



Overkill: Reforming the Legal Basis for the U.S. War on Terror

United States Report N°5 | 17 September 2021

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2001 ★ 2021

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Table of Contents

Executive Summary.....	i
I. Introduction	1
II. Bush Administration: The 2001 AUMF and Guantánamo Bay	2
III. Obama Administration: A Wider Footprint for the War on Terror.....	4
A. Associated Forces: From Detention to Targeting.....	4
B. Institutionalisation	7
C. The Counter-ISIS Campaign.....	10
D. The Quiet Spread of the War on Terror in Africa	12
1. Partnered operations.....	12
2. Somalia: From surgical strikes to ground combat	13
IV. Trump Administration: Intensification and Further Expansion.....	16
A. Continuity but Less Transparency.....	16
B. More Strikes and Ground Combat in Africa	17
C. Ancillary Self-defence in Syria: Further Stretching the AUMF.....	20
V. Biden Administration: Re-evaluation or More of the Same?	22
A. U.S. Perceptions of the Jihadist Threat	23
B. Prospects for Policy Reform	25
C. Prospects for Legal Reform	26
VI. The Way Forward	29
VII. Conclusion	32
APPENDICES	
A. Map of U.S. Military Counter-terrorism Hostilities and Detention Operations since 2001	33
B. About the International Crisis Group	34
C. Crisis Group Reports and Briefings on the United States since 2018	35
D. Crisis Group Board of Trustees	36

Principal Findings

What's new? The U.S. government is conducting a formal review of its counter-terrorism direct action operations – ie, those that involve kill or capture. But it is not clear that the review will shed light on key questions about the effectiveness of militarised counter-terrorism efforts or recommend major changes.

Why does it matter? The so-called global war on terror deserves greater oversight. Since the 11 September 2001 attacks, the U.S. has waged war upon numerous jihadist groups in a dozen or more countries. Decisions to change the conflict's scope are often taken unilaterally and in secret by the executive branch.

What should be done? The U.S. needs better rules for the war on terror. Congress and the Biden administration should cooperate on a new, more specific authorisation that requires greater deliberation, transparency and accountability for decisions about the war's scope. This process could help winnow unnecessary components of the war.

Executive Summary

Within days after al-Qaeda attacked the United States on 11 September 2001, the U.S. Congress enacted the 2001 Authorisation for Use of Military Force (AUMF), enabling President George W. Bush to use military force against the operation's planners and those who aided and harboured them. But, over time, that law became more than just the basis for waging war upon al-Qaeda and the Taliban. As the U.S. expanded operations against jihadists from the Philippines to Niger, successive presidents chose not to seek additional authority from Congress, relying instead on increasingly strained interpretations of the AUMF. These interpretations allowed the executive branch to determine the war's scope outside the full set of checks and balances that Congress is supposed to supply. This practice should stop. The Biden administration should work with Congress to update the AUMF by replacing it with a statute that promotes transparency and accountability, and that narrows the war down to those efforts necessary to meet a genuine threat.

The U.S. war on terror took shape during Bush's first term. While the Bush administration is remembered for egregious abuses committed at that time, including the rendition and torture of suspected enemy combatants, its legacy also includes certain enduring structural decisions. One was to seek from Congress a broad use of force authorisation that would allow the executive branch to place military action at the centre of its counter-terrorism strategy. The resulting statute – the 2001 AUMF – contains no termination date or geographic boundaries, and grants the president authority to determine which countries, groups or individuals will be subject to the use of force. The second such decision was to detain certain individuals captured in the conflict at Guantánamo Bay, Cuba. Thus, the administration set in motion litigation that became a proving ground for increasingly expansive theories about which groups and individuals the AUMF covered. The government sometimes pressed these theories into service to justify lethal operations.

When he took office in 2009, President Barack Obama sought to distinguish himself from President Bush, but he was only partly successful. He banned abusive interrogation techniques and decreed that he would close Guantánamo within a year – an ambition that went unfulfilled. Yet Obama did not reverse the war's course. Indeed, on his watch its footprint expanded. Borrowing theories honed while defending Guantánamo habeas corpus cases (which it continued to do even as it sought the facility's closure), the administration claimed that groups like al-Qaeda in the Arabian Peninsula (Yemen) and Al-Shabaab (Somalia) were “associated forces” of al-Qaeda and therefore covered by the AUMF. Obama's lawyers also argued that the AUMF authorised war with the Islamic State in Iraq and Syria (ISIS), even though ISIS was known to have split with al-Qaeda. But even as they drew more power from the AUMF to prosecute the war, senior officials wanted to keep a tight grip on operations. They created a framework of safeguards aimed at protecting civilians and ensuring senior-level coordination around strikes.

President Donald Trump, who followed Obama in 2017, promised another about-face, but he, too, failed to make especially dramatic changes to the structure he inherited. During his campaign, Trump claimed that he would both adopt a gloves-off

approach to the war on terror and curtail U.S. military entanglements abroad at the same time. To the relief of many, he did not make good on his threats to reintroduce the interrogation techniques Obama had banned. Nor did he entirely jettison the idea of an overarching policy framework to help set uniform standards and safeguards for the use of force in counter-terrorism activities. He did, however, rescind Obama's framework and put his own in its place. In reality, the tempo of U.S. counter-terrorism activities worldwide, especially in Africa, including engagement in "advise, assist and accompany" operations with partner forces, appeared to pick up under his watch.

