adopted the "unwilling or unable" theory of self-defense.[193] Under this theory, a State may use:

> force in self-defense against a non-state actor on the territory of a third State, without the consent of that third State . . . if the non-state actor has undertaken an armed attack against the State and the third State is itself unwilling or unable to address the threat posed by the non-state actor.[194]

The United States most famously relied on the "unwilling or unable" theory of self-defense to justify violating the sovereignty of Pakistan in the 2011 operation to capture or kill Osama Bin Laden.[195] This position has subsequently been supported, either explicitly or implicitly, by a host of additional State actors.[196]

At first blush, the Court's expansive interpretation of Common Article 3 in *Hamdan* did not appear to implicate the United States' legal authority to use force within or against another nation.[197] In seemingly acknowledging a non-international armed conflict with al-Qaeda, the Court left unaddressed how this determination might affect the ability to use force against members of al-Qaeda inside the borders of another sovereign State. In fact, however, the relationship between a globalized conflict with a non-State actor and a State's right to self-defense became interestingly intertwined in the government's *jus ad bellum* justifications.

In a 2011 speech, John Brennan, Assistant to the President for Homeland Security and Counterterrorism, stated:

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193 *See* Ashley S. Deeks, "*Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 485–87 (2012).

194 Elena Chachko & Ashley Deeks, *Which States Support the 'Unwilling or Unable' Test?*, LAWFARE (Oct. 10, 2016, 1:55 PM). The "unwilling or unable" theory of self-defense has similarities to the concept of humanitarian intervention, in that States are perceived as either too weak or too callous to address a threat and thus forfeit their sovereignty claim. *See generally* Reeves, *supra* note 183, at 205–12 (discussing humanitarian intervention in more depth).

195 *See generally* Chachko & Deeks, *supra* note 194 (discussing when a State is unwilling or unable to address a non-State threat within its territory).

196 *See generally id.* (documenting international support for the "unwilling or unable" test).

197 Hamdan dealt narrowly with an individual detained in Afghanistan, where the *jus ad bellum* justifications for the use of force were well-accepted. *See, e.g.*, Jack M. Beard, *America's New War on Terror: The Case for Self-Defense under International Law*, 25 HARV. J. L. & PUB. POL'Y 559 (2002) (positing that the U.S.'s invasion of Afghanistan was a lawful use of force under self-defense).

> Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.[198]

This statement indicates that the self-defense calculation necessary under *jus ad bellum* may be fulfilled by the fact that the United States is engaged in a global armed conflict with al-Qaeda.[199] Taken together with other statements by both Bush and Obama administration officials, the position may be that the "[*jus ad bellum*] trigger is automatically satisfied more generally based on the existence of a continuing [non-international armed conflict]."[200] That global conflict classification, of course, can ultimately be traced back to the holding in *Hamdan*.

A full exploration of the legal standards applicable to a self-defense justification is beyond the scope of this paper—but in general, most States and scholars agree that a lawful exertion of self-defense must be in response to either an actual armed attack, or one that is imminent.[201] As the above statement indicates, the United States position seems to be that the presence of al-Qaeda, in itself, without regard to individual activities or threats that the specific presence poses, may be sufficient to trigger the right of self-

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198 *See* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, "Strengthening Our Security by Adhering to Our Values and Laws" Program on Law and Security at Harvard Law School, (Sept. 16, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an [https://perma.cc/H2P9-933B].

199 The Lawfare Institute in cooperation with Brookings, *Legality of Targeted Killing Program under International Law*, LAWFARE, https://www.lawfareblog.com/legality-targeted-killing-program-under-international-law [https://perma.cc/KK7F-H94R].

200 *Id*. This position appears to be a case of the tail wagging the dog, however, and a conflation between *jus ad bellum* and *jus in bello*.

