Notes

Al Hela's Deathly Silence: The Decline of International Law's Role in Interpreting the 2001 AUMF

Sullivan & Cromwell LLP Student Writing Prize in Comparative and International Law, Outstanding Note

Nearly a decade ago, the D.C. Circuit's decision in Al-Bihani v. Obama *made a forceful case against the use of international law-of-war principles to interpret the 2001 Authorization for the Use of Military Force (AUMF). This decision was reached despite a plurality of the Supreme Court suggesting a contrary approach in* Hamdi v. Rumsfeld. *Although the D.C. Circuit walked back the* Al-Bihani *court's holding en banc, two recent decisions have revived* Al-Bihani*'s reasoning, strongly suggesting that international law has no relevance in AUMF-interpretation. This position has particularly strong ramifications for determining the end of the decades-long war it authorized. While U.S. law on conflict termination is decidedly rigid and formalistic, international law principles would provide a more nuanced and fact-based legal approach to the end of war—a framework all-but-foreclosed by* Al-Bihani *and its progeny.*

This Note aims to update the analysis of this issue by addressing the progression from Hamdi, *through* Al-Bihani, *to the recent cases of* Al-Alwi v. Trump *and* Al Hela v. Trump, *and by examining the way in which Judge Neomi Rao of the D.C. Circuit Court of Appeals*

crafted her opinion in Al Hela *to quietly promote a viewpoint that is hostile to international law's applicability. This Note also examines ramifications of the* Al Hela *decision on determining the end of the 'Forever War,' as well as proposals for the political branches to rethink and address the end of the current conflict. Finally, this Note proposes the adoption of an international law-based conception of the end of war*.

INTRODUCTION

There has been considerable judicial and scholarly debate about the applicability of international legal principles to the President's constitutional war-making powers under the 2001 Authorization for the Use of Military Force (AUMF).[1] Enacted in the immediate aftermath of the September 11 attacks,[2] the AUMF granted the President extensive powers to combat terrorism.[3] Nearly twenty

1. *See generally, e.g.*, Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) [hereinafter *Al-Bihani I*]; Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) [hereinafter *Al-Bihani II*]; Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L L. 67 (2017); Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L. J. 49 (2016) [hereinafter Ingber, *International Law*]; Curtis A. Bradley & Jack Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628 (2016) [hereinafter Bradley & Goldsmith, *Obama's AUMF*]; Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War – Part II*, LAWFARE (Dec. 31, 2011, 4:48 PM), https://www.lawfareblog.com/ndaa-good-bad-and-laws-war-part-ii [https://perma.cc/2U5U-SKA7]; Gianni P. Pizzitola, Note, *To Know Our Enemy: How and When the International Laws of War Define Whom the President May Fight in the War on Terror*, 104 CORNELL L. REV. 1903 (2019).

2. The 60-word authorization was passed on September 18, 2001, one week after the attacks. Gregory D. Johnson, *60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BUZZFEED (Jan. 16, 2014), https://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most [https://perma.cc/UQ8C-F3HR]. White House lawyers and congressional staffers haggled over the details for a few sleep-deprived nights before approving a draft, and yet "[w]hat was written in a few days of fear has now come to govern years of action." *Id.*

3. The Authorization gives the President the authority

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

years later, the AUMF is still with us.[4] It is not, however, the same authorization that it was in its infancy.[5]

The reach of the AUMF expanded remarkably in the subsequent years after its passage.[6] The past three presidential administrations have invoked the AUMF in contexts beyond what a reader of its plain text could ever have envisioned.[7] Further, the conflict it authorizes has gone on far longer than any war in our history, begging the question: When will it *really* end?[8]

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

4. *See, e.g.*, THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2020), https://www.whitehouse.gov/wp-content/uploads/2020/10/Annual-1264-Report-on-Legal-and-Policy-Framework-re-Military-Use-of-Force.pdf [https://perma.cc/2BZ3-XW57] (detailing "legal, factual and policy bases" for the use of military force in 2019, including the 2001 AUMF). This Report was released on October 20, 2020 by the Trump Administration pursuant to Section 1264 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. No. 115-91), as amended by Section 1261 of the NDAA for FY 2020 (Pub. L. No. 116-92).

5. *See infra* note 7 and accompanying text.

6. *Id.*

7. *See generally supra* note 3 and accompanying text; David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 75–79 (2002) (describing congressional considerations of the language of the AUMF and how it was meant to interact with the War Powers Resolution). *See also* U.S. Dep't of Just. Off. of Legis. Affs., Letter from Assistant Att'y Gen. William E. Moschella to Members of the S. Select Comm. on Intel. and the H.R.'s Permanent Select Comm. on Intel. (Dec. 22, 2005), https://www.justice.gov/sites/default/files/ag/legacy/2007/01/11/surveillance6.pdf [https://perma.cc/D2MN-SCP2] (describing the Bush Administration's legal basis for authorizing wiretapping by the National Security Administration); Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn't Necessary*, N.Y. TIMES (Sept. 10, 2014), https://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html [https://perma.cc/XPZ5-YWBZ] (describing the Obama Administration's position that the AUMF authorized the use of military force against ISIS); THE WHITE HOUSE, REPORT ON THE LEGAL & POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 6 (2018), https://assets.documentcloud.org/documents/4411804/3-18-War-Powers-Transparency-Report.pdf#page=6 [https://perma.cc/72SM-VDQ6] (asserting a right under the AUMF to use force in "collective self-defense") [hereinafter 2017 WHITE HOUSE REPORT].

8. On August 30, 2021, the United States completed a withdrawal of ground troops from Afghanistan. *See, e.g.*, Phil Stewart & Idrees Ali, *Last U.S. Troops Depart Afghanistan After Massive Airlift Ending America's Longest War*, REUTERS (Aug. 30, 2021, 7:08 PM), https://www reuters.com/world/last-us-forces-leave-afghanistan-after-nearly-20-years-2021-08-30/ [https://perma.cc/25HZ-VY88]. However, even assuming a limited U.S. presence in

The question of how to determine the end of a war is dealt with in vastly different ways by U.S. domestic law and international law.[9] U.S. domestic law, as elaborated by Supreme Court precedents, grants supreme authority to the acts of Congress and the President.[10] International law permits a more flexible approach that places the end of law-of-war applicability at the factual end of conflict.[11] In light of this tension, the question arises: Does the international law framework for the end of war have any import in interpreting and applying the AUMF?[12]

The Supreme Court in *Hamdi v. Rumsfeld* suggested that international law-of-war principles do influence the understanding of presidential authority to detain enemy combatants under the AUMF.[13] Since *Hamdi*, the question of whether international legal principles cabin the President's domestic legal authority under the AUMF has bounced around the D.C. Circuit, which has considered habeas corpus petitions from Guantanamo Bay for over a decade.[14]

In some instances, the D.C. courts have agreed that international law-of-war concepts—including those regarding the end of war—should be considered in defining the scope of the AUMF.[15] On the other hand, another line of judicial reasoning in those courts has insisted that international law has no bearing on interpreting the

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Taliban-controlled Afghanistan, campaigns pursuant to the 2001 AUMF continue to take place across the globe, and the capacity and plans for future operations will remain in and around Afghanistan. *See, e.g.*, Mark Landler, *20 Years On, the War on Terror Grinds Along, With No End in Sight*, N.Y. TIMES (Sept. 10, 2021), https://www nytimes.com/2021/09/10/world/europe/war-on-terror-bush-biden-qaeda.html [https://perma.cc/69G7-4W43]; Gene Healy & John Glaser, *Don't Just End the War in Afghanistan, Repeal the Resolution That Authorized It*, DEFENSE ONE (May 27, 2021), https://www.defenseone.com/ideas/2021/05/dont-just-end-war-afghanistan-repeal-resolution-authorized-it/174358/ [https://perma.cc/9M9T-KXN6]; Joshua Keating, *The Forever War Won't End Until Congress Ends It*, SLATE (May 5, 2021, 4:06 PM), https://slate.com/news-and-politics/2021/05/biden-afghanistan-aumf-forever-war-power-congress html [https://perma.cc/F2S8-3NUX].

9. *See infra* Part I.

10. *See infra* Section I.B.

11. *See infra* Section I.A.

12. *See infra* Part II.

13. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004); *see also infra* Section I.C.2.

14. *See infra* Section II.A.

15. *See, e.g.*, Warafi v. Obama, 409 F. App'x 360, 361 (D.C. Cir. 2011) (remanding to district court to determine whether the petitioner was "permanently and exclusively engaged as a medic," as defined by Article 24 of the First Geneva Convention).

AUMF.[16] This position was prominently advocated in the concurring opinion of then-Judge Brett Kavanaugh in the case of *Al-Bihani v. Obama*.[17] According to this school of thought, the authority of the AUMF is not cabined by international law, and the limits of its granted powers can be determined only by a subsequent act of the political branches.[18] In the current conflict, this construction has tremendous ramifications.[19]

In the recently-decided cases of *Al-Alwi v. Trump*[20] and *Al Hela v. Trump*,[21] Kavanaugh's understanding received a forceful boost. In *Al Hela* specifically, Judge Neomi Rao of the D.C. Court of Appeals may have attempted to declare the debate moot.[22] If Judge Rao's approach to the issue in *Al Hela* persists, it can subtly, but substantially, remove international law principles as a key inhibitor of executive actions under the AUMF. What is most fascinating about *Al Hela* is how the opinion created this effect. In her opinion, Judge Rao did not discuss international law at all. Rather, she crafted her opinion in such a way as to clearly demonstrate her resistance to international law's incorporation into the AUMF.

This Note will examine this recent progression in the case law of the D.C. Circuit and the shift in understanding it represents. Part I will first outline the basic international and domestic legal frameworks surrounding the end of war and, second, how *Hamdi* and past executive practice have granted legitimacy to the use of international law in interpreting the AUMF. Part II will next demonstrate how certain judges of the D.C. Circuit have whittled away at international law's relevance, honing-in on the way in which Judge Rao meticulously crafted her opinion in *Al Hela* to support this view. Part III will highlight the practical ramifications of Judge Rao's opinion regarding a potential end to the conflict and how one of the political branches might mitigate those ramifications—if they wish to do so. Finally, a proposal is made for reconceptualizing the end of conflict in a way that utilizes the more flexible framework of international law.

16. *See infra* Sections II.B.–C.

17. *See Al-Bihani II*, 619 F.3d 1, 9 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

18. *See infra* Sections II.B.–C.

19. *See infra* Part III.

20. Al-Alwi v. Trump, 901 F.3d 294, 298 (D.C. Cir. 2018).

21. Al Hela v. Trump, 972 F.3d 120, 135 (D.C. Cir. 2020) [hereinafter *Al Hela*].

22. *See infra* Section II.C.

I. BACKGROUND: THE DOMESTIC AND INTERNATIONAL LAW FRAMEWORKS FOR ENDING WAR

While international law contains two separate frameworks for international armed conflict and non-international armed conflict, both place significant emphasis on the factual conclusion of conflict.[23] On the other hand, U.S. domestic law places a premium on the acts and determinations of the political branches.[24] However, the international laws of war occasionally influence domestic law, both as complementary justifications for actions taken pursuant to domestic authority, and as mechanisms to help define the bounds of domestic law.[25] Especially in regard to defining the boundaries of domestic law, international law may play a role in determining the end to the conflict authorized by the AUMF.[26]

A. International Law Frameworks for the End of War

In order to evaluate the international legal framework informing the end of a particular conflict, it is first necessary to determine the international law classification of the conflict and the framework within the international law of armed conflict—or international humanitarian law (IHL)[27]—which applies to it. Regardless of classification, international law defines an armed conflict by the facts on-the-ground, rather than by any subjective decision.[28]

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23. *See infra* Section I.A.

24. *See infra* Section I.B.

25. *See infra* Section I.C.

26. *Id.*

27. International humanitarian law (IHL) consists of both treaty-based and customary international law. IHL is based primarily on treaties such as the Geneva Conventions, but IHL can also be based on generally-accepted international practice. *See, e.g.*, *War and Law*, INT'L COMM. OF RED CROSS, https://www.icrc.org/en/war-and-law [https://perma.cc/7M7V-L5Q6].

28. Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF*, 47 COLUM. HUM. RTS. L. REV. 204, 205 (2016); *see also* DUSTIN A. LEWIS ET AL., INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT 25 (Feb. 2017), https://pilac.law.harvard.edu/indefinite-war [https://perma.cc/235P-SCBR] ("The international-legal concept of IAC . . . was developed, in part, to make the threshold of application more objective and factual and thereby remove the need for the relatively subjective and formal political recognition of a state of war in the legal sense.").