As for the Biden administration, which took office in January 2021, the decision to withdraw troops from Afghanistan marks a major shift in the war on terror, but it is uncertain whether further significant changes will follow. An ongoing counter-terrorism policy review appears to be looking to identify middle ground between the Obama-era safeguards for military action (which operators found rigid and cumbersome) and Trump's more operationally permissive approach. Certainly, the recent revelation that a Kabul drone strike intended for ISIS wound up killing an aid worker and other civilians militates in favour of reinstating the strongest possible safeguards. But whatever the review accomplishes on that front, some participants have suggested that it may avoid looking at more fundamental questions, such as whether Washington's military response to jihadist groups is properly calibrated to the threats the U.S. is facing, and whether the benefits of these military actions outweigh the costs.

On the subject of legal reform, there are similarly reasons to believe that the administration lacks interest in contemplating major change. It has signalled its willingness to discuss with Congress a refresh of the 2001 AUMF, but it shows no sign of prioritising progress in this direction. Instead, it has said it is waiting for Congress to make the first move and has sent signals that its preference may be simply to recodify its authority rather than make the kinds of serious reforms that would encourage broader debate about the war's appropriate contours. Under the circumstances, it seems entirely possible that the moment will pass without any legislative reform at all.

That would be a mistake. It is beyond the scope of this report to assess whether and where military force has been or continues to be a necessary and effective tool for countering jihadist threats to the United States. Still, these issues are clearly of enormous consequence to the U.S., its partners and the countries where they are operating and, overall, Crisis Group's work on the ground in many of the areas affected suggests that a rethink is very much warranted. Yet, at the moment, there is little pressure on the Biden administration to offer satisfying answers, in part because the executive branch has become habituated to making critical decisions about the war unilaterally and behind closed doors.

There is a better way. The Biden administration should expand its policy review to examine where and against whom force is a necessary and effective instrument. It should include a review of "partnered" operations in support of proxy forces. The administration should also engage Congress. Rather than wait for the legislature to make the first move before pursuing the thorny but vital challenge of updating the 2001 AUMF, it should reach out to reform-minded members and begin the process itself. In formulating a replacement, the administration and Congressional counterparts should correct the features that have allowed the 2001 AUMF to survive for two decades, becoming a seemingly bottomless well of executive authority. The new

authorisation should be specific about where and against whom force is permitted, make clear that “associated forces” can only be added by a further act of Congress, and require reauthorisation after two or three years to prevent the war from proceeding on autopilot and ensure that new generations of political leaders can be held accountable for its continuation.

Congress is not always a brake on war-making. It did, after all, enact the 2001 AUMF, not to mention authorising the Vietnam and Iraq wars. Still, if U.S. political leaders are to learn the lessons of past conflicts, then the law needs to create a framework for them to do so. A major overhaul of the 2001 AUMF is the best way to proceed in the struggle against transnational jihadism. After twenty years, there is no time to waste.

Washington/New York/Brussels, 17 September 2021

Overkill: Reforming the Legal Basis for the U.S. War on Terror

I. Introduction

One week after al-Qaeda's shocking attacks of 11 September 2001, the U.S. Congress authorised President George W. Bush to use all necessary and appropriate force against the group and those who aided and harboured them. The 2001 Authorisation for Use of Military Force (or AUMF) became the legal foundation for the U.S. intervention in Afghanistan, but it also became much more. As the Bush administration and its successors expanded militarised counter-terrorism operations (often referred to as the "war on terror"), they did not seek fresh authorisations from Congress. Rather, they developed novel legal theories to explain why the 2001 AUMF afforded them all the authority they felt they required. Over the course of four U.S. presidential administrations, the anti-jihadist struggle has involved hostilities with at least seven groups in a dozen or more countries; while the legal basis has not always been clear, in the majority of cases it has been the 2001 AUMF. Against the backdrop of mounting criticism, the Biden administration has promised to review the war on terror's policy and legal frameworks, but its appetite for major legal reform seems limited.

This report describes how U.S. executive branch lawyers and policymakers transformed the war's scope through unilateral interpretation of the 2001 AUMF and discusses the costs of this approach, including the erosion of Congress's role as a check on imprudent war-making. It suggests steps both the executive and legislative branches of the U.S. government could take to reform the 2001 AUMF in a way that would enhance Congressional and public scrutiny of the war on terror and increase accountability for key war-related decisions on the part of elected officials in both political branches of the U.S. government.

The report focuses primarily on military activities conducted under the 2001 AUMF and therefore does not address conflicts pursued by the U.S. under separate authority, such as the 2003 Iraq war, the 2011 Libya intervention or involvement in the Saudi-led campaign in Yemen that began in 2015. It draws from scholarly literature, academic reports and interviews conducted largely between May and September 2021 with over 30 current and former U.S. executive branch officials (including members of the Crisis Group staff who contributed to the report), as well as Congressional staff.

II. Bush Administration: The 2001 AUMF and Guantánamo Bay

In its response to al-Qaeda's attacks on targets in New York and Washington on 11 September 2001, the George W. Bush administration famously looked to its lawyers to justify the rendition and torture of alleged enemy combatants, and to place its operations outside the rule of law.¹ But beyond these actions, which left an enduring mark on Bush's legacy, the administration also made certain structural decisions that would shape the military response to deemed threats emanating from al-Qaeda and other jihadists for the ensuing twenty years.

First, in consultation with Congressional leadership, the Bush administration drafted a broadly worded authorisation for the use of military force (widely referred to as the "2001 AUMF"), which Congress passed by an overwhelming majority and the president signed into law on 18 September 2001. This statute, the principal domestic legal authority for U.S. counter-terrorism military action since 2001, provides that:

the President is authorized 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.²

Among the key features of this broad authorisation are that it does not explicitly specify against whom, or in which countries, force may be used. Nor does it set a date on which the authority will lapse unless renewed. The U.S. government has sometimes objected to the term "global war on terror" (a term that the Bush administration first coined and then backtracked from out of concern that it was overly broad).³ But the statute does in reality give the president a worldwide writ to use force against the groups and individuals deemed by him or her to fall within its ambit.⁴ Under the Bush administration, the U.S. military engaged in combat or took casualties in counter-terrorism operations not only in Afghanistan, but also sporadically in Somalia as well as in the Philippines.⁵

¹ See, for instance, Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York, 2007).

² Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

³ John Bellinger III, "Legal Issues in the War on Terrorism", speech, London School of Economics, 31 October 2006.

⁴ As permissive as the 2001 authorisation is, the Bush administration sought even broader statutory authority at first. Under the Bush administration's original proposal, the president would also have been authorised to use all necessary and appropriate force "to deter and pre-empt any future acts of terrorism or aggression against the United States". Unlike the law that was enacted, this proposal, which Congressional leadership rejected, would have expressly authorised the use of force against groups without any connection to the 9/11 attacks. Richard Grimmett, "Authorization for the Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History", Congressional Research Service, 16 January 2007.

⁵ Linda Robinson, Patrick B. Johnston and Gillian S. Oak, "U.S. Special Operations Forces in the Philippines: 2001-2014", RAND Corporation, 2016.

Secondly, the Bush administration's decision to detain some deemed members of enemy jihadist groups at Guantánamo Bay, Cuba beginning in January 2002 proved consequential in ways that go beyond the reputational damage caused by the U.S. government's detention policy and the abuses that occurred under it.

For one thing, because the authority to detain the 39 individuals remaining at Guantánamo arises out of the 2001 authorisation, any attempt to repeal or replace the 2001 statute or declare the conflict's end could call into question the legal basis for their detention. The Biden administration has quietly begun efforts to transfer some of these individuals out of U.S. custody. It is trying others before military commissions.⁶ Still, there may be some for whom convictions are impossible to obtain, either because evidence is lacking or because it is tainted by the abusive techniques used to get it, and whom the U.S. deems too dangerous to set free.⁷ Without criminal convictions, sustaining a legal basis to detain these individuals in the absence of the 2001 AUMF could require legal gymnastics that will be difficult to defend on rule of law or civil liberties grounds.

More important for the scope of the war, however, is that litigation spurred by Guantánamo detainees seeking their freedom helped spawn the legal theories that came to undergird the entire war on terror. Although the Supreme Court confirmed the government's legal authority to detain Taliban members under the 2001 authorisation in its 2004 *Hamdi v. Rumsfeld* decision, the detainee population at Guantánamo in fact included individuals from a far broader range of groups than just al-Qaeda and the Taliban. Individuals from groups such as the East Turkestan Islamic Movement and Lashkar-e-Taiba were also captured on the battlefield (or, in some cases, third countries) and subsequently transferred to Guantánamo.⁸ Once the U.S. courts recognised these detainees' right to petition for their release or transfer, the U.S. government had to choose between granting the requests or articulating the legal basis for their detention.⁹

It was upon this litigation that the Bush and Obama administrations offered theories for stretching the 2001 authorisation to cover not just al-Qaeda (which committed the 11 September attacks) and the Taliban (which harboured them in Afghanistan) but also the more amorphous category of "associated forces" as a way to characterise the organisational affiliations of non-al-Qaeda, non-Taliban detainees at Guantánamo.¹⁰ While at first the U.S. government offered these theories purely as ways to defend detention in court, over time they became justifications for the use of lethal force against groups beyond al-Qaeda.

⁶ Carol Rosenberg and Charlie Savage, "Biden is reviving efforts to move detainees out of Guantánamo Bay", *The New York Times*, 19 July 2021.

⁷ Carol Rosenberg, Charlie Savage and Eric Schmitt, "In bad shape and getting worse, Guantánamo poses headaches for Biden", *The New York Times*, 8 July 2021.

⁸ Crisis Group interview, former U.S. official, July 2021. Brief for Respondent, *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) (No. 06-1397).

⁹ Crisis Group interviews, former U.S. officials, June-July 2021.

¹⁰ Crisis Group interviews, former U.S. officials, June-July 2021.

III. **Obama Administration: A Wider Footprint for the War on Terror**

By all appearances, President Barack Obama seemed eager to roll back the global war on terror he inherited. Obama's pointed critiques of Bush-era counter-terrorism policies were a key theme of his presidential campaign.¹¹ On his second day in office, Obama ordered officials to start taking steps to close Guantánamo and banned interrogation techniques widely viewed as torture.¹² As president, Obama spoke of his desire to wind down the war on terror, and expressly recognised the dangers posed by an excessive focus on militarised counter-terrorism in U.S. foreign policy.¹³ Yet, as Obama's tenure proceeded, the publicly acknowledged number of groups the U.S. was fighting in the war on terror grew, as did the number of places where it was fighting them. These expansions were enabled by legal innovations, generally taken by executive branch lawyers. Collectively, these innovations significantly widened the scope of the 2001 AUMF and the conflict fought under its auspices.

A. *Associated Forces: From Detention to Targeting*

Within days of taking office in 2009, President Obama issued an executive order directing that the detention facility at Guantánamo Bay "shall be closed as soon as practicable, and no later than 1 year from the date of this order".¹⁴ Yet at the same time that the Obama administration's policy objective was closure of Guantánamo, it adopted legal arguments that both perpetuated detention and justified the expansion of lethal targeting to new countries.

There appear to have been several considerations driving the contradictions between Obama's stated desire to close the detention facility and his lawyers' often very aggressive legal arguments in support of keeping detainees locked up there.¹⁵ For one thing, Obama had set up his own task force to examine the government's favoured disposition of the detainees – many of whom some agencies had characterised as presenting a substantial security threat – and the administration did not want the courts to force its hand before it made its own determinations. Secondly, the administration's lawyers were reluctant either to concede that the government had been detaining these individuals unnecessarily or in error, or to make arguments that might curb Obama's wartime discretion or that of future presidents.¹⁶

Thirdly, there were likely political considerations. Republicans had long portrayed Obama's Democratic Party as weak on national security. Both Obama's political opponents in Congress as well as some allies opposed the president's efforts to close Guan-

¹¹ Dan Roberts, "Obama's shifting views on torture: How the candidate lost his way as president", *The Guardian*, 9 December 2012.

