

ILLEGAL, INEFFECTIVE, AND UNJUSTIFIABLE: HOW AIRBORNE STRIKES AGAINST AL-SHABAAB ONLY FURTHER U.S. IMPERIALIST INTERESTS

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INTRODUCTION

After Russia invaded Ukraine, a graphic began circulating on social media. It showed a map of airborne strikes in the past 48 hours, including an Israeli strike in Syria, Saudi strikes in Yemen, and a U.S. strike in Somalia.<sup>1</sup> The U.S. military's Africa Command ("AFRICOM") verified the strike,<sup>2</sup> which was the first of 2022 and one of over three hundred likely U.S. airborne strikes in Somalia.<sup>3</sup> AFRICOM reportedly authorized this attack to defend Somali forces,<sup>4</sup> killing sixty al-Shabaab "terrorists."<sup>5</sup> Often called a "hidden" or "secret" war,<sup>6</sup> the U.S. has been engaged in conflict in Somalia since 2002,<sup>7</sup> a longstanding military presence of which the graphic, regardless of its aims, reminded viewers.

Twenty years after 9/11, the U.S. remains engaged in counterterrorism measures worldwide. Despite declaring near-total defeat of al-Qaeda in the Middle

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\* [acknowledgments to add]

<sup>1</sup> redfish [@redfishstream], *Don't let the mainstream media's Eurocentrism dictate your moral support for victims of war. A human life is a human life. Condemn war everywhere.*, TWITTER (2022), <https://twitter.com/redfishstream/status/1496892931210309633> (last visited Apr 5, 2022). The graphic's creator, Redfish, has disputed ties to the Russian government, and now must bear a Twitter disclaimer "Russia state-affiliated media," (which may explain, though not totally undermine, the graphic's message to "condemn war everywhere"). redfish (@redfishstream), TWITTER, <https://twitter.com/redfishstream> (last visited Apr 5, 2022) (assuring that it is "NOT Russia state-controlled media").

<sup>2</sup> Lt. Cmdr. Timothy Pietrack, *Somali, U.S. forces engage insurgents in support of the Federal Government of Somalia*, U.S. AFRICA COMMAND, <https://www.africom.mil/pressrelease/34297/somali-us-forces-engage-insurgents-in-support-of-the-federal-government-of-somalia> (last visited Apr 5, 2022).

<sup>3</sup> See *Appendix*.

<sup>4</sup> Pietrack, *supra* note 2.

<sup>5</sup> While I resist using the word "terrorist," which turns an individual's actions into a totalizing identity, much like the term "criminal" (not to mention the racist and political factors influencing who is labeled a terrorist, again very much like "criminal"), this Article uses "terrorist" when citing U.S. government statements but does not endorse the use of the term. For further critique of the term "terrorist," see Richard Jackson, Jeoren Gunning & Marie Breen Smith, *The Case for a Critical Terrorism Studies* (2007).

<sup>6</sup> See, e.g., THE HIDDEN U.S. WAR IN SOMALIA: CIVILIAN CASUALTIES FROM AIR STRIKES IN LOWER SHABELLE, 1–72 (2019), <https://www.amnestyusa.org/wp-content/uploads/2019/03/The-Hidden-U.S.-War-in-Somalia.pdf>; Matthew Cole & Nick Turse, *CLA Contractor Dies in Secret U.S. War in Somalia*, THE INTERCEPT (Nov. 26, 2020), <https://theintercept.com/2020/11/26/somalia-cia-michael-goodboe/>.

<sup>7</sup> ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2020, 11 (2020), <https://media.defense.gov/2020/May/06/2002295555/-1/-1/1/SEC-1057-CIVILIAN-CASUALTIES-MAY-1-2020.PDF?source=GovDelivery>.

East,<sup>8</sup> U.S. administrations continue to caution that the U.S. faces imminent, countless terrorist threats.<sup>9</sup> Instead, recent administrations have framed counterterrorism not as an urgent defensive project against attacks but as a comprehensive initiative against any threat to the U.S., its allies, or its interests.<sup>10</sup> This expanded strategy now includes initiatives in sub-Saharan Africa, the Sahel, China, and Southeast Asia.<sup>11</sup> Nonetheless, the U.S. still locates the primary terrorist threat ideologically in radical Islam and geographically in Africa and Asia.<sup>12</sup> Administrations frame ‘new’ terrorist threats under the original mandate of the War on Terror, expanding the geographic scope of counterterrorism while still connecting these local or regional terrorist organizations to al-Qaeda.

Such expansion of U.S. counterterrorism strategy is particularly concerning when the U.S. has defined terrorism by racist, gendered, and Islamophobic criteria. Thousands of individuals have faced detention,<sup>13</sup> torture,<sup>14</sup> and execution<sup>15</sup> for sharing

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<sup>8</sup> See Barack Obama, *Remarks by the President on the Administration’s Approach to Counterterrorism*, WHITEHOUSE.GOV (Dec. 6, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/06/remarks-president-administrations-approach-counterterrorism> (considering al-Qaeda “degraded” and no longer posing an “existential threat”).

<sup>9</sup> *Remarks as Prepared for Delivery by Assistant to the President for Homeland Security, Dr. Liz Sherwood-Randall on the Future of the U.S. Counterterrorism Mission: Aligning Strategy, Policy, and Resources*, THE WHITE HOUSE (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-assistant-to-the-president-for-homeland-security-dr-liz-sherwood-randall-on-the-future-of-the-u-s-counterterrorism-mission-aligning-strategy-policy-and-resources/> (“Make no mistake: Terrorism is a serious threat”).

<sup>10</sup> DONALD TRUMP, *National Strategy for Counterterrorism of the United States of America* 1–25 (2018), [https://www.dni.gov/files/NCTC/documents/news\\_documents/NSCT.pdf](https://www.dni.gov/files/NCTC/documents/news_documents/NSCT.pdf); *Remarks by President Biden on Afghanistan*, THE WHITE HOUSE (Aug. 16, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/16/remarks-by-president-biden-on-afghanistan/>; Obama, *supra* note 8.

<sup>11</sup> *Programs and Initiatives*, UNITED STATES DEPARTMENT OF STATE BUREAU OF COUNTERTERRORISM, <https://www.state.gov/bureau-of-counterterrorism-programs-and-initiatives/>.

<sup>12</sup> *Id.*; TRUMP, *supra* note 10. Framing diverse terrorist non-state actors as agents of al-Qaeda helps anchor these new regional conflicts to the original mission of post-9/11 defense.

<sup>13</sup> AMERICAN CIVIL LIBERTIES UNION, *INSATIABLE APPETITE: THE GOVERNMENT’S DEMAND FOR NEW AND UNNECESSARY POWERS AFTER SEPTEMBER 11* (2002); HUMAN RIGHTS WATCH, *PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES* 10 (2002); CENTER FOR CONSTITUTIONAL RIGHTS, *EROSION OF CIVIL LIBERTIES IN THE POST 9/11 ERA* (2005); AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, *THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE* (2003); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* 21 (2003).

<sup>14</sup> *20 Years of U.S. Torture – and Counting*, HUMAN RIGHTS WATCH (Jan. 9, 2022), <https://www.hrw.org/news/2022/01/09/20-years-us-torture-and-counting>.

<sup>15</sup> See, e.g., Shala Cachelin, *The U.S. drone programme, imperial air power and Pakistan’s federally administered tribal areas*, CRITICAL STUDIES ON TERRORISM 1, 7 (2022).

(or just seeming to share) certain identities with those who planned 9/11.<sup>16</sup> Moreover, the U.S. has used counterterrorism to justify war and pervasive conflicts in primarily non-white and Muslim-majority countries that have now endured decades of U.S. intervention.<sup>17</sup> Counterterrorism has had a profoundly disruptive impact on states and individuals sharing traits the U.S. associates with “terror.”

Though abandoning the more plainly illegal counterterrorism policies,<sup>18</sup> the U.S. still views terrorism as an exceptional threat against which it mobilizes a range of tactics,<sup>19</sup> including airborne strikes<sup>20</sup> against individuals in foreign states. Between 2001 and 2021, the U.S. carried out at least 91,340 airborne strikes in Africa and the Middle East.<sup>21</sup> Strikes often occur outside of active battle zones and are conducted by non-soldiers miles away.<sup>22</sup> The U.S. government disclosed some of its procedures for strikes in 2013,<sup>23</sup> yet much about the targeting determinations remain secret.<sup>24</sup> Domestic litigation regarding the U.S. “kill list” has been unsuccessful,<sup>25</sup> but human rights organizations and media seek to hold the U.S. accountable through independent investigations.<sup>26</sup> Despite mounting international criticism, the U.S. insists that it abides

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<sup>16</sup> See OFFICE OF THE INSPECTOR GEN., *supra* note 13, at 21 (showing that most of the 9/11 detainees were Pakistani); Emmanuel Mauléon, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. 1326 (2018) (describing intensive policing of Black, specifically Somali, Muslims).

<sup>17</sup> After 9/11, the U.S. has taken military action in Afghanistan, Djibouti, Iraq, Libya, Pakistan, Somalia, Syria, and Yemen. See Stephanie Sedell, *The 2001 Authorization for Use of Military Force: A Comprehensive Look at Where and How it Has Been Used*, COSTS OF WAR (2021).

<sup>18</sup> See Lisa Hajjar, *The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US “War on Terror,”* 44 L. & SOC. INQUIRY 922 (2019) for a discussion of how the U.S. shifted from casting members of terrorist organizations as entirely beyond IHL (such as suspending Geneva protections in Guantánamo and torturing detainees) to trying to interpret IHL to legalize its current strategies, like its targeted killing program.

<sup>19</sup> Apart from military intervention, the U.S. levels economic sanctions, provides ‘antiterrorism training,’ and funds counterterrorism partners, among other strategies. See *Programs and Initiatives*, *supra* note 11.

<sup>20</sup> For this paper, I use the term airborne strikes to classify all lethal strikes launched via air (including drone strikes and strikes launched from ships or bases). This classification is narrower than targeted killings, which can include ground operations.

<sup>21</sup> Imogen Piper & Joe Dyke, *Tens of Thousands of Civilians Likely Killed by US in ‘Forever Wars,’* AIRWARS (2021), <https://airwars.org/news-and-investigations/tens-of-thousands-of-civilians-likely-killed-by-us-in-forever-wars/>.

<sup>22</sup> Jeremy Scahill, *Leaked Military Documents Expose the Inner Workings of Obama’s Drone Wars*, THE INTERCEPT (2015), <https://theintercept.com/drone-papers/the-assassination-complex/>.

<sup>23</sup> PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 22, 2013).

<sup>24</sup> *Id.*

<sup>25</sup> See *al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010); *New York Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013); *Kareem v. Haspel*, 986 F.3d 859 (D.C. Cir. 2021).

<sup>26</sup> See, e.g., HIDDEN U.S. WAR, *supra* note 6; Scahill *supra* note 22; Piper & Dyke *supra* note 21.

by the laws of armed conflict when conducting strikes.<sup>27</sup>

Al-Shabaab is a Somalia-based organization seeking to establish an Islamic form of governance in the state, comprised of members motivated by jihad, members opposing foreign influences in Somali politics, and others pursuing business or clan interests.<sup>28</sup> As the current largest affiliate of al-Qaeda,<sup>29</sup> al-Shabaab became a focus of U.S. counterterrorism despite being, according to AFRICOM, “unable to attack the U.S.”<sup>30</sup> The U.S. has been engaged in counterterrorism in Somalia since 2002,<sup>31</sup> and its actions have included support for Somali and African Union forces, limited ground operations, and the focus of this Article, airborne strikes against al-Shabaab.<sup>32</sup> Counterterrorism has thus justified two decades of involvement in a state that hosts no immediate threat to the U.S. However, U.S. interest in Somalia preceded 2002 and extends beyond counterterrorism to other economic and political interests.<sup>33</sup>

This Article contends that the airborne strikes against al-Shabaab are both an unlawful tactic and a tool of U.S. military imperialism. Using legal analysis, an empirical study of open-source data of strike incidents, and historical material, I show how the strikes are unlawful and ineffectual in practice as well as in theory. I argue that the duration of the program despite such legal and practical flaws suggests that the aim of these strikes is not necessarily “killing terrorists” but maintaining continued military presence in Somalia. While much of the scholarship on airborne strikes is focused on Yemen, Pakistan, and Afghanistan, Somalia has received less attention despite two decades of U.S. engagement. Building off the work of critical terrorism scholars, geographers, and TWAAIL (Third World Approaches to International Law) scholars,

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<sup>27</sup> See, e.g., Harold Koh, *The Obama Administration and International Law*, Speech to the American Society of International Law, STATE DEP’T (Mar. 25, 2010), <https://www.state.gov/documents/organization/179305.pdf>; Rebecca Sanders, *Human Rights Abuses at the Limits of the Law: Legal Instabilities and Vulnerabilities in the “Global War on Terror,”* 44 REVIEW OF INTERNATIONAL STUDIES 2, 15 (2017).

<sup>28</sup> HUSSEIN SOLOMON, TERRORISM AND COUNTER-TERRORISM IN AFRICA: NEW SECURITY CHALLENGES 48 (2015).

<sup>29</sup> Eric Schmitt & Abdi Latif Dahir, *Al Qaeda Branch in Somalia Threatens Americans in East Africa*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/world/africa/al-qaeda-somalia-shabab.html>.

<sup>30</sup> Harm Venhuizen, *US Airstrikes in Somalia Continue at Rapid Pace Even After Force Relocation*, MILITARY TIMES (Jan. 26, 2021), <https://www.militarytimes.com/news/your-military/2021/01/26/us-airstrikes-in-somalia-continue-at-rapid-pace-even-after-force-relocation/> (quoting Air Force Col. Chris Karns).

<sup>31</sup> Peter J. Quaranto, *United States Counter-Terrorism in Somalia*, ISS AFRICA (2008), <https://issafrica.org/chapter-3-united-states-counter-terrorism-in-somalia>.

<sup>32</sup> Stephen Burgess, *Military Intervention in Africa: French and US Approaches Compared*, 1 AIR FORCE J. EUR., M.E., AND AFR. AFF. 69, 70–72 (2019); see also Charlie Savage & Eric Schmitt, *Biden Approves Plan to Redeploy Several Hundred Ground Forces Into Somalia*, N.Y. TIMES (May 16, 2022), <https://www.nytimes.com/2022/05/16/us/politics/biden-military-somalia.html>.

<sup>33</sup> See Quaranto, *supra* note 30; *infra* Background, Part III.

as well as advocacy organizations and data projects, this Article supplements the legal and conceptual critiques of airborne strikes with an empirical analysis of U.S. strikes against al-Shabaab. Following the works of Ruth Blakeley, Priya Satia, Shala Cachelin, and Campbell Munro, who have named targeted killing as a tactic of imperial control, as well as of Lisa Parks and Andrea Miller, who have condemned the racial profiling utilized in target selection, this Article is the first scholarly work to combine historical, legal, and empirical critique of the U.S. campaign against al-Shabaab.

In Part I, I discuss the domestic legal framework governing the airborne strike program. I then survey applicable international law, identifying the prevailing (though varied) interpretations of IHL and indicating the ways U.S. legal arguments depart from such understandings. Next, I address claims by U.S. administrations and legal advisers about the purported legality of using airborne strikes for counterterrorism. I ultimately conclude that the U.S. policy of targeting and killing members of al-Shabaab via airborne strikes is illegal under domestic and international law.

In Part II, I analyze open-source data of airborne strikes against al-Shabaab in Somalia to conclude that not only is U.S. policy unlawful in theory, it is also unlawful in practice. Evaluating 333 airborne strike incidents, I show that U.S. targeting determinations are so fundamentally flawed that they fail to satisfy binding principles of international law and current targeting guidance. Moreover, they fail to achieve the purported aim of killing “terrorists” and stopping terrorism.

In Part III, I argue that because airborne strikes against al-Shabaab are both unlawful and ineffective, their continued implementation for nearly two decades suggests that the ultimate goal of these strikes is to maintain military presence in Somalia, rather than to defeat al-Shabaab. Situating the strike program in the context of U.S. military presence in Somalia and worldwide, I contend that U.S. airborne strikes in Somalia cannot just be evaluated as U.S. efforts to claim legal rights to new forms of violence.<sup>34</sup> Rather, these strikes must also be understood as a strategy of U.S. imperialism to ensure access to markets, resources, and military bases.<sup>35</sup> That is, the way the U.S. has responded to terrorism is not a new form of warfare but a continuation of its Cold War efforts to control strategic states<sup>36</sup> such as Somalia.

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<sup>34</sup> See, e.g., Hajjar, *supra* note 18; Lisa Hajjar, *Lawfare and Armed Conflicts: A Comparative Analysis of Israeli and U.S. Targeted Killing Policies and Legal Challenges Against Them*, in *LIFE IN THE AGE OF DRONE WARFARE* (2017).

<sup>35</sup> Ruth Blakeley, *Drones, State Terrorism and International Law*, 11 *CRITICAL STUD. ON TERRORISM* 321, 335 (2018); Lisa Parks, *Vertical Mediation and the U.S. Drone War in the Horn of Africa*, in *LIFE IN THE AGE OF DRONE WARFARE* 134 (2017).  
*Studies on Terrorism*, 11:2, 321-341

<sup>36</sup> See Blakeley, *supra* note 35; Campbell Munro, *The Entangled Sovereignities of Air Police: Mapping the Boundary of the International and the Imperial*, 15 *GLOBAL JURIST* 117, 125 (2015).

I conclude by highlighting the impact of airborne strikes on Somalis, further confirming that continued U.S. lethal violence in the state is unjustifiable.

## METHODOLOGY

In this Article, I employ legal, empirical, and historical analysis to evaluate the U.S. airborne strike program against al-Shabaab. I consider the program under both international law and domestic law, remaining conscious of how U.S. government interests inform the legal justifications promoted by its agents and advisers. This Article is guided by Lisa Hajjar's articulation of state lawfare, or "the practices of officials to reinterpret international humanitarian law (IHL) or human rights laws in ways that deviate from prevailing internationally accepted understandings in order to 'legalize' state practices that would otherwise constitute violations."<sup>37</sup> In this framework, I understand U.S. legal statements as not neutral or objective interpretations of the law, but also as efforts to modify popular understandings of the law, or even remake law, to justify its programs. I assemble the U.S. legal position from administration statements, legal adviser white papers, speeches, and Congressional hearings. With these government statements, I show how the U.S. has claimed the lawful authority to enact and execute this program, which I then compare critically with other leading interpretations to argue that in fact the U.S. lacks any such authority.

For analysis of airborne strikes against al-Shabaab and the targeting determinations for such strikes, I analyzed open-source data on strike incidents from Airwars. Considered the most authoritative compilation of U.S. strike data, Airwars is a nonprofit focused on bringing transparency and accountability to military conflicts and civilian harm.<sup>38</sup> For strikes in Somalia, it gathers information from U.S. and Somali news media, U.S. military statements, the Bureau of Investigative Journalism, Amnesty International, FOIA responses, Somali Twitter, and other available media.<sup>39</sup> By aggregating a variety of sources, it is the comprehensive record of all possible U.S. strikes in Somalia. I collected its incident information for airborne strikes in Somalia against al-Shabaab (333). By examining each incident description, I attempt to construct the U.S. targeting policy, as the U.S. government discloses minimal information about targeting. I assessed each incident description to determine the possible basis for targeting that individual, group, or area, as the justification for the strike reveals which interpretation of IHL the U.S. follows. This analysis, combined with the civilian casualties or other information about each strike, inform the conclusions about the legality of the U.S. strike campaign. The methods for this

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<sup>37</sup> Hajjar, *supra* note 34, at 69. I apply her definition to interpretations of domestic law as well.

<sup>38</sup> Who We Are, AIRWARS, <https://airwars.org/about/team/> (last visited Dec 14, 2021).

<sup>39</sup> U.S. Strikes and Civilian Casualties, AIRWARS, <https://airwars.org/civilian-casualties/ussom341-august-24-2021/> (last visited Dec 16, 2021).

analysis are further described in the Appendix.

Lastly, I supplement the legal and applied analysis of the U.S. airborne strike program with the necessary historical context for its implications, taking a critical perspective informed by Geography, TWAIL, and Critical Terrorism Studies. This Article situates the current strike program in U.S. imperialism and its engagement with Somalia, expanding the understanding of airborne strikes from a counterterrorism tactic with questionable legal status to a tool of military imperialism.

## BACKGROUND

### A. THE U.S. HAS SPENT DECADES ESTABLISHING A GLOBAL MILITARY PRESENCE

The U.S., in its formation and expansion, occupied territories, some of which continue to be governed by the U.S., so it is proper to frame this critique as one of empire. Despite the U.S. origin myth as one of resisting empire and colonialization, the U.S. has occupied a number of territories for economic, political, and military interests.<sup>40</sup> For example, the U.S. occupied Haiti for two decades to “restore order” and “maintain political and economic stability in the Caribbean.”<sup>41</sup> Admittedly interested in Haiti for decades prior, fearing European influence on the island,<sup>42</sup> the U.S. used the mounting political violence as an excuse to invade and install a U.S.-favored president. With the Haitian-American Treaty of 1915, the U.S. took control of Haitian finances and asserted the right to intervene in Haiti whenever the U.S. deemed necessary.<sup>43</sup> Such self-interested state-building missions characterize U.S. foreign intervention throughout its history. Today, many U.S. occupied territories also

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<sup>40</sup> The U.S. began as a settler colonial state, seizing Indigenous lands across the continent. As a product of the War of 1898, the U.S. occupied Cuba and the Philippines, and it imposed colonial rule on the Philippines for nearly 50 years. It also acquired Puerto Rico and Guam shortly thereafter, and the U.S. began building military bases on these newly occupied islands. David Vine, *No Bases? Assessing the Impact of Social Movements Challenging US Foreign Military Bases*, 60 CURRENT ANTHRO. 158, 161 (2019). Today, the U.S. maintains territories, which have no voting power but are governed by the U.S., which include Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands. It also holds 11 other islands. While the U.S. is adamant it hold territories, not colonies, these populations remain under U.S. political rule and economic dependency. *See* Insular Cases, 1901 (which use the word “territories” to describe the newly seized islands, despite rulings that effectively establish them as colonies). For a deeper discussion of U.S. imperialism, see DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE* (2019).

<sup>41</sup> U.S. Invasion and Occupation of Haiti, 1915–34, STATE DEP’T, <https://history.state.gov/milestones/1914-1920/haiti> (last visited Apr 7, 2022) (“President Wilson sent the U.S. Marines to Haiti to prevent anarchy. In actuality, the act protected U.S. assets in the area and prevented a possible German invasion.”).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

function as current U.S. military bases.<sup>44</sup> Thus, the U.S.'s history of colonial and imperial occupation is intrinsically linked to its current global military presence.

By the end of WWII, the United States occupied more than 30,000 installations at more than 2,000 sites worldwide.<sup>45</sup> In its race to create allies during the Cold War, the U.S. began a campaign of military base development in allied states, and it intervened in wars in Korea and Vietnam ostensibly to fight communism.<sup>46</sup> In general, newly independent African nations were reluctant to choose sides in the Cold War, and many refused U.S. assistance or requests to host bases.<sup>47</sup>

At the same time, the U.S. instigated several coups in strategic states to help install favorable governments,<sup>48</sup> which often failed to achieve their goals and in fact worsened relations.<sup>49</sup> Still, the U.S. insisted on a policy to contain communism<sup>50</sup> and Soviet influence.<sup>51</sup> Communism, socialism, and other leftist economic reforms were seen as inherently dangerous to U.S. interests and grounds for military action, such as Guatemala's land reforms threatening the United Fruit Company<sup>52</sup> or Iran's effort to nationalize oil.<sup>53</sup> The U.S. even engaged in efforts to stem leftist African intellectual movements.<sup>54</sup> None of these governments posed a military threat to the U.S.<sup>55</sup> Rather, the threats were to the U.S. economy and a U.S. global order, and these interventions were part of the U.S. neoliberal effort to ensure corporate access to resource-rich

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<sup>44</sup> DAVID VINE, *BASE NATION* (2015) (including Puerto Rico, Guam, the U.S. Virgin Islands, and the Marshall Islands).

<sup>45</sup> Vine, *supra* note 40, at 162. Of course, at the end of WWII, the U.S. also occupied Japan and West Germany, to establish the new, pro-U.S. governments. See James Dobbins et al., *Post-World War II Nation-Building* in AFTER THE WAR 11 (2008) (characterizing such nation-building as successful).

<sup>46</sup> David Wiley, *Militarizing Africa and African Studies and the U.S. Africanist Response*, 55 AFR. STUD. REV. 147, 149 (2012); see also Thematic Study and Guidelines: Identification and Evaluation of U.S. Army Cold War Era Military-Industrial Historic Properties, U.S. ARMY ENVIRONMENTAL CENTER, [https://gis.penndot.gov/CRGISAttachments/Survey/Cold\\_war.pdf](https://gis.penndot.gov/CRGISAttachments/Survey/Cold_war.pdf).

<sup>47</sup> Wiley, *supra* note 46, at 149.

<sup>48</sup> The CIA has confirmed its involvement in seven coups. J. Dana Stuster, *Mapped: The 7 Governments the U.S. Has Overthrown*, FOREIGN POLICY (Aug. 20, 2013), <https://foreignpolicy.com/2013/08/20/mapped-the-7-governments-the-u-s-has-overthrown/>.

However, the U.S. has been implicated in between 64 and 118 regime changes that occurred during the Cold War. See LINDSEY O'ROURKE, COVERT REGIME CHANGE 97, 225 (2018). For further information on regime change, see MICHAEL GROW, U.S. PRESIDENTS AND LATIN AMERICAN INTERVENTIONS (2008); WILLIAM BLUM, KILLING HOPE (2004).

<sup>49</sup> *Id.* at 225.

<sup>50</sup> O'ROURKE, *supra* note 48, at 105.

<sup>51</sup> *Id.* at 131.

<sup>52</sup> *Id.*

<sup>53</sup> Malcolm Byrne, *CIA Admits It Was Behind Iran's Coup*, FOREIGN POLICY (Aug. 19, 2013 1:00AM), <https://foreignpolicy.com/2013/08/19/cia-admits-it-was-behind-irans-coup/>.

<sup>54</sup> Wiley, *supra* note 46, at 149.

<sup>55</sup> O'ROURKE, *supra* note 48, at 111.



markets.<sup>56</sup> After the Cold War, the international policy mission remained to support democratic (i.e., pro-U.S.) free market nations.<sup>57</sup>

Despite a brief movement to close military bases and scale back international military presence,<sup>58</sup> the War on Terror reignited U.S. military expansion through wars in Afghanistan and Iraq, the establishment of foreign military bases and detention centers, military assistance to foreign states, and other militarized counterterrorism operations in at least seven other countries.<sup>59</sup> Presently, the U.S. holds three times as many installations as all other states combined,<sup>60</sup> or up to 95 percent of the world's bases.<sup>61</sup> The U.S. does not disclose a full count of its bases,<sup>62</sup> but researcher David Vine's 2015 effort to calculate the scope of U.S. military presence identified up to 800 bases in at least 80 countries.<sup>63</sup> The U.S. has undoubtedly built a global military empire, the scope of which is likely understated, rather than overstated, by these metrics.<sup>64</sup>

The U.S. has recently focused its military growth into Africa. AFRICOM, the newest of 6 geographic commands, was established in 2007,<sup>65</sup> beginning the Bush

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<sup>56</sup> Stuster, *supra* note 48.