1. International Armed Conflict

One type of conflict under international law is an international armed conflict, or an "IAC."[29] International law conceptions of war have taken shape over centuries, but, for a modern-era understanding, the best place to start is the 1949 Geneva Conventions.[30] According to Common Article 2 of the Geneva Conventions, the Conventions apply in cases of "declared war or of any other armed conflicts which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[31] These conflicts are characterized mainly by an actual declared war, the participation of two opposing states in an armed conflict, or where "peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."[32]

Where these conditions are met, IHL applies in those territories participating in the conflict "beyond the cessation of hostilities until a general conclusion of peace is reached."[33] The International Criminal Tribunal for the Former Yugoslavia (ICTY) elaborated on this formulation, finding that IHL would apply where "no general conclusion of peace" had yet "brought military operations in the region to a close."[34] This reflected the language of Article 6(2) of the Fourth Geneva Convention and Article 3(b) of Additional Protocol I, which both provide for the cessation of their applicability "on the general close of military operations."[35] Although neither of these sources explain how to determine "the general close of military operations," the standard has been defined alternatively as the "final end of all

29. *See* Lewis et al., *supra* note 28, at 21–22.

30. *Id.*

31. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Prior to the Geneva Conventions, it was commonly contended that IHL should only apply in a case of actual declared war. *See* Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT'L L. 1, 109, 114–18 (2015).

32. Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(4), June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter AP I].

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

34. *Id.*; *see also* U.K. MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 3.10 (2004) (explaining that the *Tadić* formulation does not require a peace treaty to indicate a "general conclusion of peace" and citing support from international practice).

35. Geneva Convention IV, *supra* note 31, art. 6, ¶ 2; AP I, *supra* note 32, art. 3(b).

fighting between all those concerned,"[36] or the end of "movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat."[37]

2. Non-International Armed Conflict

The other type of conflict recognized by international law is a non-international armed conflict, or "NIAC."[38] "[A]rmed conflicts not of an international character occurring in the territory of one of the High Contracting Parties" are also covered by the provisions of IHL in Common Article 3.[39] These conflicts feature one or more non-state armed groups, either in conflict with a state or another non-state group.[40] According to the *Tadić* Tribunal's characterization of an

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36. U.S. DEP'T OF DEF., LAW OF WAR MANUAL JUNE 2015 ¶ 10.3.4.

37. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS 67 (Yves Sandoz et al. eds., 1987); INT'L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION I ¶ 279 (Philip Spoerri & Knut Dörmann eds., 2016). These standards apply to standard IACs between states. Cases of occupation have a different standard dealt with in the Geneva Conventions and Additional Protocol I. For example, Geneva Convention IV provides that its provisions shall apply until "one year after the general close of military operations." Geneva Convention IV, *supra* note 31, art. 6, ¶ 3.

38. INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUG. 1949, Common Art. 3 (2001). Additional Protocol II also establishes itself as applying

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

Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. This is an arguably stricter definition than Common Article 3 seems to apply. The United States is not a party to AP II, so the parameters of Common Article 3 are more relevant for our purposes. *See* Weizmann, *supra* note 28, at 213.

39. *Id.*

40. *See, e.g.*, AP II, *supra* note 38, art. 1(1):

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

Although the United States is not a party to Additional Protocol II, its formulation of an NIAC is helpful for understanding the scope of Common Article 3's application, as AP II claims only to supplement Common Article 3 "without modifying [Common Article 3's] existing conditions of application." *Id.*; *see also* Lewis et al., *supra* note 28, at 53.

NIAC, application of IHL requires: (1) a certain level of organization, with the requisite command structure to sustain military operations; and (2) a minimum level of intensity in the relevant hostilities.[41] Defining exact standards for both of these prongs has proven elusive, but attempts have been made by international tribunals and the drafters of the Rome Statute.[42] International tribunals have considered a variety of factors in determining the level of organization, including the existence of a command structure, military and logistical capacity, a disciplinary system, and the ability for a group to speak with one voice.[43] Factors considered in determining the intensity of hostilities include the quantity and quality of troops and weapons deployed, the types of actions, the effects on the civilian population, and whether external actors are involved.[44]

The end of a NIAC, like the end of an IAC, depends on the unraveling of the factual criteria which defined it in the first place.[45] There is no treaty definition for the end of an NIAC, nor clear guidance from international tribunals.[46] The ICTY has stated that the end of applicability of IHL in the case of an NIAC should be conditioned on the achievement of a "peaceful settlement."[47] This approach may be

41. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgement, ¶¶ 561–68 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). Later tribunal cases applied the test that the *Tadić* court formulated. *See, e.g.*, Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 175 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 84, 90–134 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence (Trial Chamber I), ¶ 93 (Dec. 6, 1999).

42. See Lewis et al., *supra* note 28, at 54–58, for a summary of these authorities and their deliberations.

43. *Id.* at 55; *see also* Prosecutor v. Dyilo, Judgment, ICC-01/04-01/06, ¶¶ 537–38 (Mar. 14, 2012); Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 175–206 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 168 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Tristan Ferraro, *The Applicability and Application of IHL to Multinational Forces*, 95 INT'L REV. RED CROSS 561, 576 (2013).

44. *See* Lewis et al., *supra* note 28, at 55; Ferraro, *supra* note 43, at 576–77; Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 177–93 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

45. *See* Weizmann, *supra* note 28, at 220.

46. *Id.* at 222–24.

47. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *See also* Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgement, ¶ 100 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (ruling that once hostilities reached a threshold necessary for classification as an NIAC, the status of NIAC would hold, regardless of subsequent drops in hostilities).

merely "of moderate utility" because, even with a formal agreement, IHL will continue to apply if levels of violence meet the NIAC threshold.[48] Another approach is to look at whether either of the two factors which triggered the beginning of an NIAC have ceased.[49] For example, according to one commentator, it may be enough for the hostilities to fall below the intensity threshold "with a certain degree of permanence and stability."[50] Under this approach, permanence and stability are key.[51] As the ICTY warned, lightly concluding the applicability of IHL can lead to "participants in an armed conflict . . . [being] in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion."[52]

3. The Release of Prisoners upon the "Cessation of Hostilities"

In addition to the various tests analyzed thus far to determine the boundaries of IHL applicability to IACs and NIACs, IHL also provides for modifications of its legal framework when actual hostilities have ended, but the conflict has not yet ended as a matter of international law.[53] According to the Geneva Conventions' framework of IHL applicable to IACs, "[p]risoners of war shall be released and repatriated without delay after the *cessation of active hostilities*."[54] The U.K. Ministry of Defence interprets the "cessation of active hostilities" as occurring when "there is no immediate expectation of their resumption."[55] According to this formulation, the

48. Weizmann, *supra* note 28, at 223 (citing SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 253 (2012); Jann K. Kleffner, *Human Rights and International Humanitarian Law: General Issues*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 51, 65 (T. Gill & D. Fleck eds., 2010)).

49. Weizmann, *supra* note 28, at 223.

50. Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT'L REV. OF THE RED CROSS 163, 180 (2014).

51. Weizmann, *supra* note 28, at 223–34.

52. Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgement Vol. II, ¶ 1694 (Int'l Crim Trib. for the Former Yugoslavia Apr. 15, 2011).

53. *See* Weizmann, *supra* note 28, at 232–34, 232 n.115 (quoting INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 514 (Jean Pictet ed., 1958)) ("The 'close of hostilities' should be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities.").

54. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, ¶ 1, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (emphasis added).

55. U.K. MINISTRY OF DEFENCE, *supra* note 34, ¶ 8.169.

end of hostilities will likely coincide with the expiration of IHL in an NIAC if an NIAC legally ends when the intensity-of-hostilities threshold is no longer met.[56] The U.S. Department of Defense interprets "cessation of hostilities" similarly, but adds that at this point, "the belligerents feel sufficiently at ease about the future that they are willing to release and repatriate all [prisoners of war]."[57]

B. U.S. Law on the End of Conflicts and Hostilities

The U.S. conflict against the Taliban and Al Qaeda has been characterized as an NIAC by international law commentators,[58] the Supreme Court[59] and the U.S. government.[60] However, U.S. domestic law takes a very different approach from international law to determining the end of war or hostilities for the purposes of exercising U.S. constitutional war powers. The Constitution, while vesting the power to declare and make war in Congress and the President respectively, does not discuss the termination of war.[61] Until the Civil War, conflicts generally ended with a formal peace treaty.[62] The Civil War was found by the Supreme Court in *The Protector* to have been formally ended by presidential proclamation, as it was necessary to "refer to some public act of the political departments" to determine the

56. Weizmann, *supra* note 28, at 233.

57. U.S. DEP'T OF DEF., *supra* note 36, ¶ 9.37.2.

58. *See* 31st Int'l Conf. of the Red Cross and Red Crescent [ICRC], Nov. 28–Dec. 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 9–11, ICRC Doc. 31IC/11/5.1.2 (Oct. 2011).

59. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628–31 (2006) (quoting Common Article 3 of the Geneva Conventions) (holding that the conflict with Al Qaeda is an armed conflict "not of an international character" because it is not a clash between nations).

60. *See, e.g.*, U.S. DEP'T OF JUST., LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR ORGANIZATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 3 (2013), https://irp fas.org/eprint/doj-lethal.pdf [https://perma.cc/SD9H-CR82]. The Department of Justice stated that "[a]ny U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities." *Id.* (citing John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011)).

61. U.S. CONST. art. I, § 8, cl. 11, art. II.

62. *See, e.g.*, Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49 (concluding the Northwest Indian War); Treaty of Mortefontaine, U.S.-Fr., Dec. 21, 1801, 8 Stat. 178 (The Quasi-War with France); Treaty of Peace and Amity, Between His Britannic Majesty and the United States of America (Treaty of Ghent), U.S.-Gr. Brit. art. IX, Dec. 24, 1814, 8 Stat. 218 (War of 1812); Treaty of Guadalupe Hidalgo, U.S.-Mex., July 4, 1848, 9 Stat. 922 (Mexican-American War); Treaty of Paris, U.S.-Sp., Dec. 10, 1898, 30 Stat. 1754 (Spanish-American War).

end of the war.[63] Acts of the political branches were required to determine the ends of World War I and World War II as well.[64] In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, decided over a year after actual hostilities ended in World War I, the Supreme Court upheld the War-Time Prohibition Act as a valid exercise of governmental war powers.[65] The Court emphasized that the term "until the conclusion of the present war" in the Act would depend on the "ratification of the treaty of peace or the proclamation of peace."[66] In *Ludecke v. Watkins*, decided after hostilities ended in World War II, the Supreme Court held that war powers only terminated when a war was ended by a political act such as a peace treaty, legislation, or presidential proclamation and that, otherwise, the war powers exercised by the President are "not exhausted when the shooting stops."[67] Rather, the ending of World War II was a matter "of political judgement for which judges have neither technical competence nor official responsibility."[68]

Although the historical legal standard enshrined in these cases stood the test of time doctrinally,[69] it has not aged well in practice.[70]

63. The Protector, 79 U.S. 700, 701–02 (1871); *see also* McElrath v. United States, 102 U.S. 426, 438 (1880); United States v. Anderson, 76 U.S. (9 Wall) 56, 71 (1870) (pointing to a different presidential proclamation than that identified in *The Protector* as delineating the end of the war).

64. *See infra* notes 65–68 and accompanying text.

65. Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 168 (1919). This case was decided after the United States declined to ratify the Treaty of Versailles. For the purposes of war-time statutes affecting manufacturing and the like, World War I officially "continued" until the passage of Joint Resolutions in March and June 1921. The first of those Joint Resolutions only called for the construal of certain war-time Acts "as if the war had ended and the present or existing emergency had ended." Joint Resolution of Mar. 3, 1921, ch. 136, 41 Stat. 1359 (1921). The second formally ended the state of war. Joint Resolution of July 2, 1921, ch. 40, 42 Stat. 105 (1921).

66. *Hamilton*, 251 U.S. at 153, 164–65 (quoting War-Time Prohibition Act, ch. 212, 40 Stat. 1045, 1046 (1918)).

67. Ludecke v. Watkins, 335 U.S. 160, 167–69 (1948); *see also* Jaegler v. Carusi, 342 U.S. 347–48 (1952) (holding that the war with Germany ended for the purposes of domestic war powers with Congress' Joint Resolution of Oct. 19, 1951).

68. *Ludecke*, 335 U.S. at 170.

69. The fact that *Ludecke* is "authoritative precedent" gave rise to fears that in the context of the 2001 AUMF, the President may be able to exercise war powers "indefinitely." Adam Klein, Note, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865, 1878 (2010) (quoting Stephen I. Vladeck, Ludecke's *Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SEC. L.& POL'Y 53, 56 (2006)).

70. *See generally* Vladeck, *supra* note 69.