¹² Executive Order 13492, 22 January 2009.

¹³ Barack Obama, "Remarks by the President at the National Defense University", 23 May 2013.

¹⁴ Executive Order 13492, *op. cit.*

¹⁵ Crisis Group interview, former U.S. official, June 2021.

¹⁶ Crisis Group interviews and exchanges, former administration officials, June–August 2021. For a discussion of the Department of Justice's reluctance to cede the writ of habeas corpus in a Guantánamo transfer case at the end of the Obama administration, see "The other Latif (the United States of America)", Radiolab, 17 March 2020.

tánamo, even though the Bush administration had for years been moving in that direction.¹⁷ Contesting detention cases in court bought the president's handlers time with respect to at least some cases as they considered how to manage the fallout from the transfers and releases already in progress.

Thus, pushed by the courts to provide the government's views on the legal standard for detention of individuals at Guantánamo Bay, the Obama administration quickly offered a rationale that differed only modestly from the scope of authority asserted by the Bush administration, but was more explicit in its assertions.¹⁸ Within the executive branch, there were differing opinions as to whether this was the right approach.¹⁹ The Department of State, looking to international law and conscious of U.S. allies' opinions, had hoped for a narrower interpretation of detention authority.²⁰ The Department of Defense, interested in maintaining operational flexibility, took a more expansive view.²¹ The Department of Justice, concerned about protecting the president's room for manoeuvre, similarly favoured an expansive definition.²²

In the end, the latter two agencies largely prevailed. In a memorandum filed on 13 March 2009, the Obama administration asserted that under the 2001 authorisation, the president had the power to detain:

persons that the President determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.²³ [*Emphasis added*]

The reference to "associated forces" was pulled from a Bush-era definition of who could be detained at Guantánamo as an enemy combatant and – just as during the Bush administration – was meant to create flexibility in detaining captured jihadists who were not directly affiliated with the Taliban or al-Qaeda.²⁴ At a more granular level, the U.S. government did not have a theory of what "associated forces" actually meant.²⁵ But the term sufficed as a placeholder while the lawyers debated its legal provenance and meaning among themselves. Ultimately, under continued litigation pressure by detainees challenging the legal basis of their detention, the administra-

¹⁷ David M. Herszenhorn, "Funds to close Guantánamo denied", *The New York Times*, 20 May 2009.

¹⁸ Crisis Group interviews, former U.S. officials, June-July 2021.

¹⁹ Crisis Group interview, former U.S. official, July 2021.

²⁰ Crisis Group interview, former U.S. official, July 2021.

²¹ Crisis Group interview, former U.S. official, July 2021.

²² Crisis Group interview, former U.S. official, July 2021.

²³ Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In re: Guantánamo Bay Detainee Litig.*, Misc. No. 08-0442, at 1 (D.D.C. 13 March 2009).

²⁴ Crisis Group interviews, former U.S. officials, June-July 2021. See also Rebecca Ingber, "Co-Belligerency", *Yale Journal of International Law*, vol. 42 (2017), p. 67.

²⁵ Crisis Group interview, former U.S. officials, June-July 2021.

tion backfilled the concept with content.²⁶ The Defense Department's general counsel, Jeh Johnson, articulated the standard that the U.S. government lawyers arrived at in a 2012 speech. He said:

An "associated force," as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al-Qaeda, and (2) is a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.²⁷

At the policy level, the significance of the Obama administration's invocation of "associated forces" was twofold. First, it allowed the U.S. government to continue arguing for the detention of individuals who did not belong to either al-Qaeda or the Taliban. Secondly, it created a mechanism for the administration to continue expanding the war on terror's scope under the ostensible framework of the 2001 authorisation without returning to Congress. While executive branch lawyers would talk among themselves about which groups fit the definition they had constructed, they were not required to air their deliberations with the public or weigh countervailing input from outside actors. Arguably, Congress had rejected this kind of open-ended legal framework when it nixed the Bush administration's original proposal for the 2001 authorisation because it did not restrict itself to entities with a strict connection to the 9/11 attacks. Yet it wound up not mattering. If the executive branch could not obtain authority from Congress, it could unilaterally expand its powers through legal interpretation.²⁸

Thus, although the term "associated forces" was first used to justify the detention of individuals at Guantánamo, it soon became the basis for other operations as well. Most significantly, the executive branch repurposed the concept of associated forces to target new groups outside Afghanistan.²⁹ One former U.S. official observes that even though the concept of associated forces was invented to justify detention and endorsed by the DC Circuit Court of Appeals and Congress on those grounds, the Defense Department soon "borrowed [it] whole hog for targeting".³⁰ Yet, in using force against groups outside Afghanistan, neither the Bush nor the early Obama administration publicly described the legal basis for doing so with any precision. It was not until the U.S. Senate questioned this basis that the Obama administration revealed the list of "associated forces".³¹

²⁶ Crisis Group interview, former U.S. official, July 2021.

²⁷ Jeh Johnson, "National Security Law, Lawyers and Lawyering in the Obama Administration", speech, Yale Law School, 22 February 2012.

²⁸ Congress subsequently affirmed the president's detention authority with respect to associated forces in the National Defense Authorization Act for Fiscal Year 2012. Federal courts did so as well. See, for example, *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013). "This Court has stated that the AUMF authorizes the President to detain enemy combatants, which includes (among others) individuals who are part of al-Qaeda, the Taliban or associated forces. As this Court has explained in prior cases, the President may also detain individuals who substantially support al-Qaeda, the Taliban, or associated forces in the war".