<sup>57</sup> O'ROURKE, *supra* note 48, at 230.

<sup>58</sup> See David E. Lockwood and George Siehl, *Military Base Closures: A Historical Review from 1988 to 1995*, CRS REPORT FOR CONGRESS (Oct. 18, 2004).

<sup>59</sup> United States Counterterrorism Operations 2018–2020, COSTS OF WAR, <https://watson.brown.edu/costsofwar/papers/2021/USCounterterrorismOperations> (last visited Apr. 7, 2022). These numbers do not account for U.S. technical support for allied military intervention. *Id.*

<sup>60</sup> Doug Bandow, *750 Bases in 80 Countries Is Too Many for Any Nation: Time for the US to Bring Its Troops Home*, CATO INSTITUTE (Oct. 4, 2021), <https://www.cato.org/commentary/750-bases-80-countries-too-many-any-nation-time-us-bring-its-troops-home>.

<sup>61</sup> Vine, *supra* note 40, at 161.

<sup>62</sup> The Pentagon, when compelled to report its military activities, provided incomplete and inaccurate counts of its bases. David Vine et. al, *Drawdown: Improving U.S. and Global Security Through Military Base Closures Abroad*, QUINCY INSTITUTE FOR RESPONSIBLE STATECRAFT (Sept. 20, 2021), <https://quincyinst.org/report/drawdown-improving-u-s-and-global-security-through-military-base-closures-abroad/>. According to the Pentagon, in 2018 (the last time such disclosure was legally compelled), the U.S. operated than 700 bases in 70 countries. VINE, *supra* note 44. However, this count excluded many popularly known bases. *Id.*

<sup>63</sup> Vine et al., *supra* note 62; VINE, *supra* note 44; Bandow, *supra* note 60. The U.S. Army has corroborated Vine's list, using it over the Pentagon's in a recent study. Vine et al., *supra* note 62.

<sup>64</sup> The number of sites and facilities, of which there may be many on an individual base, are even higher. BASE STRUCTURE REPORT: FY 2018 BASELINE, DOD (2018) (estimating 585,000 facilities and 4,775 sites in 45 countries). Moreover, the U.S. also employs private security contractors to conduct operations while obscuring U.S. involvement, in case the host country is uncomfortable with U.S. involvement, further contributing to the U.S.'s worldwide presence. Adam Moore & James Walker, *Tracing the US Military's Presence in Africa*, 21 GEOPOLITICS 686, 694 (2016).

<sup>65</sup> Lauren Ploch, *Africa Command: U.S. Strategic Interests and the Role of the U.S. Military in Africa*, CONGRESSIONAL RESEARCH SERVICE 1 (July 22, 2011).

Administration's "pivot" to Africa.<sup>66</sup> The Obama administration oversaw a tenfold increase in personnel and a 200 percent increase in missions on the continent.<sup>67</sup> While the Pentagon insists Camp Lemonnier is the only U.S. base in Africa, there are 46 installations in Africa as of 2017,<sup>68</sup> and many AFRICOM operations are also conducted through bases in Germany.<sup>69</sup> By Vine's investigation, the U.S. operates at least five bases in Somalia alone.<sup>70</sup> The U.S. also funds African armies through Trans-Sahara Counter-Terrorism Partnership and the Pentagon's Operation Juniper Shield.<sup>71</sup> It is nearly impossible to illustrate the full scope of U.S. activities on the African continent, and to disentangle its actions in Somalia from those. AFRICOM does not release information about most of its operations and greatly restricts the ability of reporters to observe any of its activities, and it does not even disclose a total number of countries in which it operates.<sup>72</sup>

Additionally, the U.S. provides billions of dollars as military and counterterrorism assistance.<sup>73</sup> Almost every country in Africa and the Middle East receives military aid, totaling \$7 billion, or over half of all U.S. military assistance, with the majority going to the Horn of Africa.<sup>74</sup> Part of this assistance includes training forces, which the U.S. conducts in at least 79 countries.<sup>75</sup> Much like the U.S.'s Cold War strategy, this military funding and training functions as a form of "soft power" working to ensure U.S. interests abroad by persuading states to support U.S. policies through the distribution of assistance.<sup>76</sup> In some ways, current U.S. counterterrorism

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<sup>66</sup> See NICK TURSE, *TOMORROW'S BATTLEFIELD: U.S. PROXY WARS AND SECRET OPS IN AFRICA* ? (2015); Moore & Walker, *supra* note 64, at 687.

<sup>67</sup> TURSE, *supra* note 66, at ?; Moore & Walker, *supra* note 64, at 687.

<sup>68</sup> Bandow, *supra* note 60.

<sup>69</sup> TURSE, *supra* note 66, at ?

<sup>70</sup> Bandow, *supra* note 60.

<sup>71</sup> TURSE, *supra* note 66, at ?

<sup>72</sup> TURSE, *supra* note 66, at ?;

<sup>73</sup> The U.S. government spent \$12 billion in military assistance in 2020 to 165 countries, and economic assistance to 212. FOREIGN ASSISTANCE, <https://foreignassistance.gov/> (last visited Apr. 7, 2022). Military assistance is up 89 percent from 2000. Kaia Hubbard, *3 Charts That Illustrate Where U.S. Foreign Aid Goes*, US NEWS & WORLD REPORT (May 24, 2021), [/www.usnews.com/news/best-countries/articles/2021-05-24/afghanistan-israel-largest-recipients-of-us-foreign-aid](https://www.usnews.com/news/best-countries/articles/2021-05-24/afghanistan-israel-largest-recipients-of-us-foreign-aid).

<sup>74</sup> FOREIGN ASSISTANCE, *supra* note 73.

<sup>75</sup> United States Counterterrorism Operations 2018–2020, *supra* note 59; George Petras et al., *Exclusive: US counterterrorism operations touched 85 countries in the last 3 years alone*, USA TODAY (Feb. 25, 2021 2:00AM), <https://www.usatoday.com/in-depth/news/2021/02/25/post-9-11-us-military-efforts-touched-85-nations-last-3-years/6564981002/>.

<sup>76</sup> See Carla Martinez Machain, *Exporting Influence: U.S. Military Training as Soft Power*, 65 J. CONFLICT RESOLUTION 313 (2021). Moreover, organizations funded by the U.S., like NATO, contribute assistance to fight terrorism and "project stability beyond its borders" "in areas of strategic importance." NATO on the Map, NATO, <https://www.nato.int/nato-on-the-map/#lat=38.10684321970394&lon=-38.21728923559096&zoom=-1&layer=3> (last visited Apr 7, 2022) (making the logic plain: "If NATO's neighbours are more stable, the Allies are more secure.").

measures can be understood as simply an extension of this goal to install favorable governments and establish military power.<sup>77</sup>

Counterterrorism has continued to support military intervention under the rationale of stability: cutting off threats before they materialize in the U.S.<sup>78</sup> There has been no scaling back of this policy; if anything, it has continued to expand globally. Yet in October 2020, DHS named American white supremacists as the greatest terrorist threat to the United States.<sup>79</sup> Counterterrorism measures outside the U.S. seem largely disconnected from the primary terrorist threats, or in many ways counterproductive to combatting them.<sup>80</sup> Of course, it is also apparent that this military apparatus largely operates in majority non-white countries, countries that have historically endured colonialism, empire, and occupation.<sup>81</sup> The U.S. military investment in Africa in large part concerns the general U.S. strategic interest in Africa's natural resources and energy resources, access to which could be impaired by unfavorable regimes arising out of political instability.<sup>82</sup> As Jim Inofe, Chairman of the U.S. Committee on Armed Services declared: "No country in the world has benefited more from the global stability, peace, and prosperity of the last 75 years than the United States of America."<sup>83</sup>

## B. HISTORY OF SOMALIA AND U.S. ENGAGEMENT

Somalia is geographically diverse, predominantly Muslim state neighboring Kenya, Ethiopia, and Djibouti, separated from Yemen by the Gulf of Aden. Its capital, Mogadishu, sits on the coast. Somalia possesses an incredibly strategic location on the Red Sea as the "gateway" between the Middle East and Sub-Saharan Africa,<sup>84</sup> and it is the neighbor of longtime U.S. ally, Ethiopia. Somalia has oil, but international oil companies have not been able to operate since the civil war.<sup>85</sup> While the current

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<sup>77</sup> O'ROURKE, *supra* note 48, at 236; Melissa Willard-Foster, *The Post-9/11 Era: Regime Change and Rogues, Iraq 2003, Libya 2003, and Libya 2011* in TOPPLING FOREIGN GOVERNMENTS 176 (2019).

<sup>78</sup> TURSE, *supra* note 66, at ?;

<sup>79</sup> HOMELAND THREAT ASSESSMENT, DHS (Oct. 2020),

[https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf)

<sup>80</sup> Adam Taylor, *Map: The U.S. is bound by treaties to defend a quarter of humanity*, WASHINGTON POST (May 30, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/05/30/map-the-u-s-is-bound-by-treaties-to-defend-a-quarter-of-humanity/>.

<sup>81</sup> United States Counterterrorism Operations 2018–2020, *supra* note 59.

<sup>82</sup> Ploch, *supra* note 65, at 2.

<sup>83</sup> THE ROLE OF ALLIES AND PARTNERS IN U.S. MILITARY STRATEGY AND OPERATIONS: HEARING BEFORE THE COMMITTEE ON ARMED SERVICES, HOUSE OF REPRESENTATIVES, ONE HUNDRED SIXTEENTH CONGRESS, SECOND SESSION.

<sup>84</sup> Quaranto, *supra* note 30.

<sup>85</sup> Claudia Carpenter, *Somalia will announce deadline for maiden licensing round "soon" after encouraging bids*, (Nov. 10, 2021), <https://www.spglobal.com/commodityinsights/en/market-insights/latest->

government has reopened talks of offshore exploration, the President and Prime Minister of Somalia recently cancelled the first U.S. oil exploration contract.<sup>86</sup> Furthermore, with the longest coastline of the African mainland, Somalia controls waters critical to trade.<sup>87</sup> It is no surprise that the U.S. wants a favorable Somali government, or at least one that is not hostile to the U.S.

Somalia is traditionally organized by clans, which constitute the primary legal and social contract for Somalis.<sup>88</sup> Until Italian and British colonization, Somalia never had a centralized government.<sup>89</sup> Moreover, its national borders have long been disputed with Ethiopia and Kenya,<sup>90</sup> particularly as Italy also colonized Ethiopia and tried to unite the two.<sup>91</sup> The former British colony is now Somaliland, a state currently unrecognized by the international community.<sup>92</sup> Other regions have attempted to declare statehood, though none have fully seceded.<sup>93</sup>

Somalia has long faced Western intervention, beginning with British colonization in 1884 and Italian colonization shortly thereafter.<sup>94</sup> After WWII, Somalis tried to reunite the country but were divided as to whether seek independence or reunification first, as well as over which type of government would suit the new state best.<sup>95</sup> In 1949, the UN granted Italy a ten-year trusteeship to oversee Somalia's transition to independence, while the British region did not gain independence until

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[news/oil/111021-somalia-will-announce-deadline-for-aid-licensing-round-soon-after-encouraging-bids](https://www.dw.com/en/somalia-will-announce-deadline-for-aid-licensing-round-soon-after-encouraging-bids/a-60846562).

<sup>86</sup> Somalia's president cancels US oil deal hours after it was signed, DW (Feb. 2, 2022), <https://www.dw.com/en/somalia's-president-cancels-us-oil-deal-hours-after-it-was-signed/a-60846562>. The U.S., of course, also has a longstanding interest in oil in the Middle East,<sup>86</sup> and accordingly, an interest in allies in and around the region. See, e.g., Toby Craig Jones, *America, Oil, and War in the Middle East*, 99 J. AMERICAN HIST. 208 (2012); Shibley Telhami, *The Persian Gulf: Understanding the American Oil Strategy*, BROOKINGS (Mar. 1, 2022), <https://www.brookings.edu/articles/the-persian-gulf-understanding-the-american-oil-strategy/>; U.S. ENERGY SECURITY: WEST AFRICA AND LATIN AMERICA, SENATE HEARING 108-351 (Oct. 21, 2003); *Oil Dependence and U.S. Foreign Policy*, CFR, <https://www.cfr.org/timeline/oil-dependence-and-us-foreign-policy> (last accessed Apr. 13, 2022).

<sup>87</sup> Piracy in the Gulf of Aden, Indian Ocean, and Arabian Sea has threatened international trade. However, Somali piracy actually began as a response to illegal fishing in Somali waters during the absence of a Somali navy, with local fisherman attempting to collect "taxes" from these unlawful vessels. TURSE, *supra* note 66, at .

<sup>88</sup> ABDULLAH A. MAHMOUD, STATE COLLAPSE AND POST-CONFLICT DEVELOPMENT IN AFRICA 18 (2008).

<sup>89</sup> AFYARE ABDI ELMI, UNDERSTANDING THE SOMALI CONFLAGRATION 17 (2010).

<sup>90</sup> Roland Marchal, *Somalia: A New Front Against Terrorism*, ITEMS: INSIGHTS FROM THE SOCIAL SCIENCES (2007), <https://items.ssrc.org/crisis-in-the-horn-of-africa/somalia-a-new-front-against-terrorism/>.

<sup>91</sup> MOHAMED HAJI MUKHTAR, HISTORICAL DICTIONARY OF SOMALIA 4 (2003).

<sup>92</sup> MUKHTAR, *supra* note 91, at 5; PAOLO TRIPODI, THE COLONIAL LEGACY IN SOMALIA 92 (1999).

<sup>93</sup> See MUKHTAR, *supra* note 91, at 5.

<sup>94</sup> TRIPODI, *supra* note 92, at ?.

<sup>95</sup> *Id.*

1960.<sup>96</sup> The two then joined to form the Somali Republic, which attempted to unite the country, without much success.<sup>97</sup>

During the Cold War, the U.S. unsuccessfully tried to ally with Somalia until Mohammed Siad Barré came to power.<sup>98</sup> Siad Barré gained control in a 1969 military coup and attempted to unite the country, but he lacked support from the beginning, largely for limiting clan power.<sup>99</sup> Siad Barré promoted scientific socialism and soon began to model his government after Soviet Communists, seeking to convert the state into a Marxist-Leninist republic with help from the USSR.<sup>100</sup> Siad Barré's Communist goals threatened U.S. interests, as Siad Barré implemented widespread nationalization policy and initiated a war against Ethiopia,<sup>101</sup> a U.S. Cold War ally.<sup>102</sup> However, in 1977, the USSR withdrew support for Somalia and began backing Ethiopia.<sup>103</sup> One year later, opponents attempted to overthrow Barré, but the effort failed.<sup>104</sup> Once the USSR broke ties with Somalia, the U.S. quickly began financially supporting the unpopular Barré government to gain its loyalty.<sup>105</sup> Such support, as well as military training, assisted Barré's more totalitarian turn until the U.S. finally withdrew support in 1988.<sup>106</sup>

After the U.S. pulled its military and economic aid, the regime quickly collapsed.<sup>107</sup> In 1991, a variety of opposition groups, mostly clan-based factions, united to overthrow Barré.<sup>108</sup> Though united in their opposition to Barré, these groups failed to otherwise merge and immediately disaggregated once they removed Barré.<sup>109</sup> The

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<sup>96</sup> *Id.*; IOAN LEWIS, UNDERSTANDING SOMALIA AND SOMALILAND 32 (1993).

<sup>97</sup> MUKHTAR, *supra* note 91, at 5. The U.S. supported combining Somalia and Somaliland so that the UK could incorporate the new state into the Commonwealth, but Italy opposed. TRIPODI, *supra* note 92, at 92.

<sup>98</sup> HARUN MARUF & DAN JOSEPH, INSIDE AL-SHABAAB 9 (2018).

<sup>99</sup> MUKHTAR, *supra* note 91, at 7.

<sup>100</sup> MUKHTAR, *supra* note 91, at 7; LEWIS, *supra* note 96, at 38–39; SHAUL SHAY, SOMALIA IN TRANSITION 10 (2017).

<sup>101</sup> See “Buried in the Sands of the Ogaden”: *The Horn of Africa and SALT II, 1977–1979*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1977-1980/horn-of-africa> (last accessed Apr. 13, 2022).

<sup>102</sup> *Id.* (until the USSR began to support Ethiopia, prompting the U.S. to begin supporting Somalia); see also Quaranto, *supra* note 30.

<sup>103</sup> LEWIS, *supra* note 96, at 44.

<sup>104</sup> MUKHTAR, *supra* note 91, at 8.

<sup>105</sup> Emira Woods, *Somalia*, INSTITUTE FOR POLICY STUDIES (Jan. 1, 1997), <https://ips-dc.org/somalia/>; MUKHTAR, *supra* note 91, at xl (noting that after Somalia agreed to allow U.S. access to a military port and airfield in the country, the U.S. provided \$53 million in economic aid and \$40 million in military aid).

<sup>106</sup> EMMA LEONARD & GILBERT RAMSAY, GLOBALIZING SOMALIA 145–46 (2013).

<sup>107</sup> LEONARD & RAMSAY, *supra* note 106, at 146.

<sup>108</sup> *Id.*

<sup>109</sup> MUKHTAR, *supra* note 91, at 8.

Barré government lost power in 1991, and the U.S. lost its embassy.<sup>110</sup> One of the strongest factions, the United Somali Congress, took control of Mogadishu and installed an interim president, Ali Mahdi Muhammad, but it still struggled against the remaining groups and internal divisions.<sup>111</sup> The UN then launched its first peacekeeping mission in 1992,<sup>112</sup> a multinational coalition led by the U.S.<sup>113</sup>

The Bush Administration sent a humanitarian relief mission to Somalia, Operation Restore Hope, as part of the UN's United Task Force in Somalia.<sup>114</sup> The Clinton Administration continued the operation and expanded its scope to include nation-building.<sup>115</sup> Claiming to bring democracy to Somalia,<sup>116</sup> the U.S. once again sought to establish a favorable government in a foreign country under a mission of state-building. That is, until the Black Hawk Down incident<sup>117</sup> made the political costs of involvement in Somalia untenable, prompting U.S. withdrawal from the mission.<sup>118</sup> The UN withdrew two years later in 1995.<sup>119</sup>

Following the mission, the UN and the Intergovernmental Authority on Development (IGAD) attempted to host a series of peace talks for Somalia, which established the Transitional National Government (TNG) in 2000, followed by the Transitional Federal Government (TFG) in 2004.<sup>120</sup> The new government included a formula for clan representation called the 4.5 plan.<sup>121</sup> Most Somalis despised the clan quota as unconstitutional, and as the TFG ended up being led by two clans that were

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<sup>110</sup> Somalia, UNITED STATES DEPARTMENT OF STATE, <https://www.state.gov/countries-areas/somalia/> (last visited Dec 16, 2021).

<sup>111</sup> *Id.*; LEWIS, *supra* note 96, at 44; PAUL WILLIAMS, FIGHTING FOR PEACE IN SOMALIA 22 (2018).

<sup>112</sup> MAHMOUD, *supra* note 88, at 140; TRIPODI, *supra* note 92, at 140.

<sup>113</sup> WILLIAMS, *supra* note 111, at 22; United Nations Operations in Somalia – UNOSOM I Background, PEACEKEEPING UN, <https://peacekeeping.un.org/mission/past/unosom1backgr2.html> (last visited Apr 5, 2022).

<sup>114</sup> LEONARD & RAMSAY, *supra* note 106, at 143; RAPHAEL CHIJIJOKE NJOKU, THE HISTORY OF SOMALIA 148 (2013).

<sup>115</sup> LEONARD & RAMSAY, *supra* note 106, at 147.

<sup>116</sup> LEONARD & RAMSAY, *supra* note 106, at 147.

<sup>117</sup> When Pakistani peacekeepers were killed by one of Muhammad's opponents, Mohamed Farrah Aidid, the U.S. sought to capture the general, resulting in the "Black Hawk Down" Battle of Mogadishu in October 1993. WILLIAMS, *supra* note 111, at 22; TRIPODI, *supra* note 92, at 155; LEWIS, *supra* note 96, at 79. Several American soldiers were killed, and a Somali crowd, angry with the perceived reprisal attacks for the death of the Pakistani troops, disfigured the body of one soldier. TRIPODI, *supra* note 92, at 155. The incident was broadcast in the U.S., prompting public outrage. *Id.* The reaction, which prompted skepticism about U.S. interventionism, has been dubbed "Somalia Syndrome." See Robert G. Patman, *The Roots of Strategic Failure: The Somalia Syndrome and Al Qaeda's Path to 9/11*, 52 INT'L POL. 89 (2015).

<sup>118</sup> WILLIAMS, *supra* note 111, at 23; LEWIS, *supra* note 96, at 79.

<sup>119</sup> WILLIAMS, *supra* note 111, at 23; LEWIS, *supra* note 96, at 79.

<sup>120</sup> WILLIAMS, *supra* note 111, at 23–24.

<sup>121</sup> WILLIAMS, *supra* note 111, at 23; see also LEWIS, *supra* note 96, at 81–85.

pro-Ethiopian, the new government looked like a proxy regime.<sup>122</sup> As such, the TFG struggled for control and was largely unworkable.<sup>123</sup>

Around the same time, U.S. interest in Somalia resurged. The U.S. blamed Somalia for the 1998 bombings of its embassies in Nairobi and Dar es Salaam, as well as an attack of a U.S. boat off the coast in Yemen in 2000.<sup>124</sup> Some report that the DoD had quietly been engaged in a campaign to kill or capture al-Qaeda leaders in Somalia since 2000.<sup>125</sup> Immediately following 9/11, the Bush administration named Somalia a safe haven for al-Qaeda,<sup>126</sup> suspecting bin Laden might seek refuge in the state.<sup>127</sup> The U.S. also immediately declared Somalia's al-Itihaad al-Islamiya a Foreign Terrorist Organization, freezing its bank assets, and it placed many Somali businesses and individuals on its Specially Designated Nationals and Blocked Persons list.<sup>128</sup> Somalia was not linked to 9/11.<sup>129</sup> Instead, it was as if 9/11 provided the opportunity to validate U.S. concerns about Somalia and justify engagement it was already contemplating. As early as November 2001, the U.S. debated entering Somalia.<sup>130</sup> The U.S. held off until 2002, then it sent over special forces and CIA agents to train Somali troops to combat al-Qaeda.<sup>131</sup> Over the next few years, U.S. officials reiterated

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<sup>122</sup> WILLIAMS, *supra* note 111, at 25; MARUF & JOSEPH, *supra* note 98, at 41.

<sup>123</sup> SOLOMON, *supra* note 98, at 48; MARUF & JOSEPH, *supra* note 98, at 18; ELMI, *supra* note 89, at 4.

<sup>124</sup> Quaranto, *supra* note 30.

<sup>125</sup> Donovan C. Chau, U.S. *Counterterrorism in Sub-Saharan Africa: Understanding Costs, Cultures, and Conflicts*, STRATEGIC STUDIES INSTITUTE, U.S. ARMY WAR COLLEGE 1, 16 (2008).

<sup>126</sup> Country Reports on Terrorism 2019, UNITED STATES DEPARTMENT OF STATE, <https://www.state.gov/reports/country-reports-on-terrorism-2019/> (last visited Dec 16, 2021); *see also* MARUF & JOSEPH, *supra* note 98, at 28 (“‘Somalia has been a place that has harbored Al-Qaeda and, to my knowledge, still is,’ US Defense Secretary Donald Rumsfeld told a news conference in November.2 General Richard Myers, chairman of the US military’s Joint Chiefs of Staff, went a step further a couple of weeks later: ‘Somalia is one potential country—there are others as well—a potential country where you might have diplomatic, law enforcement action or potentially military action. All the instruments of national power, not just one.’”).

<sup>127</sup> Quaranto, *supra* note 30; *see also* 9/11 COMMISSION REPORT 366 (2004) (“In talking with American and foreign government officials and military officers on the front lines fighting terrorists today, we asked them: If you were a terrorist leader today, where would you locate your base? Some of the same places come up again and again on their list...the nearby Horn of Africa”). Such a research method, based on the perception of government officials, to identify Somalia as a site of terrorism, merits far greater interrogation than this Article could provide.

<sup>128</sup> ELMI, *supra* note 89, at 75; *Specially Designated Nationals And Blocked Persons List (SDN) Human Readable Lists*, U.S. DEP’T OF TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists> (last updated May 6, 2022).

<sup>129</sup> 9/11 COMMISSION REPORT, *supra* note 127.

<sup>130</sup> Roland Marchal, *Somalia: A New Front Against Terrorism*, ITEMS: INSIGHTS FROM THE SOCIAL SCIENCES (2007), <https://items.ssrc.org/crisis-in-the-horn-of-africa/somalia-a-new-front-against-terrorism/>. Others say the U.S. considered attacking Somalia in 2002. *See* ELMI, *supra* note 89, at 75.

<sup>131</sup> Marchal, *supra* note 130.

concerns about al-Qaeda establishing a stronghold in the “ungoverned” space of Somalia.<sup>132</sup>

In the midst of federal instability, nonstate actors began providing basic services to Somalis.<sup>133</sup> The Islamic Courts emerged as a local response to the insecurity across Somalia, as many regions lacked any federal support.<sup>134</sup> These courts were diverse in ideology and culture, largely run by clan elders.<sup>135</sup> The Islamic Courts began operating as early as 1994, and they helped establish stability for commerce, so they were soon supported by business leaders.<sup>136</sup> By 2003, the courts had gained such popularity that they united, forming the Union of the Islamic Courts, and took control of Mogadishu, as well as south and central Somalia.<sup>137</sup> The UIC’s stricter implementation of sharia broke from Somalia’s historically tolerant observation of Islam.<sup>138</sup> However, because of UIC’s ability to establish peace in the city, which had largely been under the control of warlords, most Somalis welcomed its leadership in Mogadishu.<sup>139</sup>

The TFG attempted to establish a central government in Mogadishu, fighting UIC for control of the city.<sup>140</sup> However, the TFG’s police and ministers failed to provide the same level of safety for residents of Mogadishu as they had experienced under the UIC, so the new government failed to gain popular support.<sup>141</sup> The CIA also had a considerable role in undermining the TFG in its early years. By 2002, the U.S. government began working with Mogadishu warlords to track down suspects for the U.S. embassy bombings and members of al-Qaeda, offering millions in rewards.<sup>142</sup> The U.S. recruited around a dozen warlords, some of whom were ministers in the TFG, to help capture suspected members of al-Qaeda.<sup>143</sup> In 2006, when the warlords stopped assisting with the War on Terror, the U.S. encouraged them to unite as the Alliance

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<sup>132</sup> See ELMI, *supra* note 89, at 75 (quoting Charles Snyder, Samuel Helland, and Jendayi Frazer).