In more recent full-scale wars, peace has been announced in speeches on television rather than formalized by legislation, proclamation, or treaty.[71] President George H.W. Bush declared the 1991 Iraq-Kuwait War over in a speech to Congress;[72] President Obama similarly announced the end of the Second Iraq War.[73] Additionally, the opaque reality of modern warfare and statecraft has complicated the ideal of clear-cut temporal boundaries of war, with U.S. practice, for better or worse, adapting to that reality.[74] Presidents have long introduced U.S. armed forces into major hostilities without a formal declaration of war.[75] In some cases, those hostilities have protracted into conflicts like the wars in Korea and Vietnam, the latter prompting the enactment of the War Powers Resolution.[76] The Resolution limits the President's

71. *See infra* notes 72–73 and accompanying text.

72. President George H.W. Bush, Address Before a Joint Session of Congress on the End of the Gulf War (Mar. 6, 1991), https://millercenter.org/the-presidency/presidential-speeches/march-6-1991-address-joint-session-congress-end-gulf-war [https://perma.cc/4MES-XYWW].

73. *See* President Barack Obama, Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), https://obamawhitehouse.archives.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq/ [https://perma.cc/G9HE-CQAJ] ("Operation Iraqi Freedom is over, and the Iraqi people now have lead responsibility for the security of their country.").

74. *See, e.g.*, History Matters, *Why Don't Countries Formally Declare War Anymore? (Short Animated Documentary)*, YOUTUBE (May 8, 2020), https://www.youtube.com/watch?v=F1rzd3eG7ps; *see also* Frédéric Mérgret, *'War'? Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361, 376–78 (2002) (discussing how the invocation of self-defense could lead to a potentially unending War on Terror).

75. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863) (accepting President Lincoln's blockade of Confederate ports as "conclusive evidence" of a state of war validating the use of said blockade). The only instance of comparable magnitude earlier in time was probably the beginning of the Mexican-American War, when President James Polk informed Congress that "war exist[ed]" after a skirmish in the contested Mexico-American border area in 1846 purportedly resulted in Mexican troops "shed[ding] the blood of our fellow-citizens on our own soil." *See* Louis Fisher, *The Mexican War and Lincoln's "Spot Resolutions*" 1, L. LIBR. OF CONG. (Aug. 18, 2009), http://www.loufisher.org/docs/wi/433.pdf [https://perma.cc/2B43-VTG2] (quoting 5 JOINT COMM. ON PRINTING OF THE HOUSE AND SENATE, A COMPILATION OF MESSAGES AND PAPERS BY THE PRESIDENTS 2288 (James D. Richardson ed., (1917)). Interestingly, the one who attempted to hold him to task was Rep. Abraham Lincoln, who introduced the Spot Resolutions requesting evidence that the battleground was actually American land. *Id.*

76. Off. of Legal Couns., Deployment of United States Armed Forces into Haiti, Letter Opinion for Four United States Senators 176 (Sep. 27, 1994) (explaining that the purpose of enacting the War Powers Resolution was "to prevent the United States from being engaged, without express congressional authorization, in major, prolonged conflicts such as the wars in Vietnam and Korea, rather than to prohibit the President from using or threatening to use

ability to enter into hostilities without congressional authorization in the form of a declaration or statutory authorization to cases of national emergency, and creates a system of reporting to Congress.[77]

C. How International Law Has Informed Interpretation of the AUMF

Although international law and domestic U.S. law differ dramatically in their treatment of the end of conflict,[78] international law's fact-based conception may have a role to play in determining the end of the AUMF's authority. In practice, international law intersects with domestic law to inform U.S. actions under the AUMF in multiple ways.[79] One form it can take is as a separate justification geared towards explaining actions to an international audience that have their own, distinct frameworks under domestic law.[80] As a matter of politics, if not strict legality per se, the executive will be sure to invoke both domestic and international law justifications to stave off criticism and pressure from both external and internal actors.[81] A second way in which international law may intersect with U.S. law is as an interpretive tool, in which well-established principles of international law could inform the bounds of less fleshed-out domestic legal doctrines.[82]

1. International Law as a Separate Source of Justifications

Professors Curtis Bradley and Jean Galbraith have posited that an interactive dynamic exists in which "presidents draw on legal support in one sphere, international or domestic, to help compensate—at least rhetorically—for weak legal support in the other."[83] For

troops to achieve important diplomatic objectives where the risk of sustained military conflict was negligible.").

77. War Powers Res., 50 U.S.C. §§ 1541–48 (2018). The AUMF is such a statutory authorization (115 Stat. 224). Therefore, actions taken pursuant to the AUMF do not trigger the 60-day limit on use of force without congressional authorizations or reporting requirements of the Resolution. *See* 50 U.S.C. § 1541(c).

78. *See supra* Sections I.A–B.

79. *See generally* Curtis Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689 (2016).

80. *See id.* at 727–32.

81. *Id.* at 760–61.

82. *See infra* Section I.C.2.

83. Bradley & Galbraith, *supra* note 79, at 708.

example, the Bush Administration was seemingly content with embracing relatively underwhelming international law justifications when undertaking actions under the AUMF.[84] The Administration considered asking the U.N. Security Council for an explicit authorization to use force against Al Qaeda and the Taliban in the aftermath of 9/11, but then backtracked and simply invoked a self-defense justification under Article 51 of the U.N. Charter.[85] Professors Bradley and Galbraith argued that the Bush Administration felt secure enough in its domestic legal authority—the then-new and widely accepted AUMF—that it felt comfortable with a tenuous international law justification.[86]

The Obama Administration likely faced the converse of the dynamic: as U.S. actions gained international acceptance, or at least acquiescence, in the decade following 9/11, President Obama may have been more comfortable emphasizing international law justifications for actions against ISIS because the domestic law authority—the AUMF—had begun to lose some legitimacy, especially when applied to groups like ISIS, which did not exist when the AUMF was enacted.[87]

2. International Law as an Interpretive Tool in Defining Domestic Law

Another way international law manifests itself is as an interpretive mechanism to help define not only the nation's war powers under international law, but also its powers under domestic law.[88] This

84. *Id.* at 729. For examples of Bush Administration lawyers explaining the international law justifications for AUMF-related activities, see, for example, John B. Bellinger, *Legal Issues in the War on Terrorism, Address at the London School of Economics* (Oct. 31, 2006), https://2009-2017.state.gov/s/l/2006/98861 htm [https://perma.cc/7S2Y-RXYJ] (asserting that U.S. actions against Al Qaeda and the Taliban were justified under international law as acts of self-defense and justifying U.S. actions, including detention, as consistent with the Geneva Conventions). *Cf.* Memorandum from the President, Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), https://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf [https://perma.cc/C46W-FGCB] (asserting, among other things, that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan").

85. Bradley & Galbraith, *supra* note 79, at 729; *see also* U.N. Charter, art. 51 (recognizing "the inherent right of individual or collective self-defence").

86. Bradley & Galbraith, *supra* note 79, at 729.

87. *Id.* at 730–73 (describing the Obama Administration's invocation of the international law rights of individual and collective self-defense).

88. *See generally* Ingber, *International Law*, *supra* note 1.

application has the potential to both constrain and expand the powers of the President.[89]

In the context of the AUMF, the use of international law as an interpretive device has its roots in the case of *Hamdi v. Rumsfeld*.[90] In *Hamdi*, a plurality of the Supreme Court read into the AUMF the ability for the President to detain individual members of Al Qaeda and the Taliban without trial.[91] To do so, the Court drew on "longstanding law-of-war principles" which implied that, under international law, detention authority for the duration of an armed conflict is considered part-and-parcel of a state's legal toolkit.[92] That toolkit and its contents had been handed to the President with the passage of the AUMF, and it followed that the President's authority to use "all necessary and appropriate force" included the authority to detain for the duration of the conflict.[93] The Court thus used international law-of-war definitions as a means to interpret the AUMF which, in this case, allowed for more flexibility than a mere domestic law analysis could have permitted.[94]

Furthermore, the *Hamdi* Court was careful to warn against unfettered executive power and strongly implied that international law constraints could come into play, just as international law permissions had.[95] Specifically, the Court cited the Third Geneva Convention[96] for the proposition that the detention allowed in *Hamdi* must end "after

89. *Id.*

90. *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

91. *Id.* at 516–24.

92. *Id.* at 518–21.

93. *See id.* (quoting the AUMF).

94. *See* Ingber, *supra* note 1, at 63.

> The Court inferred from these international law *prohibitions* on detention beyond the end of hostilities a rule *permitting* a state to detain so long as hostilities are ongoing. It then invoked that implicit state authority and incorporated it into the congressional statutory grant of authority to the President, presumably inferring that Congress must have intended to grant the President the full authorities of the *state* under international law. The result was an extension of the President's domestic statutory authority beyond the use of force to include detention.

Id. (citing Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-international Armed Conflicts?*, EJIL: TALK! (May 7, 2014), http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/ [https://perma.cc/9JBU-8K5W]; *Hamdi*, 542 U.S. at 520).

95. *See Hamdi*, 542 U.S. at 530–31 (warning of the dangers of an "unchecked system of detention" and "unlimited power"); *see also* Ingber, *International Law*, *supra* note 1, at 64.

96. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

the cessation of active hostilities."[97] As Professor Rebecca Ingber explains, the *Hamdi* Court was "willing to displace existing domestic constraints only . . . because it was able to import international ones."[98]

The *Hamdi* Court's usage of international law is an example of what Professor Ingber calls a "Reverse Betsy."[99] The reference is to the case *Murray v. The Schooner Charming Betsy*, in which the Supreme Court established that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[100] While *Charming Betsy* stands for the proposition that statutes should never be interpreted as violating international law, the move in *Hamdi* demonstrates a photo-negative of the doctrine: it posits that the ambiguous statute may be interpreted to contain more power when that power would be consistent with the powers of a state under international law.[101] The logical flaw in using the doctrine in this way is that *Charming Betsy*'s rationale lays in presumed congressional intent—that Congress, in drafting the statute, should be presumed to have had the limits of international law in mind.[102] To suggest the converse—that when Congress drafts a statute relating to the use of force abroad, it does so with the intent to incorporate international law understandings, even to permit broader executive authority—requires a slight interpretive stretch.[103]

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97. *Hamdi*, 542 U.S. at 520.

98. Ingber, *International Law*, *supra* note 1, at 64. To suggest otherwise—that the Court meant only to expand the boundaries of executive power without cabining it with international law constraints—would be to conclude that the *Hamdi* Court was knowingly upholding indefinite detention of an American citizen.

99. *Id.* at 62–66.

100. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

101. Ingber, *International Law*, *supra* note 1, at 62–64.

102. *See id.* at 62 (explaining that the *Charming Betsy* canon relies on a theory of "presumed congressional intent").

103. One would think that if Congress intended a 60-word authorization of force abroad to allow a President to exercise powers inconsistent with domestic statutes and potentially the Constitution, Congress would have said so, rather than leave that construction for the importation of international law concepts. *Ingber reasoned that:*

> This is not simply a grant of authority in what would otherwise be a domestic law vacuum . . . . The Court's expansive interpretation of the AUMF crafted statutory authority for the President's administrative detention scheme—for citizens and noncitizens alike—in the place of the ordinary criminal framework and statutory rules to the contrary. It replaced the well-established procedures and constitutional and statutory norms of the criminal law framework . . . with a modified form of habeas corpus review . . . . The Court thus relied on the existence of an international law *constraint* to justify a domestic statutory *grant* of authority to the President, and in the process overrode the ordinary operation of explicit domestic law protections.

Although the Obama Administration had committed to international law compliance with seemingly more sincerity than the Bush Administration,[104] the Obama Administration likely did so in order to unlock more power than it otherwise would have had.[105] In doing so, the Administration insisted not only on compliance with international law, but also on the proposition that compliance with domestic law depends upon compliance with international law.[106]

Id. at 64.