²⁹ Crisis Group interviews, former U.S. officials, June-August 2021.

³⁰ Crisis Group interview, former U.S. official, August 2021.

³¹ Brian Finucane, "Putting AUMF repeal into context", *Just Security*, 24 June 2021.

B. *Institutionalisation*

During the Obama administration's first term, one former U.S. official described a "constant flow" from the U.S. military of proposals for targeted strikes on what it referred to as "high-value targets" – ie, senior leaders and operational masterminds – as well as for other strikes and raids.³² This former official characterised the proposals as "kind of wild".³³ At this time, there was no formal White House policy guidance as to what operations the Defense Department should be conducting, or how it should conduct them, or any standard process for considering the foreign policy implications of counter-terrorism operations.³⁴

In a traditional war between states, the absence of this sort of framework might not be so glaring, given that the enemy forces and their individual combatants tended to be better defined and more readily identifiable, but as the war on terror spread to encompass more difficult-to-distinguish groups in more countries with whom the U.S. was at peace, it became a problem. Policymakers looked to lawyers to set the limits for what they could lawfully do but these limits, at least in the U.S. government's view of the law, created quite a bit of operational flexibility. The military had to abide by standard law of war rules about distinguishing combatants from civilians and ensuring that harm to civilians from any attack was not excessive in relation to the anticipated military advantage. The U.S. also recognised rules of international law intended to protect host states' sovereignty.³⁵ But, at least as interpreted and applied by the Pentagon, these rules were permissive, and some early Obama-era strikes resulted in large numbers of civilian casualties.³⁶

Senior officials (including President Obama, who according to former officials tracked reports of civilian casualties closely) were undoubtedly troubled by the number of innocent people being killed or injured.³⁷ Beyond moral concerns, they worried about the implications for host state cooperation if operations caused extensive civilian deaths, as well as the possibility that killings would create grievance and foster more militancy. They also worried about the mismatch between the U.S. government's legal approach to the war on terror (which justified the use of force on the idea that the U.S. was in a geographically unbounded war with certain terrorist groups) and the legal theories of close allies (which as discussed below tended to see self-defence as the best justification for using force against armed groups), as discrepancies could complicate military cooperation.³⁸

In order to impose a policy framework for oversight and approval of direct action, and put these operations on a footing that foreign partners could more easily live with, White House officials began crafting what they originally termed the "institutionalisation project".³⁹ This attempt to institutionalise safeguards later became the "Pro-

³² Crisis Group interview, former U.S. official, July 2021.

³³ Crisis Group interview, former U.S. official, July 2021.

³⁴ Crisis Group interview, former U.S. official, July 2021.

³⁵ Brian Egan, "International Law, Legal Diplomacy, and the Counter-ISIL Campaign", speech, American Society of International Law, 1 April 2016.

³⁶ Dexter Filkins, "What we don't know about drones", *The New Yorker*, 6 February 2013.

³⁷ Crisis Group interview, former U.S. official, July 2021.

³⁸ Crisis Group interview, former U.S. official, July 2021.

³⁹ Crisis Group interview, former U.S. official, July 2021.

cedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities” or “Presidential Policy Guidance” (PPG). The administration issued the Guidance in classified form late in Obama’s first term and publicised the new policy in a major presidential speech, which outlined its key features.⁴⁰

The new Guidance applied to “direct action” outside “areas of active hostilities”. The latter term referred to traditional war zones with substantial U.S. ground presence and a high operational tempo such as Afghanistan – and, after the campaign against the Islamic State (ISIS) began, Iraq and Syria. The former term, “direct action”, referred to “lethal and non-lethal uses of force, including capture operations”.⁴¹ Under the new policy framework, force was to be used only when necessary and then with the goal of preventing civilian casualties.⁴² In the main, operators would use force only if there was “near certainty” that the individual being targeted was in fact the lawful target and “near certainty” that the action could be conducted without injuring or killing non-combatants.⁴³

The PPG also sought to impose policy-based constraints that might bolster the legitimacy of U.S. operations in the eyes of foreign partners who had different interpretations of the rules of international law regarding the use of force.⁴⁴ While the U.S. believed that it was in armed conflict against al Qaeda and its associated forces wherever they might be located, and could therefore target individuals based on their membership in the group, many of its allies believed that they could only lawfully use force if these individuals created an imminent threat or otherwise triggered the right of self-defence under international law. The PPG thus used language that gestured toward the international legal standard for self-defence in requiring that targets pose a “continuing and imminent threat to the American people”.⁴⁵

The Guidance also created new procedures for vetting proposed strikes. The PPG required that proposals for direct action be reviewed by the general counsel of the relevant operating agency prior to submission to the staff at the National Security Council. At that point, the proposal would be subject to inter-agency legal review before presentation to senior policymakers, cabinet officials and – in the last step – the president for approval.

Former U.S. officials observed that the operating agencies’ pre-existing culture had been biased in favour of action.⁴⁶ The PPG created a check on that bias.⁴⁷ The White House’s involvement meant that operators had to make the case for strikes and that policymakers took the strategic implications into consideration.⁴⁸ In con-

⁴⁰ Crisis Group interviews, former U.S. officials, July-August 2021.

⁴¹ “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities”, U.S. National Security Council, 2013.

⁴² Crisis Group interviews, former U.S. officials, July 2021.

⁴³ “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities”, *op. cit.*

⁴⁴ Crisis Group interview, former U.S. official, August 2021.

⁴⁵ “Background Briefing by Senior Administration Officials on the President’s Speech on Counterterrorism”, White House, 23 May 2013.