<sup>133</sup> WILLIAMS, *supra* note 111, at 23.

<sup>134</sup> Marchal, *supra* note 130.

<sup>135</sup> *Id.*

<sup>136</sup> WILLIAMS, *supra* note 111, at 29; SOLOMON, *supra* note 98, at 39; STIG JARLE HANSEN, AL-SHABAAB IN SOMALIA 22 (2013).

<sup>137</sup> WILLIAMS, *supra* note 111, at 29–30; LEONARD & RAMSAY, *supra* note 106, at 7; SOLOMON, *supra* note 98, at 39.

<sup>138</sup> LEWIS, *supra* note 96, at 87.

<sup>139</sup> MARUF & JOSEPH, *supra* note 98, at 29, 38; ELMI, *supra* note 89, at 2, 82.

<sup>140</sup> MARUF & JOSEPH, *supra* note 98, at 46.

<sup>141</sup> HANSEN, *supra* note 136, at 50 (describing TFG police as “predatory” to city residents); LEWIS, *supra* note 96, at 85–88 (noting how under the UIC, food prices dropped and businesses improved).

<sup>142</sup> ELMI, *supra* note 89, at 2, 25, 61, 81; WILLIAMS, *supra* note 111, at 28; LEWIS, *supra* note 96, at 85; MARUF & JOSEPH, *supra* note 98, at 33–35; SHAY, *supra* note 100, at 187.

<sup>143</sup> Marchal, *supra* note 130; Burgess, *supra* note 32, at 80–81; HANSEN, *supra* note 136, at 8, 34; MARUF & JOSEPH, *supra* note 98, at 39.



for Peace and Counterterrorism, which it then funded.<sup>144</sup> The U.S. circumventing the TFG further deteriorated its credibility and signaled its inefficacy,<sup>145</sup> and the violence and fear caused by the CIA-backed warlords added to the city's insecurity.<sup>146</sup>

Fearing the rise of the UIC and the potential of an Islamic government in Somalia, Ethiopia invaded in December 2006 to bolster the TFG.<sup>147</sup> When the UIC supplanted the Alliance and the TFG in Mogadishu,<sup>148</sup> the U.S. pivoted to instead counter the power of the Courts.<sup>149</sup> Ethiopia claimed UIC was linked to al-Qaeda, a position the U.S. adopted, publicly accusing the UIC of being completely controlled by al-Qaeda.<sup>150</sup> The U.S. backed, and by some reports encouraged, Ethiopia's invasion of the city.<sup>151</sup> Neither of these were popular moves in Somalia, particularly given the stability the UIC offered.<sup>152</sup> Now facing foreign attack, the UIC invited worldwide Islamic support against the TFG, Ethiopia, and the U.S.<sup>153</sup> The U.S. then turned to the African Union to encourage greater action in Somalia, and the UN Security Council, which of course includes the U.S., approved IGAD and African Union entry into the state.<sup>154</sup> Shortly after, in 2007, the UNSC authorized the African Union peacekeeping mission (AMISOM) to support the TFG,<sup>155</sup> the largest deployment of peacekeepers in the world.<sup>156</sup> which Somalis similarly perceived as a foreign invasion to support an unpopular government.<sup>157</sup> Together, Ethiopia and the African Union, backed by the U.S., overthrew the UIC in Mogadishu, and the UIC disbanded.<sup>158</sup>

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<sup>144</sup> MARUF & JOSEPH, *supra* note 98, at 35; LEWIS, *supra* note 96, at 85.

<sup>145</sup> LEWIS, *supra* note 96, at 85. Moreover, reports claim the U.S. blocked IGAD's proposal for a peacekeeping mission to support the TFG. WILLIAMS, *supra* note 111, at 34 ("Critics of U.S. policies also noted that IGASOM [IGAD's mission in Somalia] might well run counter to the ongoing US covert support for various Somali warlords in Mogadishu under the guise of fighting terrorism.").

<sup>146</sup> MARUF & JOSEPH, *supra* note 98, at 29, 33; WILLIAMS, *supra* note 111, at 28. These warlords were also very unpopular relative to the UIC. HANSEN, *supra* note 136, at 39. UIC as an indigenous response to the warlord power. See Samar al-Bulushi, *Kenya, the United States, and the Project of Endless War in Somalia*, ROAPE (Mar. 2, 2020), <https://roape.net/2020/03/02/kenya-the-united-states-and-the-project-of-endless-war-in-somalia/>.

<sup>147</sup> Marchal, *supra* note 130; HIDDEN U.S. WAR, *supra* note 6, at 16; Burgess, *supra* note 32, at 80.

<sup>148</sup> ELMI, *supra* note 89, at 75; WILLIAMS, *supra* note 111, at 29; MARUF & JOSEPH, *supra* note 98, at 38.

<sup>149</sup> MARUF & JOSEPH, *supra* note 98, at 39.

<sup>150</sup> *Id.* at 44.

<sup>151</sup> *Id.* at 43.

<sup>152</sup> ELMI, *supra* note 89, at 81.

<sup>153</sup> LEWIS, *supra* note 96, at 89.

<sup>154</sup> WILLIAMS, *supra* note 111, at 34.

<sup>155</sup> TURSE, *supra* note 66, at ?; WILLIAMS, *supra* note 111, at 42. The U.S. supported AMISOM through private military contracts to provide training and equipment. WILLIAMS, *supra* note 111, at 44.

<sup>156</sup> WILLIAMS, *supra* note 111, at 2.

<sup>157</sup> *Id.* at 58–59.

<sup>158</sup> Marchal, *supra* note 130; Samar al-Bulushi, *Peacekeeping as Occupation*, 22 TRANSFORMING ANTHRO. 31, 32 (2014). The U.S. began training African Union forces in 2007, continuing through the Obama

As al-Shabaab proved to be persistent opposition, the TFG sought U.S. assistance, and the U.S. provides training, funding and airborne strikes.<sup>159</sup> The U.S. considerably funded and developed the TFG during the civil war, helping the transition into the current Federal Government of Somalia,<sup>160</sup> which succeeded the TFG in 2012.<sup>161</sup> Now, at the Federal Government's request, the U.S. remains engaged in myriad counterterrorism operations.<sup>162</sup> Over the past two decades, it has also provided Somalia billions of dollars in economic, development, and humanitarian aid.<sup>163</sup> Such military and financial assistance echoes earlier U.S. efforts to ensure support for its interests. After decades of involvement, the U.S. reestablished its embassy in the state in 2016.<sup>164</sup>

However, the Federal Government has only tenuous control over the country, and it faces repeated attacks by opposition groups including al-Shabaab.<sup>165</sup> The U.S. deployed military advisors to assist the Somali government in 2007, and it has stationed troops in the country since 2014.<sup>166</sup>

Despite a partial withdrawal of troops in January 2021, the U.S. remains engaged militarily in Somalia against al-Shabaab.<sup>167</sup> Since 2002, the U.S. has assisted Somali and African Union forces primarily by training and advising troops and by conducting airborne strikes, though it also participates in ground operations against al-Shabaab with Somali forces.<sup>168</sup> The U.S. also sporadically launches strikes against ISIS

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administration. Burgess, *supra* note 32, at 80–81; HANSEN, *supra* note 136, at 58. For a full account of the military operations, see SHAY, *supra* note 100.

<sup>159</sup> MARUF & JOSEPH, *supra* note 98, at 117, 226. The U.S. also provided training and funding to AMISOM. WILLIAMS, *supra* note 111, at 105.

<sup>160</sup> Burgess, *supra* note 32, at 81. Uganda also lobbied heavily to encourage the U.S. to intervene, emphasizing Somalia as the proper focus for U.S. counterterrorism, and these efforts seemingly greatly influenced U.S. decisions to intervene. WILLIAMS, *supra* note 111, at 44.

<sup>161</sup> Andrews Atta-Asmoah, *Long Walk to Restoration*, INST. SEC. STUD. 1 (2013).

<sup>162</sup> See *infra* Part II(A).

<sup>163</sup> MARUF & JOSEPH, *supra* note 98, at 278.

<sup>164</sup> Paul D. Williams, *Understanding US Policy in Somalia: Current Challenges and Future Options* (July 2020), <https://www.chathamhouse.org/sites/default/files/publications/research/2020-07-14-us-policy-somalia-williams.pdf>.

<sup>165</sup> WILLIAMS, *supra* note 111, at 334–35.

<sup>166</sup> Phil Stewart, *U.S. Discloses Secret Somalia Military Presence, Up to 120 Troops*, REUTERS (July 2, 2014), <https://www.reuters.com/article/us-usa-somalia/exclusive-u-s-discloses-secret-somalia-military-presence-up-to-120-troops-idINKBN0F800V20140703>.

<sup>167</sup> See Oriana Pawlyk, *After Most US Troops Pull Out of Somalia, Some Reenter for Training Event* | *Military.com*, (Feb. 1, 2021), <https://www.military.com/daily-news/2021/02/01/after-most-us-troops-pull-out-of-somalia-some-reenter-training-event.html>. Some remained for training and ground support. *Id.*

<sup>168</sup> Daniel R. Mahanty, *Great Expectations: AFRICOM's New Quarterly Report on Civilian Casualties*, JUST SECURITY (Apr. 21, 2020), <https://www.justsecurity.org/69785/great-expectations-africom-new-quarterly-report-on-civilian-casualties/>. This includes the Danab, an elite branch of Somali forces. *Id.*

and al-Qaeda in Somalia.<sup>169</sup> The U.S. conducts airborne strikes from bases in surrounding countries, including Djibouti, Kenya, Niger, Uganda, Seychelles, Chad, and Ethiopia, as well as from Naval ships off the coast.<sup>170</sup> The U.S. also uses bases in Germany for conducting drone operations.<sup>171</sup> Recently, President Biden has redeployed hundreds of Special Operations forces into Somalia, after a year of troops commuting into Somalia from neighboring countries.<sup>172</sup> The U.S. has reframed Somalia's internal political struggle into part of its counterterrorism operations, while also using the conflict to increase and leverage its already massive military empire.

### C. HISTORY OF AL-SHABAAB

Al-Shabaab is a Somalia-based organization with varied, sometimes competing, motivations of territorial control, economic gain, establishing an Islamic government, and contesting foreign influence.<sup>173</sup> While there are competing accounts of the origin of al-Shabaab, the most widely-accepted account holds that al-Shabaab directly emerged from a faction of the UIC.<sup>174</sup> After the UIC was defeated in 2007, al-Shabaab remained active, fighting for control of the state.<sup>175</sup> Though ideologically divided from

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<sup>169</sup> Civilian Deaths by US President in Somalia, AIRWARS, <https://airwars.org/conflict-data/civilian-deaths-by-us-president-in-somalia/> (last visited Apr 6, 2022). I do not analyze those strikes in this Article, as the analysis is distinct to al-Shabaab.

<sup>170</sup> Nick Turse, *Target Africa: America's expanding drone network*, THE INTERCEPT (Oct. 15, 2015, 4:59AM), <https://theintercept.com/drone-papers/target-africa/>; TURSE, *supra* note 66.

<sup>171</sup> TURSE, *supra* note 66, at ?.

<sup>172</sup> See Savage & Schmitt, *supra* note 82 (quoting an official who explained that the move was to fight al-Shabaab leaders posing a threat to “us, and our interests and our allies”); Jonathan Guyer, *Biden Sought to End Endless Wars. So What's the Military Doing in Somalia?*, VOX, (July 18, 2022), <https://www.vox.com/23204510/somalia-us-troops-return-shabaab-biden>; Karoun Demirjian, *U.S. less effective at countering terrorist threats in Afghanistan and Somalia since troop withdrawal, generals warn*, WASH. POST (Mar. 15, 2022), <https://www.washingtonpost.com/national-security/2022/03/15/us-military-somalia-afghanistan/>;

Meghann Myers, *US troops now 'commuting to work' to help Somalia fight al-Shabab*, MILITARY TIMES (Apr. 27, 2021), <https://www.militarytimes.com/news/your-military/2021/04/27/us-troops-now-commuting-to-work-to-help-somalia-fight-al-shabab/>; Oriana Pawlyk, *After Most US Troops Pull Out of Somalia, Some Reenter for Training Event*, MILITARY.COM (Feb. 1, 2021), <https://www.military.com/daily-news/2021/02/01/after-most-us-troops-pull-out-of-somalia-some-reenter-training-event.html>.

<sup>173</sup> SOLOMON, *supra* note 98, at 48.

<sup>174</sup> HANSEN, *supra* note 136, at 9, 15, 19; Marchal, *supra* note 130. See SHAY, *supra* note 100, for a detailed account of the individuals and groups contributing to the development of al-Shabaab. However, accounts differ: Somali journalist Abdirahman Aynte Ali locates its origins in a 2003 meeting in Hargeisa, whereas an al-Shabaab webpage Kataaib says al-Shabaab began organizing in the al-Huda camp in 1996. See HANSEN, *supra* note 136, at 19.

<sup>175</sup> HANSEN, *supra* note 136, at 47.

the start,<sup>176</sup> al-Shabaab united against Ethiopia, AMISOM, and U.S. interference.<sup>177</sup>

Al-Shabaab's fight to rid Somalia of Ethiopian forces earned it support in Mogadishu.<sup>178</sup> By 2007, membership in al-Shabaab had reached thousands, and Somalis living abroad sent money to the organization to help it defend against Ethiopia.<sup>179</sup> Most Somalis initially disagreed with the U.S.'s classification of al-Shabaab as a Foreign Terrorist Organization, because it was perceived as rightfully resisting Ethiopian occupation.<sup>180</sup>

Ethiopia defeated al-Shabaab in Mogadishu in 2007, but the organization regrouped in the south of the country until it was able to launch hit-and-run or suicide attacks on Ethiopian bases.<sup>181</sup> Finally, Ethiopia withdrew from Mogadishu in 2009.<sup>182</sup>

At this time, al-Shabaab was offering a variety of social services in the absence of the federal government, including schools, courts, and police, which it funded through taxes and managed through a variety of administrators.<sup>183</sup> Only one maktab, or agency, was a military force: Amniyat.<sup>184</sup> Business activity and employment increased in areas of al-Shabaab control, and it also began funding infrastructure development.<sup>185</sup> Al-Shabaab originated to serve more of an economic function, while engaging in some local armed attacks and it is comprised of jihadists, business interests, and clans marginalized by the 4.5 configuration.<sup>186</sup>

However, as it lost territory in Mogadishu, al-Shabaab lost support and began to forcibly recruit members.<sup>187</sup> Initially, al-Shabaab never purported to pursue global jihad,<sup>188</sup> but once it claimed affiliation with al-Qaeda in 2012, a decision that was very

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<sup>176</sup> *Id.* at 38, 45; SOLOMON, *supra* note 98, at 46 (noting the group's difficulty with clan divisions and the influence of clan political and economic interests).

<sup>177</sup> WILLIAMS, *supra* note 111, at 51, MARUF & JOSEPH, *supra* note 98, at 48.

<sup>178</sup> WILLIAMS, *supra* note 111, at 51, 59, ELMI, *supra* note 89, at 81, SOLOMON, *supra* note 98, at 39; MICHAEL KEATING & MATT WALDMAN, WAR AND PEACE IN SOMALIA 311 (2018).

<sup>179</sup> MARUF & JOSEPH, *supra* note 98, at 50.

<sup>180</sup> ELMI, *supra* note 89, at 81; WILLIAMS, *supra* note 111, at 30.

<sup>181</sup> HANSEN, *supra* note 136, at 47–54.

<sup>182</sup> *Id.* at 73.

<sup>183</sup> *Id.* at 86–91.

<sup>184</sup> WILLIAMS, *supra* note 111, at 90, 91.

<sup>185</sup> HANSEN, *supra* note 136, at 89–91. Claims that al-Shabaab hindered humanitarian aid are also perhaps misconstrued. Al-Shabaab positively received UNICEF and IRC assistance, but it blocked UN World Food Programme from operating in its territories because it allegedly distributed expired food. *Id.* at 116.

<sup>186</sup> SOLOMON, *supra* note 98, at 48. This definition is accepted by the UN. *Id.*

<sup>187</sup> HANSEN, *supra* note 136, at 112.

<sup>188</sup> Though global jihadists, including Osama bin Laden, expressed support for al-Shabaab's fight. MARUF & JOSEPH, *supra* note 98, at 109.

controversial within the group,<sup>189</sup> civilian support further plummeted.<sup>190</sup>

Now, al-Shabaab is al-Qaeda's largest affiliate with around 10,000 members.<sup>191</sup> Al-Shabaab still primarily clashes with Somali forces but has launched attacks against civilians in Somalia, Uganda, and Kenya.<sup>192</sup> Having been driven from Mogadishu by AMISOM and the TFG in 2011,<sup>193</sup> Al-Shabaab currently occupies some territory in the southeast of Somalia, around Jilib.<sup>194</sup> Despite its setbacks, al-Shabaab remains an adaptive and enduring force in Somalia.

**PART I: U.S. airborne strike targeting policy relies on invalid interpretations of both domestic law and international law, and resultingly, the program in concept is unlawful.**

In Part I, I outline the legal framework governing targeting for airborne strikes, which I then compare to U.S. claims of the program's legality, to ultimately conclude that the current U.S. policy is unlawful. In Section A, I describe U.S. law applicable to airborne strikes in Somalia, then in Section B I cover applicable international law. In Section C, I compile remarks the U.S. government has made about the program's lawfulness, and in Section D, I show why such claims are completely unfounded and why the policy is illegal under both domestic and international law.

**A. U.S. LAW GOVERNING EXTRATERRITORIAL USE OF FORCE AND TARGETING**

In terms of domestic law, the 2001 Authorization for the Use of Military Force Act (AUMF) is the primary authority for airborne strikes conducted by the Department of Defense (DoD) in Somalia. Additionally, when the CIA conducts strikes, its actions may be governed by either the AUMF or the Covert Action Statute. The president's authority to approve strikes is also constrained by Constitution. Due to the absence of specific legislation governing airborne strikes abroad, and given the broad executive discretion to approve lethal action for counterterrorism, each administration also determines the policies and procedures restricting airborne strikes. While not law, these policies become the primary check on the use of such lethal force.

Immediately following 9/11, the Bush administration passed the

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<sup>189</sup> MARUF & JOSEPH, *supra* note 98, at 191; HANSEN, *supra* note 136, at 9.

<sup>190</sup> SOLOMON, *supra* note 98, at 57; Bryce W. Reeder & John R. Smith, *US Strikes in Somalia and Targeted Civilian Killings by Al-Shabaab: An Empirical Investigation*, 589, 591 FOREIGN POLICY ANALYSIS (2020).

<sup>191</sup> W.J. Hennigan, *America's War in Afghanistan Is Over. But in the Horn of Africa, Its War On Terror Rages On*, TIME (Sept. 30, 2021), <https://time.com/6102688/war-on-terror-after-afghanistan/>.

<sup>192</sup> HIDDEN U.S. WAR, *supra* note 6, at 45–47.

<sup>193</sup> See SHAY, *supra* note 100, for a full account of the military operations. WILLIAMS, *supra* note 111, at 120 (saying al-Shabaab withdrew in 2012).

<sup>194</sup> SOLOMON, *supra* note 100, at 47.

Authorization for the Use of Military Force Act (AUMF), which remains the prevailing authority for the president to authorize the uses of the Armed Forces in counterterrorism.<sup>195</sup> The AUMF allows the president to use “all necessary and appropriate” force against individuals, organizations, and even nations “he determines” are responsible for the 9/11 attacks.<sup>196</sup> However, subsequent administrations have interpreted the AUMF to continue to allow force against “associated forces” of al-Qaeda and the Taliban, years after 9/11, because they supposedly pose an ongoing threat.<sup>197</sup> In 2014, Obama expanded the interpretation of the AUMF to also authorize attacks against ISIS, which is distinct from al-Qaeda and often in direct conflict with it.<sup>198</sup> Under a strict interpretation of the AUMF, however, the president and the executive branch should select targets for force based on their interpretation of the perceived link between a group, nation, or individual and the 9/11 attacks.

This expansive interpretation has been heavily criticized as authorizing a limitless War on Terror far beyond the scope of the 9/11 attacks.<sup>199</sup> The Obama administration maintained that the AUMF would not apply to anyone the “the executive labels a ‘terrorist’” or even all terrorist organizations that embrace “al-Qaeda ideology,” only those which posed a direct threat to the U.S. and can be linked to the 9/11 attacks.<sup>200</sup> Nonetheless, the AUMF has been invoked against loose al-Qaeda affiliates with local aims, such as al-Shabaab.<sup>201</sup> Accordingly, the federal government has consistently asserted that the AUMF governs most uses of airborne strikes as counterterrorism.

The legal framework somewhat changes when the CIA is involved. Presently, the DoD and the CIA both conduct airborne strikes abroad, often together.<sup>202</sup> There

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<sup>195</sup> Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>196</sup> *Id.*

<sup>197</sup> See *Remarks by President Biden*, *supra* note 10; Obama, *supra* note 8; Trump, *supra* note 10; Milena Sterio, *Lethal Use of Drones: When the Executive Is the Judge, Jury, and Executioner*, 23 THE INDEPENDENT REVIEW 35, 39 (2018); Michael J. Boyle, *The legal and ethical implications of drone warfare*, 19 INT. J. OF HUMAN RIGHTS 105, 109 (2015).

<sup>198</sup> Stephen Pomper, *Targeted Killing and the Rule of Law: The Legal and Human Costs of 20 Years of U.S. Drone Strikes*, CRISIS GROUP (Feb. 10, 2022), <https://www.crisisgroup.org/united-states/targeted-killing-and-rule-law-legal-and-human-costs-20-years-us-drone-strikes>.

<sup>199</sup> Sterio, *supra* note 197, at 38.

<sup>200</sup> Jeh Johnson, *National security law, lawyers and lawyering in the Obama Administration*, (2012).

<sup>201</sup> See Pomper, *supra* note 198; Chris Savage et al., *Obama Expands War with al-Qaeda to Include al-Shabaab in Somalia*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-Qaeda-to-include-shabab-in-somalia.html>; Guyer, *supra* note 172 (explaining Biden invoked the 2001 AUMF for the redeployment of troops into Somalia).

<sup>202</sup> Jens Ohlin, *The Combatant's Privilege in Asymmetric and Covert Conflicts*, 40 YALE J. INT'L L. 337, 372–73 (2015); Greg Miller, *CLA remains behind most drone strikes, despite effort to shift campaign to Defense*, WA. PO. (Nov. 25, 2013), <https://www.washingtonpost.com/world/national-security/cia-remains-behind->

is also some debate as to whether the AUMF authorizes only the armed forces to use lethal force, or whether it includes actions by the CIA.<sup>203</sup> Though the title of Section 2 of the AUMF refers only to the armed forces, the text does not specifically restrict the AUMF to only DoD action, so it's possible CIA action could fall under the AUMF.<sup>204</sup> The President also has authority to approve covert actions, which includes CIA actions, under 50 U.S.C. § 3093 (the Covert Action Statute).<sup>205</sup> Under the Covert Action Statute, any covert action cannot violate an existing federal statute and cannot be a “traditional military activity.”<sup>206</sup> There is debate over whether CIA conducted airborne strikes are a traditional military activity,<sup>207</sup> discussed further in Section D. Congress has defined military activities as those conducted by military personnel under the direction and control of a U.S. military commander,<sup>208</sup> which would allow CIA-conducted airborne strikes to comply with the Covert Action Statute. Additionally, if DoD personnel conduct the strike under CIA leadership, the strike could be an authorized covert action under that interpretation.<sup>209</sup> Thus, strikes conducted by the CIA might be covered by the AUMF or might be covered by Covert Action Statute, or if they can be considered traditional military activity, such strikes may not have any legal authorization.

Lastly, if a citizen is lethally targeted outside the U.S., the Constitution would apply.<sup>210</sup> The government would be constrained by Due Process considerations in executing a citizen without trial.<sup>211</sup> So far, in Somalia, no U.S. citizens have been

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[most-drone-strikes-despite-effort-to-shift-campaign-to-defense/2013/11/25/c0c07a86-5386-11e3-a7f0-b790929232e1\\_story.html](https://www.washingtonpost.com/news/energy-environment/wp/2013/11/25/c0c07a86-5386-11e3-a7f0-b790929232e1_story.html). The CIA and DoD sometimes conduct strikes together. See Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT. SEC. L. & POL'Y 540, 567 (2012).

<sup>203</sup> See, e.g., Kevin Jon Heller, *Why Title 50 Does Not Provide the CIA with a Public Authority Justification*, OPINIO JURIS (June 9, 2014), <http://opiniojuris.org/2014/09/06/title-50-provide-cia-public-authority-justification/>; Robert Chesney, *CIA, Drone Strikes, and Public Authority: Responding to Kevin Heller*, LAWFARE (Sept. 9, 2014), <https://www.lawfareblog.com/cia-drone-strikes-and-public-authority-responding-kevin-heller>; Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT. SEC. J. 85 (2011).

<sup>204</sup> See Authorization for Use of Military Force, *supra* 195; Chesney, *supra* note 203.

<sup>205</sup> Presidential Approval and Reporting of Covert Actions, 50 U.S.C. § 3093 (2019).

<sup>206</sup> *Id.*

<sup>207</sup> EXCEPTION(S) TO THE RULE(S), CENT'R FOR CIVILIANS IN CONFLICT 25 (Nov. 2020).

<sup>208</sup> CONFERENCE REPORT ON THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1991, H.R. REP. NO. 102-166 (July 25, 1991) at 21 [hereinafter “CONFERENCE REPORT”].

<sup>209</sup> Ohlin, *supra* note 202, at 374; Joseph B. Berger III, *Covert Action*, 67 JFQ 32 (2012).

<sup>210</sup> See *Reid v. Covert*, 354 U.S. 1, 45 (1957) (holding the Constitution applied to military court-martials); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 71 (D.D.C. 2014) (“The fact that Anwar Al-Aulaqi, Samir Khan and Abdulrahman Al-Aulaqi were in Yemen at the time they were killed did not alter these basic legal rights under the U.S. Constituion [sic].”). See also Jameel Jaffer, *The Drone Memos ?* (2016).

<sup>211</sup> See *Al-Aulaqi*, 35 F. Supp. 3d at 70 (“The powers granted to the Executive and Congress to wage war and provide for national security does not give them carte blanche to deprive a U.S. citizen of his

targeted and killed as members of al-Shabaab.<sup>212</sup>

In terms of policy governing airborne strikes, the U.S. Armed Forces published a Joint Targeting Manual in 2013. The Manual broadly outlines the targeting principles and processes, rather than detail specifics about how it identifies targets or assesses risk to civilians.<sup>213</sup> It also reserves the option to make spontaneous targeting decisions,<sup>214</sup> so it seems these processes may also be overridden. However, if a special ops team invokes self-defense, this process can be entirely circumvented.<sup>215</sup> This Manual is the most recent to have been published, so it is possible this Manual still governs targeting.