201 *See, e.g.*, Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634–35 (1984) (positing that the right to act in self-defense in the case of an imminent attack is consistent with the U.N. Charter).

defense.[202] Similarly, former State Department Legal Advisor Brian Egan has stated that once the United States has used force against a non-State group in lawful self-defense in the wake of an actual or imminent armed attack, it is not legally required to conduct further imminence analyses prior to subsequent uses of force.[203] Taking a slightly different approach, other government officials have stated that certain known qualities of how al-Qaeda members operate are relevant to any "imminence" assessment.[204] In other words, an individual's membership in al-Qaeda is, in itself, a consideration in the imminence determination because of the known tactics and practices of that non-State armed group. Additionally, the DOJ White Paper appears to weave a *jus in bello* analysis of what constitutes a member of an armed group in its discussion of

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[202] *See* Attorney General Eric Holder, Remarks as Prepared for Delivery by Attorney General Eric Holder at Northwestern University School of Law (Mar. 5, 2012), https://www.lawfareblog.com/text-attorney-generals-national-security-speech [https://perma.cc/36JR-FUBC] (stating that the imminence calculation would take into account al-Qaeda's history of carrying out armed attacks, and their demonstrated ability to attack with little warning in the future).

[203] *See* State Department Legal Adviser Brian Egan, Address at the American Society of International Law (Apr. 8, 2016), https://www.lawfareblog.com/State-department-legal-adviser-brian-egans-speech-asil [https://perma.cc/V4BV-5KY9] (stating that this is true as long as "hostilities have not ended"); Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law,* 52 COLUM. J. TRANSNATIONAL L. 77, 90 (2013) (describing the legal positions surrounding required imminence assessments for subsequent attacks).

[204] John Brennan stated that various attributes associated with al-Qaeda specifically play a role in the imminence analysis: "We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups . . . . [A]fter all, al-Qa'ida does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an "imminent" attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations." Brennan, *supra* note 198. This understanding is also reflected in the DOJ White Paper, though the self-defense discussion is couched in an examination of constitutional rights, not international law. *See* DOJ White Paper, *supra* note 103, at 7–8 ("By its nature, therefore the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate."). For a thorough examination of the factors that states consider in the *Jus ad Bellum* analysis involving non-state actors, *see* Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by NonState Actors*, 106 AM. J. INT'L L. 770 (2012).

imminence.[205] It is difficult to piece together a comprehensive position that the United States takes on the *jus ad bellum* self-defense analysis when it comes to non-State actors.[206] However, it is evident from the above examples that membership in the al-Qaeda organization is important to this analysis. That the global armed conflict with al-Qaeda is somehow defined under international law, and that this fact is important in its self-defense calculation, is apparent in several government statements regarding the resort to force.[207]

2.4. Domestic Authority – The 2001 Authorization for the Use of Military Force

The above discussion focuses on how *Hamdan* has been used by the United States to justify its actions under international law. Interestingly, the case is also part of the foundation of the government's attempt to justify the global war against al-Qaeda under the domestic legal framework. The 2001 Authorization for the Use of Military Force (AUMF) authorizes the President to use

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[205] DOJ White Paper, *supra* note 103, at 8 ("Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qaida's continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat."). Confusingly, this discussion is found within a larger examination of the constitutional rights at issue in the proposed strike, although international sources are cited throughout. *Id*. at 6–8. It is therefore unclear if the term "imminence" is being used in the *jus ad bellum* context.

[206] COMM. ON INT'L LAW, N.Y.C. BAR, THE LEGALITY UNDER INTERNATIONAL LAW OF TARGETED KILLINGS BY DRONES LAUNCHED BY THE UNITED STATES 5 (2014), https://www2.nycbar.org/pdf/report/uploads/20072625-TheLegalityofTargetedInternationalKillingsbyUS-LaunchedDrones.pdf. [https://perma.cc/X6JX-NE34].

[207] In a 2013 address, for example, President Obama remarked: "Moreover, America's actions are legal . . . . Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war—a war waged proportionally, in last resort, and in self-defense." President Barack Obama, The Future of our Fight Against Terrorism, remarks at National Defense University (May 23, 2013), https://www.lawfareblog.com/text-presidents-speech-afternoon [https://perma.cc/7X7T-T5C4]. It is questionable whether the classification of the conflict with al-Qaeda in the *in bello* context should bear any legal significance in the *ad bellum* framework.