⁴⁶ Crisis Group interviews, former U.S. officials, July-August 2021.

⁴⁷ Crisis Group interview, former U.S. official, July 2021.

⁴⁸ Crisis Group interviews, former U.S. officials, July-August 2021.

trast, the prior process, under which operating agencies sometimes had to coordinate only with the relevant U.S. ambassadors rather than with the State Department or National Security Council in Washington, left those operators a great deal more freedom of action.⁴⁹

Although the Guidance may have helped reduce civilian casualties from U.S. strikes in countries such as Yemen, it still had its critics.⁵⁰ According to a number of former U.S. officials, as a result of the policy standards imposed by the PPG, U.S. operations became more precise over time.⁵¹ Still, those sceptical of the use of force as a counter-terrorism tool criticised the framework as being too permissive. Some officials expressed the concern that operating agencies were able to game the policy standards imposed by the PPG by tailoring their characterisation of the intelligence presented to policymakers as needed to meet those standards, such as “continuing and imminent threat”.⁵²

In addition, those with more hawkish instincts worried that the new Guidance interposed a highly bureaucratic process for approving strikes and other counter-terrorism operations that vested considerable power in civilians who were out of their depth.⁵³ Some officials at operating agencies argued that, though operators sometimes make mistakes, it was on the whole worse to involve policymakers in decisions about specific uses of force, because too often “policymakers are unqualified to make these calls. ... [They are] incompetent in this arena”, as they lack the requisite military expertise.⁵⁴

Lastly, critics of the militarised approach to counter-terrorism complained that even though the PPG imposed heightened policy standards and a White House-coordinated approval process, it also institutionalised a “war” response to terrorism in the executive branch and normalised lethal operations far away from the conventional battlefields of Afghanistan and (after the counter-ISIS campaign started in 2014) Iraq and Syria.⁵⁵ Consequently, critics argued, policymakers became further habituated to using force to combat terrorism.⁵⁶ In the view of one former U.S. official, the PPG contributed to a “mowing the grass mindset” in terms of managing the terrorist threat.⁵⁷ A former official observes that under the PPG, the question too often became: “How do we do this operation?”, rather than: “Should we do this operation?”⁵⁸ Another former U.S. official noted that by making militarised counter-terrorism more sustainable, the PPG may have made it harder to wind down. Said this former official: “Sustainability is actually a problem”.⁵⁹

⁴⁹ Crisis Group interview, former U.S. official, July 2021.

⁵⁰ Peter Bergen, David Sterman and Melissa Salyk-Virk, “America’s Counterterrorism Wars: The War in Yemen”, New America Foundation, 17 June 2021; Charlie Savage and Scott Shane, “U.S. reveals death toll from airstrikes outside war zones”, *The New York Times*, 1 July 2016.

⁵¹ Crisis Group interviews, former U.S. officials, July -August 2021.

⁵² Crisis Group interviews, former U.S. officials, July 2021.

⁵³ Crisis Group interviews, former U.S. officials, July 2021.

⁵⁴ Crisis Group interviews, former U.S. official, July 2021.

⁵⁵ Crisis Group interview, former U.S. official, June 2021.

⁵⁶ Crisis Group interviews, former U.S. officials, July 2021.

⁵⁷ Crisis Group interview, former U.S. official, July 2021.

⁵⁸ Crisis Group interview, former U.S. official, July 2021.

⁵⁹ Crisis Group interview, former U.S. official, June 2021.

C. *The Counter-ISIS Campaign*

In the summer of 2014, ISIS surged across northern Iraq from Syria, capturing Mosul, committing widespread atrocities, menacing U.S. consular and diplomatic posts, and threatening to attack Baghdad. Confronted with what Secretary of State John Kerry later deemed genocidal attacks on the Yazidis and the threats to U.S. personnel and the Iraqi government, the Obama administration began ordering airstrikes on ISIS, first in Iraq and then in Syria. But there was a legal complication: Congress had not authorised the administration to wage war on ISIS. There was accordingly no clear legal foundation for a protracted campaign against the group.

The Obama administration first relied solely upon the president's powers as commander-in-chief under Article II of the U.S. constitution, which are widely understood to include the right to protect both the U.S. homeland and U.S. persons abroad from attack. But it soon encountered a challenge: under the 1973 War Powers Resolution – a statute enacted at the end of the Vietnam war to rein in unilateral war-making by the executive branch – the introduction of U.S. forces into hostilities sets a 60-day clock. When this time runs out, the executive must withdraw the forces if Congress has not authorised the conflict.⁶⁰ There was a reason that the administration chose this legal tack, notwithstanding the hurdles erected by the War Powers Resolution. One former official recalls that when U.S. forces returned to Iraq in 2014, “we didn’t initially think they had the legal authority [under the 2001 AUMF] to do anything about ISIS. ... [We thought they could] only protect the embassy”.⁶¹

To address the 60-day deadline, the Obama administration could have gone to Congress to seek a specific authorisation for the use of force against ISIS. But it was not confident that it would get the statute that it sought. One former U.S. official recounts that the administration felt “gun-shy” after failing the previous year to secure Congressional authorisation for the use of force against the Syrian government in response to the chemical weapons attack it launched against civilians in a Damascus suburb.⁶²

Faced with the felt exigency of fighting ISIS and uncertainty of Congressional authorisation, the Obama administration turned to a second option.⁶³ It decided to develop an argument that Congressional authorisation was not needed because it had already been granted under the 2001 authorisation. As the 60-day deadline approached, the Obama administration announced that it had statutory authority to continue anti-ISIS hostilities, relying principally on the 2001 authorisation, but also on the 2002 Authorisation for the Use of Military Force against Iraq.⁶⁴ According to one former U.S. official, none of the senior executive branch lawyers involved in the deliberations thought that the application of the 2001 AUMF to ISIS was the best interpretation of the law, particularly because of the split between ISIS and al-Qaeda.⁶⁵ Another former official, though a supporter of and participant in the counter-ISIS

⁶⁰ Crisis Group interview, former U.S. official, August 2021.