Each administration also establishes standards governing airborne strikes, which are generally classified. While Bush's policy remained secret, after mounting public criticism, the Obama administration released a redacted version of the guidelines informing its policy: the Presidential Policy Guidelines (PPG) in 2016.<sup>216</sup> The PPG included a requirement that a strike can only be authorized if there was "near certainty" "non-combatants" would not be harmed.<sup>217</sup> The guidelines also set out that, barring extraordinary circumstances, direct action would only be taken against "high-value terrorists" if there were "near certainty" the targeted individual is the lawful target.<sup>218</sup> It did not include the actual policies and procedures of the acting agencies. In his second term, President Obama also drastically limited CIA authority to conduct airborne strikes.<sup>219</sup> At the same time, the New York Times reported that the Obama administration "quietly" expanded the authority for use of force in Somalia to allow

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life without due process and without any judicial review."); Comm. of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988); *see also* Jonathan G. D'Errico, Executive Power, Drone Executions, and the Due Process Rights of American Citizens, 87 FORD. L. REV. 1185 (2018).

<sup>212</sup> *See Appendix.*

<sup>213</sup> JOINT TARGETING MANUAL 3–60 (Jan. 31, 2013). There also appears to be a method to guide civilian casualty calculations, but the PDF is not publicly available: No-Strike and the Collateral Damage Estimation Methodology. The U.S. has also made several reservations to the NATO Joint Targeting Manual, namely that it does not presume civilian status in cases of doubt. NATO STANDARD AJP3.9 ALLIED JOINT DOCTRINE FOR JOINT TARGETING, ed. B, version 1, 10 (Nov. 2021). It also refuses to comply with having a gender adviser review targets. *Id.* at 11. While this is limited to NATO operations, these reservations help further illuminate the U.S. position in its own operations.

<sup>214</sup> JOINT TARGETING MANUAL, *supra* note 130, at II-3.

<sup>215</sup> <https://www.lawfareblog.com/biden-administration-faces-reckoning-decades-making-over-united-states-use-air-power-and-civilian>

<sup>216</sup> PROCEDURES FOR APPROVING DIRECT ACTION, *supra* note 23.

<sup>217</sup> Testimony of Nathan A. Sales, "Targeted Killing" and the Rule of Law: The Legal and Human Costs of 20 Years of US Drone Strikes, Senate Committee on the Judiciary (Feb. 9, 2022).

<sup>218</sup> PROCEDURES FOR APPROVING DIRECT ACTION, *supra* note 23.

<sup>219</sup> *See* Gordon Lubold and Shane Harris, *Trump Broadens CIA Powers, Allows Deadly Drone Strikes*, WSJ (2017), <https://www.wsj.com/articles/trump-gave-cia-power-to-launch-drone-strikes-1489444374> (last visited May 11, 2022).



airborne strikes to defend African troops, rather than requiring U.S. forces be under direct threat.<sup>220</sup>

In its “Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets,” the Trump administration rolled back the requirements of the PPG to implement a “reasonable certainty” standard when it came to casualties for civilian adult men.<sup>221</sup> The new system for authorizing targets was more relaxed and decentralized than the Obama era, and it allowed field operators to target individuals based on suspected membership in terrorist organizations, rather than their individual threat.<sup>222</sup> These policies were not announced by the Trump administration but revealed through Freedom of Information Act litigation by the ACLU, and they were similarly heavily redacted.<sup>223</sup> Moreover, the Trump administration permitted lower standards for strikes in certain countries, so the general policy did not always apply.<sup>224</sup> The Trump administration also revoked an Obama order that the government disclose estimates of airborne strike fatalities.<sup>225</sup> Finally, President Trump expanded CIA authority to conduct strikes.<sup>226</sup>

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<sup>220</sup> HIDDEN U.S. WAR, *supra* note 6, at 22.

<sup>221</sup> PRINCIPLES, STANDARDS, AND PROCEDURES FOR U.S. DIRECT ACTION AGAINST TERRORIST TARGETS, available at <https://int.nyt.com/data/documenttools/trump-ppg-drone-strike-rules-foia/52f4a4baf5fc54c5/full.pdf>; *see also* Trump’s Secret Rules for Drone Strikes and Presidents’ Unchecked License to Kill, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/news/national-security/trumps-secret-rules-for-drone-strikes-and-presidents-unchecked-license-to-kill/> (last visited Apr 6, 2022); ACLU Comment on Release of Trump Administration Lethal Force Rules, AMERICAN CIVIL LIBERTIES UNION (May 1, 2021), <https://www.aclu.org/press-releases/aclu-comment-release-trump-administration-lethal-force-rules>; Charlie Savage, *Trump’s Secret Rules for Drone Strikes Outside War Zones Are Disclosed*, N.Y. TIMES, May 1, 2021, <https://www.nytimes.com/2021/05/01/us/politics/trump-drone-strike-rules.html>; Trump revokes Obama rule on reporting drone strike deaths, BBC NEWS, March 7, 2019, <https://www.bbc.com/news/world-us-canada-47480207>.

<sup>222</sup> *See infra* note 213.

<sup>223</sup> Savage, *supra* note 221; PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

<sup>224</sup> Charlie Savage & Eric Schmitt, *Biden Secretly Limits Counterterrorism Drone Strikes Away From War Zones*, N.Y. TIMES, March 3, 2021.

<sup>225</sup> *Id.*; Charlie Savage, *Trump Revokes Obama-Era Rule on Disclosing Civilian Casualties From U.S. Airstrikes Outside War Zones*, N.Y. TIMES, March 6, 2019, <https://www.nytimes.com/2019/03/06/us/politics/trump-civilian-casualties-rule-revoked.html>; “Executive Order 13862 of March 6, 2019, on Revocation of Reporting Requirement,” U.S. Federal Register, (2019) <https://www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement/>.

<sup>226</sup> Paul Shinkman, *Report: Trump Gives CIA Authority for Drone Strikes*, US NEWS & WORLD REPORT (Mar. 14, 2017), <https://www.usnews.com/news/politics/articles/2017-03-14/report-trump-gives-cia-authority-for-drone-strikes> (President Trump even allowed CIA supervisors to approve strikes themselves, which seems to violate § 3093); Gordon Lubold & Shane Harris, *Trump Broadens CIA Powers, Allows Deadly Drone Strikes*, WSJ (Mar. 13, 2017), <https://www.wsj.com/articles/trump-gave-cia-power-to-launch-drone-strikes-1489444374>; Eric Schmitt & Matthew Rosenberg, *C.I.A. Wants*

Immediately upon taking office, President Biden ordered new limits on authorizing drone strikes outside battlefields.<sup>227</sup> These limits allegedly increase targeting restrictions on strikes occurring outside active warzones to require self-defense for U.S. or partner troops<sup>228</sup> or presidential approval in cases without a self-defense claim.<sup>229</sup> These limits were not announced by the administration but disclosed by anonymous sources.<sup>230</sup> The fact that the implementation of these limits was “quiet” or “secret”<sup>231</sup> underscores the difficulty in assessing whether a strike complies with U.S. policy. These limits are apparently temporary while the administration conducts its review of the Trump policies and determines whether it will implement a new policy or maintain the current standards,<sup>232</sup> so it seems the Trump standards otherwise

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*Authority to Conduct Drone Strikes in Afghanistan for the First Time*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/us/politics/cia-drone-strike-authority-afghanistan.html> (the CIA previously only operated in Pakistan and Syria, but in fall 2017, began campaigning to act in Afghanistan) <https://www.nytimes.com/2017/09/15/us/politics/cia-drone-strike-authority-afghanistan.html>; see also Robert Chesney, *A Revived CIA Drone Strike Program? Comments on the New Policy*, LAWFARE (Mar. 14, 2017), <https://www.lawfareblog.com/revived-cia-drone-strike-program-comments-new-policy>.

<sup>227</sup> Paul Shinkman, *Pentagon Confirms Biden’s New Restrictions on Drone Strikes, Commando Raids*, U.S. NEWS & WORLD REPORT (Mar. 8, 2021), <https://www.usnews.com/news/national-news/articles/2021-03-08/pentagon-confirms-bidens-new-restrictions-on-drone-strikes-commando-raids>; Savage, *supra* note 221; Savage & Schmitt, *supra* note 224; Jeremy Scahill, *The Mysterious Case of Joe Biden and the Future of Drone Wars*, THE INTERCEPT (Dec. 15, 2021), <https://theintercept.com/2021/12/15/drone-strikes-joe-biden-pentagon-kabul/>. It is unclear whether President Biden considers Somalia an active battlefield. In March 2017, the Trump administration declared parts of Somalia “areas of active hostilities,” where warzone targeting rules would apply for at least 180 days. Somalia: Inadequate US Airstrike Investigations, HUMAN RIGHTS WATCH (Jun 16, 2020), <https://www.hrw.org/news/2020/06/16/somalia-inadequate-us-airstrike-investigations>. In its 2019 annual report on civilian casualties, the US Defense Department defined Somalia as “a declared theater of active armed conflict.” *Id.* President Biden has made no such claims.

<sup>228</sup> Schmitt & Dahir, *supra* note 29.

<sup>229</sup> USSOM345 – February 22, 2022, <https://airwars.org/civilian-casualties/ussom345-february-22-2022/> (last visited Apr 6, 2022); Eric Schmitt, *U.S. Carries Out First Airstrike in Somalia Since August*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/us/politics/somalia-shabab-us-airstrike.html>.

<sup>230</sup> Savage & Schmitt, *supra* note 224; Zachary Cohen et al., *CIA remains in limbo on rules governing drone strikes in Afghanistan after Biden’s troop withdrawal* (July 5, 2021), <https://www.cnn.com/2021/07/05/politics/cia-drone-strike-afghanistan-suspected-terrorists/index.html>.

<sup>231</sup> *Id.*

<sup>232</sup> Scahill, *supra* note 227; Savage, *supra* note 221; Savage & Schmitt, *supra* note 224 (adding that the Biden administration sought an extension of the review, which was originally supposed to last two months); Catie Edmondson, *Calling Civilian Casualties a ‘Failure,’ Democrats Urge Biden to Do Better*, CONGRESSMAN RO KHANNA (Jan. 20, 2022), <https://khanna.house.gov/media/in-the-news/calling-civilian-casualties-failure-democrats-urge-biden-do-better> (explaining the program still seems to be in review); Cohen, *supra* note 230 (explaining the administration is debating whether to change CIA and DoD authority to conduct strikes in Afghanistan: “One option under review is to place new criteria

remain. Nonetheless, beyond the Trump policies, the Biden administration appears to follow additional secret, temporary guidelines governing targeting decisions and airborne strikes. While the actual provisions remain classified, these statements can help illuminate at least some of the intended limits for airborne strikes.

Overall, domestic law offers little guidance on airborne strikes, but the text of the AUMF seems to restrict their use to individuals and groups responsible for 9/11. While the Covert Action Statute may provide greater discretion for CIA-conducted airborne strikes, the text prohibits traditional military activities from being considered covert actions. Despite these limits, presidential policy has further expanded executive authority for airborne strikes.

## B. INTERNATIONAL LAW GOVERNING COMBATANT STATUS AND TARGETING

International law governs the decision of a state to use force (*jus ad bellum*) and its subsequent actions in that conflict (*jus in bello*). When the U.S. conducts an airborne strike in another state, it must have lawfully initiated or entered the conflict, and the strike itself must comply with international law.<sup>233</sup>

### *i. Jus ad Bellum*

Absent a claim of self-defense, if a state can show it was invited to participate in the conflict, its decision to use force would not violate the UN Charter and other *jus ad bellum* considerations.

Employing airborne strikes is a decision to use force that is governed by *jus ad bellum* rules.<sup>234</sup> When a government lethally targets an individual in another state, the

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on who the CIA can target — membership in a terrorist group like al Qaeda or ISIS would not necessarily be automatic grounds for a strike under the new policy, sources said.”).

<sup>233</sup> The U.S. is only bound to international law it ratifies. Within the U.S., ratified treaties are either self-executing (that is, the provisions of the treaty instantly go into effect) and non-self-executing treaties, which require an act of Congress to codify into law. *Medellín v. Texas*, 552 U.S. 491, 511–12 (2008) (“In sum, while treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”) The U.S. does not consider the Geneva Conventions self-executing, and the U.S. generally interprets its obligations under international law as unenforceable or already consistent with U.S. law. *See generally* Aya Gruber, *Who’s Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017 (2007); Deborah Pearlstein, *Contra CIA, Non-Self-Executing Treaties Are Still the Supreme Law of the Land*, OPINIO JURIS (Oct. 28, 2015), <http://opiniojuris.org/2015/10/28/contra-cia-non-self-executing-treaties-are-still-the-supreme-law-of-the-land/>. For further discussion of treaties and their effects, see Stephen P. Mulligan, *International Law and Agreements*, CONGRESSIONAL RESEARCH SERVICE (Sept. 19, 2018). The U.S. refusal to consider treaties it ratifies as enforceable further indicates U.S. contempt for international legal obligations.

<sup>234</sup> U.N. Charter art. 51; Sanders, *supra* note 27, at 14.

foremost question is whether that action violates that state's sovereignty as protected by the UN Charter.<sup>235</sup> If a state government invites another state to participate in an existing conflict, the intervening state's decision to use force complies with international law.<sup>236</sup> When a state government is fighting a nonstate actor, such as al-Shabaab, it is generally accepted that only the state government, not the nonstate actor, can lawfully invite another state party.<sup>237</sup> Here, Somalia has invited U.S. assistance to combat al-Shabaab,<sup>238</sup> so the U.S. has entered the conflict

However, Article 51 of the UN Charter preserves a state's right to use force in self-defense, which then must be immediately reported to the Security Council.<sup>239</sup> Any action taken in self-defense must be necessary and proportional, never retributive.<sup>240</sup> A state cannot just invoke self-defense as a pretext in order to use force in another state, it must be a credible claim of actual threat to that state.<sup>241</sup> Because Somalia invited U.S. intervention, the U.S. does not need a claim of self-defense for its engagement in the conflict to comply with international law.

## *ii. Jus in Bello*

When the U.S. deploys airborne strikes to kill members of al-Shabaab, the primary legal question is whether the person targeted is a lawful target. The law governing individual lethal targeting is highly context-dependent, with different restrictions determined by the nature of the conflict, and unsettled in certain key respects. The Hague Conventions and the Additional Protocols to the Geneva Conventions govern the conduct of hostilities, which includes targeting,<sup>242</sup> and the

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<sup>235</sup> U.N. Charter art. 2.4. According to Article 2, all UN members must refrain from uses of force that violate the "territorial integrity or political independence of any state." The ICJ has held that using force within a state is the same as using it against that state. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 169 (Interim Protection Order of May 10), reprinted in 23 INT'L LEGAL MAT. 468 (1984).

<sup>236</sup> See *Nicar. v. U.S.*, para. 246.; *Democratic Republic of the Congo v. Uganda*, para. 128.

<sup>237</sup> Laura Visser, *Intervention by invitation and collective self-defence: two sides of the same coin?*, 7 J. USE OF FORCE INT'L L. 292, 298 (2020).

<sup>238</sup> See *Al Qaeda Branch in Somalia Threatens Americans in East Africa*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/world/africa/al-qaeda-somalia-shabab.html>; Guyer, *supra* note 172.

<sup>239</sup> U.N. Charter art. 51.

<sup>240</sup> See Self-defence, ICRC, <https://casebook.icrc.org/glossary/self-defence> (last visited Apr 6, 2022); *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, para. 147.

<sup>241</sup> *Nicar. v. U.S.* (holding that the U.S.'s claim of collective self-defense was invalid, suggesting the state must face an armed attack to invoke self-defense). Self-defense against a nonstate armed group was not even acknowledged as valid until 9/11. Christof Heyns, *Extrajudicial, Summary or Arbitrary Executions*, UN GENERAL ASSEMBLY (Sept. 13, 2013).

<sup>242</sup> International Law on the Conduct of Hostilities, ICRC, <https://www.icrc.org/en/doc/war-and-law/conduct-hostilities/overview-conduct-of-hostilities.htm> (last visited Dec 15, 2021).

Geneva Conventions and certain human rights conventions afford protections to those participating in hostilities. In this section, I first describe the differences in targeting restrictions during international armed conflicts and non-international armed conflicts.

International humanitarian law (IHL) governs targeting decisions international and non-international armed conflicts. IHL consists of binding treaties, including the Geneva Conventions and Hague Conventions, as well as customary international law.<sup>243</sup> IHL applies to the entire territory under control of a party in a conflict, regardless of whether combat occurs.<sup>244</sup> Thus, IHL constrains targeting decisions both on and off of the battlefield. The status of international human rights law during armed conflict is disputed,<sup>245</sup> but certain human rights, including the right against the arbitrary deprivation of life,<sup>246</sup> always apply in armed conflicts.<sup>247</sup> It is further disputed whether a targeted killing that complies with IHL satisfies international human rights law or if international human rights law includes additional legal requirements.<sup>248</sup> The UN has suggested that, at minimum, if a targeting decision is inconsistent with IHL, it certainly violates international human rights law.<sup>249</sup>

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<sup>243</sup> Customary international law is general practice accepted as law. *Customary Law*, ICRC, <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>.

<sup>244</sup> *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para. 68. (“Although the Geneva Conventions are silent as to the geographical scope of international “armed conflicts,” the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities.”).

<sup>245</sup> See, e.g., Andrew Clapham, *Human Rights in Armed Conflict: Metaphors, Maxims, and the Move to Interoperability*, 12 HR&ILD 9 (2018); Yuval Shany, *Co-Application and Harmonization of IHL and IHRL: Are Rumors About the Death of Lex Specialis Premature*, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 20-22 (July 2020); Francoise Hampson, *The relationship between international humanitarian law and international human rights law*, in S. SHEERAN AND N. RODLEY (eds.), ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 212 (2013); Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INT’L L. STUD. 61 (2015).

<sup>246</sup> The Universal Declaration of Human Rights protects the right to life. UNIV. DEC. OF HUMAN RIGHTS art. 3. Similarly, the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of human life. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978) art. 6.

<sup>247</sup> General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life; Heyns, *supra* note 241.

<sup>248</sup> See Shany, *supra* note 245, at 8, 20–21; Clapham, *supra* note 245, at 22; Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INTERNATIONAL REVIEW OF THE RED CROSS, 601, 606 (2008).

<sup>249</sup> See Human Rights Committee continues to discuss draft general comment on the right to life, OHCHR (July 19, 2017), <https://www.ohchr.org/en/press-releases/2017/07/human-rights-committee-continues-discuss-draft-general-comment-right-life-0> (“Uses of lethal force authorized and

Additionally, three fundamental principles of IHL serve as customary international law in all conflicts.<sup>250</sup> Underlying all targeting regulations is the principle of distinction,<sup>251</sup> which requires that parties avoid harming civilians and requires combatants to distinguish themselves from civilian population.<sup>252</sup> Civilians must never be the target of an attack.<sup>253</sup> The principle of proportionality holds that civilian casualties must not be excessive compared to the definite military advantage gained, which prohibits targeting areas with the potential for excessive civilian harm.<sup>254</sup> Finally, the principle of military necessity, that the decision must be necessary to a legitimate military purpose, also constrains targeting decisions.<sup>255</sup> These principles of distinction, proportionality, and necessity give rise to other applicable customary international provisions, including the duty to take precautions to avoid civilian casualties,<sup>256</sup> the duty to verify a target is a proper military objective<sup>257</sup> and an objective that least

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regulated by and complying with international humanitarian law are, in principle, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians...violate article 6 of the [International Covenant on Civil and Political Rights]”). Still, there have been some moves within the UN to consider IHRL as imposing additional burdens on targeting and use of force decisions in armed conflict. *See* Clapham, *supra* note 245, at 14. While I would recommend that position, this Article follows the UN guidance.

<sup>250</sup> Customary international law has disputed domestic legal status. *See generally* Mulligan, *supra* note 233; Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641 (2017).

<sup>251</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [hereinafter *Additional Protocol I*]; *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter *Geneva III*]; Customary IHL - Rule 1, IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rule\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rule_rule1) (last visited Dec 15, 2021); *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, Jan. 26, 2010, U.S.T.S. 539 [hereinafter *Hague Regulations*]; *see also*, St. Petersburg Declaration (Dec. 11, 1868).

<sup>252</sup> Customary IHL - Rule 1, IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rule\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rule_rule1) (last visited Apr. 6, 2022); *Additional Protocol I; Geneva III*.

<sup>253</sup> *Hague Regulations; Additional Protocol I; Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1997, 1125 U.N.T.S. 609.

<sup>254</sup> Proportionality in Attack - Rule 14, IHL Database, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rule\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule_rule14) (last visited May 11, 2022).

<sup>255</sup> *Fundamental principles of IHL*, ICRC, <https://casebook.icrc.org/glossary/fundamental-principles-ihl> (last visited Apr. 6, 2022).

<sup>256</sup> Customary IHL - Rule 15, IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rule\\_rule15](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rule_rule15); Customary IHL - Rule 17, IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rule\\_rule17](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rule_rule17).

<sup>257</sup> Customary IHL - Rule 16, IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rule\\_rule16](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rule_rule16).

endangers civilians,<sup>258</sup> and the prohibition against indiscriminate attacks.<sup>259</sup>

If the situation is an international armed conflict (IAC), combatants may be targeted unless they are hors de combat. Under Hague law, their very status as combatants (as defined by the Geneva Conventions) renders them always targetable.<sup>260</sup> Geneva Convention III, Article 4 identifies clear criteria for someone to be considered a combatant: being commanded by a person responsible for their subordinates, wearing a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws and customs of war.<sup>261</sup> Additional Protocol I expanded combatant recognition through reduced criteria: where armed forces can include any organized armed group, not just a state armed forces, that is party to the conflict so long as they are under a responsible command<sup>262</sup> and allowing combatants to retain their status even if, due to the nature of the conflict, they cannot distinguish themselves.<sup>263</sup>

In a non-international armed conflict (NIAC), only Common Article 3 of the Geneva Conventions and Hague law apply. These conventions do not formally define combatant status, and they seem to require targeting decisions be based not on an individual's status but on their activities. Because NIACs were imagined as internal violence against one's own state, efforts to codify law for NIAC avoided granting combatant status to those nonstate actors.<sup>264</sup> Combatants are lawfully permitted to directly participate in hostilities,<sup>265</sup> and no one has the right to attack one's own state. Thus, everyone in a NIAC is a civilian, but civilians who directly participate in hostilities lose their protections, and a state may lethally target them.<sup>266</sup> A civilian is

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<sup>258</sup> Customary IHL – Rule 21, IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule21](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule21). “When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives.” *Id.*

<sup>259</sup> Customary IHL – Rule 11, IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule11](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule11).

<sup>260</sup> *Hague Regulations, Additional Protocol I, art. 48.*

<sup>261</sup> *Geneva III.*

<sup>262</sup> *See Additional Protocol I, art. 43.*

<sup>263</sup> So long as they carry arms openly preceding and during military engagement. *See Additional Protocol I, art. 44.*

<sup>264</sup> Emanuela-Chiara Gillard, *Protection of Civilians in the Conduct of Hostilities*, in ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT 157, 158–59 (2016); Sean Aughey and Aurel Sari, *Targeting and Detention in Non-International Armed Conflict*, 91 INT’L L. STUD. 60 (2015).

<sup>265</sup> *See Additional Protocol I, art. 43; see also*, Emily Crawford, *Combatants*, in ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT 123, 123 (2016); Kenneth W. Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21st Century*, 1 IDF L. R. 69, 71 (2003).

<sup>266</sup> Direct Participation in Hostilities, HOW DOES LAW PROTECT IN WAR?, <https://casebook.icrc.org/glossary/direct-participation-hostilities> (last visited Dec 14, 2021). The ICRC recommends determining direct participation in hostilities as engaging in an action that crosses a threshold of harm to an opposing force or protected group, where the action directly causes the

only targetable for the time that they directly participate in hostilities, which may include preparations for an attack, but once they cease participating, they regain the protections of a civilian.<sup>267</sup> Thus, in NIACs, IHL does not classify certain individuals as inherently targetable because of their status; the law instead seems to require an individual take specific hostile action before being subject to lethal force.

However, some have argued that an implicit combatant status exists in a NIAC, suggested in the provisions of Common Article 3, as well as in Additional Protocol II, which governs NIACs where the nonstate party exercises territorial control and operates under a responsible command.<sup>268</sup> Without recognition of a combatant status, there is a risk of a revolving door for civilians, who may participate in hostilities then return to pure civilian status where they are no longer targetable, but do so repeatedly over the course of the conflict.<sup>269</sup> Some have argued that a person who repeatedly directly participates in hostilities as their role in a nonstate armed group should be considered a combatant.<sup>270</sup> They would therefore always be targetable, even when they are not directly participating in hostilities, until they unambiguously opt out of the conflict.<sup>271</sup>

The ICRC endorses a “continuous combat function” approach to classifying certain members of nonstate parties as always targetable,<sup>272</sup> though it offers limitations

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harm, and where the harm directly supports one party to the detriment of the other, or the belligerent nexus. A civilian who directly participates in hostilities in an IAC could be targeted as well. *Id.*

<sup>267</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC, <https://casebook.icrc.org/case-study/icrc-interpretive-guidance-notion-direct-participation-hostilities> (last visited Apr 6, 2022).

<sup>268</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 [hereinafter *Additional Protocol II*]. The U.S. has not ratified Additional Protocol II.

<sup>269</sup> See Watkin, *supra* note 265, at 85; Michelle Lesh, *Direction Participation in Hostilities*, in ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT 181, 188 (2016); Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT’L L. 683, 739 (2009).

<sup>270</sup> Robert Donaldson, *The Lawfulness of US Drone Strikes in Pakistan: An International Perspective*, AIR UNIV. (June 2012).

<sup>271</sup> See Sassöli & Olson, *supra* note 248, at 607; Elizabeth Salmon, *Who Is a Protected Civilian?*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1150 (2015); Dapo Akande, *Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direction Participation in Hostilities*, 59 INT’L & COMP. L. QUARTERLY 180, 183 (2010); Jann K. Kleffner, *From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities: On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, NETHERLANDS INT’L L. REV. 315–336 (2007); Michael N. Schmitt, *Targeting and Humanitarian Law: Current Issues*, 80 INT’L L. STUD. 151, 164 (2006).

<sup>272</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267. The ICRC uses the term “member of an organized armed group” to describe who may be targeted, but it distinguishes between the non-State party to the conflict and its armed forces, requiring that any members targeted must be part of the military wing. It further defines these members as having a continuous combat function. Under the ICRC, the U.S. could only target members of Amniyat, not al-Shabaab, but to avoid confusion, this Article presents the ICRC approach as requiring a person be a “fighter,”



to how and when an individual might be considered to have this function.<sup>273</sup> Membership in the nonstate group is insufficient—the individual’s role must be to continuously directly participate in hostilities—and membership must be determined by the actual function of the individual, not “abstract affiliation, family ties, or other criteria prone to error, arbitrariness, or abuse.”<sup>274</sup> Israel has taken a more permissive approach than the ICRC, contending that membership in a terrorist group is sufficient for an individual to lose civilian status,<sup>275</sup> as has the U.S.,<sup>276</sup> and the ICRC guidance has not reached customary international law status.<sup>277</sup> Whether to classify individuals in a NIAC as quasi-combatants remains a highly contentious issue,<sup>278</sup> and the lawfulness of making these determinations is disputed. In a NIAC context, I am highly skeptical of allowing states to use a status-based determination for targeting without explicit legal authority, for reasons discussed in Section D below. However, accepting the ICRC guidance as instructive does not change the core arguments of this Article.