"all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[208] The executive branch has used *Hamdan* in two distinct ways in its efforts to show compliance with the AUMF. First, it has cited to Justice Kennedy's concurring opinion in *Hamdan* for the proposition that any operation against al-Qaeda would necessarily be part of the greater global armed conflict, and not constrained geographically by international law or the AUMF because the status of the parties is of paramount importance.[209] It is uncertain what parallels are being drawn between the international law understanding of the armed conflict, and the scope of the conflict as defined in the AUMF in this instance, however.

Secondly, the government has asserted that compliance with the AUMF is ultimately contingent on the country's compliance with international law.[210] In other words, the AUMF should be interpreted as being consistent with international law.[211] After listing the case authorities standing for this proposition,[212] the OLC Memorandum states that since the military operation against al-Awlaki would be a part of the greater non-international armed conflict with al-Qaeda, the strike would comply with international law as long as it abides by the applicable rules of armed conflict.[213] The Memorandum then immediately launches into a discussion regarding *Hamdan* and the geographic scope of the non-international armed conflict with al-Qaeda for purposes of applying

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[208] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[209] The DOJ White Paper, after establishing that the U.S. is currently in a non-international armed conflict with al-Qaeda as held in *Hamdan*, goes on to State that: "Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities . . . . For example, the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes." *See* Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006) (Kennedy, J., concurring) (what makes a non-international armed conflict distinct from an international armed conflict is "the legal status of the entities opposing each other"); DOJ White Paper, *supra* note 104, at 3.

[210] OLC Memo, *supra* note 104, at 24.

[211] *Id*.

[212] Prosecutor v. Tadić, Case No. IT-94-1-AR72, Appeals Chamber Judgment, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999) (citing several federal court cases, including the Supreme Court decision in F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004)).

[213] *Id*. at ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999).

the laws of armed conflict.[214] In considering the fundamental principles of the laws of war, including military necessity, prevention of unnecessary suffering, proportionality and distinction, the document then states that the military would indeed abide by those precepts.[215] The government's arguments regarding compliance with the AUMF, then, are ultimately tied to its reading of *Hamdan* in justifying its conduct of hostilities *in bello.* The memo ultimately concludes that the government is acting in compliance with international law, and therefore likewise not acting in violation of the AUMF.[216]

3. LESSONS FROM *HAMDAN*

In many ways, *Hamdan* is the legal keystone for many of the country's global military actions today, and the root of some of its most criticized practices. In effect, the *Hamdan* decision has been used by the United States as standing authority to target al-Qaeda and associates—assuming sovereignty and the law of armed conflict are considered—wherever located. Many scholars and organizations have expressed concern or outright disagreement with this approach.[217] Prominent scholars and institutions continue to oppose the underlying assumption itself, that a global non-international armed conflict with al-Qaeda, in fact, has ever existed

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214 *Id*.

215 *Id*. at 28–29.

216 *Id*. at 30.

217 *See, e.g.*, UN Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, UN Doc. CCPR/C/USA/CO/4, (Apr. 23, 2014) ("The Committee notes the State party's position that drone strikes are conducted in the course of its armed conflict with Al-Qaida, the Taliban and associated forces in accordance with its inherent right of national self-defence, and that they are governed by international humanitarian law as well as by the Presidential Policy Guidance that sets out standards for the use of lethal force outside areas of active hostilities. Nevertheless, the Committee remains concerned about the State party's very broad approach to the definition and geographical scope of 'armed conflict', including the end of hostilities, the unclear interpretation of what constitutes an 'imminent threat', who is a combatant or a civilian taking direct part in hostilities, the unclear position on the nexus that should exist between any particular use of lethal force and any specific theatre of hostilities, as well as the precautionary measures taken to avoid civilian casualties in practice (arts. 2, 6 and 14).").