⁶¹ Crisis Group interview, former U.S. official, July 2021.

⁶² Crisis Group interview, former U.S. official, August 2021.

⁶³ Crisis Group interview, former U.S. officials, June-August 2021.

⁶⁴ “Letter from the President – War Power Resolution Regarding Iraq”, White House, 23 September 2014.

⁶⁵ Crisis Group interview, former U.S. official, August 2021.

campaign, went so far as to characterise the application of the 2001 AUMF to ISIS as “abuse” of the statute.⁶⁶

Still, confronted with leaders who felt an urgent imperative to continue battling ISIS, and who did not want to be beholden to Congress for authorisation, these lawyers took the view that there was a “legally available” interpretation of the AUMF covering ISIS.⁶⁷ According to a former official, “nobody felt good about” the interpretation.⁶⁸

There was not even consensus among executive branch lawyers as to the exact theory by which the 2001 statute applied to ISIS.⁶⁹ In a 2015 speech, Stephen Preston, then general counsel at the Defense Department, articulated one theory connecting ISIS to al-Qaeda for the purposes of the 2001 authorisation. Under this view, the statute authorised the use of force against ISIS because ISIS was a successor entity to al-Qaeda in Iraq, whose leader Abu Musab al-Zarqawi had sworn loyalty to Osama bin Laden.⁷⁰ Thus, even though ISIS had since publicly broken with bin Laden’s successor Ayman al-Zawahiri, and was therefore at odds with al-Qaeda, Preston argued that ISIS was covered because of its longstanding ties to the latter.

Regardless of the theory, creating a legal basis for the use of force against ISIS under the 2001 authorisation paved the way for a major expansion of counter-terrorism operations.⁷¹ Most immediately, the U.S. now had clear authority to make war on a new group in two new countries, Iraq and Syria. But ISIS quickly developed or associated itself with a number of affiliates who swore allegiance to the group. The executive branch never publicly disclosed the criteria by which it determined whether these affiliates were or were not part of ISIS for the purposes of the 2001 AUMF. Its lawyers took up the question, however. According to a former U.S. official, the lawyers heard a drumbeat late in Obama’s tenure from at least some senior White House officials: who is “AUMF-able”?⁷²

The United States soon began using military force against some ISIS affiliates (which they treated as single entity together with ISIS) outside of Iraq and Syria. In 2015, the U.S. launched an airstrike on an ISIS leader in Libya.⁷³ The following year, the U.S. mounted a sustained campaign of airstrikes on ISIS targets in Libya, including to support the Government of National Accord’s efforts to recapture the city of Sirte from ISIS militants.⁷⁴ Also in 2016, the U.S. began targeting ISIS’s branch, the Islamic State Khorasan Province, in Afghanistan.⁷⁵ In addition, lawyers considered whether the 2001 authorisation would cover a Boko Haram faction that rechristened itself Islamic State in West Africa Province.⁷⁶

⁶⁶ Crisis Group interview, former U.S. official, July 2021.

⁶⁷ Crisis Group interview, former U.S. official, August 2021.

⁶⁸ Crisis Group interview, former U.S. official, August 2021.

⁶⁹ Crisis Group interview, former U.S. official, August 2021.

⁷⁰ Stephen Preston, “Legal Framework for the United States’ Use of Military Force Since 9/11”, speech, American Society for International Law, 10 April 2015.

⁷¹ Crisis Group interviews, former U.S. officials, July 2021.

⁷² Crisis Group interview, former U.S. official, June 2021.

⁷³ “Letter from the President – War Powers Resolution”, White House, 11 December 2015.

⁷⁴ “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, White House, 5 December 2016.

⁷⁵ *Ibid.*

⁷⁶ Crisis Group interview, former U.S. official, June 2021.

When the Obama administration opened the door to a dramatic expansion of the war on terror by deciding that the 2001 AUMF covered ISIS and that it did not need an ISIS-specific authorisation, it effectively closed the door to nascent efforts to update the 2001 authorisation, at least in the short term. By communicating to Congress that the executive branch did not need new statutory authority to fight ISIS, the Obama administration removed pressure from Congress to enact an authorisation.⁷⁷ Further, once the administration began relying on the 2001 AUMF for the conflict with ISIS, any reform of that authority, to say nothing of repeal, risked undermining military operations.⁷⁸ On the whole, Congress was happy to be let off the hook. If members could avoid a hard vote on a matter of war and peace, they would do so.⁷⁹ When the Obama administration did eventually submit a proposal for an ISIS-specific war authorisation after announcing it was not legally necessary, Congress showed little interest.

D. *The Quiet Spread of the War on Terror in Africa*

1. Partnered operations

Although the Bush administration had carried out a limited set of operations in Somalia against individuals affiliated with al-Qaeda, it was during the Obama and Trump administrations that the use of force under the 2001 AUMF became routine in Somalia and (as discussed in the following section) also crept into parts of the Sahel and West Africa.

This underappreciated chapter of the war on terror developed quietly and very differently than earlier phases. Unlike the deliberate expansion of the war to include al-Qaeda in the Arabian Peninsula in Yemen at the beginning of the Obama administration, or the launch of the counter-ISIS campaign in 2014, the expansion of the war's African fronts was often a bottom-up affair, propelled by special operations forces taking the initiative on the ground.⁸⁰

These troops were often deployed on what the U.S. military described as non-combat “advise, assist and accompany” missions alongside local partner forces, often under the authority of a statute that Congress enacted to permit the Pentagon to spend appropriated funds in support of foreign counter-terrorism forces. This statute is sometimes referred to as “127e”, which is taken from its U.S. Code citation – 10 U.S.C. §127e.⁸¹

⁷⁷ Crisis Group interviews, former U.S. officials, June–August 2021.