### C. THE U.S. INSISTS ITS STRIKES ARE LAWFUL

Each administration has repeatedly claimed it abides by all applicable domestic and international law when choosing to use force as a counterterrorism strategy and specifically when conducting airborne strikes.<sup>279</sup>

In terms of domestic law, the U.S. first maintains that the AUMF authorizes all “necessary and appropriate” uses of force.<sup>280</sup> These interpretations are temporally and geographically expansive. John Brennan, former Assistant to the President for Homeland Security and Counterterrorism, asserted that nothing in the AUMF

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distinguishing from the U.S. approach of targeting all members of al-Shabaab. The fighter-member distinction is used for rhetorical simplicity. *See also* Customary IHL – Rule 3, IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule3](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule3) (while the ICRC endorses the continuous combat function interpretation, it acknowledges that practice remains unclear as to the combatant status of members of armed opposition groups).

<sup>273</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267.

<sup>274</sup> *Id.*

<sup>275</sup> *See* Sterio, *supra* note 197, at 207.

<sup>276</sup> *See id.*; PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

<sup>277</sup> *See* Customary IHL – Rule 3, *supra* note 271.

<sup>278</sup> *See* Amit Anand & Preethi Lolaksha Nagaveni, *Covert Drone Strikes and the Rules on Targeting: Obama’s Troubling Legacy*, KING’S L. REV. & STRIFE J. 67, 78 (2018); Larry May, *Targeted Killings and Proportionality in Law*, 11 J. INT’L CRIM. JUST. 47 (2013).

<sup>279</sup> Koh, *supra* note 27 (declaring the U.S. is “firmly committed to complying with applicable law”); Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism Woodrow Wilson International Center for Scholars, Washington, D.C. April 30, 2012 (explaining that the U.S. “will use everything lawful at our disposal”); Remarks of Brian J. Egan, Legal Adviser, U.S. Department of State Annual Meeting of the American Society of International Law, Washington, D.C. April 1, 2016 (assuring the airborne strike program complies with all international law).

<sup>280</sup> Koh, *supra* note 27; PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

restricted the use of force to al-Qaeda or to “hot battlefields” in Afghanistan.<sup>281</sup> According to the Justice Department, any use of force is considered part of the “non-international armed conflict” covered by the AUMF regardless of whether it occurs outside a zone of active hostilities.<sup>282</sup> Furthermore, administrations have asserted that the Constitution confers a duty on the President to protect the nation from threats such as terrorism.<sup>283</sup>

U.S. legal advisers and government officials have also affirmed that the decision to use force at all complies with international law.<sup>284</sup> Insisting the U.S. is in an armed conflict with al-Qaeda and associated forces,<sup>285</sup> administrations have asserted the “inherent” right to self-defense under international law.<sup>286</sup> Moreover, they have claimed the right to self-defense against imminent attacks<sup>287</sup> and alleged that its interpretation of imminence complies with international law.<sup>288</sup> Leon Panetta, former Secretary of Defense, has gone even further to say that the U.S. can legitimately prevent future attacks as self-defense.<sup>289</sup> U.S. legal advisers have also purported to have the right under international law to use force in self-defense when the country involved is “unwilling and unable” to take action against the threat.<sup>290</sup> Because the U.S. has broadly construed its self-defense mission as against al-Qaeda and associated forces worldwide, it insists it does not need to analyze individual decisions to use force in

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<sup>281</sup> Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism Harvard Law School, Cambridge, Massachusetts September 16, 2011

<sup>282</sup> U.S. Department of Justice, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force,” White Paper, Draft, November 8, 2011 <http://fas.org/irp/eprint/doj-lethal.pdf> [hereinafter “Justice Dep’t White Paper”] (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–31 (2006)); Brennan, *supra* note 281.

<sup>283</sup> Justice Dep’t White Paper, *supra* note 282; PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

<sup>284</sup> PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

<sup>285</sup> Stephen Preston, “The Legal Framework for the United States’ Use of Military Force Since 9/11,” speech before the Annual Meeting of the American Society of International Law, Washington, D.C., April 10, 2015, <http://www.defense.gov/News/Speeches/Speech-View/Article/606662>; Koh, *supra* note 149; Justice Dep’t White Paper, *supra* note 282 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–31 (2006)); Brennan, *supra* note 279; Brennan, *supra* note 281.

<sup>286</sup> Justice Dep’t White Paper, *supra* note 282; Koh, *supra* note 27; Brennan, *supra* note 279.

<sup>287</sup> Attorney General Eric Holder, speech at Northwestern University School of Law, March 5, 2012, <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>; Justice Dep’t White Paper, *supra* note 282.

<sup>288</sup> Koh, *supra* note 27; Brennan, *supra* note 281.

<sup>289</sup> Matthias Maass, *No End in Sight? US Policy on Targeted Killing by Aerial Drone Strikes: a Legal-Political Assessment*, 15 INT. STUD. L. REV. 61, 67 (2014).

<sup>290</sup> Brennan, *supra* note 281; Egan, *supra* note 279; Holder, *supra* note 287; DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, 80, 957 (2016), <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>.

specific countries under the Article 51 self-defense requirements.<sup>291</sup> Brian Egan, former legal adviser to the State Department, interpreted the right to self-defense to include imminent attacks, but that even absent specific evidence of an imminent attack, the U.S. could still lawfully conclude a threat is imminent and exercise self-defense.<sup>292</sup> According to Harold Koh and Panetta this right to self-defense only ends when al-Qaeda gives up its intention to harm the U.S.<sup>293</sup>

The U.S. also maintains that individual targeting decisions accord with domestic and international law.<sup>294</sup> Officials have also interpreted the AUMF to authorize targeting of individuals in associated forces of al-Qaeda and the Taliban, such as al-Shabaab,<sup>295</sup> and the AUMF has been named as the authority for specific airborne strikes.<sup>296</sup> John Brennan asserted that nothing in international law bans the use of lethal force against U.S. “enemies” outside hot battlefields.<sup>297</sup> The Obama administration particularly insisted that individual strikes do not violate the domestic ban on assassination.<sup>298</sup> Eric Holder confirmed that it is “entirely lawful” to target specific leaders of terrorist organizations under both U.S. law and IHL.<sup>299</sup> Even when the target is a U.S. citizen, the Obama administration asserted that a lethal strike, without judicial process, would not violate due process protections.<sup>300</sup> According to

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<sup>291</sup> Brennan, *supra* note 281 (“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.”).

<sup>292</sup> Egan, *supra* note 279.

<sup>293</sup> Koh, *supra* note 27; Maass, *supra* note 289, at 67.

<sup>294</sup> Koh, *supra* note 27 (“U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war”); PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

<sup>295</sup> Preston, *supra* note 285.

<sup>296</sup> See, e.g., U.S. Africa Command Conducts Strike Against al-Shabaab, AFRICOM (Aug. 24, 2021), <https://www.africom.mil/pressrelease/33977/us-africa-command-conducts-strike-against-al-shabaab> (U.S. forces are authorized to conduct strikes in support of combatant commander-designated partner forces under the 2001 Authorization of Use for Military Force).

<sup>297</sup> Brennan, *supra* note 279 (“There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield.”)

<sup>298</sup> Koh, *supra* 27; see also *Remarks by the President at the National Defense University* (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (while not directly mentioning assassination, President Obama insisted that the U.S. government may lawfully kill U.S. citizens abroad via airborne strike if they are “potential terrorist targets”).

<sup>299</sup> Holder, *supra* note 287.

<sup>300</sup> *Id.* (arguing due process and judicial process not the same); MEMORANDUM FOR THE ATTORNEY GENERAL RE: APPLICABILITY OF FEDERAL CRIMINAL LAWS AND THE CONSTITUTION TO CONTEMPLATED LETHAL OPERATIONS AGAINST SHAYKH ANWAR AL-AULAQI (July 16, 2010) (“For these reasons, and on these understandings, we do not believe the Constitution prohibits the proposed lethal action, does not violate the assassination ban in Executive Order 12333”); LETTER

Holder, all targeting decisions comport with the guiding IHL principles: that combatants and civilians who directly participate in hostilities may be targeted intentionally under the principle of distinction, that anticipated collateral damage must not be excessive relative to the military advantage under proportionality, and that drone strikes should not cause unnecessary suffering.<sup>301</sup> Even in cases where it appears that civilian casualties were excessive or the targets were not lawful, like the August 29, 2021 strike that killed ten civilians in Afghanistan during the U.S. military withdrawal, the military has concluded that it did not violate the laws of war.<sup>302</sup>

D. U.S. AIRBORNE STRIKES AGAINST MEMBERS OF AL-SHABAAB ARE UNLAWFUL UNDER DOMESTIC AND INTERNATIONAL LAW.

Even under interpretations generous to the U.S. government, U.S. policy to use airborne strikes against members of al-Shabaab violate both domestic law and international law.

*i. U.S. airborne strikes against al-Shabaab likely violate domestic law.*

The U.S. government cannot claim airborne strikes against al-Shabaab are covered by the AUMF, without which, they become unlawful unless through a dubious exception for strikes conducted by the CIA. The U.S. exceeds such already expansive executive authority, both through unreasonable interpretations and direct violate, which reiterates the difficulty in using domestic law as any sort of restraint.

Even following a generous interpretation of the AUMF, in light of U.S. administrations' very broad interpretations of its authority, the use of force against al-Shabaab in Somalia constitutes an impermissible extension of the Act. The AUMF requires that the President find that a nation, organization, or person was involved with the 9/11 attacks before the U.S. can use force against them. Furthermore, the AUMF only allows the President to take action "in order to prevent any future acts of international terrorism against the U.S. *by such nations, organizations, or persons.*"<sup>303</sup> The AUMF does not authorize preventive measures against any possible threat of a terrorist attack; it solely authorizes force to prevent attacks from nations,

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FROM ATTORNEY GENERAL ERIC HOLDER TO HON. PATRICK J. LEAHY (May 22, 2013), <https://www.justice.gov/slideshow/AG-letter-5-22-13.pdf> (saying the execution al-Awlaki comported with the law).

<sup>301</sup> Holder, *supra* note 287; Brennan, *supra* note 281 (affirming the efficacy of strikes against al-Qaeda and the Taliban).

<sup>302</sup> Deadly US drone strike in Kabul did not break law, Pentagon says, BBC NEWS (November 3, 2021), <https://www.bbc.com/news/world-us-canada-59157089> (quoting the U.S. Air Force Inspector Lieutenant General Sami Said declaring there was no violation of a law of war in a strike that killed ten Afghan civilians).

<sup>303</sup> Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added).

organizations, or persons involved in 9/11. Al-Shabaab had no known role in “plan[ing], authoriz[ing], commit[ing], or aid[ing]” the 9/11 attacks, nor did it harbor anyone involved.<sup>304</sup> Thus, al-Shabaab would not fall under the text of the AUMF,<sup>305</sup> and any use of force against al-Shabaab cannot be justified under the AUMF.

The AUMF does allow the President to determine who was involved in 9/11, and administrations have interpreted this provision broadly. Yet al-Shabaab still cannot fall under these interpretations. Following the Obama administration’s interpretation, the AUMF only applies to terrorist organizations that pose a direct threat to the U.S.,<sup>306</sup> and AFRICOM admitted, al-Shabaab poses no threat of attack.<sup>307</sup> Administrations have also made conflicting claims about the extent to which al-Shabaab is linked to al-Qaeda. In 2016, Obama administration interpreted the AUMF to cover al-Shabaab, and it did not provide a reason why the organization could suddenly be considered responsible for the 9/11 attacks.<sup>308</sup> The Trump administration and the Biden administration understand al-Shabaab as an affiliate of al-Qaeda.<sup>309</sup> As described in Section A, understanding the AUMF as authorizing force against “associated forces” of al-Shabaab also stemmed from repeated presidential interpretations.<sup>310</sup> Al-Shabaab did not become an affiliate of al-Qaeda until over a decade after the attacks,<sup>311</sup> and it operates under a leadership structure largely distinct from al-Qaeda.<sup>312</sup> Al-Shabaab remains a primarily local organization without having ever conducted an attack on the U.S. and was hardly formed at the time of 9/11.<sup>313</sup> While it may be an associated force of al-Qaeda, the AUMF itself only authorizes action against organizations involved in the planning of the 9/11 attacks, and it seems like a gross mischaracterization of the text to include al-Qaeda’s geographically

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<sup>304</sup> See 9/11 COMMISSION REPORT, *supra* note 127.

<sup>305</sup> Andrew Desiderio & Lara Seligman, ‘A very dangerous precedent’: Democrats take aim at Biden’s Somalia airstrikes, POLITICO (July 27, 2021), <https://www.politico.com/news/2021/07/27/democrats-biden-somalia-airstrike-500916> (a concern shared by Democrat members of Congress); see also Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT’L L. 67, 83 (2017).

<sup>306</sup> See Johnson, *supra* note 200.

<sup>307</sup> Venhuizen, *supra* note 30 (“Al-Shabaab is unable to attack the U.S. homeland today.”) (quoting Air Force Col. Chris Karns).

<sup>308</sup> Savage et al, *supra* note 201. (“The executive branch’s stretching of the 2001 war authorization against the original Al Qaeda to cover other Islamist groups in countries far from Afghanistan — even ones, like the Shabab, that did not exist at the time — has prompted recurring objections from some legal and foreign policy experts.”) The move marks a shift from classifying only specific al-Shabaab leaders as sufficiently connected to al-Qaeda to be legal targets, instead deeming the entire organization targetable. *Id.* Some have suggested the change was to remove the “self-defense” requirement of U.S. troops being under attack to authorize airborne strikes, increasing the ability of the administration to conduct strikes without exempting Somalia from the 2013 PPG. *Id.*

<sup>309</sup> See COUNTRY REPORTS ON TERRORISM 2020, BUREAU OF COUNTERTERRORISM.

<sup>310</sup> See *supra* note 198.

<sup>311</sup> MARUF & JOSEPH, *supra* note 98, at 191; HANSEN, *supra* note 136, at 9.

<sup>312</sup> See SHAY, *supra* note 100 (describing in detail the affiliations of each founding member).

<sup>313</sup> See *supra* note 174.

distinct, future affiliates. Such presidential determinations are contrary to the reality of al-Shabaab and seem rooted in problematic oversimplifications about the unity of Islamic organizations, so they cannot form the basis of a legitimate interpretation of the AUMF.<sup>314</sup> Lastly, given the secrecy surrounding targeting decisions, it is impossible to assess whether targets had any link to those responsible for the 9/11 attacks.<sup>315</sup> As there is no public connection between al-Shabaab and 9/11, and based on the descriptions of airborne strikes analyzed in Part II, such connection is highly unlikely.

If the AUMF cannot authorize airborne strikes the DoD conducts against al-Shabaab, such strikes, violate the Constitution and the War Powers Resolution.<sup>316</sup> Under Article 1 Section 8 of the Constitution, Congress has the sole power to declare war.<sup>317</sup> However, the War Powers Resolution permits the President to enter hostilities if there is a declaration of war, a specific statutory authorization, or a national emergency created by attack upon the U.S.<sup>318</sup> Congress has not authorized the use of force in Somalia, and as al-Shabaab has not created any national emergency within the U.S., without the AUMF. Because it has so far only been authorized by presidential administrations, the present use of force in Somalia is unlawful without the AUMF.

The Covert Action Statute also cannot be reasonably read to include airborne strikes, given its prohibition on traditional military activities. Legal scholars are divided,<sup>319</sup> but killing an individual in a NIAC, as in the case of Somalia, seems like a plainly traditional military activity.<sup>320</sup> Congress seems to suggest an activity is only military if it is conducted and lead by the DoD, hinging the definition of “traditional military activity” on the actors involved.<sup>321</sup> Under that interpretation, an activity otherwise not permitted as a covert action becomes permissible if the leadership switches from the DoD to CIA, allowing situations where the CIA leads a fully DoD team.<sup>322</sup> To define an activity as military based on who participates, not the activity itself, seems to defy common sense.<sup>323</sup> Particularly where the DoD is involved, an

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<sup>314</sup> Though the U.S. has acted like every Islamic organization and Muslim must bear the consequences for 9/11, such Islamophobic generalizations must not be accepted as permissible interpretations of the law.

<sup>315</sup> Sterio, *supra* note 197, at 38.

<sup>316</sup> War Powers Resolution 50 U.S.C. § 1544(b).

<sup>317</sup> U.S. Const. art. 1 § 8.

<sup>318</sup> *Id.*

<sup>319</sup> See, e.g., Robert Chesney, More on CIA Drone Strikes, Covert Action, TMA, and the Fifth Function, *LAWFARE* (Sept. 7, 2014), <https://www.lawfareblog.com/more-cia-drone-strikes-covert-action-tma-and-fifth-function>; EXCEPTION(S) TO THE RULE(S), *supra* note 207; Heller, *supra* note 203.

<sup>320</sup> See Heller, *supra* note 203; Chesney, *supra* note 202, at 616.

<sup>321</sup> CONFERENCE REPORT, *supra* note 208, at 21.

<sup>322</sup> See Wall, *supra* note 203, at 132–33 (describing the raid on Osama bin Laden’s residence as one such instance).

<sup>323</sup> It seems unnecessary to ban the CIA and other agencies from conducting traditional military activities if it can only be a traditional military activity when fully conducted by the military. Some

airborne strike seems like certainly a military activity that cannot be covered by the Covert Action Statute.<sup>324</sup> However, even if Congress's interpretation can be taken as instructive, which would allow the President to approve strikes conducted by led by the CIA, such strikes are the minority in Somalia<sup>325</sup> and violate international law.<sup>326</sup>

Evidently, the executive branch has had considerable power in shaping the U.S. government's interpretation of international and domestic law governing the use of force. For example, a Justice Department white paper cites to legal adviser statements, such as John Brennan's 2012 speech, to explain its position on executive authority.<sup>327</sup> Without pointing to any other authority to support its claims of legality, and despite legitimate interpretations to the contrary, the executive branches of each administration say their actions are lawful because other officials in the executive branch agree.<sup>328</sup> The judicial branch has been largely unable to review these legal interpretations,<sup>329</sup> and executive branch lawyers are, for the most part, not required to present their best understanding of the law, just whether something could be "legally available."<sup>330</sup> By asserting new legal rights through its own interpretations,<sup>331</sup> U.S. administrations have authorized a use of force far beyond the text of the AUMF and contrary to international law, as I show below.

*ii. U.S. airborne strikes against al-Shabaab violate international law*

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have read this seemingly illogical provision to mean that the Covert Action Statute just ensures that the military will not be subject to lower reporting thresholds. *See* Chesney, *supra* note 319. Others, myself included, are not convinced. *See* Heller, *supra* note 203.

<sup>324</sup> *See generally* Berger, *supra* note 208.

<sup>325</sup> *See infra* Part II(B).

<sup>326</sup> *See infra* Part I(D) and II(C). CIA General Counsel Caroline Krass asserted the ability to violate international law with such covert strikes. *See* Maj. Peter C. Combe, *The Covert Action Statute: The CIA's Blank Check?*, 9 J. NAT'L SEC. L. & POL'Y 29, 31 (2017).

<sup>327</sup> Justice Dep't White Paper, *supra* note 282.

<sup>328</sup> Jameel Jaffer, *How the US justifies drone strikes: targeted killing, secrecy and the law*, THE GUARDIAN (November 15, 2016), <https://www.theguardian.com/us-news/2016/nov/15/targeted-killing-secrecy-drone-memos-excerpt> ("The Obama administration officials insisted that drone strikes were lawful, but the "law" they invoked was their own. It was written by executive branch lawyers behind closed doors, withheld from the public and even from Congress, and shielded from judicial review.").

<sup>329</sup> Sterio, *supra* note 197, at 47–48; Pomper, *supra* note 198; Conor Friedersdorf, *America's Shadow Death Row*, THE ATLANTIC (Jan. 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/americas-shadow-death-row/617757/>.

<sup>330</sup> Pomper, *supra* note 198. Notably, what the U.S. government once purported was lawful in counterterrorism has been found to violate IHL and the Constitution. *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that Guantánamo detainees had the right to habeas corpus, which they had previously been denied); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that the Geneva Conventions applied to Guantánamo detainees, contrary to the Bush administration's claims); Boumediene v. Bush, 553 U.S. 723 (2008) (holding that restricting the jurisdiction of habeas cases for Guantánamo detainees was unconstitutional).

<sup>331</sup> A practice Lisa Hajjar rightfully calls state lawfare. *See* Hajjar, *supra* note 34, at 69.

Though the U.S. has not violated *jus ad bellum* by its participation in the conflict in Somalia, in terms of *jus in bello*, U.S. policy governing airborne strikes against al-Shabaab employs unlawful targeting practices under IHL for four reasons.

The U.S.'s use of force against al-Shabaab in Somalia is, under international law, legal from a *jus ad bellum* perspective. While the U.S.'s claims about a right to intervene if a state is "unwilling or unable,"<sup>332</sup> its right to self-defense against imminent or future attacks,<sup>333</sup> and even its right to deter future attacks<sup>334</sup> are contrary to international legal norms, the U.S. is lawfully engaged in a distinct non-international armed conflict in Somalia. The Somali government is in an armed conflict with al-Shabaab, given the frequency of serious attacks from both sides, and the Somali government has invited U.S. military and financial support.<sup>335</sup> Accordingly, the conflict

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<sup>332</sup> See DAVID CORTRIGHT ET AL., *DRONES AND THE FUTURE OF ARMED CONFLICT: ETHICAL, LEGAL, AND STRATEGIC IMPLICATIONS* (2015) ("The suggestion is made that states have the right to attack a state "unwilling or unable" to respond to the problem of terrorism on its territory. The proposal was originally developed at Chatham House, a UK international affairs think tank. The "unable or unwilling" claim is not based on any treaty, rule of customary international law, or general principle of law"); Heyns, *supra* note 241.

<sup>333</sup> The U.S. frequently claims that its use of airborne strikes against members of terrorist organizations are lawful actions taken in self-defense, including those taken in "anticipatory" self-defense. Pietrack, *supra* note 2; Koh, *supra* note 27; Brennan, *supra* note 279. The move to interpret Article 51 as authorizing self-defense against nonstate groups is disputed. See FINAL REPORT ON AGGRESSION AND THE USE OF FORCE, INTERNATIONAL LAW ASSOCIATION 14–17 (2018). While the U.S. does have the legal right to take self-defense actions against imminent threats, Article 51 does not authorize anticipatory self-defense, and it is generally accepted to be unlawful. See Self-defence, *supra* note 154; Maass, *supra* note 289, 69. The U.S.'s claim that al-Qaeda poses a "continuing" imminent threat fails to meet international legal standards. *Id.* Even if the attack is imminent, anticipatory self-defense would not be lawful unless the threat is specific. FINAL REPORT ON AGGRESSION, *supra* note 333, at 7, 11, 13–14 (concluding that the attack must be specific and imminent for anticipatory self-defense to be lawful).

<sup>334</sup> See Heyns, *supra* note 241.

<sup>335</sup> See *supra* note 238.



is a NIAC,<sup>336</sup> as it is two states engaged in an armed conflict against a nonstate group,<sup>337</sup> and IHL applies for the conflict's duration.<sup>338</sup> Therefore, in the conflict with Somalia against al-Shabaab, the U.S. can lawfully target individuals who directly participate in hostilities, or if following the ICRC's interpretation, can target individuals who have a continuous combat function anytime.

In terms of *jus in bello*, the U.S. lethally targets members of terrorist organizations for their status as members and claims to do so lawfully.<sup>339</sup> The current airborne strike policy targets members of "terrorist groups" organizations who are "engaged in ongoing hostilities against the U.S. or pose a continuing, imminent threat."<sup>340</sup> The U.S. does not classify members of terrorist organizations as combatants, retaining a distinction between "lawful combatants" and "unprivileged belligerents,"

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<sup>336</sup> The U.S. classifies its conflict with al-Qaeda and associated forces more generally as a NIAC. Brennan, *supra* note 281; Preston, *supra* note 285; HIDDEN U.S. WAR, *supra* note 6, at 22. According to the Geneva Convention definition of a NIAC—"not of an international character"—this classification is acceptable. *Geneva III*, Art. 3. Chris Jenks, *A Matter of Policy: United States Application of the Law of Armed Conflict*, 46 SOUTHWESTERN L. REV. 337, 339 (2017); see also Laurie Blank & Benjamin R. Farley, *Determining When the Armed Conflict With Al-Qaeda Started*, JUST SECURITY (2016), <https://www.justsecurity.org/29898/determining-armed-conflict-al-qaeda-started/>. However, NIACs are commonly understood as internal conflicts between a state and a nonstate actor operating within its borders, a reading supported by the original comments to the Geneva Conventions and the judgments of international criminal tribunals. See Jake William Rylatt, *An Evaluation of the U.S. Policy of "Targeted Killing" under International Law*, 44 CAL. WEST. INT'L L. J. 115, 121–24 (2014). Thus, the U.S. classification of its entire conflict against al-Qaeda as an NIAC has been the subject of much debate and criticism. See, e.g., Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflict*, 89 INT'L L. STUD. 696, 702–04 (2013) (arguing that the conflict does not square neatly into any category); Kevin Jon Heller, *No, the UN Has Not Said the U.S. Is Engaged in an "Armed Conflict" with al-Qaeda*, OPINIO JURIS (May 21, 2021), <http://opiniojuris.org/2011/05/21/no-the-un-has-not-affirmed-that-the-us-is-engaged-in-an-armed-conflict-with-al-qaeda/> (arguing such characterization is plainly wrong); Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities*, 47 COLUM. H.R.L. REV. 204, 205 (2016) (contending it is up for debate). Because the conflict against al-Shabaab in Somalia can be safely considered a NIAC for the above reasons, this Article applies NIAC for those reasons.

<sup>337</sup> Some have acknowledged the peculiar fiction of classifying a conflict that includes multiple state governments as a NIAC when states are on the same side. Especially when the conflict spans across states, there's some movement to begin recognizing a transnational armed conflict, particularly because with the imbalance of multiple states against a nonstate groups. However, this concept is not at all near recognition. See Heyns, *supra* note 241. Despite the international geographic scope, the conflict remains a NIAC because the U.S. and Somalia are fighting together against a nonstate actor. The U.S. also attempted to make this claim in order to deny legal protections to someone suspected of terrorism. See Rebecca Sanders, *Human Rights Abuses at the Limits of Law*, 44 REV. INT'L STUD. 2 (2017).

<sup>338</sup> See *Non-International Armed Conflict (NIAC)*, MÉDECINS SANS FRONTIÈRES, <https://guide-humanitarian-law.org/content/article/3/non-international-armed-conflict-niac/> (last accessed May 12, 2022).