104. *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay 4–10, *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-442 (D.D.C. Mar. 13, 2009) (explaining the international laws of war applicable to actions taken under the AUMF); *Harold Hongju Koh, Legal Adviser, U.S. Department of State, The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law, Washington, D.C.*, U.S. DEP'T OF STATE (Mar. 25, 2010), https://2009-2017.state.gov/s/l/releases/remarks/139119.htm [https://perma.cc/2VA5-XMZG] ("[W]e are resting our detention authority on a domestic statute—the 2001 Authorization for Use of Military Force (AUMF)—as informed by the principles of the laws of war."); *Eric H. Holder, Attorney General, U.S. Department of Justice, Speech at the Northwestern University School of Law*, U.S. DEP'T OF JUSTICE (Mar. 5, 2012), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law [https://perma.cc/PTX4-U66B] ("International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally."); *Jeh Charles Johnson, Gen. Counsel, Dep't of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Address Before Yale Law School*, YALE L. & POL'Y REV. (Feb. 22, 2012), http://ylpr.yale.edu/sites/default/files/YLPR/johnson_national_security_law_lawyers_and_lawyering_in_the_obama_administration.pdf [https://perma.cc/FLM2-X7HW] (explaining how the Obama Administration relied on the "well-established concept of cobelligerency in the law of war) [hereinafter *Johnson Speech*]; *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before S. Foreign Relations Comm*., 113th Cong. (2014) (statement of Stephen W. Preston, Gen. Counsel, Dep't of Def.) (explaining the Obama Administration's reliance on the AUMF for actions against "associated forces" of Al Qaeda relies on the concept) [hereinafter *Preston Testimony*]. *Cf. Attorney General Alberto R. Gonzales, Prepared Remarks at The University of Chicago Law School*, U.S. DEP'T OF JUSTICE (Nov. 9, 2005), https://www.justice.gov/archive/ag/speeches/2005/ag_speech_0511092 html [https://perma.cc/AW2X-KGM7] ("[T]he reliance on [international] law will put at risk the very reverence for the law on which this country, and the legitimacy of the Court itself, depends."); Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J. L. & PUB. POL'Y 73, 75 (2006) (arguing that the President is not bound by international law in the exercise of his war powers).

105. Ingber, *supra* note 1, at 65; *see also* Bradley & Goldsmith, *Obama's AUMF*, *supra* note 1, at 629.

106. Ingber, *International Law*, *supra* note 1, at 70. It is worth noting that in a brief filed in opposition to Guantanamo detainee Ghaleb Nassar Al-Bihani's appeal for a rehearing en banc in the D.C. Court of Appeals, the Obama Administration explicitly disagreed on this point *with a decision that was decided in the Administration's favor*. Response to Petition for

Chief examples of this are the Office of Legal Counsel memoranda analyzing the legality of targeting a U.S. citizen: Anwar al-Awlaki.[107] In these memoranda, executive branch lawyers presented international legal concepts that implied exceptions to the scope of limiting domestic authorities—including a statute criminalizing murder abroad, an executive order banning assassinations, the Fifth Amendment's Due Process Clause, and the Fourth Amendment's prohibition on unreasonable search and seizure.[108]

Whatever its motivations, the Obama Administration held fast to its application of international law as a possible constraint on executive actions under the AUMF. Although in many instances international law expanded the operational capacity of the AUMF,[109] it served to constrain executive powers in others.[110] For example, in the *Al Bihani I* case, which held that international law concepts should not be regarded in interpreting the AUMF,[111] the government's lawyers went out of their way to disagree with the D.C. Circuit's statement that the "premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war . . . is mistaken."[112] Similarly, regarding the end of war, the Obama Administration agreed with the court in *Hamdi*, arguing that a Guantanamo Bay detainee should not be released because "the laws of war focus [authority to detain] on the cessation of 'hostilities,'" which continued at that time in Afghanistan.[113] This statement insinuated that

Rehearing and Rehearing En Banc 5, Al-Bihani v. Obama (No. 09-5051) (D.C. Cir. May 5, 2010).

107. Ingber, *International Law*, *supra* note 1, at 67–70.

108. U.S. DEP'T OF JUST., MEMORANDUM FROM THE OFF. OF LEGAL COUNSEL TO THE ATT'Y GEN., APPLICABILITY OF FEDERAL CRIMINAL LAWS AND THE CONSTITUTION TO CONTEMPLATED LETHAL OPERATIONS AGAINST SHAYKH AZNWAR AL-AULAQI 12–30 (July 16, 2010); U.S. DEP'T OF JUST., MEMORANDUM FROM THE OFF. OF LEGAL COUNSEL TO THE ATT'Y GEN., LETHAL OPERATIONS AGAINST SHEIKH ANWAR AL-AULAQI 1–7 (Feb. 19, 2010).

109. The prime example of this is perhaps the international law-based doctrine of "co-belligerency." This term refers to the idea that, in a legal conflict with one enemy, that enemy's co-belligerents are also legal fair game. Under the Obama Administration, the concept was used to expand the AUMF's scope to include ISIS, as ISIS was a "co-belligerent" of Al Qaeda. *See, e.g.*, *Johnson Speech*, *supra* note 104; *Preston Testimony*, *supra* note 104. For a critique of the invocation of co-belligerency as a "well-established" principle of international law, see Ingber, *Co-Belligerency*, *supra* note 1, at 69.

110. *See infra* notes 112–113 and accompanying text.

111. *See infra* Section II.B.

112. Response to Petition For Rehearing and Rehearing En Banc, *supra* note 106, at 5 (quoting *Al-Bihani I*, *supra* note 1, at 871).

113. Brief for Appellees at 18, Al Bihani v. Obama, 590 F.3d 866 (2009) (No. 09-5051).

the Administration would concede the end of war where hostilities ceased in fact.

II. THE DECLINE OF INTERNATIONAL LAW'S INFLUENCE IN THE D.C. CIRCUIT AND ITS IMPACT ON DETERMINING THE END OF THE WAR ON TERROR

While *Hamdi* and executive branch practice set the stage for an embrace of international law-based interpretation of the AUMF, the flirtation proved to be short-lived. This Part will detail the initial endorsement of this position in the D.C. Circuit and Congress, alongside subsequent decisions of the D.C. Circuit that vehemently opposed international law's influence. In particular, two recent cases have further entrenched the D.C. Circuit in the position that international law has no role in defining the terms of the AUMF.

A. The Initial Endorsement of International Law Incorporation

The invocation of international law in interpreting the AUMF, first espoused in *Hamdi* and continued by the Obama Administration, initially gained traction in the D.C. Circuit and in Congress.[114] After the Supreme Court's decision in *Boumediene v. Bush*,[115] which ruled that non-citizens detained at Guantanamo Bay were entitled to habeas corpus review under the U.S. Constitution, the D.C. District Courts heard a plethora of habeas petitions challenging detention authority under the AUMF.[116] In several cases, these courts echoed Obama Administration constructions of international law limitations on AUMF-based powers.[117] For example, in *Hamlily v. Obama*, the D.C. Circuit essentially imported the executive branch's international law-based 'co-belligerency' construction, ruling that the AUMF authorized the detention of persons who were part of Al Qaeda, the Taliban or "associated forces"—defined by looking at whether "those forces would be considered co-belligerents under the law of war."[118] In *Gherebi v. Obama*, the Court "adopt[ed] the government's [co-

114. *See infra* notes 118–124 and accompanying text.

115. Boumediene v. Bush, 553 U.S. 723, 733 (2008).

116. *See, e.g.*, *infra* notes 118–121 and accompanying text; Sections II.B.–C.

117. *See, e.g.*, *infra* notes 118–121 and accompanying text.

118. Hamlily v. Obama, 616 F.Supp. 2d 63, 75 (D.D.C. 2009).

belligerency-based] standard for detention."[119] In coming to that decision, the Court in *Gherebi* undertook an analysis of the Geneva Conventions and other principles of international law.[120]

The international law-based extension of AUMF authority to co-belligerents also found implicit endorsement from Congress in the National Defense Authorization Act for Fiscal Year 2012, when "associated forces" were added to the list of those detainable under the AUMF.[121] Explicitly, members of Congress have echoed the executive's position on co-belligerency.[122]

B. Al-Bihani's Opposition to International Law as a Basis for AUMF Interpretation

As the influence of an international law-based interpretation of the AUMF gained traction, opposition to such influence began to grow.[123] The greatest challenge came in the case of *Al-Bihani v. Obama*.[124] Ghaleb Nassar Al-Bihani served as a cook with a paramilitary group associated with the Taliban and Al Qaeda and had been held at Guantanamo Bay since 2002.[125] In appealing the denial of his habeas petition, Al-Bihani made several arguments based on the international laws of war, including that basing his detention on "substantial support" of Al Qaeda and the Taliban violated the international laws of war because he was a civilian and that, as a matter of international law, the war in which he was captured had ended when

119. *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 70 (D.D.C. 2009) (basing the "government's standard" on the co-belligerency concept).

120. *Id.* at 57–71; *see also* Khairkhwa v. Obama, 703 F.3d 547, 550 (D.C. Cir. 2012).

121. National Defense Authorization Act For Fiscal Year 2012, Pub. Law 112–81, 125 Stat 1298, § 1021(b)(2) (2011) [hereinafter 2012 NDAA]. There is no direct reference in the NDAA to the laws of war.

122. *See, e.g.*, *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force*: *Hearing Before the Sen. Comm. on Armed Serv.*, 113th Cong. 29 (2013) (statement of Sen. Levin):

> Where you are authorized to use force under domestic law, AUMF, and under international law against a foreign country or organization, that the authority automatically extends under the law of armed conflict to a co-belligerent, to some entity that has aligned themselves with the specified entity against us, in the fight against us.

123. *See infra* notes 127–132, 136–139 and accompanying text.

124. *See generally Al-Bihani*, 590 F.3d 866 (D.C. Cir. 2010).

125. *Id.* at 869.

the Taliban had lost control of Afghanistan.[126] In *Al-Bihani I*, Judge Brown of the D.C. Circuit Court of Appeals dismissed immediately "the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war."[127] According to the Court, not only had the international laws of war "not been implemented domestically by Congress," but even if they had been implemented domestically, "Congress had the power to authorize the President in the AUMF and other later statutes to exceed those bounds."[128] Moving on from appellant Al-Bihani's "inapposite and inadvisable" use of international law-related arguments, the Court stated unequivocally that "[t]he sources we look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw."[129]

For a few months, *Al-Bihani I* became precedent for the D.C. Circuit, and a few cases were decided on its basis.[130] However, a petition to rehear *Al-Bihani I* en banc was denied, with seven of the nine active D.C. Circuit judges stating: "We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits."[131] This effectively turned *Al-Bihani I*'s attack on international law incorporation into dicta.[132]

Then-Judge Brett Kavanaugh, who had concurred in the majority opinion of *Al-Bihani I,* took the opportunity to disagree

126. *Id.* at 870–71. Al-Bihani's other international law-based arguments were that the brigade for which he fought was not a 'co-belligerent' of Al Qaeda or the Taliban, and that the United States was bound under international law to grant him prisoner-of-war status. *Id.*

127. *Id.* at 871.

128. *Id.*

129. *Id.* at 871–72. The Court concluded that the jurisdictional provision of the Military Commissions Act of 2009 should be used to define the scope of military detention under the AUMF, rather than the international laws of war.

130. *See, e.g.*, Sulayman v. Obama, 729 F. Supp. 2d 26, 31–32 (D.D.C. 2010) (citing *Al-Bihani I* as rejecting *sub silento* the author of the majority's opinion in Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009), because Judge Walton in *Gherebi* had relied on international law-of-war principles, while *Al-Bihani I* had rejected the applicability of those principles); Al Adahi v. Obama, 692 F. Supp. 2d 85, 88–89 (D.D.C. 2010) (explaining the court's amended standard of review in light of the rejection of international law-of-war principles in *Al-Bihani II*).

131. Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) (Mem.).

132. *See* Stephen I. Vladek, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1463 (2011); Pizzitola, *supra* note 1, at 1918 ("[T]he court seemed to walk back its holding in the first *Al-Bihani* decision and refuse to take an affirmative stance on the relationship between international law and the AUMF.").

vehemently in writing.[133] His point was straightforward: "non-self-executing treaties and customary international law are not domestic U.S. law."[134] According to the Constitution, treaties are the supreme law of the land;[135] however, non-self-executing international agreements and customary international law which are not explicitly incorporated into U.S. law via statute are not.[136] Judge Williams, writing separately in the denial, took issue with Judge Kavanaugh's failure to "adequately distinguish" between international law as "judicially enforceable . . . U.S. law" and as a "basis for courts to alter their interpretation of federal statutes."[137] Whereas Judge Kavanaugh protested the use of these international law norms as a "basis for courts to alter their interpretation of federal statutes,"[138] Judge Williams felt that international law does, and should, affect statutory interpretation and that, as a matter of interpretation, international discourse (including international law) regarding an international phenomenon (such as war) would be an intuitive source for the meaning of the words of a statute authorizing military action abroad.[139] Additionally, Judge Williams deemed it "improbable that in authorizing the use of all 'necessary and appropriate force' Congress could have contemplated employment of methods clearly and unequivocally condemned by international law."[140]

After the denial to rehear the issue en banc, the legal question of whether international law-of-war principles should play a role in interpreting the AUMF became once again unresolved.[141] Subsequent habeas cases within the D.C. Circuit have continued to grapple with the issue, with some appearing to resist the would-be holding in *Al-Bihani I*.[142]

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133. *See Al-Bihani II*, 619 F.3d 1, 9 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

134. *Id.* at 16.

135. U.S. CONST. art. VI., cl. 2.

136. *Al-Bihani II*, 619 F.3d at 13; *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 818 (1997).