under international law.[218] But until now, little attention has been paid to the significant role that the *Hamdan* decision has played in the government's legal reasoning, or the precise series of links the executive branch has made between the holding and its legal justifications for its conduct of hostilities. Whether these links and assertions rest on a fair interpretation of the opinion, or whether they constitute a house of cards built on *Hamdan*, is of certain interest to international and human rights law scholars, and the American public at large.[219]

The *Hamdan* Court implicitly accepted one of the preconditions to the application of Common Article 3, which is the presence of an armed conflict. The failure to address the "armed conflict" threshold matter does, and will continue to, affect reliance on the holding in the face of arguments that the armed conflict with al-Qaeda has functionally ceased.[220] Further, the Court's expansive understanding of Common Article 3—that it stands in "contradistinction" to Common Article 2—has provided unexpected legitimacy to United States' legal positions regarding extraterritorial targeting. Whether the Court intended for this classification to extend beyond the borders of Afghanistan is not clear. However, it is unlikely that the Supreme Court intended to open a transnational targeting aperture for the United States government. The executive branch later used this categorization of hostilities to assert that the customary rules of warfare applied globally to the conflict with al-Qaeda, rather than more restrictive human rights law.[221] The Court's avoidance in articulating the

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[218] *See, e.g.*, Int'l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict,* at 10, 32IC/15/11 (Dec. 2015) ("The ICRC does not share the view that a conflict of global dimensions is, or has been, taking place [between al Qaeda and the United States]."); Dinstein, Concluding Remarks, *supra* note 54, at 407–08 (stating that a non-international armed conflict cannot be global as only one state is in the conflict).

[219] *See, e.g.*, Anna Diakun, *Fighting to Bring the Drone Program Into the Light*, AMERICAN CIVIL LIBERTIES UNION (Oct. 25, 2016, 11:30 AM), https://www.aclu.org/blog/national-security/targeted-killing/fighting-bring-drone-program-light [https://perma.cc/3U2E-V25K] (noting that the American public has a right to examine the government's justifications for foreign drone strikes—the legal bases of which are still largely unclear even after the disclosure of the OLC Memo and DOJ White Paper).

[220] *See* Kenneth Roth, *The War against Al-Qaeda Is Over*, WASH. POST (Aug. 2, 2013), https://www.washingtonpost.com/opinions/the-war-against-al-qaeda-is-over/2013/08/02/3887af74-f975-11e2-b018-5b8251f0c56e_story.html [https://perma.cc/8DK9-FJVK].

[221] *See infra* section 2.2.5.

traditional standards of Common Article 3 application—including a lack of consideration of the specific organizational characteristics of al-Qaeda and duration and intensity of hostilities within Afghanistan—has paradoxically offered the American government much room to maneuver in interpreting the proper scope of applying the laws of targeting elsewhere. The decision ultimately provided tacit legal validity to the government's application of targeting rules to areas outside of the "hot battlefield" against members of al-Qaeda and associated forces. In effect, the *Hamdan* opinion has provided the executive branch an opportunity to claim legal legitimacy for its actions, without discernable limits.

The United States currently has 8,000 special operations personnel deployed in 80 different countries [222] in an effort to weaken a thriving al-Qaeda and its ideological offspring.[223] A third Presidential administration has continued the highly-contested practice of lethal targeting by drones within multiple foreign countries.[224] Concerns that the legal framework under which the United States conducts counter-terrorism operations encourages the

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222 Leo Shane III, *SOCOM Head: We Can't Do Everything,* MILITARY TIMES, (May 4, 2017), https://www.militarytimes.com/news/pentagon-congress/2017/05/04/socom-head-we-can-t-do-everything/ [https://perma.cc/44W6-48SN]; *see also* WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2018), https://www.lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force [https://perma.cc/Y47Y-6YYD] [hereinafter 2018 MILITARY FORCE REPORT] (disclosing to Congress areas where American troops are currently deployed and justifications for the use of force).