<sup>339</sup> PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

<sup>340</sup> *Id.*

but both are treated the same way in targeting.<sup>341</sup> Instead, the U.S. treats members of nonstate armed groups as continuously directly participating in hostilities, because they “share the group’s hostile intent.”<sup>342</sup> For this reason, the U.S. considers members of nonstate armed groups always targetable.<sup>343</sup> It is unclear whether the U.S. classifies all of al-Shabaab or only Amniyat as the nonstate *armed* group, but its statements suggest that its policy focuses on all members of al-Shabaab, as does the data discussed in Part II. This policy violates IHL for the four reasons set forth below.

*First*, a targeting policy based on group membership violates the principle of distinction. The ICRC explains that to comply with the principle of distinction, only members who have a continuous combat function, like a fighter, can be targeted when they are not directly participating in hostilities.<sup>344</sup> However, the U.S. targeting policy claims all members of a terrorist group may be targeted.<sup>345</sup> The DoD Law of War Manual contends that merely “being a part of a nonstate armed group that is engaged in hostilities against a State is a form of engaging in hostilities that makes private persons<sup>346</sup> liable to treatment in one or more respects as unprivileged belligerents.”<sup>347</sup> That is, contrary to the ICRC position and prevailing international legal norms,<sup>348</sup> the U.S. considers every member of a non-state armed group as engaged in hostilities against the U.S., even if the specific member does not perform a combat function.<sup>349</sup>

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<sup>341</sup> LAW OF WAR MANUAL, *supra* note 290, at 104–05, 210.

<sup>342</sup> *Id.* at 222. The DoD explicitly disavows the strict interpretation of NIAC targeting law, instead adopting an implicit combatant recognition for members of an armed group. *Id.* at 228 (“Some States may choose to characterize persons who belong to hostile, non-State armed groups that do not qualify for status as lawful combatants as “civilians” who may not be attacked unless they are taking a direct part in hostilities. However, these States may also characterize the act of joining and remaining a member of an armed group that is engaged in hostilities as a form of taking a direct part in hostilities that continuously deprives these individuals of their protection from being made the object of attack.”) *Id.*

<sup>343</sup> *Id.* at 222, 228.

<sup>344</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267; see also Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 120 (2010); Michael Bothe, *Direct Participation in Hostilities in a Non-International Armed Conflict*, ICRC (Oct. 26, 2004), <https://www.icrc.org/en/doc/assets/files/other/2004-05-expert-paper-dph-icrc.pdf> (using the term “fighter” to describe who may be always targeted in a NIAC).

<sup>345</sup> See PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

<sup>346</sup> The refusal to even use the word “civilian” is intentional. See LAW OF WAR MANUAL, *supra* note 290, at 158.

<sup>347</sup> LAW OF WAR MANUAL, *supra* note 290, at 158.

<sup>348</sup> See Heyns, *supra* note 241; Anand & Nagaveni, *supra* note 278, at 81; Sterio, *supra* note 197, at 207 (“It should be noted that the Obama Administration has argued that individuals who are part of an armed group are ‘belligerents and, therefore, lawful targets under international law.’ The Obama Administration has seemingly rejected the ICRC approach and adopted a more aggressive tactic in determining which individuals can be targeted.”).

<sup>349</sup> See *al-Odah v. United States*, 611 F.3d 8, 16 (D.C. Cir. 2010) (determining it is significant that “Al Odah traveled to Afghanistan on a series of one-way plane tickets purchased with cash in a manner consistent with travel patterns of those going to Afghanistan to join the Taliban and al Qaeda”);

Because al-Shabaab contains agencies and actors with a variety of functions and has cabined its militant activity to only one agency,<sup>350</sup> not all of its members are fighters.<sup>351</sup> However, the U.S. policy would render all al-Shabaab always targetable. As interpreted by the ICRC,<sup>352</sup> such a targeting policy violates the principle of distinction.

*Second*, contrary to the ICRC guidance, the way the U.S. defines membership in a nonstate armed group is highly discretionary, bias- and error-prone, and overinclusive, which violates the principle of distinction when used to lethally target individuals. The DoD Manual explains that it uses “circumstantial or functional” information to determine membership because it is so difficult to tell whether someone has joined a nonstate armed group.<sup>353</sup> Such evidence includes acting at the direction of the group, traveling upon “specific clandestine roads,” and traveling with other members in “remote locations.”<sup>354</sup> Lethally targeting an individual because of where they traveled, for example, leaves considerable room for discretion and error, and such errors are discussed in Part II. Worse, though a person may not be an official

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Uthman v. Obama, 637 F.3d 400, 406 (D.C. Cir. 2011) (“In two prior cases, this Court has stated that staying at an al Qaeda guesthouse is ‘powerful—indeed ‘overwhelming’—evidence’ that an individual is part of al Qaeda”); Suleiman v. Obama, 670 F.3d 1311, 1314 (D.C. Cir. 2012) (“There is no dispute that Suleiman’s travel was initiated at the suggestion of and facilitated by a Taliban recruiter, and that he traveled a well-worn path to Afghanistan frequently used by Taliban recruits. We have stated that such travel may indicate that an individual traveled to Afghanistan to join the Taliban.”); LAW OF WAR MANUAL, *supra* note 200, at 222 (explaining that traveling with the group or staying at its facilities render someone a member, criteria that would encompass all members, not just fighters). All of these determinations focus on being a member or “part” of the group, rather than being a fighter.

<sup>350</sup> WILLIAMS, *supra* note 111, at 90, 91.

<sup>351</sup> HANSEN, *supra* note 136, at 86–91. WILLIAMS, *supra* note 111, at 105; Akande, *supra* note 271, at 186 (noting the difficulty of identifying the fighting wing of a broad organization, interpreting ICRC guidance as restricting targeting to members of the fighting wing).

<sup>352</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267 (“While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict). Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership. However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction... 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 (hereafter: “continuous combat function”). Continuous combat function does not imply de jure entitlement to combatant privilege. *Rather, it distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.*”) (emphasis added).

<sup>353</sup> LAW OF WAR MANUAL, *supra* note 290, at 158–59; 222–23.

<sup>354</sup> *Id.* at 223.

member, if their support is important to the function of the organization, the DoD considers that individual part of the armed group.<sup>355</sup> This policy directly violates ICRC guidance that “individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL.”<sup>356</sup> Unfortunately, there is no further information about the evidence sought to determine membership, and as the DoD acknowledges, such evidence is often difficult to obtain. Such a policy of using circumstantial evidence to determine membership, and counting non-members as members, certainly violates the ICRC prohibition on using abstract affiliation or error-prone criteria to determine membership.<sup>357</sup> By relying on such flimsy evidence to make lethal targeting decisions as a matter of policy, the U.S. violates IHL by failing to reasonably distinguish civilians.

*Third*, the U.S. uses circumstantial evidence to determine membership that relies on geographic-based or identity-based profiling, a type of “criteria prone to error, arbitrariness or abuse” the ICRC prohibits. According to Amnesty International, the U.S. considers all military-aged men observed with known al-Shabaab members within specific regions legitimate military targets.<sup>358</sup> Based on their location and identity alone, the U.S. lethally targets such individuals because of the likelihood they are also a member of al-Shabaab.<sup>359</sup> Such signature strikes—targeting an individual based on location or appearance, rather than conduct or insignias—violate IHL because they rely on insufficient evidence that the target is indeed a lawful target and not a civilian.<sup>360</sup> Thus, the U.S. refuses to differentiate between possible targets and protected civilians in certain regions as matter of policy,<sup>361</sup> in violation of both the ICRC guidance and the principle of distinction.

*Fourth*, the U.S. policy violates the text of Common Article 3. Common Article 3 protects “persons taking no active part in the hostilities,”<sup>362</sup> again preserving the principle of distinction. As the above arguments show, by lethally targeting members of al-Shabaab who have no fighting function, the U.S. fails to protect such persons as a matter of policy. While “hostilities” is not defined, the ICRC suggests that hostilities include inflicting injury, death, destruction, or military harm, and that hostilities

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<sup>355</sup> *Id.* at 159, 224. This information includes merely following directions by the group’s leader.

<sup>356</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267.

<sup>357</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267.

<sup>358</sup> HIDDEN U.S. WAR, *supra* note 6, at 60.

<sup>359</sup> HIDDEN U.S. WAR, *supra* note 6, at 61.

<sup>360</sup> *See* Heyns, *supra* note 241.

<sup>361</sup> *See* Cachelin, *supra* note 15, at 7 (“This difficulty or unwillingness to differentiate between innocents and militants is acknowledged by the Pentagon’s Defence Science Board noting that “enemy combatants look like everyone else; enemy vehicles look like civilian vehicles; enemy equipment and materials look like civilian equipment and materials”).

<sup>362</sup> *Geneva I, II, III, IV art. 3.*

directly cause the harm rather encompass activities that might facilitate harm, such as political or economic activities.<sup>363</sup> The ICRC guidance<sup>364</sup> for targeting individuals in nonstate armed groups attempts to follow the constraints of Common Article 3<sup>365</sup> by limiting such lethal targeting to fighters and by including strict standards for evidence that someone is a fighter.<sup>366</sup> Because the U.S. targets members of al-Shabaab, it may target members who are engaging in propaganda, collecting money, or recruiting other members, activities that are not considered hostilities. According to the Common Article 3, such individuals cannot be the targets of force.<sup>367</sup> The U.S. policy to lethally target members of al-Shabaab who may never have engaged in hostilities plainly fails Common Article 3.

The U.S. is on notice that its airborne strike program does not comply with international law. The UN Human Rights Committee has raised concerns about the U.S.'s limitless definition of "armed conflict," its broad definition of imminent threats, and its determination of combatants.<sup>368</sup> Similarly, the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions warned that the U.S.'s policy of classifying all members of terrorist organizations as always targetable violates IHL.<sup>369</sup> The U.S. drone program was even the subject to two lawsuits in Germany, alleging that such strikes violate the NATO Status of Forces Agreement, as strikes launched from AFRICOM (headquartered in Stuttgart, Germany) fail to comply with German law, which constitutionally protects the right to life.<sup>370</sup> Nonetheless, the U.S. wrongly insists its airborne strike policy adheres to international law, an effort to reinterpret the

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<sup>363</sup> Direct Participation in Hostilities, *supra* note 266 (classifying propaganda, sanctions, road-building, research, and recruitment all as activities that would not qualify as hostilities).

<sup>364</sup> ICRC guidance is exactly that, guidance, it does not yet have customary status. *See supra* note 272. The ability to target anyone who is not directly participate in hostilities in a NIAC does not officially exist as IHL, because all of the conventions governing NIACs only deem it lawful to lethally target those taking an active part in hostilities. If the ICRC guidance were found to impermissibly conflict with these conventions (as I believe it does), the U.S. targeting policy would be made that more unlawful, as the U.S. would have no basis within the text of Common Article 3 to target anyone not engaging in hostile action. That is, the ICRC guidance seems to permit targeting decisions based on status (a fighter in a nonstate armed group) whereas the text of Common Article 3 requires protection until an takes a certain action.

<sup>365</sup> Additional Protocol II has a similar provision requiring states to protect civilians until "they take a direct part in hostilities," but the U.S. did not ratify the Protocol.

<sup>366</sup> While I believe any policy that allows an individual in a NIAC to be targeted for their status as a fighter, rather than their direct hostile action, violates Common Article 3, even adopting the ICRC's permissive approach to targeting in NIACs does not render the U.S. program lawful.

<sup>367</sup> *See Geneva I, II, III, IV art. 3.*

<sup>368</sup> CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA, CCPR/C/USA/CO/4. The Committee also raised concerns about the lack of precaution to avoid civilian casualties.

<sup>369</sup> *See Heyns, supra* note 241.

<sup>370</sup> Emma DiNapoli, *German Courts Weigh Legal Responsibility for U.S. Drone Strikes*, LAWFARE (Apr. 4, 2019), <https://www.lawfareblog.com/german-courts-weigh-legal-responsibility-us-drone-strikes>.

law directly counter to prevailing understandings. The U.S. repeatedly claims that it abides by international law while operating under an unlawful interpretation of targeting requirements in NIACs. By violating IHL through compounding executive reinterpretations, the U.S. attempts to recast international law to assert a legal right to previously unauthorized violence.<sup>371</sup> As I show in Part II, the repeated unlawful implementation of its policy further undermines its legality.

**PART II: The U.S. fails to either target or kill members of al-Shabaab who directly participate in hostilities, and such extreme inaccuracy renders the airborne strike program illegal in practice.**

As explained above, targeting members of al-Shabaab would not satisfy the ICRC guidance, which would require the U.S. to target only fighters, not just members. The following analysis reveals how dangerous this “membership” standard for targeting is to Somalis in areas perceived as being under al-Shabaab control.

**A. AIRBORNE STRIKE DATA**

To date, the U.S. has likely conducted 333 airborne strikes in Somalia, beginning in 2007,<sup>372</sup> though the first acknowledged strike was in 2011.<sup>373</sup> President Obama oversaw 56 airborne strikes,<sup>374</sup> and President Trump, with further relaxed rules on targeting, authorized 256.<sup>375</sup> Despite attempting to restrict the use of airborne strikes outside active warzones, President Biden has already approved fourteen strikes.<sup>376</sup>

The Appendix contains a table of airborne strikes conducted by the U.S. against al-Shabaab in Somalia. For each strike, I included a description of the target as explained by AFRICOM, or, if no explanation was provided, information from other public sources about the target.<sup>377</sup> I excluded unsubstantiated incident reports and used the description for each incident most favorable to the U.S. government. I then classified each strike incident by whether the U.S. has any claim that the target was directly participating in hostilities at the time of the strike. Further explanation of these

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<sup>371</sup> See Hajjar, *supra* note 34, at 69.

<sup>372</sup> Piper & Dyke *supra* note 21.

<sup>373</sup> Somalia: Reported US Covert Actions 2001-2016, THE BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-covert-actions-2001-2017> (last visited Dec 9, 2021).

<sup>374</sup> See *Appendix*.

<sup>375</sup> See *Appendix*.

<sup>376</sup> See *Appendix*.

<sup>377</sup> Airwars uses public sources, preferring firsthand accounts. See *Methodology*, AIRWARS, <https://airwars.org/methodology> (last accessed May 12, 2022). The Appendix only includes strikes Airwars determined could be credibly attributed to the U.S. For more information, see *Appendix*.

methods can be found in the Appendix.

## B. ANALYSIS OF AIRBORNE STRIKES AGAINST AL-SHABAAB

An analysis of strike data shows that the U.S.'s airborne strike policy classifies members of al-Shabaab as always targetable, and that in practice, airborne strikes do not reliably kill individuals who directly participate in hostilities or who can be considered fighters.

*i. Targeting decisions are likely based on targeting individuals based on membership in a terrorist organization, not on their direct participation in hostilities*

As shown in the Appendix, only in 32 of the 333 airborne strikes against al-Shabaab did the U.S. claim that the target was directly participating in hostilities.<sup>378</sup> For example, on August 24, 2021, AFRICOM reported killing al-Shabaab members “engaged in active combat” against Danab forces,<sup>379</sup> and on August 1, 2021, the Somali government announced a U.S. airborne strike destroyed an al-Shabaab firing position engaging its forces.<sup>380</sup> Thus, in less than ten percent of airborne strikes did the U.S. claim the target was directly participating in hostilities against U.S. or Somali forces, provided its reports and its intelligence were correct.

In 31 other airborne strikes, the U.S. claimed al-Shabaab posed a threat around, but not during, the time of the strike. In 13 incidents, AFRICOM announced that al-Shabaab had threatened U.S. or Somali forces immediately prior to the strike.<sup>381</sup> For example, on February 22, 2022, AFRICOM announced it launched a strike against “al-Shabaab terrorists after they attacked partner forces.”<sup>382</sup> For these airborne strikes conducted after al-Shabaab allegedly attacked U.S. or Somali forces, it is unclear whether the attack occurred immediately before the strike. In 18 others, it’s possible that an attack from al-Shabaab was imminent.<sup>383</sup> On January 19, 2019, the U.S.

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<sup>378</sup> On September 28, 2016, the U.S. struck a local friendly militia that was helping combat al-Shabaab, though AFRICOM initially claimed to have killed al-Shabaab fighters in action. *See* USSOM066-C – September 28, 2016, AIRWARS, <https://airwars.org/civilian-casualties/ussom066-c-september-28-2016/> (last visited Apr 6, 2022). Claims that the target was directly participating in hostilities should be heavily scrutinized, as such, these numbers reflect a generous view of U.S. targeting decisions.

<sup>379</sup> *See Appendix no. 6.*

<sup>380</sup> *See Appendix no. 10*; SONNA [@SONNALIVE], *1st August, 2021, The Danab, SNA & their partners have once again struck a blow to the heart of #AS. At 1022 a.m. & 1101 a.m. air strikes occurred b/w Bacadweyne & Camara towns near Wisil town in #Galmudug State in support of a #Danab operation resulting in zero civilian casualties* <https://t.co/HCeBFQeyle>, TWITTER (Aug. 1, 2021 2:04AM), <https://twitter.com/SONNALIVE/status/1421758785442492417>.

<sup>381</sup> *See Appendix no.s 1, 2, 5, 9, 19, 24, 25, 41, 87, 102, 198, 207, 213.*

<sup>382</sup> Pietrack, *supra* note 2. Again, this interpretation grants U.S. the benefit of assuming that the targets were the same people who launched the attack.

<sup>383</sup> *See Appendix no.s 4, 27, 40, 113, 130, 165, 176, 177, 178, 179, 233, 235, 271, 280, 288, 289, 290, 298.*

conducted airborne strikes against al-Shabaab claiming that Somali forces were anticipating an attack,<sup>384</sup> and on May 11, 2020, a strike hit a training camp that security sources believed housed militants who were planning an attack.<sup>385</sup> On August 20, 2020, the U.S. killed an allegedly high-ranking member of al-Shabaab who had a history of making explosives and was reportedly working to plant explosives on a public road at the time of the strike.<sup>386</sup> ICRC guidelines for direct participation in hostilities suggest that it can include the preparations for an attack.<sup>387</sup> Assuming in all 28 of these situations the time between al-Shabaab's act of hostilities and the airborne strike was close enough for the U.S. to plausibly claim the targets were directly participating in hostilities at the time of the strike, these instances can also be considered to have a valid claim that the target was directly participating in hostilities.

Two other strike incidents were unclear in the description of the target, but there was enough information to afford the U.S. the benefit of doubt. If Somali forces seemed to attack al-Shabaab first or were on the ground at the time of the strike, I concluded there was possibly a situation of active hostilities occurring rather than a one-sided attack by Somalia or the U.S.<sup>388</sup> On the contrary, on September 21, 2020, a strike targeted al-Shabaab members attempting to scavenge a damaged vehicle.<sup>389</sup> While it's possible these individuals might have been repurposing the vehicle to use in an attack, such an inference is too hypothetical and too temporally distant from any hostile act to be considered preparations under the ICRC definition of direct participation in hostilities. Regardless, these borderline cases do not substantially alter the data, which makes it resoundingly clear that the U.S. is not relying on such a claim for the majority of the targeting decisions.

To summarize, based on information pulled from AFRICOM's reports, Somali government press releases, and other open-source media, the U.S. could only plausibly claim that the target was directly participating in hostilities at the time for a generous maximum of 65 of these 333 airborne strikes. Accordingly, approximately 80 to 90 percent of the airborne strikes<sup>390</sup> were against targets who were not directly participating in hostilities against the U.S. or partner forces. Sometimes, these targets were alleged to be al-Shabaab fighters. For example, on October 6, 2018, AFRICOM

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<sup>384</sup> See *Appendix no. 165*.

<sup>385</sup> See *Appendix no. 40*.

<sup>386</sup> See *Appendix no. 32*.

<sup>387</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267.

<sup>388</sup> See *Appendix no.s 10, 286*.

<sup>389</sup> See *Appendix no. 28*.

<sup>390</sup> Anywhere from 80.48 to 90.39 percent, based on 32 to 65 instances of a target directly participating in hostilities. See *Appendix*.



declared it killed an “al-Shabaab militant” near a village.<sup>391</sup> More often, however, targets were identified simply as including members of al-Shabaab. On October 16, 2017, AFRICOM targeted a vehicle it believed to be carrying al-Shabaab members,<sup>392</sup> on April 5, 2020, AFRICOM declared it targeted “al-Shabaab terrorists,”<sup>393</sup> and on January 13, 2021, AFRICOM reported killing “one al-Shabaab personnel.”<sup>394</sup> Thus, for most of its airborne strikes, the U.S. seems to rely on reasoning that al-Shabaab members are always targetable, despite not directly participating in hostilities.

Both AFRICOM and the CIA conduct airborne strikes in Somalia, but AFRICOM has claimed 248 of the 333 strikes in Somalia, or just under 75 percent of the strikes. The remaining 85 airborne strikes could be undeclared AFRICOM strikes, CIA strikes, or are not U.S. strikes at all.<sup>395</sup> Of the 248 declared strikes, 77 to 88 percent of strikes were against targets who were not directly participating in hostilities against the U.S. or partner forces.<sup>396</sup> Of the undeclared strikes, 91 to 99 percent were against individuals not directly participating in hostilities.<sup>397</sup> The implications of undeclared AFRICOM strikes or CIA-led strikes is further discussed in Part II(C), but overall, even excluding all undeclared strikes, the majority of AFRICOM-claimed airborne strikes are still against individuals not directly participating in hostilities. Thus, AFRICOM and the CIA would both appear to target individuals based on al-Shabaab membership.

*ii. Targets appear to be chosen as a result of bad intelligence.*

In many cases, it seems that the U.S. falsely identified civilians as members of al-Shabaab. For example, On March 18, 2019, AFRICOM declared that it had killed three “terrorists,” but Amnesty International later confirmed the three men were civilian farmers.<sup>398</sup> Similarly, on November 12, 2017, the U.S. killed three civilian

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<sup>391</sup> See *Appendix no. 195*; U.S. Conducts Airstrike in Support of the Federal Government of Somalia, U.S. AFRICA COMMAND (Oct. 9, 2018), <https://www.africom.mil/pressrelease/31253/u-s-conducts-airstrike-in-support-of-the-federal-government-of-somalia>.

<sup>392</sup> See *Appendix no. 247*; *The US Military Claims These Men It Killed Were “Terrorists” but We Know They Were Civilian Farmers*, AMNESTY INTERNATIONAL (Sept. 30, 2019), <https://www.amnesty.org/en/latest/press-release/2019/09/us-military-shows-appalling-disregard-for-civilians-killed-in-somalia-air-strike/>.

<sup>393</sup> See *Appendix no. 45*; USSOM303 – April 5, 2020, <https://airwars.org/civilian-casualties/ussom303-april-5-2020/> (last visited Apr 6, 2022).

<sup>394</sup> See *Appendix no. 18*.

<sup>395</sup> As noted in the Appendix, by already excluding strikes Airwars deemed could not be reliably attributed to the U.S., it is less likely that such undeclared strikes were not U.S. actions.

<sup>396</sup> Anywhere from 77.0 to 87.5 percent, based on 31 to 57 instances of a target directly participating in hostilities.

<sup>397</sup> Anywhere from 90.6 to 98.8 percent, based on 1 to 8 instances of a target directly participating in hostilities.

<sup>398</sup> *US Military Claims*, *supra* note 392.

farmers sleeping on the side of the road.<sup>399</sup> On December 6, 2017, the U.S. killed five civilians traveling in a truck,<sup>400</sup> and on March 10, 2020, the U.S. struck a private minibus.<sup>401</sup> Assuming the U.S. is not targeting civilians, which would be explicitly unlawful,<sup>402</sup> the only possible basis for their being targeted is if the U.S. had mistakenly identified them as members of al-Shabaab.<sup>403</sup>

In other situations, AFRICOM rejected claims that it had possibly made a mistake, despite evidence that it did. On December 12, 2017, AFRICOM announced it struck an al-Shabaab improvised explosive device, removing an “imminent threat to the people of Mogadishu.”<sup>404</sup> However, others reported on Twitter that the vehicle targeted was in fact carrying bananas, and in 2019, AFRICOM claimed the strike occurred on December 11, admitting there were no secondary explosions observed, which would be expected if the vehicle contained explosives.<sup>405</sup> AFRICOM seems to change its description of strike incidents retroactively. In a similar situation, on January 19, 2021, AFRICOM originally claimed it killed three “al-Shabaab operatives” in two airborne strikes, though media sources alleged that the U.S. had killed a local clan elder, Sultan Mohamed Abbas.<sup>406</sup> Later that year, in its 2nd Quarter Civilian Casualty Assessment Report, AFRICOM stated the airborne strike targeted an al-Shabaab commander while he was driving his car.<sup>407</sup> Then, in its 4th Quarter Report, AFRICOM asserted that Mohamed Abbas was a confirmed al-Shabaab commander, based on years of intelligence.<sup>408</sup> Given the minimal information on both sides, it is difficult to determine whether Abbas was indeed a longtime al-Shabaab commander, or whether the vehicle with bananas was the one targeted. Regardless, the U.S. will not disclose the information it uses to make its targeting determinations and has not

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<sup>399</sup> See *Appendix no. 243*.

<sup>400</sup> See *Appendix no. 236*.

<sup>401</sup> See *Appendix no. 56*.

<sup>402</sup> Because they were not directly participating in hostilities.

<sup>403</sup> As explained in Part I(D), this is also not legal, but the U.S. is trying to portray such a practice as a permissible legal interpretation.

<sup>404</sup> *U.S. Conducts Airstrike in Support of the Federal Government of Somalia*, U.S. AFRICA COMMAND (Dec. 12, 2017), available at <https://archive.ph/Nb0YI>.

<sup>405</sup> USSOM109 – December 12, 2017, AIRWARS, <https://airwars.org/civilian-casualties/ussom109-december-12-2017/> (last visited Apr 6, 2022).

<sup>406</sup> USSOM331-C – January 19, 2021, AIRWARS, <https://airwars.org/civilian-casualties/ussom331-c-january-19-2021/> (last visited Apr 6, 2022).

<sup>407</sup> *Id.*; U.S. Africa Command Civilian Casualty Assessment Quarterly Report; 2nd Quarter, 2021, U.S. AFRICA COMMAND (June 4, 2021), <https://www.africom.mil/pressrelease/33802/us-africa-command-civilian-casualty-assessment-quarterly-report-2nd-quarter-2021>.

<sup>408</sup> U.S. Africa Command Civilian Casualty Assessment Quarterly Report; 4th Quarter, 2021, U.S. AFRICA COMMAND (Mar. 11, 2022), <https://www.africom.mil/pressrelease/34309/us-africa-command-civilian-casualty-assessment-quarterly-report-4th-quarter-2021>.

acknowledged that its understanding of certain events, or at least how it presents them, changes as it emerges that the original understanding may not have been accurate.

Overall, the U.S. seems to target individuals without sufficient evidence that they were either directly participating in hostilities or members of al-Shabaab.