137. *Al-Bihani II*, 619 F.3d at 53 (quoting Kavanaugh Op. at 9, 13, 32).

138. *Id.* at 32.

139. *Id.* at 53–54.

140. *Id.* at 54.

141. *See* Vladeck, *supra* note 132, at 1463.

142. *See* Al Warafi v. Obama, No. CV 09-2368 (RCL), 2015 WL 4600420, at 7 (D.D.C. July 30, 2015) (finding that all "the AUMF detention authority demands is that the fighting continue," and not basing the detention authority on the decision of the political branches); Razak v. Obama, 174 F. Supp. 3d 300, 304 (D.D.C. 2016) (finding the petitioner's detention still valid because "active hostilities," as defined by the Third Geneva Conventions, had not

C. Al-Alwi and Al Hela

In two recent cases, the D.C. Circuit Court of Appeals has appeared to retrench itself in *Al-Bihani I*'s original approach—treating international law as increasingly irrelevant in interpreting the AUMF.[143]

1. Al-Alwi

The first of the two cases, *Al-Alwi v. Trump*, concerned Moath Hamza Ahmed Al-Alwi's contention that, regardless of the legitimacy of his original detention, his continued detention—over a decade after being captured on the battlefield in Pakistan in 2001—was unauthorized.[144] At the district level, Al-Alwi made two arguments to this effect: his first argument was based on the plurality in *Hamdi*, which had recognized in the AUMF a detention authority based on the laws-of-war, but conceded that detention authority "may last no longer than active hostilities."[145] Al-Alwi argued that the "active hostilities" in which he had been involved had ended in Afghanistan, pointing to several remarks by President Obama to this effect.[146] His second argument was that, in the alternative, the *Hamdi* Court had noted "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that

yet ended in Afghanistan); *see also* Vladeck, *supra* note 132, at 1463 n.69. (noting a D.C. Court of Appeals decision that seemed to endorse an international law-based interpretation of the AUMF's scope in an unreported decision, in which it remanded a case to the district court based on the petitioner's contention that as a medic, they were improperly detained under Article 2 of the First Geneva Convention) (citing Al-Warafi v. Obama, 409 F. App'x 360, 360–61 (D.C. Cir. 2011) (per curiam)).

143. *See infra* Sections II.C.1–2.

144. Al-Alwi v. Trump, 236 F. Supp. 3d 417 (D.D.C. 2017) [hereinafter *Al-Alwi I*]; Al-Alwi v. Trump, 901 F.3d 294 (D.C. Cir. 2018) [hereinafter *Al-Alwi II*].

145. Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (citing Geneva Convention (III) Relative to Treatment of Prisoners art. 118, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364).

146. *Al-Alwi I*, 236 F. Supp. 3d 417, 421–22. Al-Alwi was captured in Afghanistan during Operation Enduring Freedom, which, according to President Obama, ended in 2014. President Obama and Secretary of Defense Chuck Hagel then announced the commencement of Operation Freedom's Sentinel, part of which was the continuance of the "counterterrorism mission against the remnants of Al Qaeda." U.S. DEP'T OF DEFENSE, *Obama, Hagel Mark End of Operation Enduring Freedom* (Dec. 28, 2014), https://www.defense.gov/Explore/News/Article/Article/603860/obama-hagel-mark-end-of-operation-enduring-freedom/ [https://perma.cc/ZHZ4-HK6C].

understanding may unravel."[147] Al-Alwi argued that the understanding of a detention authority based on laws-of-war had "unraveled" due to the unconventional nature of the conflict against the Taliban in Afghanistan.[148]

In February 2017, the D.C. District Court denied the petition, holding that "the record establishes clearly that both Congress and the President agree that the military is engaged in active hostilities in Afghanistan."[149] The court found that Al-Alwi's "unraveling" argument did not pass muster because "this case does not present a situation in which petitioner's detention would be inconsistent with the 'clearly established principle of the law of war that detention may last no longer than active hostilities' or the rationale underlying that principle."[150]

The Court of Appeals affirmed the district court's ruling.[151] In response to Al-Alwi's argument that the unprecedented nature of the conflict in Afghanistan had caused the government's detention authority under law-of-war principles to "unravel," the Court responded: (1) that no statute placed limits on the government's detention powers;[152] (2) that Al-Alwi's authorities (including *Hamdi*) "merely suggest the possibility" that detention authority could unravel;[153] and (3) that Al-Alwi had not "identified an international law principle affirmatively stating that detention of enemy combatants may *not* continue until the end of active hostilities, even in a long war. Instead, law-of-war principles are open-ended and unqualified on the subject."[154] In response to Al-Alwi's argument that the current conflict in Afghanistan differed from the one in which he was captured, the Court stated that the texts of the AUMF and 2012 NDAA suggest detention authority continues as long as "hostilities between the relevant entities are ongoing," regardless of whether a "change in the form of hostilities" has taken place.[155] The Court concluded that the executive branch had represented that the relevant conflict continued, and that the political branches have the authority to determine whether

147. *See id.* at 423 (citing *Hamdi*, 542 U.S. at 521).

148. *Id.*

149. *Id.* at 421.

150. *Id.* at 423.

151. *Al-Alwi II*, 901 F.3d 294, 294 (D.C. Cir. 2018).

152. *Id.* at 297.

153. *Id.* at 298.

154. *Id.*

155. *Id.* at 300.

an armed conflict has ended.[156] The Court referenced the World War II-era case *Ludecke v. Watkins*, which emphasized that, when the scope of a war-time statute is tied to the existence of a war, "Congress leaves the determination of when a war is concluded to the usual political agencies of the Government."[157]

2. Al Hela

The second recent case to address the issue, albeit implicitly, is *Al Hela v. Trump*,[158] recently reheard en banc—on another issue—by the full D.C. Circuit.[159] The latter case, in part through an apparent misreading of the former, would bring the D.C. Circuit to an *Al-Bihani*-esque, categorical rejection of the application of international law principles to AUMF interpretation.[160] The difference between *Al Hela* and *Al-Bihani*, however, is that, while the court in *Al-Bihani* was explicit in its rejection of international law, the *Al Hela* court did so silently.[161] Still, Judge Rao's silence speaks volumes.

In *Al Hela*, Judge Rao addressed a variety of challenges made by Abdulsalam Al Abdulrahman Al Hela, including claims that the petitioner's due process rights had been violated.[162] More importantly for our purposes, Al Hela also contested the President's authority to detain him in the first place.[163]

Al Hela first challenged the district court's finding that his detention was authorized for having "substantially supported" enemy forces, arguing that he was not effectively a "part of" those forces and that the government had not proved his "direct support" for hostilities.[164] Judge Rao began her analysis of this argument with a

156. *Al-Alwi II*, 901 F.3d 294, 298–300(D.C. Cir. 2018).

157. *See id.* at 299 (citing Ludecke v. Watkins, 335 U.S. 160, 169 n.13 (1948)).

158. *See generally Al Hela*, 972 F.3d 120, 135 (D.C. Cir. 2020) .

159. *See generally* Al Hela v. Biden, No. 19-5079 (D.C. Cir. 2021).

160. *See infra* notes 179–190 and accompanying text.

161. In fact, a search of Judge Rao's lengthy opinion reveals that variations of terms 'international law' and 'laws of war' appear sparsely, and only then in quotations that hold no relevance to resolving the petitioner's challenges.

162. *See infra* Section III.A.1. It was on this issue that the judgment was vacated, with oral arguments heard, *on the issue of due process only*, on September 30, 2021. Judge Rao denied that Al Hela was protected by the Due Process Clause, instead finding the Clause to be wholly inapplicable to "aliens without property or presence in the sovereign territory of the United States." *Al Hela*, 972 F.3d at 127.

163. *Al Hela*, 972 F.3d at 130–32.

164. *Id.*

terse citation to a familiar statement from *Al-Bihani I*: "[t]he sources we look to for resolution [of statutory questions] are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw."[165] This statement was likely not intended to inform the reader of the sources of law to be found in the average judicial opinion—this statement was the crux of Judge Brown's holding in *Al-Bihani I*, later reduced to dicta in the denial of en banc rehearing, that international law has no place in the interpretation of the AUMF.[166] Thus, Judge Rao implicitly rejected the potential argument—once advanced by Al Bihani[167]—that "substantial support" of enemy forces as a basis for detention is not supported by international law.[168] With no reference to either the ramifications of this quotation or its subsequent history, Judge Rao moved on to analyze and reject Al Hela's "substantial support" arguments.[169]

Judge Rao also dealt with Al Hela's argument that the President's detention authority had "unraveled."[170] Referring to the decision in *Al-Alwi II*, she stated, "[w]e recently rejected an identical argument, observing that the AUMF and the 2012 NDAA impose no time limit on the President's authority to detain enemy combatants."[171] Judge Rao went further, explaining how *Al-Alwi II* supports the rejection of Al Hela's unraveling claim:

> The government maintains that the War on Terror is an ongoing conflict involving combat operations by the United States and its allies abroad. Courts lack the authority or the competence to decide when hostilities have come to an end. "The 'termination' of hostilities is 'a political act.'" *Al Alwi*, 901 F.3d at 299 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 168–69, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948)). So long as the record

165. *Id.* at 130 (citing *Al-Bihani I*, *supra* note 1, at 871–72).

166. *See supra* notes 127–129 and accompanying text.

167. *Al-Bihani I*, 590 F.3d 866, 871 (D.C. Cir. 2010).

168. Judge Rao's refusal to allow international law into the analysis is particularly striking considering how the District Court had denied Al Hela's petition, despite noting that "the 'substantial support' prong of [the government's] detention authority" would also be interpreted "based on the principles of the laws of war." Al Hela v. Trump, No. 05-cv-1048, unclass. slip op. at 20 (D.D.C. Jan 28, 2019). Judge Lamberth concluded that Al Hela's continued detention would be consistent both with U.S. statutory law and the laws of war. *See id.* at 21 (citing Fourth Geneva Conventions, arts. 5, 27, 42, 43 & 78). I have not been able to access Al Hela's briefs.

169. *Al Hela*, 972 F.3d 120, 130–32 (D.C. Cir. 2020) .

170. *Id.* at 135.

171. *Id.*

> establishes the United States military is involved in combat against Al Qaeda, the Taliban, or associated forces, we have no warrant to second guess fundamental war and peace decisions by the political branches. *See id.* at 300; *Al Bihani*, 590 F.3d at 874.[172]

Judge Rao's characterization of Al-Alwi's argument as presenting an "identical argument" is only partially correct; as demonstrated above, the court in *Al-Alwi II* actually grappled with *two* related arguments: (1) that the President's authority had unraveled because of the unprecedented nature of the conflict in Afghanistan; and (2) alleging that the original conflict, during which the petitioner was captured in Afghanistan, had ended in fact.[173] The first of these two arguments *is* identical to the contention in *Al Hela*.[174] However, it was only in response to the second argument—that the original conflict in that case had ended—that the *Al-Alwi II* Court discussed at length how the "determination of when hostilities have ceased is a political decision."[175]

Taken together, to be sure, the two prongs of the *Al-Alwi II* opinion did not leave much breathing room for an "unraveling" argument: according to *Al-Alwi II*, the political branches alone determine the end of a conflict, and the judiciary defers to that judgment.[176] Additionally, *Hamdi* notwithstanding, the Court in *Al-Alwi II* was not willing to question AUMF authority on the basis of the unconventional nature of the conflict.[177] On the other hand, *Al-Alwi II*'s muted response to the unraveling argument, and its lip service to law-of-war principles, indicate at least a theoretical openness to recognizing an end of war powers at the factual "end of active hostilities"—as required by international law.[178]

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172. *Id.*

173. *See supra* notes 151–157 and accompanying text.

174. The argument that the authority had unraveled appears as Al-Alwi's first argument in the *Al-Alwi II* Court of Appeals opinion. *See Al-Alwi II*, 901 F.3d 294, 297–98 (D.C. Cir. 2018). The district court had the opposite order. *See generally Al-Alwi I*, 236 F. Supp. 3d 417 (D.D.C. 2017).

175. *Al-Alwi II*, 901 F.3d at 299–300.

176. *Id.*

177. *See id.* at 300 ("Nothing in the text of the AUMF or the National Defense Authorization Act suggests that a change in the form of hostilities, if hostilities between the relevant entities are ongoing, cuts off AUMF authorization.").