223 *See, e.g.*, Russ Mead, *Six Years Since Bin Laden's Death, And His Group is More Powerful Than Ever,* DAILY CALLER (May 2, 2017), http://dailycaller.com/2017/05/02/six-years-since-bin-ladens-death-and-his-group-is-more-powerful-than-ever/ [https://perma.cc/2HAU-GNV2] (asserting the remaining ideology and legacy of Bin Laden and the U.S. presence in fighting terrorism worldwide).

224 *See* Micah Zenko, *Obama's Embrace of Drone Strikes Will Be a Lasting Legacy,* N.Y. TIMES, (Jan. 12, 2016, 2:57 PM), https://www.nytimes.com/roomfordebate/2016/01/12/reflecting-on-obamas-presidency/obamas-embrace-of-drone-strikes-will-be-a-lasting-legacy [https://perma.cc/CZ45-7LR6] (describing the increasing number of drone strikes since 2009); Spencer Ackerman, *Trump Ramped Up Drone Strikes in America's Shadow Wars*, DAILY BEAST (Nov. 26, 2018, 10:38 AM), https://www.thedailybeast.com/trump-ramped-up-drone-strikes-in-americas-shadow-wars [https://perma.cc/7R3X-M6BS] (stating that hundreds of United States drone strikes occurring in Yemen, Pakistan and Somalia from 2016 to 2018).

"creep of war" have therefore proven accurate.[225] This is not inconsequential behavior. The logic of the *Hamdan* opinion underpins the United States' ever-expanding global targeting campaign and other State actors appear increasingly comfortable with this paradigm.[226] In this transnational era of warfare,[227] the United States' broad interpretation of the *Hamdan* opinion may become persuasive on a global scale. The *Hamdan* Court's expansive conflict classification, and the government's subsequent use of that precedent, may also dictate future analyses regarding transnational non-State armed groups and accompanying rules of warfare.[228] As a "specially affected State" the United States' actions are extremely influential in developing customary international law. [229]

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225 *See* Daskal, *supra* note 163, at 1173*; see generally* ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON (Simon and Schuster 2016) (arguing that increases in remote military abilities contribute to blurring lines between civilian and soldier).

226 *See, e.g.*, Judah Ari Gross & Associated Press, *With Egypt's Blessing, Israel Conducting Drone Strikes in Sinai – Report,* TIMES ISR. (July 11, 2016, 1:44 PM), https://www.timesofisrael.com/with-egypts-blessing-israel-conducting-drone-strikes-in-sinai-report/ [https://perma.cc/JWF7-KCNK] (presenting Egypt's supporting of Israel's drone strikes against terrorists operating in the Sinai Peninsula); Associated Press, *Jordan Drones Hit IS Arms Depot, Barracks in Southern Syria*, FOX NEWS (Feb. 4, 2017), http://bigstory.ap.org/article/9cc4b40802d143b69ca40b6c299878b9/jordan-drones-hit-arms-depot-barracks-southern-syria [https://perma.cc/4UHU-4QAR] (describing Jordan carried out airstrikes against Islamic State targets in southern Syria). However, "[i]n the 15 years since the first U.S. drone strike, armed drones have been purchased by militaries around the world, but their use has remained tethered to active battlefields and areas where governments are acting with the consent of the targeted state." J. Dana Stuster, *The State of Sovereignty,* LAWFARE (Apr. 30, 2017, 10:00 AM), https://www.lawfareblog.com/state-sovereignty [https://perma.cc/Y7BJ-UUD9].

227 9/11 COMMISSION REPORT, *supra* note 68, at 361–62 ("In the post-9/11 world, threats are defined more by the fault lines within societies than by the territorial boundaries between them…. [C]hallenges have become transnational rather than international. That is the defining quality of world politics in the twenty-first century.").

228 *See* 2018 MILITARY FORCE REPORT, *supra* note 222, at 1–2 (stating that the United States is currently in an armed conflict with al-Qaeda, al Shabaab—an associated force of al-Qaeda, the ISIS, the Taliban, and the Taliban Hiqqani Network). Indeed, parallel reasoning may have influenced the targeting justifications for ISIS members located outside of the "hot battlefields" of Iraq and Syria.