*iii. Targets appear to be chosen based on identity- and location-based profiling.*

Such targeting decisions could also be understood differently. Rather than a failure or mistake of intelligence, it seems the U.S. policy may be to reject individualized evidence in favor selecting targets based on general facts about the people or area, known as signature strikes. In the numerous cases in which AFRICOM targeted a “member” of al-Shabaab, it’s entirely possible that the basis of that determination was simply the individual’s age and gender because of where they were, or other innocuous facts, like being out at night in a rural area.<sup>409</sup> Again, by using the description most favorable to the U.S., much of the data states that the target could have been an al-Shabaab member, yet these claims may seem thin. On January 27, 2020, AFRICOM declared it killed one al-Shabaab “operative” or “terrorist,” yet many reported that the individual was in fact a civilian farmer working in his field.<sup>410</sup> On March 18, 2019, AFRICOM claimed a strike killed three “terrorists,” yet later reports from an Amnesty investigation suggest civilian farmers were killed.<sup>411</sup> On November 12, 2017, AFRICOM again declared it killed “fighters,” while other reports claim the individuals were civilian farmers.<sup>412</sup> It’s possible that all such individuals were secretly members of al-Shabaab or that all of these witnesses were falsely alleging civilian harm. Yet, in these and many other examples,<sup>413</sup> it seems far more likely that these individuals were simply targeted because they fit a certain profile, not because AFRICOM had particularized evidence of their involvement in al-Shabaab. Without further information from the U.S. government about the evidence it uses to make its targeting determinations, many of these strikes look as if the U.S. relied on an identity-based profile. Such a signature strike policy is inherently racist, as the U.S. refuses to differentiate between individuals, instead categorizing all Somali men in certain areas as al-Shabaab to and condemning them to death.<sup>414</sup> This practice renders an entire

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<sup>409</sup> See *Appendix no.s 81, 138, 243*.

<sup>410</sup> USSOM272-C – January 27, 2020, AIRWARS, <https://airwars.org/civilian-casualties/ussom272-c-january-27-2020/> (last visited Apr 6, 2022).

<sup>411</sup> USSOM209-C – March 18, 2019, AIRWARS, <https://airwars.org/civilian-casualties/ussom209-c-march-18-2019/> (last visited Apr 6, 2022).

<sup>412</sup> USSOM101-C – November 12, 2017, AIRWARS, <https://airwars.org/civilian-casualties/ussom101-c-november-12-2017/> (last visited Apr 6, 2022).

<sup>413</sup> See *Appendix no.s 68, 72, 114, 118, 214, 243, 307, 319*.

<sup>414</sup> Cachelin, *supra* note 251, at 7 (arguing that signature strikes employ a system of “race-thinking” that homogenizes everyone with a certain, refusing to acknowledge differences within a racial and religious identity to instead impose an idea of “guilt by association”); Munro, *supra* note 35, at 125;

identity of people killable, due to almost exclusively racial, gendered, and religious assumptions.

Resultingly, it is highly likely that for many of the 269 to 302 strikes in which targets may have included members of al-Shabaab, the individuals killed were not in fact members at all but were classified as such because of bad intelligence or identity-based profiling. Even if some of these individuals were members, it is further unlikely that they were fighters for al-Shabaab, given that Amniyat is only one of many al-Shabaab agencies. As such, this data should cast into extreme doubt any claim that the U.S. is killing many “terrorists” at all.

#### C. SUCH FAILURES FURTHER UNDERMINE THE U.S.’S CLAIMS OF THE PROGRAM’S LEGALITY.

This analysis shows that the U.S.’s airborne strike program is, in practice, illegal under domestic and international law. In practice, strikes against al-Shabaab also appears to violate U.S. airborne strike policy.

##### *i. Airborne strikes against al-Shabaab largely violate domestic law.*

As explained in Part I(D), the 2001 Authorization for Use of Military Force (AUMF) is not valid authorization for the DoD to conduct airborne strikes against al-Shabaab. Of the 333 airborne strikes attributed to the U.S., the DoD has claimed 248 as declared strikes. Such strikes are, without the AUMF, unlawful.

For the remaining 85 airborne strikes, it is unclear whether these are CIA strikes, undeclared AFRICOM strikes, or possibly not strikes from the U.S. at all.<sup>415</sup> AFRICOM generally publicly reports strikes, but it is under no legal obligation to do so.<sup>416</sup> Under the Covert Action Statute, the CIA does not have to declare that it conducted an action,<sup>417</sup> so it is impossible to conclusively determine responsibility. Moreover, AFRICOM may sometimes claim responsibility for CIA-conducted strikes.<sup>418</sup> Regardless, CIA-conducted strikes are, as explained in Part I(D), are of uncertain legal status.

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Parks, *supra* note 35, at 145–47; Jamie Allinson, *The Necropolitics of Drones*, 9 Int’l Pol. Soc. 113, 119–21 (2015)

<sup>415</sup> See *Appendix*.

<sup>416</sup> See generally 10 U.S.C. § 130(c) (exempting from disclosure information produced in cooperation with foreign governments); 10 U.S.C. § 122(a) (exempting from public reports any classified information or “any other type of information that the Secretary of Defense determines should not be made available to the public in the interest of national security.”).

<sup>417</sup> 50 U.S.C. § 3093(e).

<sup>418</sup> EXCEPTION(S) TO THE RULE(S), *supra* note 207, at 11.

*ii. Many airborne strikes violate international law individually, and taken as a whole, the program violates fundamental principles of IHL.*

In practice, the U.S. seems to treat members of al-Shabaab as always targetable, which as explained in Part I(D) is an illegal policy. With this basis for targeting determinations rejected, most of the U.S.'s airborne strikes become unlawful without further information. Moreover, the program as a whole violates fundamental principles of IHL.

The U.S. appears to mostly target and kill individuals who are not directly participating in hostilities, relying on a status-based determination rather than an action-based one. Because targeting civilians is outright unlawful and the U.S. claims its strikes comply with international law, it seems the U.S. considers al-Shabaab members to be always targetable in a NIAC and thinks such a practice is a valid legal interpretation.<sup>419</sup> However, unlike the strict NIAC requirement of targeting those who directly participate in hostilities or the more permissive ICRC guidance to also target fighters with a continuous combat function, the U.S.'s expansive interpretation certainly has not been internationally accepted as lawful,<sup>420</sup> nor should it be. Targeting a member of al-Shabaab with a purely administrative, economic, or political function is akin to targeting a civilian.<sup>421</sup> Furthermore, given the difficulty in gathering reliable intelligence,<sup>422</sup> the biases in U.S. efforts to determine membership,<sup>423</sup> and complete lack of transparency of process,<sup>424</sup> the way the U.S. identifies members create an impermissible risk to those living in conflict zones who may be falsely considered members of a terrorist group. Thus, because not all members of al-Shabaab have a continuous combat function, any strike that seemed to target individuals based on

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<sup>419</sup> See *supra* Part I(C) (assuming, to give the benefit of doubt, that the U.S. government is not deliberating targeting civilians and retroactively calling them al-Shabaab members).

<sup>420</sup> There is no universal acceptance that IHL implicitly authorizes a state to kill those not directly participating in hostilities in a NIAC. See Sterio, *supra* note 197, at 207 (explaining that only the U.S. and Israel believe membership in a declared terrorist organization is sufficient grounds for someone to lose civilian status).

<sup>421</sup> See *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267 (explaining “recruiters, trainers, financiers and propagandists...individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations” “remain civilians”). See also *Appendix no. 2*, USSOM348– July 17, 2022, AIRWARS, <https://airwars.org/civilian-casualties/ussom348-july-17-2022/> (last visited Aug. 11, 2022) (noting that according to one report, one of the individuals killed was the “leader of Al-Shabaab in charge of financial affairs in this area,” which might be a purely administrative function).

<sup>422</sup> Scahill, *supra* note 227.

<sup>423</sup> See Parks, *supra* note 35, at 145–47; Hajjar, *supra* note 18, at 943.

<sup>424</sup> Rosa Brooks, *Drones and the International Rule of Law*, 28 J. ETHICS & INT'L AFF. 83, 89 (2014); HIDDEN U.S. WAR, *supra* note 6, at 60–61.

membership alone violates the principle of distinction and the Common Article 3 protection of those who do not participate in hostilities.

As shown in practice, the U.S.'s policy to use membership, not fighter status, to make a targeting determination is clearly highly discretionary, bias- and error-prone, and overinclusive, which risks violating the principle of distinction according to the ICRC. Similarly, these strikes would violate Common Article 3. Based on the frequency of mistakes and civilian casualties, it appears that in practice, targeting decisions rely on information that cannot "reasonably be regarded as reliable in the prevailing circumstance," as required by the ICRC.<sup>425</sup> The examples in Part II(B)(ii) illustrate the unreliability of U.S. targeting determinations, particularly when it comes to claims that the target was a member of al-Shabaab. Moreover, U.S. strikes have killed between 70 and 143 civilians in Somalia.<sup>426</sup> While civilian harm is allowed under IHL as collateral, so long as it is not excessive,<sup>427</sup> each strike incident alleged to have exclusively civilian casualties seems to be a failure to distinguish civilians. Such strikes individually violate the fundamental IHL principle of distinction, including the strike on March 18, 2019, where all men killed were claimed to be civilian farmers.<sup>428</sup> Additionally, as explained in Part II(B)(iii), even for strikes without claims of civilian casualties, there is good reason to believe that many alleged members of al-Shabaab were not fighters (or even members) but civilians. By resulting in so many mistakes and civilian casualties, the way the U.S. membership standard operates in practice violates international law.

If the U.S. policy of targeting members is unlawful, most of its strikes become unlawful. For the 268 to 301 cases where it was not clear the targeted individuals directly participated in hostilities—where the U.S. may have instead targeted them for being members of al-Shabaab—the U.S. would need to show additional evidence that the individual plausibly served a continuous combat function or was certainly directly participating in hostilities. Evidence that the individual were not only a member but a *fighter* of al-Shabaab would comply with the ICRC's broad interpretation of NIAC law, yet most of these cases lack such proof.

Planning future attacks might indicate that the individual occupied a continuous combat function within al-Shabaab. At least 17 strikes targeted individuals who were planning attacks or otherwise threatening U.S. and Somali forces.<sup>429</sup>

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<sup>425</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267.

<sup>426</sup> Civilian Deaths, *supra* note 169. The U.S. has only conceded to five civilian deaths. *Id.*

<sup>427</sup> See *Proportionality*, ICRC, <https://casebook.icrc.org/glossary/proportionality> (last visited Apr 7, 2022).

<sup>428</sup> USSOM209-C – March 18, 2019, AIRWARS, <https://airwars.org/civilian-casualties/ussom209-c-march-18-2019/> (last visited Apr 6, 2022).

<sup>429</sup> See *Appendix no.s* 27, 40, 113, 130, 165, 176, 177, 178, 179, 233, 235, 271, 280, 288, 289, 290, 298.

Anticipatory self-defense requires a specific imminent attack to be lawful,<sup>430</sup> and the U.S. must gain definite military advantage when launching an attack.<sup>431</sup> While the U.S. may target an individual making preparations for an attack,<sup>432</sup> it is unclear whether all of these situations included preparations “of a specifically military nature and so closely linked to the subsequent execution of a *specific hostile act* that they already constitute an integral part of that act”<sup>433</sup> to satisfy ICRC guidance, because the descriptions are so general. Without further information, it is unclear whether the U.S. had such evidence for every strike. If any were conducted to deter a general anticipated threat, that strike would be unlawful,<sup>434</sup> such as the strike on March 18, 2019, where AFRICOM declared that it had killed three “terrorists” to “decrease morale ahead of Somali Army operations.”<sup>435</sup> Such anticipatory self-defense is not a lawful ground for use of force,<sup>436</sup> and such a claim about “decreasing morale” seems impermissibly speculative.<sup>437</sup> As explained in Part I(B), the ICRC advises that a person has a continuous combat function only if their “continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities.”<sup>438</sup> Therefore, if the planning or preparations can be considered direct participation in hostilities, it’s also possible to conclude that, if such planning is part of the individual’s continuous function, they are fighter for al-Shabaab. Again, the U.S. does not provide such information when describing its strikes, so it is not possible to determine whether these strikes are lawful.

Similarly, in the 13 cases where it seemed the targeted individual had previously participated in an attack against the U.S. or Somalia, the U.S. may have been able to determine they had a continuous combat function within al-Shabaab. However, according to the ICRC, evidence of past attacks is insufficient alone to determine an

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<sup>430</sup> FINAL REPORT ON AGGRESSION, *supra* note 333, at 14.

<sup>431</sup> *Practice Related to Rule 8: Military Advantage*, ICRC, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2\\_rul\\_rule8#:~:text=Definite%20means%20a%20concrete%20and,a%20hypothetical%20and%20speculative%20one.&text=The%20military%20advantage%20anticipated%20from,particular%20parts%20of%20the%20attack](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_rul_rule8#:~:text=Definite%20means%20a%20concrete%20and,a%20hypothetical%20and%20speculative%20one.&text=The%20military%20advantage%20anticipated%20from,particular%20parts%20of%20the%20attack) (last accessed Apr. 13, 2022) (“*Definite* means a concrete and perceptible military advantage rather than a hypothetical and speculative one.”).

<sup>432</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267.

<sup>433</sup> *Id.* Conversely, the preparation of a general campaign of unspecified operations would not qualify as direct participation in hostilities. Emphasis mine.

<sup>434</sup> Maass, *supra* note 289, at 62. *See also Appendix no. 91, 132.*

<sup>435</sup> US Military Claims, *supra* note 392.

<sup>436</sup> *See infra* note 333. The U.S. repeatedly invokes a self-defense justification when its forces face attack in Somalia. *See* MARUF & JOSEPH, *supra* note 98, at 275 (“Critics of the growing US presence pointed out there would be no need for self-defense if US troops hadn’t been put on the Somali front lines in the first place.”).

<sup>437</sup> *See Practice Related to Rule 8*, *supra* note 431.

<sup>438</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267.

individual has a continuous combat function.<sup>439</sup> Relying solely on participation in a past attack risks targeting civilians, who are only targetable during the time they participate in hostilities and regain protection once finished.<sup>440</sup> It is unlawful to target civilians for involvement in past attacks,<sup>441</sup> because it would amount to a retaliatory killing.<sup>442</sup> Often, AFRICOM announced it was targeting a person who previously engaged in hostilities against the U.S. or partner forces.<sup>443</sup> If these previous attacks were temporally close to the airborne strike, it is possible the U.S. targeted a fighter or a civilian still directly participating in hostilities. However, if these previous attacks were far in the past or if there is no evidence that the person is a fighter, then the U.S. looks like might be targeting the individual for revenge for past attacks, which is unlawful. For example, on January 7, 2021, the U.S. Air Force announced, “This strike targeted known al-Shabaab leaders who facilitated finance, weapons, fighters, and explosives. One is suspected of being involved in a previous attack against U.S. and Somali forces.”<sup>444</sup> According to the ICRC, the leaders would not be targetable as fighters for their role in facilitating weapons or explosives,<sup>445</sup> and targeting the individual suspected in a previous attack for deterrence violates IHL.<sup>446</sup> Without specific, additional information that someone who participated in a past attack did so in a continuous combat function for al-Shabaab, the U.S. cannot lawfully target individuals for participation in previous hostilities.

To be generous to the U.S., I will assume that the necessary information exists for the 33 uncertain strikes.<sup>447</sup> Without further descriptions from the U.S. for each of the remaining 268 airborne strikes where the target was conclusively directly participating in hostilities, it is not possible to conclude that they were lawful. The U.S. might have had additional evidence a member was in fact a fighter, or that an attack

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<sup>439</sup> *Id.* (explaining that in contrast to an individual with a continuous combat function in an armed group, “The behaviour of individual civilians depends on a multitude of constantly changing circumstances and, therefore, is very difficult to anticipate. Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct.”).

<sup>440</sup> *Id.*

<sup>441</sup> See Heyns, *supra* note 241. The U.S. targets individuals for involvement in past attacks also as a matter of policy. Justice Dep’t White Paper, *supra* note 282. While this is an Obama-era policy, it seems that the Trump administration (and thus the Biden administration) retained the main goals of the policy, despite the specific changes in processes that have been described above.

<sup>442</sup> UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final Report, UN Doc. S/1994/674, 27 May 1994, §§ 63–64.

<sup>443</sup> See *Appendix no.s 5, 9, 19, 24, 25, 41, 87, 102, 198, 207, 213*.

<sup>444</sup> U.S. Africa Command conducts strike on al-Shabaab leaders, U.S. AFRICA COMMAND (Jan. 7, 2021), <https://www.africom.mil/pressrelease/33401/us-africa-command-conducts-strike-on-al-shabaab-leaders>.

<sup>445</sup> *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra* note 267.

<sup>446</sup> See Heyns, *supra* note 241; Maass, *supra* note 289, at 62.

<sup>447</sup> See *supra* Part II(B) for further discussion of the 30.



was imminent, or that the individual immediately concluded the previous attack. However, without such proof, these strikes would be unlawful.

Taken as a whole, the airborne strike program against al-Shabaab violates the binding IHL principles of distinction, proportionality, and necessity.<sup>448</sup> The U.S. policy of targeting members of al-Shabaab has led to serious civilian harm, which indicates a failure of U.S. targeting determinations to properly distinguish civilians or an outright refusal to do so.<sup>449</sup> Given the risks of misidentification inherent in airborne strikes,<sup>450</sup> the U.S.'s refusal to engage possible remedies<sup>451</sup> and its removal of processes that safeguarded civilians<sup>452</sup> violate the principle of distinction, which requires parties to take all feasible precautions to avoid civilian harm when conducting attacks.<sup>453</sup> While the U.S. insists that instances of civilian harm, when it acknowledges them, are simply mistakes, repeated reliance on forms of intelligence that are clearly bad at identifying members of al-Shabaab render the conduct illegal over time.<sup>454</sup> Such mistakes in targeting, if they can be considered mistakes, in aggregate constitute a failure to distinguish civilians or to minimize civilian harm. Broad signature strike policies, such as the classification of all military-aged men in al-Shabaab-controlled area as members of al-Shabaab, as could be inferred from the number of civilian male casualties,<sup>455</sup> also

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<sup>448</sup> *Fundamental principles of IHL*, *supra* note 255.

<sup>449</sup> See HIDDEN U.S. WAR, *supra* note 6, at 65. ("In some strikes documented in the report US forces appear to have either targeted civilians or failed to verify that targets were military objectives. In others, evidence indicates that the US failed to take feasible precautions to distinguish between civilians and fighters or to choose appropriate means or methods in conducting strikes in order to minimize the harm caused to civilians and civilian objects, resulting in apparently indiscriminate or disproportionate attacks. Further, the findings in this report, and the responses received from AFRICOM to Amnesty International's allegations, raise serious concerns about the methodology employed by the US to assess strike outcomes and to determine the civilian or "combatant" status of individuals killed in its attacks.")

<sup>450</sup> *Senate Hearing on "Targeted Killing" and the Rule of Law*, HUMAN RIGHTS WATCH (Feb. 9, 2022), <https://www.hrw.org/news/2022/02/09/senate-hearing-targeted-killing-and-rule-law> (explaining that surveillance drones zero in on the target, often missing civilians, and that operators are influenced by confirmation bias when assessing intelligence); Larry Lewis, *Hidden Negligence: Aug. 29 Drone Strike is Just the Tip of the Iceberg*, JUST SECURITY (Nov. 9, 2021), <https://www.justsecurity.org/78937/hidden-negligence-aug-29-drone-strike-is-just-the-tip-of-the-iceberg/>.

<sup>451</sup> Lewis, *supra* note 450 (condemning the U.S.'s refusal to fund or staff civilian casualty investigations, and its refusal to find anyone accountable for harm).

<sup>452</sup> PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221.

<sup>453</sup> *Precautions in attack*, ICRC, <https://casebook.icrc.org/glossary/precautions-attack> (last visited Apr 7, 2022) ("IHL requires those planning and deciding on an attack to take precautionary measures, including refraining from attacking when incidental loss of civilian life or destruction of civilian objects outweighs the military advantage of the attack.").

<sup>454</sup> *Senate Hearing*, *supra* note 450 ("Even if every single civilian death caused by US strikes was considered legal under the laws of war, the sheer number of them and the similarities between them would be major cause for concern.").

<sup>455</sup> See *supra* Part II(B); see also Chris Woods, *Understanding the Gulf Between Public and US Government Estimates of Civilian Casualties in COVERT DRONE STRIKES*, IN DRONES AND THE FUTURE OF ARMED

indicate a refusal to properly and reliably identify civilians. The U.S. also rejects most claims of civilian harm,<sup>456</sup> so either the independent media investigations are grossly wrong, or the U.S. continues to fail to distinguish civilians even after an attack.

Similarly, such high levels of civilian casualties may also violate proportionality. Proportionality is determined by the incidental civilian harm relative to the military advantage anticipated,<sup>457</sup> which, as discussed below, is often unclear. Given conflicting reports about civilian casualties and whether individuals were members of al-Shabaab,<sup>458</sup> it may be difficult to assess whether an individual strike has an excessive number of civilian casualties relative to the military advantage. However, while an individual strike in which civilians were harmed, though deeply troubling, may not violate proportionality in the IHL respect, the sheer number of civilian casualties across airborne strikes in Somalia begins to raise legal issues,<sup>459</sup> particularly given the program's failure to achieve military objectives. Accordingly, a violation of proportionality would also violate the International Covenant on Civil and Political Rights protection of the right to life because the excessive harm to civilians amounts to an arbitrary deprivation of life.<sup>460</sup> With the failure of U.S. government reports to accurately identify or disclose civilian casualties,<sup>461</sup> it is also fair to assume the true civilian harm is much greater than what is currently represented.

The inefficacy of the program also violates military necessity.<sup>462</sup> U.S. airborne strikes against al-Shabaab often fail to meet any cognizable military objective: they fail to kill confirmed al-Shabaab fighters or to defend U.S. or Somali forces. Strikes that kill civilians, or members of al-Shabaab who do not appear to be engaged in hostilities against U.S. or Somali forces, do not confer a clear military objective. Even if all members of al-Shabaab pose some abstract threat to Somalia for joining a group engaged in conflict against the government, the practice of killing individual members does not appear to have weakened al-Shabaab.<sup>463</sup> Instead, such lethal actions have arguably cemented the organization's opposition to the government and foreign

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CONFLICT : ETHICAL, LEGAL, AND STRATEGIC IMPLICATIONS, ed. David Cortright, et al. 194 (2015) (noting a similar pattern in Pakistan).

<sup>456</sup> Woods, *supra* note 455, at 187.

<sup>457</sup> *Proportionality*, *supra* note 427.

<sup>458</sup> See, e.g., *Appendix no.s 56, 68, 73, 78, 81, 114, 118, 138, 142, 214, 217, 243, 307, 309*.

<sup>459</sup> *Senate Hearing*, *supra* note 450.

<sup>460</sup> Human Rights Committee, *supra* note 249.

<sup>461</sup> Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>.

<sup>462</sup> The US does not have a public definition of military necessity. LAW OF WAR MANUAL, *supra* note 290, at 56.

<sup>463</sup> See LEONARD & RAMSAY, *supra* note 106, at 161; MARUF & JOSEPH, *supra* note 98, at 225.

influence.<sup>464</sup> Targeting members of al-Shabaab thus does not convey clear military advantage<sup>465</sup> in the way that targeting a fighter or someone directly participating in hostilities would.

Accordingly, in practice, airborne strikes against al-Shabaab individually and cumulatively violate international law.

*iii. Lastly, U.S. airborne strikes against al-Shabaab likely violate domestic policy.*

Finally, the airborne strike program in practice seems inconsistent with the limited disclosures of the Obama and Biden administrations' policies. While administrative policy is of course, not law, for the executive branch to have such expansive discretion to set policy and then in practice frequently violate or circumvent such policy, the program becomes exceedingly difficult to evaluate.

The Obama administration policy only explicitly authorized lethal action for "high-value terrorists" and retained an exception to assess action against other "lawful terrorist target."<sup>466</sup> The U.S. declared Somalia a place of active hostilities in November 2016, so any strike prior would be subject to these rules. The majority of strikes in that time frame were against unnamed alleged members of al-Shabaab, and while it's possible they were all identified high-value terrorists, as explained in Part II(B), it is more likely that many were targeted based on their profile or perceived membership in al-Shabaab. The target also must have posed a "continuing, imminent threat to U.S. persons." However, strikes from May 2013 to November 2016 were dominantly against individuals not directly participating in hostilities against the U.S.,<sup>467</sup> so they did not seem to pose an "imminent" threat to "U.S. persons."<sup>468</sup> Still, the policy reserved

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<sup>464</sup> See LEONARD & RAMSAY, *supra* note 106, at 161 (explaining that U.S. involvement has led to increased attacks by al-Shabaab against people perceived as working with the U.S.).

<sup>465</sup> See Military advantage, ICRC, <https://casebook.icrc.org/glossary/military-advantage> (last visited Apr 7, 2022).

<sup>466</sup> PROCEDURES FOR APPROVING DIRECT ACTION, *supra* note 23 (requiring "(i) an assessment that capture is not feasible at the time of the operation: (ii) an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (iii) an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.>").

<sup>467</sup> See *Appendix*.

<sup>468</sup> Additionally, the administration required "near certainty" that only the target or another lawful target be killed. The policy also favored capture over death, and it required a showing that there was no reasonable alternative to lethal action. While I cannot evaluate the feasibility of capture for each strike incident, given the 40 strikes that occurred from the time of the policy to the Obama declaration, it appears that lethal force is exercised so frequently as to violate this stated policy as well. See *Appendix*.

the ability to approve variations from the procedure. If these strikes were approved exceptions, not violations, the exceptions seem to have become the rule in practice.

Because the Trump administration policy<sup>469</sup> was so permissive, it does not appear that the airborne strikes overseen by President Trump violated his standards as disclosed. With reduced certainty requirements that civilians would not be harmed and with broad exemptions from the procedures,<sup>470</sup> the Trump administration's policy provided almost no knowable limits on strike approval.

Unfortunately, given the limited disclosure of the Trump administration's targeting policy and the anonymous statements regarding some of President Biden's interim decisions, it is also challenging to determine whether airborne strikes against al-Shabaab comport with the Biden administration's current policy. However, it appears that half of the strikes under the Biden administration still fail to adhere to the President's policy to require self-defense for U.S. or Somali troops,<sup>471</sup> unless he has classified Somalia as a warzone, and it does not appear President Biden has.<sup>472</sup> For example, on August 1, 2021, AFRICOM struck a military base housing al-Shabaab, which does not appear to have been in self-defense.<sup>473</sup> The policy does allow limited exceptions for an airborne strike to occur absent a self-defense claim, but for half the strikes to lack a self-defense justification, the exception might subsume the rule. The administration appears to set standards it does not follow; however, unlike the Obama administration, the Biden administration has not publicly clarified its guidelines for airborne strikes. Analysis of the Biden policy is limited by anonymous disclosure that may not even accurately represent the current policy.