178. *Id.* The *Al-Alwi II* Court concluded that because the record establishes that U.S. forces are in active combat, the government's detention authority continues. In other words, although the Court depended on the executive branch's representations to that effect, the

Judge Rao appears to collapse these two prongs of the *Al-Alwi II* opinion into one—maintaining that the conflict cannot "unravel" without a "political act."[179] In Judge Rao's view, *Al-Alwi II* stands for the proposition that not only do the political branches have sole competence to *determine* that a conflict has ended in fact; they also have the exclusive authority to *decide* when a conflict shall be considered concluded for the purposes of exercising war powers.[180]

This view has a few key implications. First, according to Judge Rao's conception of the political branches' authority to not only determine but exclusively decide the end of conflict, there seems to be no avenue short of a political decision that would allow detention authority to end.[181] This essentially nullifies the *Hamdi* Court's suggestion that the legal authority to detain may "unravel." Second, both *Ludecke* and *Al-Alwi II* arguably left open the possibility for judicial determination of a factual end of war.[182] In *Ludecke*, the Supreme Court had stated that "[w]hether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."[183] The D.C. Circuit in *Al-Alwi II* said that "[t]he question alluded to in *Ludecke* [was] not compelled" in Al-Alwi's case, based only on the fact of ongoing hostilities in Afghanistan.[184] Additionally, the Court rejected the unraveling argument in part because Al-Alwi had not "identified an

ultimate deciding factor was factual conflict, not the executive's decision that a status of war should remain in effect. *Id.*

179. *See supra* notes 151–160, 173–178 and accompanying text.

180. To be sure, the semantics in this inquiry are a bit difficult. On the one hand, Judge Rao said, "[c]ourts lack the authority or the competence to decide when hostilities have come to an end." *Al Hela*, 972 F.3d 120, 135 (D.C. Cir. 2020). Yet, in the same paragraph, she said, "[t]he Constitution vests the war powers in Congress and the President. An essential aspect of the war powers is the initiation and cessation of armed conflict . . . ." *Id.* Additionally, the courts in *Al-Alwi II* and *Al Hela* seem to give differing weight to the assertion in *Ludecke* that "[t]he 'termination' of hostilities is 'a political act.'" Ludecke v. Watkins, 335 U.S. 160, 168–69 (1948). To the *Al-Alwi II* Court, which quoted *Ludecke* for the proposition that the executive determines when the conflict on-the-ground has ended, it would be more accurate if *Ludecke* had said 'the termination of hostilities is a political *determination*' or something to that effect. *Al-Alwi II*, 901 F.3d 294, 299 (D.C. Cir. 2018). Ultimately, the context of Judge Rao's usage seems to give the political branches more deference than does the *Al-Alwi II* Court.

181. *See supra* notes 173–178 and accompanying text.

182. *See infra* notes 183–188 and accompanying text.

183. *Ludecke*, 335 U.S. at 169.

184. *Al-Alwi II*, 901 F.3d at 299. In the wake of the recent U.S. withdrawal from Afghanistan, the *Ludecke* question may very well be compelled.

international law principle affirmatively stating that detention of enemy combatants may *not* continue until the end of active hostilities."[185] In so doing, the Court implied the possibility of a different outcome, had Al-Alwi identified such a principle.

Ultimately, Judge Rao's opinion severely limited the Supreme Court's findings in *Hamdi*, significantly expanded the holdings of the D.C. Circuit in *Al-Alwi II*, and answered the question posed by the Supreme Court in *Ludecke* in the negative.[186] The opinion also demonstrated Judge Rao's position, rejecting domestic application of the international law-of-war concept that the end of hostilities can spell the end of detention authority.[187]

II. WHERE DO WE GO FROM HERE?

The future of international law as an interpretive device for the AUMF has become cloudy in the wake of *Al Hela*.[188] Several things can happen that may either throw Judge Rao's opinion into sharper relief or quietly incorporate it into future justifications of AUMF-based actions. This Part will first explore two possible scenarios that can see the doctrine revived in *Al Hela* play an important role for an incoming presidential administration inheriting a broad mandate of presidential war power. Further, this Part will outline a few potential solutions.

185. *Id.* at 298. The district court had similarly dismissed Al-Alwi's petition, with a strong statement emphasizing that Al-Alwi's petition failed precisely because "the duration of a conflict does not somehow excuse it from *longstanding law of war principles*." *Al-Alwi I*, 236 F. Supp. 3d 417, 423 (D.D.C. 2017) (emphasis added).

186. *See supra* notes 182–184 and accompanying text. Judge Rao's analysis precludes a judicial determination "that a war though merely formally kept alive had in fact ended." Ludecke v. Watkins, 335 U.S. 160, 169 (1948).

187. Judge Rao may believe that international law, as "soft" law, does not present a sufficient constraint on presidential action and that it invites the kind of power expansion identified by Professor Ingber. *See, e.g.*, Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a They, Not an It*, 96 MINN. L. REV. 194, 220 (2011) ("[I]nternational law has varying degrees of 'softness' that invite policy judgments and allow a wide range of plausible interpretations."); *id.* at 222 ("[D]omestic statutes pertaining to the conduct of foreign affairs may also be manipulated through [international law-based] interpretations, such as Harold Koh's definition of 'hostilities' under the War Powers Resolution to not include drone attacks, aerial piloted attacks, and other military efforts.") (citing *Libya and War Powers: Hearing Before the S. Foreign Rels. Comm.*, 112th Cong. (June 28, 2011) (written testimony of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State)).

188. *See infra* Sections III.A–B.

This Part will end with a suggestion to look to international law as the starting point for reconceptualizing the conflict.

A. Ramifications

In the wake of *Al Hela*, there are at least two potential scenarios in which Judge Rao's conception of international law-based AUMF interpretation can have broad ramifications for the continuation of the current conflict.

1. The Result of En Banc Rehearing on the Due Process Issue

Later in the *Al Hela* case, Judge Rao dismissed the petitioner's arguments that his due process rights were being violated, finding that Guantanamo detainees, as non-citizens held outside the United States, are not protected by either procedural or substantive due process.[189] Judge Griffith, who had concurred in part, dissented to this part of the opinion.[190] Judge Griffith found Judge Rao's decision regarding due process unnecessary to the eventual holding, and also pointed to various precedents assuming the application of the Due Process Clause.[191] Ultimately, according to Judge Griffith, the holding could stand even assuming Al Hela's entitlement to due process, on the basis that his "detention still serves the established law-of-war purpose of preventing captured individuals from returning to the field of battle."[192]

This due process aspect of Judge Rao's holding garnered significant criticism, and, within a few months, Al Hela successfully petitioned the D.C. Circuit for rehearing en banc on this important issue.[193] In granting Al Hela's motion for rehearing, the Circuit instructed that arguments be made only on the issues of due process, and not on other sections of Judge Rao's opinion.[194] On rehearing, the

189. *Al Hela*, 972 F.3d 120, 138–50 (D.C. Cir. 2020) .

190. *Id.* at 151 (Griffith, J., concurring in part).

191. *See id.* at 152 (citing Ali v. Trump, 959 F.3d 364, 369–73 (D.C. Cir. 2020); Aamer v. Obama, 742 F.3d 1023, 1038–42 (D.C. Cir. 2014); Kiyemba v. Obama, 561 F.3d 509, 514 n.4 (D.C. Cir. 2009)).

192. *Id.*

193. Al Hela v. Biden, No. 19-5079 (D.C. Cir. 2021).

194. *Id.*; *see also* Opposition to Petition for Rehearing En Banc, Al Hela v. Trump, No. 19-5079 (Dec. 8, 2020). In their brief, the government's lawyers actually reference Al Hela's contention, in addition to the main arguments against Judge Rao's position on extraterritorial due process, arguing that Judge Rao "skirted the relevance of the international law of war."

panel can: (1) reinstate Judge Rao's opinion, including with regard to her findings on due process; (2) reverse Judge Rao's opinion entirely; or (3) find that due process does protect Guantanamo detainees, but nonetheless uphold the rejection of Al Hela's habeas petition on other bases—including the other aspects of Judge Rao's opinion. In any case, with the question of due process poised to be answered, Al Hela's fate (and that of other detainees) may rest more squarely on other reasons why the government's continued detention is purported to be lawful.[195] Those reasons would rely on a diminished influence of the laws of war,[196] and Judge Rao's reasoning on this matter may come into greater focus for future cases.

2. Entrenchment of Power within the Executive Branch

Even if it fails to survive rehearing, the opinion in Al Hela may still subtly move the goalposts, both for executive branch justifications of AUMF-related actions and in habeas petitions asserting an unraveling of AUMF authority.

The United States is unlikely to cease military activity authorized either by the 2001 AUMF itself or a slightly narrower version of it.[197] In an overview of the legal framework of military activities under the Obama Administration, the U.S. Department of Defense General Counsel was able to point to support by both the judicial[198] and legislative[199] branches for the Administration's

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Id. at 15. Tellingly, the government's lawyers did not respond by sticking with the position that the international laws of war were irrelevant for the AUMF's interpretation; rather, they focused on arguing that Al Hela's detention would be consistent with those laws of war. *See id.*

195. *See, e.g.*, *supra* notes 190–192 and accompanying text. Judge Griffith concluded that the holding of *Al Hela* did not require a decision on the due process issue and could rest on "the *established law-of-war purpose* of preventing captured individuals from returning to the field of battle." *Al Hela*, 972 F.3d 120, 135 (D.C. Cir. 2020) (Griffith, J., concurring in part).

196. *See Al Hela*, 972 F.3d at 152 (Griffith, J., concurring in part).

197. *See, e.g.*, Rachel Oswald, *Taliban Takeover Seen Narrowing Prospects for 2001 AUMF Update*, ROLL CALL (Aug. 19, 2021, 11:00 AM), https://www rollcall.com/2021/08/19/taliban-takeover-seen-narrowing-prospects-for-2001-aumf-update/ [https://perma.cc/FH6Y-KGB9].

198. *See, e.g.*, Khan v. Obama, 655 F.3d 20, 23 (D.C. Cir. 2011); Barhoumi v. Obama, 609 F.3d 416, 432 (D.C. Cir. 2010); Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010); Hamlily v. Obama, 616 F.Supp.2d 63, 75 (D.D.C. 2009).

199. *See* 2012 NDAA, *supra* note 121, § 1021(b)(2) (codified at 10 U.S.C. § 801) (acknowledging the inclusion of any individual who was "a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United

application of the AUMF not only to Al Qaeda, but also to a large range of "associated forces," including ISIS.[200] At the same time, President Obama acknowledged the problems associated with the continued use of the 2001 AUMF and expressed his (ultimately futile) desire to repeal it.[201] Perhaps recognizing the discrepancy in using the AUMF to justify a conflict with ISIS, he tried to have Congress authorize that conflict in a separate statute, although that too never came to fruition.[202] In the meantime, the Obama Administration continued to justify its activities against ISIS under the 2001 AUMF, a practice that continued into the Trump Administration.[203]

Indeed, the Trump Administration not only continued to cite the AUMF as support for continued operations against ISIS, but also adopted the international law justification of "collective self-defense" as additional support for continued operations against ISIS.[204] The Trump Administration also reportedly considered using the AUMF to justify operations against Iran.[205]

The failures of Presidents Obama and Trump to rein in the AUMF set a dangerous precedent for a Biden Administration that has

States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces").

200. ADMINISTRATION OF BARACK OBAMA, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 4–5 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf [https://perma.cc/MST7-TL9D].

201. *See* Administration of Barack Obama, Draft Joint Resolution to Authorize the Limited Use of the United States Armed Forces Against the Islamic State of Iraq and the Levant (Feb. 11, 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/aumf_02112015.pdf [https://perma.cc/88Y6-VQ3K]; Remarks at the National Defense University, 1 PUB. PAPERS 479, 487 (May 23, 2013), https://www.govinfo.gov/content/pkg/PPP-2013-book1/pdf/PPP-2013-book1-doc-pg479.pdf [https://perma.cc/HT2C-HKUT].

202. *See generally* Administration of Barack Obama, *supra* note 201.

203. *See, e.g.*, U.S. Dep't of State, Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force for National Security Operations (2019), https://www.state.gov/wp-content/uploads/2019/10/Report-to-Congress-on-legal-and-policy-frameworks-guiding-use-of-military-force-.pdf [https://perma.cc/ZAP8-FTMV].

204. *See* 2017 White House Report, *supra* note 7.

205. *See, e.g.*, Scott R. Anderson, *When Does the President Think He Can Go to War with Iran?*, LAWFARE (June 24, 2019, 9:28 AM), https://www.lawfareblog.com/when-does-president-think-he-can-go-war-iran [https://perma.cc/Y6RH-YCYR]; Edward Wong & Catie Edmondson, *Iran Has Ties to Al Qaeda, Trump Officials Tell Skeptical Congress*, N.Y. TIMES (June 19, 2019), https://www nytimes.com/2019/06/19/us/politics/us-iran html [https://perma.cc/UP9P-F6WX].

already invoked the AUMF for military operations.[206] If the AUMF can be redirected to authorize force against a group at odds with one of the originally-authorized targets,[207] it is hard to imagine a logical stopping point at which the executive branch will declare the AUMF no longer necessary.