229 The importance of "specially affected States" was acknowledged by the International Court of Justice in the *North Seas Continental Shelf Cases.* Specifically, the court stated: "[A]n indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose

Customary international law, "by its nature . . . . evolves based on the conduct of States combined with their *opinio juris*. This evolutionary dynamic of crystallization is often driven by States acting in a manner that is not contemplated by existing law and, indeed, sometimes contrary to that law."[230] In fact, the *Hamdan* armed conflict classification paradigm may perhaps emerge as a new customary international norm.[231]

The impact and continued importance of *Hamdan*, therefore, cannot be overstated. It may also serve as a cautionary tale regarding judicial restraint, the domestic application of international law, and abdication of executive deference. While the opinion was clearly intended to address the treatment of detainees, it also ultimately laid the legal foundation for the United States' global targeting campaign through the subsequent invocation of the customary laws of war. It is not clear that the Court realized the potential ramifications of its holding in this area.

If a global non-international armed conflict does, indeed, exist between the United States and al-Qaeda, then the principle of humanity, as expressed through humane treatment provisions in Common Article 3, undoubtedly applies. However, equally as applicable is the principle of military necessity which includes the lawful targeting of al-Qaeda members. Balancing these competing principles is exceedingly important as "[d]anger ensues for the

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interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), Judgement, 1969 I.C.J. Rep. 3, 44, ¶ 74 (Feb. 20). The concept is reiterated—though the terms "particularly involved" and "important" States are used—in the Restatement (Third) of the Foreign Relations Law of the United States. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); INT'L COMM. OF THE RED CROSS, CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in [https://perma.cc/NG32-2T7Y] ("It is not simply a question of how many States participate in the practice, but also *which* States."). For a more detailed discussion, see J. Jeremy Marsh, *Lex Lata* or *Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116, 127 & 151–53 (2008).

230 *See* Schmitt & Ford, *supra* note 183.

231 *See supra* text 24 and accompanying notes 120–21; *see also* Corn, *Hamdan, Lebanon, and the Regulation of Hostilities*, *supra* note 22, at 349 ("Whether other nations would follow this course of action is unknown. However, because U.S. armed forces are the most frequently engaged armed forces in the world, such a move by the United States would result in at least a re-evaluation of current legal interpretation by major allies and military partners.").

international community if either concept gains primacy."[232] Over emphasis on military necessity has historically led to horrendous atrocities in warfare and "[c]onversely, when humanitarian concerns become dominant state military actions are unrealistically restricted by burdensome regulations diminishing the likelihood of compliance."[233] Upsetting the delicate balance between these competing principles thus inevitably results in a downward spiral into the brutality and savagery that has for so long defined warfare.[234] As applied by the executive branch, then, the *Hamdan* holding ultimately addresses not only the "noblest humanitarian impulses," but also the military necessities of transnational warfare.[235]

The war against al-Qaeda and associates has continued for 19 years unabated. Many of those now sent to fight in the conflict have little to no memory of its beginnings. They deserve to understand how the Supreme Court, in the 2006 *Hamdan* decision, fundamentally changed the extent to which the United States government could legally justify where and when we can fight the nation's wars. While *Hamdan* is traditionally viewed as an opinion on detention, it has also been used to address a question that is now almost forgotten: what happens when we fight a transnational, ideologically motivated group that is not restricted by geography or nationality? The significance and long-term impact of *Hamdan* is extraordinary, albeit for different reasons than intended by the Supreme Court.

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232 *See* Reeves & Thurnher, *supra* note 18, at 2.

233 *Id.*

234 *See* Law of War Manual, *supra* note 97, at 7–17 (discussing the history of warfare); *see also* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 797–99 (2010) (explaining the risk of an overemphasis on either overarching principle).

235 DINSTEIN, *supra* note 137, at 1 ("Some people, no doubt animated by the noblest humanitarian impulses, would like to see zero-casualty warfare. However, this is an impossible dream. War is not a chess game. Almost by definition, it entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities.").