Such inconsistencies between practice and policy (to the extent that it's known) further underscore the difficulties in evaluating U.S. policy for its lawfulness as well. Without knowing what each administration's airborne strike policy contains, beyond a few general limits and standards, the strikes themselves become the best evidence of the policy. Because of the difficulties in disentangling policy from practice, the line between policy analyzed in Part I and practice analyzed in Part II is murky. Moreover,

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<sup>469</sup> PRINCIPLES, STANDARDS, AND PROCEDURES, *supra* note 221. The policy also reserves the right to vary this procedure as necessary.

<sup>470</sup> See *supra* Part I(A).

<sup>471</sup> See *Appendix no.s 7, 11, 12, 13, 14*. The current U.S. targeting policy also seems to prefer capturing over killing targets when feasible. See PROCEDURES FOR APPROVING DIRECT ACTION, *supra* note 23. Like with the Obama administration, the frequency of lethal action may indicate the requirement is not so strict.

<sup>472</sup> See Desiderio & Seligman, *supra* note 305; Oona Hathaway & Luke Hartig, *Still at War: The United States in Somalia*, JUST SECURITY (Mar. 31, 2022), <https://www.justsecurity.org/80921/still-at-war-the-united-states-in-somalia/>.

The Trump designation of Somalia as an area of active hostilities has expired. *Id.*

<sup>473</sup> See *Appendix no.s 3; USSOM342, AIRWARS*, <https://airwars.org/civilian-casualties/ussom342-august-1-2021/> (last visit May 12, 2022).

if the deviations are consistent, the practical operation of the policy effectively supersedes the policy as written, because the policy fails to constrain practice or becomes different in practice. That is, the exceptions and alterations become the rule. Such confusion further underscores the absurdity of attempting objective legal analysis on a program that is defined by extreme secrecy, broad executive discretion, and changing standards.

**PART III: The duration of the program despite such legal and practical flaws indicates that the ultimate goal of these strikes is about continued military presence in Somalia, rather than defeating al-Shabaab.**

Evidently, the law is not a reliable constraint on the U.S. airborne strike program against al-Shabaab. The above sections detail U.S. administrations' efforts to recast domestic and international legal standards (and in some instances, their complete disavowal of such standards) to continue lethally targeting Somalis. When the U.S. government continues to rewrite domestic law, change its legal interpretations, and ignore international law, evaluating this program in a legal context is insufficient. To evaluate U.S. airborne strikes, it is necessary to understand how they fit within the longstanding U.S. interest in Somalia, instead of viewing the law as subverted or strikes as a counterterrorism tool in need of greater legal restrictions. While airborne strikes as a tool may be relatively new, the reasoning underlying this U.S. program is certainly not. Locating the airborne strike program in the U.S.'s nearly forty-year history in Somalia reveals that they are simply one element of a much broader imperial project.

**A. THE U.S. HAS CONSTRUCTED AN IMAGE OF SOMALIA THAT JUSTIFIES ITS IMPERIALIST INTERVENTION**

For nearly three decades, the U.S. has portrayed Somalia as a “failed state” or “ungoverned space” to justify its imperialist interventions into the country as counterterrorism.

The U.S. has been quick to condemn Somalia as a “failed state.”<sup>474</sup> The U.S. think tank Fund for Peace has kept Somalia as one of its top three “Failed States” since the project’s inception in 2005.<sup>475</sup> While the Fund for Peace has rebranded to the

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<sup>474</sup> See ELM, *supra* note 89, at 7, 74; SOLOMON, *supra* note 100, at 40; STATEMENT OF HON. NANCY LINDBORG, ASSISTANT ADMINISTRATOR, BUREAU OF DEMOCRACY, CONFLICT, AND HUMANITARIAN ASSISTANCE, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT: SECURITY AND GOVERNANCE IN SOMALIA: CONSOLIDATING GAINS, CONFRONTING CHALLENGES, AND CHARTING THE PATH FORWARD, (2013).

<sup>475</sup> Nate Haken, *Understanding Resilience: The Case of Somalia*, FRAGILE STATES INDEX (Apr. 6, 2019), <https://fragilestatesindex.org/2019/04/06/understanding-resilience-the-case-of-somalia/>; Felipe

more palatable “Fragile States Index,” and the UN has raised its classification of Somalia to “fragile,”<sup>476</sup> such rhetorical changes do not erase the longstanding imaginations of Somalia as the “archetypal” or “quintessential” failed state.<sup>477</sup> Much of the Western scholarship on Somalia is equivalently damning: Somalia is “collapsed,”<sup>478</sup> “shattered,”<sup>479</sup> “unending turmoil,”<sup>480</sup> and “the world’s most dangerous place.”<sup>481</sup> Failed state discourse is a racist and Western-centric way to condemn states for deviance from neoliberal ideals of statehood.<sup>482</sup> While there might be objective conditions that indicate a state government has “failed” its population (such as extreme housing insecurity or derelict infrastructure),<sup>483</sup> the practice of condemning an entire state as “failed” is both informed by and produces racist ideas about such spaces.

The U.S. has declared that the Somali government “failed,” which it uses to the explain past and present intervention described in the Background. Foreign governments, including the U.S., have claimed “state failure” in Somalia to justify interventionist state-building, security, or savior missions.<sup>484</sup> The UN authorized its first international peacekeeping mission in Somalia in 1992,<sup>485</sup> a use of force it justified because Somalia “lacked sovereign authority.”<sup>486</sup> The UN approved “any means

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Umana, *The Recovery of Somalia: Check Back With Us Again Next Year*, FUND FOR PEACE (2013), <https://fundforpeace.org/2013/06/24/the-recovery-of-somalia-check-back-with-us-again-next-year/>.

<sup>476</sup> Adam Abdelmoula, *Former ‘failed State’ Somalia on fragile path to progress: A UN Resident Coordinator blog*, UN NEWS (Dec. 26, 2021), <https://news.un.org/en/story/2021/12/1108302>.

<sup>477</sup> See, e.g., Somalia: To Move Beyond the Failed State, INTERNATIONAL CRISIS GROUP (Dec. 23, 2008), <https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-move-beyond-failed-state>;

Umana, *supra* note 104; LEONARD & RAMSAY, *supra* note 106, at 1; WILLIAMS, *supra* note 111, at 1.

<sup>478</sup> KEN MANKHAUS, SOMALIA: STATE COLLAPSE AND THE THREAT OF TERRORISM (2013).

<sup>479</sup> MARY HARPER, GETTING SOMALIA WRONG? FAITH, WAR, AND HOPE IN A SHATTERED STATE (2012).

<sup>480</sup> AL J. VENTER, SOMALIA, UNENDING TURMOIL SINCE 1975 (2017).

<sup>481</sup> JAMES FERGUSON, THE WORLD’S MOST DANGEROUS PLACE: INSIDE THE OUTLAW STATE OF SOMALIA JAMES FERGUSON (2013).

<sup>482</sup> See, e.g., Beth Thiessen, *Conceptualizing the ‘Failed State’: The Construction of the Failed State Discourse*, 1 UNIV. SASKATCHEWAN UNDERGRAD. RES. J. 129 (2015); Zubairu Wai, *Neo-Patrimonialism and the Discourse of State Failure in Africa*, 38 REV. AFR. POL. ECON. 27 (2012); Samar al-Bulushi, *Race, Space, and Terror*, 52 SEC. DIALOGUE 115, 116 (2021) (describing notions about state failure and where terror exists as “racialized imaginative geographies”). Such geographies are racist, beyond “racialized.”

<sup>483</sup> But again, this could be debated. I would classify extreme lethal violence from a police force, unaffordable medical care and education, and high unhoused populations as indicative of state failure, but of course others might believe that the state is properly functioning to uphold the capitalist market and to enforce white supremacy...

<sup>484</sup> See al-Bulushi, *supra* note 482, at 119 (“Since then, Euro-American policymakers and military strategists have regularly invoked narratives about state failure to legitimate external intervention”). Kenya, Uganda, and the African Union have also been present in Somalia. *Id.*; see also *supra* Background.

<sup>485</sup> MAHMOUD, *supra* note 88, at 140; TRIPODI, *supra* note 92, at 140.

<sup>486</sup> See Carrie Booth Walling, *Human Rights Norms, State Sovereignty, and Humanitarian Intervention*, 37 HUMAN RIGHTS QUARTERLY 383, 395 (2015).

necessary” to achieve political reconciliation,<sup>487</sup> converting an internal humanitarian crisis into a security operation led by the U.S. Somalis absolutely deserve to live free of famine and war, but any solution must include responsibility for the role that Britain, Italy, Russia, and the U.S.<sup>488</sup> had in creating such conditions through colonialism, extractivism, and the Cold War. The U.S, Ethiopian, Kenyan, and Ugandan<sup>489</sup> project of state-building in Somalia masks the self-interest at play in efforts to help establish the current federal government, a secular, neoliberal centralized government that would cooperate internationally. Somalia is considered a threat to international peace and security until it is run by a certain type of government.

However, Somalia has been a historically decentralized state with local- or clan-based governance.<sup>490</sup> Recognizing that Somalia may never establish a centralized government, which runs counter to its history, geography, and culture, might be more successful than the international community’s repeated efforts to impose governments that have not been adapted for Somalia.<sup>491</sup> Moreover, U.S. fears of an Islamic government ignore what the ICU, and even to some extent al-Shabaab, have done successfully: implement localized services and establish some economic security.<sup>492</sup> While not to deny the dangers and challenges facing Somalis, declaring Somalia “failed” limits imaginations of what a Somali state might look like and fuels U.S. claims that its absence of a central government creates a terrorist threat.

The U.S. believes that a “failed state” or an “ungoverned space” becomes a terrorist risk to itself because the instability in the state could allow terrorist organizations to take power.<sup>493</sup> Considering Somalia a potential “safe-haven” for al-Qaeda, the U.S. sought to enter Somalia immediately after 9/11.<sup>494</sup> In November 2001, Susan Rice, Assistant Secretary of State for African Affairs, called Somalia “the continent’s proverbial black hole: an ungoverned, lawless, radicalized, heavily armed country with one of the longest undefended coastlines in the region. It is terrorist heaven.”<sup>495</sup> The imagination of Somalia as hosting an insidious Islamist threat justified U.S. intervention into the entire state, and still informs U.S. operations, though most

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<sup>487</sup> CARRIE BOOTH WALLING, *ALL NECESSARY MEASURES* 78–82 (2013).

<sup>488</sup> LEONARD & RAMSAY, *supra* note 106, at 146 (arguing that the U.S. may even bear responsibility for the Somali famine).

<sup>489</sup> Assisted by IGAD, the UN, and the African Union *see* LEWIS, *supra* note 96, at 81.

<sup>490</sup> MAHMOUD, *supra* note 39, at 18; ELMI, *supra* note 89, at 17

<sup>491</sup> ELMI, *supra* note 89, at 4; SOLOMON, *supra* note 100, at 48; Said S. Samatar, *An open letter to Uncle Sam: America, pray leave Somalia to its own devices*, 28 J. OF CONTEMP. AFR. STUD. 313 (2010), RAPHAEL CHIJOKE NJOKU, *THE HISTORY OF SOMALIA* 162 (2013).

<sup>492</sup> HANSEN, *supra* note 136, at 86–91; WILLIAMS, *supra* note 111, at 105.

<sup>493</sup> *See* ASSESSING THE CONSEQUENCES OF THE FAILED STATE OF SOMALIA, (2011); Samatar, *supra* note 491, at 313.

<sup>494</sup> *See* al-Bulushi, *supra* note 482, at 119.

<sup>495</sup> Testimony of Dr. Susan E. Rice before the House International Relations Committee Subcommittee on Africa, 15 November 2001.

Somalis reject al-Shabaab.<sup>496</sup> Calling Somalia “ungoverned”<sup>497</sup> also works to rationalize violent action the U.S. would not conduct in other states. For example, at a hearing of the Subcommittee on National Security and Foreign Affairs, American University Professor Kenneth Anderson explained regarding drone strikes, “What is justified in the ungoverned regions of Somalia or Yemen is a different matter applied to places under the rule of law such as our friends and allies. The United States is not going to undertake a targeted killing in London.”<sup>498</sup> By casting Somalia as “ungoverned” and endemic with terrorism, large regions of the state have become U.S. battlegrounds. Somalis existing in regions perceived as being under al-Shabaab influence become targets of U.S. counterterrorism operations.

#### B. AIRBORNE STRIKES IN SOMALIA HELP MAINTAIN U.S. MILITARY EMPIRE

Based on the history of U.S. engagement in Somalia, as well as its overall history of maintaining global power through military intervention in strategic states, the goal of such frequent airborne strikes is clearly not the accurate killing of a “terrorist” but to sustain its longstanding presence in the state, currently under the justification of counterterrorism. The Bush administration first justified its turn to Somalia by suggesting that the country still “could” become a safe haven for al-Qaeda.<sup>499</sup> Presently, the U.S. military admits that al-Shabaab poses no threat to the U.S. in terms of an attack, yet it still considers al-Shabaab a “threat to the U.S. and a dangerous enemy”<sup>500</sup> to its partners and its “interests.”<sup>501</sup> The U.S. government fails to articulate a coherent reason for intervening in Somalia as counterterrorism.

U.S. intervention has often operated counter to its purported counterterrorism goals,<sup>502</sup> further casting doubt. While the U.S. currently claims its efforts support the Somali Federal Government and stabilize the country,<sup>503</sup> the U.S.’s involvement with Mogadishu warlords undermined its predecessor, the TFG and added to the instability

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<sup>496</sup> ELMI, *supra* note 89, at 7, 9.

<sup>497</sup> Which is also used in a deeply racist way against only certain countries. *See* al-Bulushi, *supra* note 482, at 119.

<sup>498</sup> Kenneth Anderson, Drones II: Testimony Submitted to U.S. House Of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs (2010).

<sup>499</sup> *See supra* note 126.

<sup>500</sup> *See* Venhuizen *supra* note 30.

<sup>501</sup> *See* ANNUAL REPORT ON CIVILIAN CASUALTIES, *supra* note 7, at 11.

<sup>502</sup> Bandow, *supra* note 60; Vine et. al, *supra* note 62 (“These bases are costly in a number of ways: financially, politically, socially, and environmentally. US bases in foreign lands often raise geopolitical tensions, support undemocratic regimes, and serve as a recruiting tool for militant groups opposed to the US presence and the governments its presence bolsters. In other cases, foreign bases are being used and have made it easier for the United States to launch and execute disastrous wars, including those in Afghanistan, Iraq, Yemen, Somalia, and Libya.”)

<sup>503</sup> *See* ANNUAL REPORT ON CIVILIAN CASUALTIES, *supra* note 7, at 11.



that led to the rise of the UIC.<sup>504</sup> Though it appeared the UIC was resolving much of the instability in Mogadishu, the U.S. then undermined the UIC,<sup>505</sup> fearing the rise of an Islamic state. Despite fearing a rise of terrorism in Somalia, the U.S.'s support of Ethiopia in overthrowing the UIC gave a weakening al-Shabaab a new mission against foreign interference and garnered international jihadist support.<sup>506</sup> The power of U.S. support still has a profoundly disruptive effect on Somali politics, as has the power of a terrorism accusation. Members within the TFG have accused each other of being terrorists, in hopes of U.S. financial support or pushing their rivals out of the government.<sup>507</sup> Furthermore, as shown in Part II, U.S. airborne strikes frequently kills civilians, not "terrorists." When the U.S. does kill members of al-Shabaab, the organization often launches reprisal attacks on civilians or people perceived as working with the U.S.<sup>508</sup> U.S. state-building efforts have been uneven and contradictory, and its counterterrorism efforts seem to only perpetuate al-Shabaab's mission.

Instead, U.S. engagement in Somalia appears to align with its Cold War strategy of framing economically and politically motivated military intervention as a war against an ideology.<sup>509</sup> In some ways, current U.S. counterterrorism measures can also be understood as simply an extension of its longstanding policy to secure favorable governments, economies, and military bases in strategic states, seen from its occupation of Haiti to its occupation of Afghanistan.<sup>510</sup> Somalia, with its coastal location between the Middle East and the Horn of Africa, occupies an extremely important location for oil and shipping. The U.S. certainly values having a Somali government that facilitates U.S. military and economic action in the area, and it is not the one. Somalia has increasingly become the focus of other foreign governments,<sup>511</sup>

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<sup>504</sup> See *supra* Background.

<sup>505</sup> Marchal, *supra* note 90; Burgess, *supra* note 32, at 80–81; HANSEN, *supra* note 136, at 58; MARUF & JOSEPH, *supra* note 98, at 39.

<sup>506</sup> SOLOMON, *supra* note 100, at 53 (noting that al-Shabaab calls the current government "daba dhilif," meaning a government set up for a foreign purpose).

<sup>507</sup> *Id.*

<sup>508</sup> LEONARD & RAMSAY, *supra* note 106, at 161. Hypocritically, the U.S. claims to conduct airborne strikes to prevent al-Shabaab from killing innocent civilians. See, e.g., *U.S. Africa Command Conducts Strike*, *supra* note 296 ("These efforts contrast with the indiscriminate attacks that al-Shabaab regularly conducts against the civilian population. The Federal Government of Somalia and the U.S. remain committed to fighting al-Shabaab to prevent the deaths of innocent civilians.").

<sup>509</sup> Even the U.S. government agrees. See 9/11 COMMISSION REPORT, *supra* note 127, at 377 ("Just as we did in the Cold War, we need to defend our ideals abroad vigorously.").

<sup>510</sup> These are illustrative, not definitive, endpoints.

<sup>511</sup> See al-Bulushi, *supra* note 146 (explaining Russia, China, Kenya, Uganda, and Ethiopia are also looking to establish power in Somalia: "the rapidly expanding archipelago of foreign military bases suggests that most of these actors have long-term, if not permanent, visions for securing their respective political and economic interests."). The U.S. also tries to collaborate with some of these countries, including Kenya. See Jim Garamone, U.S., *Kenyan Officials Assess Military Relationship*, U.S. DEPARTMENT OF DEFENSE (May 4, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3020271/us-kenyan-officials-assess-military-relationship/>.

and as in the past, the U.S. wants to assert its primacy. Framing state-building as a strategy of counterterrorism—and perceived “failed” or “ungoverned” spaces as security threats—is a way the U.S. continues its strategy of developing allies and establishing a global military presence.

While U.S. presence was invited and thus technically legal, U.S. efforts to secure such invitations through military and financial assistance are another tactic of military imperialism. The U.S. gives the Somali government roughly \$500 million per year in aid and development.<sup>512</sup> Its funding and friendly military assistance to the Somali Federal Government align with historic U.S. efforts to buy political favor through such exercises of soft power. At the same time, the U.S. has appeared to facilitate international assistance to Somalia,<sup>513</sup> and it additionally funds the African Union mission AMISOM.<sup>514</sup> The airborne strike program operates because of and alongside these financial strategies to assert control in the country.

Airborne strikes enable the U.S. to exercise massive military power over Somalia with a minimal troop presence and even minimal U.S. awareness.<sup>515</sup> While currently claiming to assist the Somali government, the U.S. demonstrates its capacity to enact lethal violence across the country through airborne strikes. The combination of assistance and military power makes a persuasive case for cooperation with the U.S.

Thus, the U.S. government has framed Somalia’s internal state instability as a terrorist threat to itself, its interests, and Western interests.<sup>516</sup> Somalia’s critical geopolitical position, rather than any cognizable terrorist threat, explains the U.S.’s decades of involvement in the country and its investment developing a Somali

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<sup>512</sup> Robbie Gramer & Keith Johnson, *U.S. Could Fumble Somalia Debt Relief, Dealing Blow to Counterterrorism Efforts*, POLITICO (Dec. 11, 2019), <https://foreignpolicy.com/2019/12/11/somalia-debt-relief-ambassador-africa-state-department-congress-development-diplomacy-aid-world-bank-imf/>. Again, the portrayal of Somalia is deeply infused with the ideas of state failure and U.S. benevolence: “The United States spends around half a billion dollars per year in aid and development to help prop up Somalia’s fragile government as it grapples with violence from terrorist groups and chronic instability...one of the poorest and least developed states in the world.” *Id.*

<sup>513</sup> Zohra Ahmed, *Towards a Law and Political Economy Approach to the Global War on Terror*, LPE (Nov. 24, 2021), <https://lpeproject.org/blog/towards-a-law-and-political-economy-approach-to-the-global-war-on-terror/> (connecting the U.S. influence in facilitating Somalia’s IMF loans with similar practices in Pakistan, suggesting both are a means of exerting economic pressure to obtain consent).

<sup>514</sup> See al-Bulushi, *supra* note 158, at 33.

<sup>515</sup> See *supra* Introduction.

<sup>516</sup> See, e.g., *U.S. Africa Command Conducts Strike*, *supra* note 296 (“Violent extremist organizations like al-Shabaab present long-term threats to the U.S. and regional interests”).

government favorable to U.S. interests. Airborne strikes against al-Shabaab are only one part of a decades-long strategy of U.S. military imperialism in Somalia.<sup>517</sup>

### C. LOOKING FORWARD

Despite a seeming reduction in operations, the U.S. continues to pursue intervention in Somalia with counterterrorism as a pretext. After last year's withdrawal, the Biden administration redeployed troops to Somalia in May 2022.<sup>518</sup> The move coincided with the election of Hassan Sheikh Mohamud the same month, suggesting the U.S. had been planning to increase military support for the new administration.<sup>519</sup> Once again, the U.S. is providing military backing to a government favorable to its interests.<sup>520</sup> Around the same time, a U.S. company has been trying unsuccessfully to negotiate the first offshore drilling agreement with Somalia.<sup>521</sup> The government rejected the initial agreement under a law that protects Somali natural resources,<sup>522</sup> and the current dispute between the U.S. company and the Somali government is reminiscent of decolonization-era U.S. efforts to gain or maintain access to foreign resources. The U.S. has also requested additional coastline surveillance from the UN to combat piracy in order to protect its shipping, which the UN partly granted.<sup>523</sup> It seems the U.S.'s renewed military interest in Somalia is related to the contemporaneous economic interests at stake.

Given the outside impact of U.S. counterterrorism policy on countries in Africa and Asia, the legal questions presented in this Article do not have neutral impact. Rather, any effort to assess U.S. engagement in Somalia for its lawfulness must

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<sup>517</sup> Debora Malito, *The Endless US War on Terror in Somalia*, ISPI (May 7, 2021), <https://www.ispionline.it/en/pubblicazione/endless-us-war-terror-somalia-30359>; Quaranto, *supra* note 31. There are also reports of a secret prison in Somalia. TURSE, *supra* note 66, at ?.

<sup>518</sup> Savage & Schmitt, *supra* note 172.

<sup>519</sup> Guyer, *supra* note 172.

<sup>520</sup> Mohamud has been supportive of U.S. intervention. Harun Maruf & Jeff Seldin, New Somali President Welcomes Return of US Troops, VOA, (May 17, 2022), <https://www.voanews.com/a/new-somali-president-welcomes-return-of-us-troops/6577228.html>.

<sup>521</sup> See Melisa Cavcic, *Somalia's inaugural offshore oil & gas deal with U.S. operator deemed illegal*, OFFSHORE ENERGY (Feb. 22, 2022), <https://www.offshore-energy.biz/somalias-inaugural-offshore-oil-gas-deal-with-u-s-operator-deemed-illegal/>; *Somalia's president cans US oil deal hours after it was signed*, DW (2022), <https://www.dw.com/en/somalias-president-cans-us-oil-deal-hours-after-it-was-signed/a-60846562> (last visited May 11, 2022); Harun Maruf, *Somali Government, US Company Dispute Legality of Oil Deal*, VOA (Apr. 19, 2022), <https://www.voanews.com/a/somali-government-us-company-dispute-legality-of-oil-deal-/6536605.html>.

<sup>522</sup> Cavcic, *supra* note 521. Many Somalis perceive any U.S. engagement as a guise for its interest in Somalia's oil. ELM, *supra* note 89, at 87.

<sup>523</sup> Edith M. Lederer, *UN Renews Anti-Piracy Ships off Somalia for Only 3 Months*, MILITARY.COM (Dec. 4, 2021), <https://www.military.com/daily-news/2021/12/04/un-renews-anti-piracy-ships-off-somalia-only-3-months.html> (noting the African Union, European Union, China, India, Japan, South Korea and Russia also have patrolled the region).

be conscious of the U.S.'s persistent imperialist justifications to intervene in strategic countries to the detriment (and death) of those living there. The U.S. selects places and people for this violent intervention based on a racist, Islamophobic, and gendered reasoning. When the U.S. imagines certain spaces like Somalia as "failed" or "unstable," it justifies military occupation as counterterrorism and state-building. U.S. legal reasoning is facilitated by its imperialist way of organizing and understanding parts of the world as places for U.S. intervention. Presently, this reasoning is underpinned by justifications of counterterrorism, though as shown in the Background, the justifications for intervention have changed, and U.S. interest in Somalia is persistent. Attacking the legality of airborne strikes without criticizing the overall history of U.S. intervention still leaves room for such imperialism to adapt. U.S. military empire as a whole, not just one problematic strategy of it, must remain the forefront of legal conversations.

## CONCLUSION

Despite insisting upon the legality of its airborne strikes, the U.S. government has not complied with domestic and international law in its actions against al-Shabaab. Moreover, the inability of these strikes to actually identify, kill, and stop "terrorists" undermines U.S. claims that these strikes are a legal and necessary tool of counterterrorism. Rather, airborne strikes facilitate continued military presence in Somalia, whose strategic importance to the U.S. is revealed by decades of U.S. involvement. As such, airborne strikes must be understood as a tool of U.S. imperial control, rather than counterterrorism, a practice that should not be tolerated by the domestic or international legal community.

Such criticism of the U.S. must necessarily center Somalis enduring almost two decades of an U.S. lethal violence. As shown above, certain individuals are more likely to be considered al-Shabaab members by U.S. targeting policy and are in danger of execution because of their age, gender, or work. To be a man and to be visible, whether driving or farming, in an area of al-Shabaab control, is to be a "lawful" target. The U.S. claims that al-Shabaab endangers civilians, yet its counterterrorism policy has caused as many as 143 civilian casualties. With the immense stress and trauma of living under air warfare<sup>524</sup> and the threat of strikes encouraging mass displacement in Somalia,<sup>525</sup> U.S. actions have endangered Somali civilians despite condemning terrorist

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<sup>524</sup> See, e.g., Cachelin, *supra* note 15; Blakeley, *supra* note 35; INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL AND GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* (2012); Afxentis Afxentiou, *A history of drones: moral(e) bombing and state terrorism*, 11 CRITICAL STUDIES ON TERRORISM 301 (2018).

<sup>525</sup> Amanda Sperber, *U.S. Bombardments Are Driving Somalis From Their Homes*, FOREIGN POLICY (Mar. 7, 2019), <https://foreignpolicy.com/2019/03/07/us-bombardments-are-driving-somalis-from-their-homes-airstrikes-al-shabab/>.

organizations for the same reasons.

As for members of al-Shabaab, even those engaged in terrorist acts within Somalia should not be subject to execution by the U.S., a state that is removed from the immediate interests and consequences of the conflict. A predominantly internal affair is now the object of the world's most prominent military and security force. From this framing, continuous U.S. lethal violence in Somalia becomes unjustifiable.