Part of the reason for this pessimism is that subsequent executive administrations are unlikely to dilute power inherited from their predecessors.[208] Professor Ingber points to a long-standing pattern of both Republican and Democratic presidential administrations entrenching themselves in arguments for broader powers made by their predecessors.[209] The *Al-Alwi* and *Al Hela* opinions make this entrenchment even more likely in the context of war-making powers under the AUMF.[210] Rather than merely refusing to limit the president's authority, these opinions lend judicial support to the continuance of operations under the increasingly flimsy

206. *See, e.g.*, Andrew Desidereo & Lara Seligman, *'A Very Dangerous Precedent': Democrats Take Aim at Biden's Somalia Airstrikes*, POLITICO (July 27, 2021, 4:35 PM), https://www.politico.com/news/2021/07/27/democrats-biden-somalia-airstrike-500916 [https://perma.cc/HRD7-ZYUJ].

207. *See* Daniel L. Byman & Jennifer R. Williams, *ISIS v. Al Qaeda: Jihadism's Global Civil War*, BROOKINGS INST. (Feb. 24, 2015), https://www.brookings.edu/articles/isis-vs-al-qaeda-jihadisms-global-civil-war/ [https://perma.cc/LD89-QTAY] (describing the conflict between Al Qaeda and ISIS).

208. *See* Rebecca Ingber, *The Obama War Powers Legacy and The Internal Forces That Entrench Executive Power*, 110 AM. J. INT'L L. 680, 682 (2016).

209. *Id.* at 680:

> [S]ystemic forces exist inside the executive branch that influence presidential decision-making in each modern administration and, barring a total reimagining of the executive branch, will operate on administrations to come. These internal forces include mechanisms and norms that fall within two broad categories: (1) those that favor continuity and hinder presidents from effecting change, and (2) those that incrementally help ratchet up claims to executive power.

For discussion of how executive branch lawyers may help the President aggregate more power and how internal and external checks do or do not mitigate this phenomenon, see BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 4 (2010) (identifying a transition to presidential imperialism aided by executive branch lawyers and proposing reforms); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1717–23 (2011) (arguing that the OLC cabins executive branch enough to make Ackerman's proposals unnecessary); Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 424 (2009); Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006).

210. *See supra* Section II.C.

justification for the AUMF.[211] This latter point is true not only for detention authority, but for targeting authority as well, which the judiciary is less likely to hear than detention cases.[212]

Regardless of whether the decline of international law as a basis for interpreting law becomes open precedent of the D.C. Circuit or just implicit ammunition for executive branch lawyers, it raises important questions about the end of the war on terror. If international law-of-war concepts regarding the end of war or the cessation of hostilities are not relevant in determining the end of the conflict authorized by the AUMF, the conflict will not end—even when it is factually over.[213]

Given that a factual determination of war independent of a political branch decision has been all-but-foreclosed in recent Guantanamo litigation, how will the war on Al Qaeda, the Taliban and "associated forces" actually come to an end? Additionally, assuming an answer to the previous question that conceptualizes an end to the conflict, what does that mean in practice for detention at Guantanamo and/or targeting of combatants?

B. Potential Solutions

Despite *Al Hela*, there are a number of ways in which AUMF authority can be limited dramatically. In attempting to ascertain finite limits to the conflict and related detention authority, it is helpful, first, to consider potential actions of Congress vis-à-vis the AUMF, and, second, to reconceptualize conflict termination entirely.

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211. *Id.* By refusing to question the determinations or representations of the executive, both the *Al-Alwi* and *Al Hela* cases lend themselves to a helpful string cite in the next government brief arguing for broad deference.

212. Potential plaintiffs are usually unavailable to sue after they have been targeted in a drone strike. In the rare case where someone sues on behalf of a future target (e.g., a U.S. citizen), the plaintiffs have been met with barriers relating to standing and justiciability. *See*, e.g., Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 44 (D.D.C. 2010) (dismissing a lawsuit challenging constitutionality of the executive's targeting of Anwar Al-Aulaqi because his father Nasser lacked standing and because the question presented was a nonjusticiable political question).

213. *See supra* Part I.

1. AUMF Repeal, Modification or Replacement

With the judicial endorsement of an ongoing state of war until the President and Congress say otherwise,[214] it would seem that the ball is in the political branches' court. Some scholars and policymakers have called for a repeal of the current AUMF without any replacement.[215] Others have argued that the President and Congress should agree on a new and improved authorization if they still consider it necessary to conduct systematic counterterrorism operations abroad.[216] A new authorization, or a modification of the current one,[217] could contain sunset clauses and qualifications that the drafters missed in the original 60-word authorization.[218] Sunset clauses, requiring a new vote for new authorizations every so often,

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214. *See generally supra* Section II.C.

215. *See, e.g.*, Sam Rogers & Nate Anderson, *To End Endless War, We Must Repeal the 2001 Authorization for Use of Military Force*, THE HILL (Sept. 18, 2020 1:00 PM), https://thehill.com/blogs/congress-blog/politics/517060-to-end-endless-war-we-must-repeal-the-2001-authorization-for-use [https://perma.cc/Z9EK-XJ4D]; Gene Healy & John Glaser, *Repeal, Don't Replace, the AUMF*, CATO INST. (July/Aug., 2018), https://www.cato.org/policy-report/julyaugust-2018/repeal-dont-replace-aumf [https://perma.cc/R5P2-JDYJ].

216. *See, e.g.*, Robert Chesney et al., *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INST. (2013) (proposing a new statutory framework for an authorization of military force). Many AUMF replacement proposals were aimed at specifically authorizing the fight against ISIS. *See, e.g.*, MATTHEW C. WEED, CONG. RSCH. SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS 15–16 (2017) (compiling ISIS-specific AUMF proposals); S.J. Res. 26, 114th Cong. (2015); *see also* Administration of Barack Obama, *supra* note 201. *Cf.* Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SEC. J. 115, 119 (2014) (arguing that calls for a new AUMF are misguided).

217. Congress can pass legislation limiting expansive interpretations of the AUMF. For example, a recently introduced Bill—H.R. 7500, Limit on the Expansion of the Authorization for Use of Military Force Act—proposes to limit the President's further expansion of force under the AUMF to the geographic areas within which the use of force is already used. It also states that

> [n]othing in this Act may be construed (1) to deem the use of force in any country in which United States Armed Forces are engaged in hostilities as of the date of the enactment of this Act as lawful or unlawful pursuant to the Authorization for Use of Military Force.

Limit on the Expansion of the Authorization for Use of Military Force Act, H.R. 7500, 116th Cong. § 3 (2020). This Bill would represent an "incremental" step in Congress reasserting itself in determining how the nation fights pursuant to the AUMF. *See* Jennifer Daskal et al., *An Incremental Step Toward Stopping Forever War?*, JUST SEC. (July 13, 2020), https://www.justsecurity.org/71374/an-incremental-step-toward-stopping-forever-war/ [https://perma.cc/V76S-WUES].

218. *See* Johnson, *supra* note 2.

would allow Congress a more active role in the ongoing decision-making process.[219] Qualifications could include limitations on types of force used and geographic locations, and importantly, the ability to modify these qualifications as needed.[220] For example, rather than allowing the executive branch to use a stale authorization as justification for operations against a brand new group, a provision in each year's NDAA could provide for an updated list of targetable groups.[221]

Additionally, a new AUMF could clarify the President's authority to exercise force in pursuance of its goals. One such proposal for a new AUMF framework suggested that the authorization can either directly hook the President's authorities to their Article II powers—creating a *Youngstown* Category One[222] situation that would grant the President strong domestic legal backing—or clarify how the President must act in accordance with principles of international law.[223] Such a proposal could also include that individual actions authorized therein—such as detention—would be elucidated within the legislation in relation to international law-of-war principles, especially as those principles pertain to the end of war.[224] While this would not definitively answer the question of whether international law should be used in defining a statute authorizing the use of force

219. Professor Stephen Vladeck argued in the early days of the AUMF that all authorizations of force should come with mandatory sunset clauses, which would have the effect of regularly "triggering a debate about the need for and proper scope of authorization." Vladeck, *supra* note 70, at 102–03.

220. *See* Chesney et al., *supra* note 216, at 8 ("A central challenge in designing such a statute is to provide sufficient flexibility to meet the changing threat environment while at the same time cabining discretion to use force and subjecting it to the sort of serious constraints that confer legitimacy and ensure sound strategic deliberation.").

221. *Id.* at 10–12. Chesney and colleagues have a conceptually similar proposal that would place the responsibility for identifying targetable groups within the State Department, subject to consultation with other departments and notification to Congress, thereby triggering the general statutory provision for those groups. It also may be possible to blend these two ideas: if the executive feels the need to add a new entity on the fly, the State Department can add it, but it should subsequently require explicit statutory authorization in the next NDAA.

222. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Justice Jackson's famous concurrence outlines three categories of presidential power in descending order of legitimacy. First are cases in which the President acts pursuant to an authorization from Congress and thus is at the peak of their authority. Second are cases where Congress has so far been silent, and the President acts only pursuant to assumed presidential powers. Third are cases where the President acts in defiance of congressional orders. *Id.*

223. Chesney et al., *supra* note 216, at 8–9.

224. *See supra* Sections I.A–B. This would be with reference to the international laws-of-war in an NIAC.

generally (and would probably serve as additional support for those in the Kavanaugh camp), it would clarify the obligations and rights relevant to ongoing military detention and counterterrorism operations in the United States and abroad.[225] It is certainly possible that, in crafting such an authorization, Congress could choose to forgo international law-of-war conceptions of the end of war in favor of retaining discretion over when the statutory authorization will end. However, such a decision would at least clarify the temporal restraints that Congress wished to impose on the President.[226]

Undercutting such potential solutions, however, is the currently awkward state of the conflict. Prior to the withdrawal from Afghanistan, the fight against core Al Qaeda had been seen by some as effectively over.[227] ISIS is a shadow of what it once was.[228] These

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225. Having been included in the legislation, those international law norms would become binding, even according to the line of thought promoted by then-Judge Kavanaugh.

> Congress and the President can and often do incorporate international-law principles into domestic U.S. law by way of a statute (or executive regulations issued pursuant to statutory authority) or a self-executing treaty. When that happens, the relevant international-law principles become part of the domestic U.S. law that federal courts must enforce.

Al-Bihani II, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

226. In the past, courts have recognized that Congress is empowered to pass legislation that explicitly violates customary international law, and even treaties. *See, e.g.*, S. Afr. Airways v. Dole, 817 F.2d 119, 120–21, 127 (D.C. Cir. 1987) (upholding a provision of the Comprehensive Anti-Apartheid Act that required the revocation of South African pilots' permits to provide air service to the United States, despite that right being provided by treaty); *Al-Bihani II*, 619 F.3d 1, 8 (D.C. Cir. 2010) (Brown, J., concurring):

> There is no indication that the AUMF placed any international legal limits on the President's discretion to prosecute the war and, in light of the challenge our nation faced after September 11, 2001, that makes eminent sense. Confronted with a shadowy, non-traditional foe that succeeded in bringing a war to our doorstep by asymmetric means, it was (and still is) unclear how international law applies in all respects to this new context. The prospect is very real that some tradeoffs traditionally struck by the laws of war no longer make sense. That Congress wished the President to retain the discretion to recalibrate the military's strategy and tactics in light of circumstances not contemplated by our international obligations is therefore sensible, and reflects the traditional sovereign prerogative to violate international law or terminate international agreements.

227. *See, e.g.*, Elliot Ackerman, *The Afghan War Is Over. Did Anyone Notice?*, N.Y. TIMES (Dec. 17, 2020), https://www nytimes.com/2020/12/17/opinion/afghanistan-war-biden.html?action=click&module=Opinion&pgtype=Homepage [https://perma.cc/CNE4-R8SD]; Robert Chesney & Steve Vladeck, *The National Security Law Podcast: The Blah-to-Coup Ratio Is Increasing* (Nov. 30, 2020), https://www.lawfareblog.com/national-security-law-podcast-blah-coup-ratio-increasing [https://perma.cc/NB9N-6B62] (remarking that the killing of a core Al Qaeda leader is exceedingly rare and that some consider core Al Qaeda to merely have "legacy" status with no operational influence over Al Qaeda offshoots).

228. *See, e.g.*, Statement on the Death of Islamic State of Iraq and Syria (ISIS) Terrorist Organization Leader Abu Bakr al-Baghdadi, 2019 DAILY COMP. PRES. DOC. 1 (Oct. 27, 2019),

groups represented, respectively, the main impetus for the AUMF and the most prominent justification for its maintenance.[229] This being the reality, the time for a revamped AUMF against these groups may have passed.[230] On the other hand, the current AUMF probably cannot just be repealed wholesale. U.S. counterterrorism operations continue against splinter groups, such as Al Shabaab and AQAP in Africa and the Middle East,[231] and will likely be needed as the Taliban consolidates control over Afghanistan.[232] Leaving those regions to local government supervision could allow those groups to further their agendas and strengthen their infrastructures. Of course, there are those that argue for an end to the AUMF's authorizations on the grounds that fighting endless wars halfway around the world is not necessary for our national security.[233] Indeed, the chances of an American dying in

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https://www.govinfo.gov/content/pkg/DCPD-201900758/pdf/DCPD-201900758.pdf [https://perma.cc/5PDE-8XYD] (announcing the killing of ISIS leader al-Baghdadi and declaring that "the United States obliterated [Baghdadi's] 'caliphate' in March of this year"). *But see* Alissa J. Rubin et al., *ISIS Attacks Surge in Iraq Amid Debate on U.S. Troop Levels*, N.Y. TIMES (June 10, 2020), https://www nytimes.com/2020/06/10/world/middleeast/iraq-isis-strategic-dialogue-troops.html [https://perma.cc/9TVS-C3GE].

229. *See supra* Introduction, Section II.C.2.

230. E-mail from Matthew C. Waxman, Chairman, Nat'l Sec. L. Program, Colum. L. Sch., to author (Nov. 29, 2020, 10:30 PM) (on file with author) ("[T]he moment for this may have passed."). Professor Waxman was one of the authors of the statutory framework for a new AUMF with Robert Chesney. *See* Chesney et al., *supra* note 217.

231. Corinne Ramey, *Kenyan Man Charged with Plotting Sept. 11-Style Attack*, WALL ST. J. (Dec. 16, 2020, 3:28 PM), https://www.wsj.com/articles/kenyan-man-charged-with-plotting-sept-11-style-attack-11608142077 [https://perma.cc/KZ7P-JAHZ]; Jason Burke & Abdalle Ahmed Mumin, *CIA Officer Killed in Somali Raid on Suspected Al-Shabaab Bomb-maker*, GUARDIAN (Dec. 3, 2020, 12:00 AM), https://www.theguardian.com/us-news/2020/dec/03/cia-officer-killed-in-somali-raid-on-suspected-al-shabaab-bomb-maker [https://perma.cc/H5Z8-MBFJ]; *Yemen Al-Qaeda Leader Al-Raymi Killed by US Strike*, BBC NEWS (Feb. 7, 2020), https://www.bbc.com/news/world-middle-east-51409581 [https://perma.cc/H2KR-UWM2].

232. *See, e.g.*, Oswald, *supra* note 197; Frank Figliuzzi, *Afghanistan's Fall to the Taliban Just Made Terrorism a Real Threat, Again*, MSNBC NEWS (Aug. 17, 2021, 12:30 PM), https://www msnbc.com/opinion/afghanistan-s-fall-taliban-just-made-terrorism-real-threat-again-n1276962 [https://perma.cc/G3PQ-9MKJ].

233. Healy & Glaser, *supra* note 215; *see also* Robert A. Manning & Christopher Preble, *Reality Check #8: Rethinking US Military Policy in the Greater Middle East*, ATL. COUNCIL (June 24, 2021), https://www.atlanticcouncil.org/content-series/reality-check/reality-check-8-rethinking-us-military-policy-in-the-greater-middle-east/ [https://perma.cc/MB7Z-JRRU]; Fareed Zakaria, *Opinion: Ten Years Later, Islamist Terrorism Isn't the Threat It Used to Be*, WASH. POST (April 29, 2021, 5:44 PM), https://www.washingtonpost.com/opinions/global-opinions/ten-years-later-islamist-terrorism-isnt-the-threat-it-used-to-be/2021/04/29/deb88256-a91c-11eb-bca5-048b2759a489_story.html [https://perma.cc/WG5E-NB88].

a terrorist attack is infinitesimal.[234] However, the counterpoint to this argument—that those chances are only so small *because of* ongoing counterterror operations[235]—cannot easily be dismissed. With no way of predicting the future, policymakers are caught in an unenviable position between the deteriorating legitimacy of the old AUMF and the weak case for a new one.

Ultimately, any such reform measure needs to begin with a realization that the continued use of the current AUMF reflects a set of assumptions unsupported by the reality of the current conflict.[236] In this "new war," there may be a need to reassess what constitutes victory, and what means we employ to achieve those newly defined goals.[237]

2. Ascertaining the End of Detention Authority Requires a Hybrid Model of Conflict Termination

Even if Congress could repeal or replace the AUMF in a way that would limit the scope of authorization (in terms of time,

234. See *supra* note 233 and accompanying text.

235. *See, e.g.*, U.S. STATE DEP'T, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2019, https://www.state.gov/reports/country-reports-on-terrorism-2019/ [https://perma.cc/EVK6-5CNH] (detailing "major strides to defeat and degrade international terrorist organizations").

236. *See* Ami Ayalon & Ayal Hayut-man, *Redefining Victory in Democracy's War on Terror*, LAWFARE (Feb. 18, 2020, 8:00 AM), https://www.lawfareblog.com/redefining-victory-democracys-war-terror [https://perma.cc/SG9U-KRUE]. Ayalon and Hayut-man argue that the political goal in today's wars cannot be the attainment of a future reality (*i.e.*, no terrorism) because such a goal is essentially unattainable. Rather, democratic countries involved in such wars need to set their goals as a present and continuous reality to be maintained, in which the democratic country works to preserve security, while working to ensure a high standard of living and upholding the country's core values. *Id.*

237. *Id.* Looking at the global war on terror as Ayalon and Hayut-man see it would require a dramatic paradigm shift—from a "war" on terror to a continuous law enforcement paradigm. That may be a difficult reality to accept for policymakers and their constituencies. If American policymakers come to the realization that Ayalon and Hayut-man are right, however, a transition might be made that balances the reduction of American troops with the slow establishment of an international framework for cooperatively combating terrorist threats in the long run. The foundations for such a treaty already exist. *See, e.g.*, U.N. Global Counter Terrorism Strategy, UNITED NATIONS OFF. OF COUNTER-TERRORISM, https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy [https://perma.cc/Y26N-5ECS].

geographic area or applicability to a particular group), it would likely make little difference to those detained in Guantanamo.[238]

The war initially authorized by the AUMF has been like no other in history.[239] The myriad forces involved in hostilities against the United States over the last two decades are bound not by a common land or organizing force, but instead by a transcendental ideology.[240] The reality likely is that if, as a matter of national security, operations are still necessary against the Taliban or Al-Qaeda offshoots, such as the Al-Shabaab, AQAP and ISIS, they will be necessary for the foreseeable future (and may be necessary against offshoots of those groups as well).[241] Also, individual jihadists who once pledged allegiance to one group might easily switch to another when the original group is defeated or disbanded.[242] In other words, the threat posed by Guantanamo prisoners does not stem from the prisoners' allegiance to a particular group, but from the prisoners in their "individual capacity."[243] This makes it difficult to imagine a future in which a legal requirement for release or repatriation results in actual release or repatriation.

Rather, as Adam Klein argued in a prescient 2010 Note, an on/off model of conflict termination should be replaced—at least for the purposes of detention—by a hybrid paradigm that "disaggregates" the multifaceted threat of Al Qaeda-connected terrorism.[244] In keeping

238. There are currently thirty-nine detainees remaining at Guantanamo Bay out of the roughly 780 people who have been held there. *The Guantánamo Docket*, N.Y. TIMES, https://www nytimes.com/interactive/projects/guantanamo [https://perma.cc/L8PN-HE3V].

239. *See, e.g.*, Johnson, *supra* note 2.

240. Klein, *supra* note 69, at 1894–95 ("While an ordinary soldier is anchored by an allegiance to his or her home state, Islamist terrorists' attachments to particular leaders and organizations are likely to be motivated by an ideology that transcends both, and are thus transferrable.") (citing BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 161 (2008)).

241. *See, e.g.*, Oswald, *supra* note 197 (quoting President Biden as saying: "Today, the terrorist threat has metastasized well beyond Afghanistan: al-Shabab in Somalia, al-Qaida in the Arabian Peninsula, al-Nusra in Syria, ISIS attempting to create a caliphate in Syria and Iraq and establishing affiliates in multiple countries in Africa and Asia . . . . These threats warrant our attention and resources.").

242. Klein, *supra* note 69, at 1894.

243. *See id.* at 1896 (quoting WITTES, *supra* note 240, at 161).

244. *See generally* Klein, *supra* note 69. An on/off model of conflict termination model would be one based on factual determinations as international laws of war prescribe or by a political decision or determination. Whereas aspects of these conflicts relating to identifiable groups may be begun and terminated on the basis of political decisions, Klein suggests that the detention question must be dealt with individually and with the participation of the judiciary. *Id.* at 1907–09.

with Klein's hybrid concept, Congress could authorize actual conflicts generally, with specific modifications to ensure accuracy and accountability.[245] Meanwhile, the detention of terrorism suspects would be adjudicated on a case-by-case basis under a statutory framework limiting the application of military detention without trial.[246]

3. A Starting Point: An International Law-Based Conception of the End of Conflict and Detention Authority

However, before calling for a newfangled hybrid paradigm, as Klein imagines, the realities of the conflict and the nature of its participants first invite the application of an already extant paradigm—that of international law.[247] The natural first step in employing a flexible approach is to draft around the rigidity of U.S. case law and to codify those aspects of international law that best reflect the messiness of the current conflict. For example, an authorization for conflict can condition authority on the continued existence of the factual war, with reference specifically to the *Tadić* Tribunal's characterization of an NIAC as reflecting a certain level of organization and a minimum level of intensity in the relevant hostilities.[248] Similarly, detention authority should be granted only until the "cessation of hostilities," defined by the United States itself as the point at which "belligerents feel sufficiently at ease about the future that they are willing to release and repatriate all POWs."[249]

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245. *See supra* Section III.B.1.

246. Klein cites several such proposals. *See, e.g.*, BENJAMIN WITTES & COLLEEN A. PEPPARD, DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION 16, 31 (2009) (proposing a requirement that the government prove to a federal judge that an individual detainee is an agent of a foreign power covered by statutory authorization and a "danger both to any person and to the interests of the United States"); PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 420 (2008) (proposing, among other statutory detention rules, a limit on long-term pretrial detention for a period of two years).

247. *See supra* Sections I.A.1–3.

248. *See supra* notes 37–52 and accompanying text.

249. *See supra* Sections I.A.1–3. Although the detention of Guantanamo detainees is reviewed by the Periodic Review Board to "review whether continued detention of particular individuals held at Guantanamo remains necessary to protect against a continuing significant threat to the security of the United States," the review "does not address the legality of any individual's detention under the authority of the Authorization for Use of Military Force, as informed by the *laws of war*." The Periodic Rev. Bd., PERIODIC REV. SECRETARIAT (emphasis added), https://www.prs mil/About-the-PRB/ [https://perma.cc/3K55-HRVJ]. Requiring

In his Note, Klein conceded that the hybrid model that he suggested "lacks the superficially satisfying clarity" of a more traditional paradigm, but he also pressed that a hybrid model's complexity would be suggestive of its accuracy.[250] With regard to an international law-based hybrid model, the international community's centuries of practice would help bolster that suggestion of accuracy.

CONCLUSION

As we enter our third decade in the war on terror, no illusions should be held as to a "superficially satisfying" end to the conflict.[251] With recent decisions such as *Al Hela* discouraging an international law-informed, fact-based end to AUMF authorization,[252] it seems unlikely that an end will come without the express will of the political branches. Whatever tack those political branches take, they would do well to remember that the maintenance of democratic rights and fealty to the rule of law are far from weaknesses.[253] As the AUMF nears its sell-by date, reinforcing the political, moral and legal legitimacy of the fight against terrorism will be essential in ensuring U.S. national security.

*William W. Taub**

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added consideration of a detainee's threat level as a matter of law may give the issue more weight in a habeas corpus petition or other legal action.

250. Klein, *supra* note 69, at 1909–10.

251. *Id.*

252. *See generally supra* Section II.C.

253. *See* Ayalon & Hayut-man, *supra* note 236:

> Taken together, an erosion of rights and an increase in the power of the executive branch without a clearly defined end point in sight could set up the conditions for a security state through a process of 'incremental tyranny.' This risk could be averted, however, if we view the maintenance of democratic rights and norms not as a hindrance to fighting terrorism but rather as a crucial tool for doing so. Democratic norms allow the arbitration of social conflicts and bolster social resilience. Such resilience is also supported by the formation of national consensus about the decision to engage in war—such consensus being far more likely to emerge when the executive branch must take the views of the legislature into account. And, far from being a weakness, restraint in the use of force is crucial for achieving legitimacy, both internationally and vis-a-vis the adversary's society.

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