⁷⁸ Crisis Group interview, former U.S. official, June 2021.

⁷⁹ Crisis Group interview, former U.S. official, June 2021.

⁸⁰ Crisis Group interview, former U.S. official, July 2021.

⁸¹ Crisis Group interview, current and former U.S. officials, July 2021. See also Wesley Morgan, “Behind the secret U.S. war in Africa”, *Politico*, 2 July 2018. The relevant section of 10 U.S.C. §127e reads: “Support of special operations to combat terrorism (a) Authority. The Secretary of Defense may, with the concurrence of the relevant Chief of Mission, expend up to \$100,000,000 during any fiscal year to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating authorized ongoing military operations by United States special operations forces to combat terrorism”.

But while 127e is not a use of force authorisation, it was sometimes treated that way.⁸² According to one former official, the Pentagon used the authority to create “clear, unambiguous proxies of the United States”, which U.S. forces could then partner with on combat operations.⁸³ Notwithstanding the notionally non-combat purpose of the U.S. missions to advise, assist and accompany partner forces in Somalia, U.S. forces often found themselves using lethal force. One former official suggested that the mission creep was inevitable, explaining that “if you’re accompanying a partner in combat, then you’re engaging in combat”.⁸⁴ This official noted that U.S. forces on such missions in Africa were sometimes “chasing high-value targets, which they never should have been doing”.⁸⁵

Notably, though 127e requires the defense secretary to obtain the concurrence from the relevant U.S. chief of mission for a so-called 127e program in his or her area of responsibility, it does not require consultation or concurrence of the secretary of state or broader review in Washington.⁸⁶ According to former U.S. officials, chiefs of mission in host countries were generally eager to support counter-terrorism operations and thus often easily persuaded by their military counterparts to concur on these programs. Yet in the absence of consultation with the State Department in Washington, they often failed to fully consider legal, foreign policy and humanitarian concerns of such operations before approving them.⁸⁷ Thus, the executive branch may never have thoroughly contemplated – let alone vetted – decisions about whether and to what extent the U.S. should be involved in local conflicts through such programs.

2. Somalia: From surgical strikes to ground combat

Early in Obama’s first term, the U.S. limited its use of military force in Somalia to regimented strikes against members of Al-Shabaab whom the administration had determined also belonged to al-Qaeda’s core.⁸⁸ In practice, the U.S. was thus striking only a small number of senior Al-Shabaab leaders.

The Pentagon, however, considered this approach too narrow and advocated for including all Al-Shabaab under the 2001 authorisation, in order to attain a legal basis for targeting any member of the group.⁸⁹ The Pentagon was motivated both by its perception of the threat as well as desire for greater freedom of action for operators on the ground. Not only did the United States have air assets available for strikes on high-value targets in Somalia, but U.S. special forces were on the ground, at first as part of a train-and-equip mission in support of the African Union Mission to Somalia (AMISOM) and Somali government forces.⁹⁰ U.S. forces later began accompany-

⁸² Crisis Group interview, Congressional staff member, July 2021.

⁸³ Crisis Group interview, former U.S. official, August 2021.

⁸⁴ Crisis Group interview, former U.S. official, July 2021.

⁸⁵ Crisis Group interview, former U.S. official, July 2021.

⁸⁶ 10 U.S.C. §127e.

⁸⁷ Crisis Group interviews, former U.S. officials, July 2021.

⁸⁸ Crisis Group interview, former U.S. official, June 2021. See also Preston, “Legal Framework for the United States’ Use of Military Force Since 9/11”, *op. cit.*

⁸⁹ Crisis Group interview, former U.S. official, July 2021.

⁹⁰ Crisis Group interview, former U.S. official, July 2021.

ing AMISOM and Somali forces on offensive combat missions against Al-Shabaab. As a Congressional staff member observed, “operators don’t want to simply sit in the truck or wait behind the last point of cover and conceal when partner forces engage in hostilities. Operators want to operate”.⁹¹

The State Department resisted the expansion of the 2001 authorisation to encompass all Al-Shabaab, recognising that this interpretation of the statute would “blow open the doors on the 2001 AUMF and the war on terror”.⁹² This opposition was based on both concerns about precedent – in terms of the expanded scope of the 2001 AUMF – and a view that, at the time, Al-Shabaab was primarily locally and regionally focused and not a direct threat to the U.S.⁹³ It was therefore difficult to establish that Al-Shabaab was an associated force of al-Qaeda.

But even as the lawyers in Washington continued to hold the line against deeming Al-Shabaab an “associated force” under the 2001 statute, the situation on the ground continued to evolve. Around 2015, U.S. forces in Somalia to advise, assist and accompany Somali counterparts not only began to engage in ground combat but also to request airstrikes on Al-Shabaab targets in support of partner forces.⁹⁴ By this time, the White House had instituted the Presidential Policy Guidance described above to police operations in theatres like Somalia. But in practice, the Pentagon did not regard that Guidance as applying to the uses of force by U.S. troops characterised as defensive. Thus, by characterising the strikes as “unit self-defence” (ie, necessary to protect themselves) or “collective self-defence” (ie, taken to protect partner forces) rather than offensive operations or direct action, U.S. forces were able to circumvent the policy restrictions and high-level approvals that the PPG would otherwise have required.⁹⁵

It is hard to know whether these ostensibly defensive operations were legitimate efforts to save partner troops or opportunistic efforts to expand the scope of U.S. operations. One plausible explanation was offered by a former U.S. official, who characterised the evolution of U.S. military operations in Somalia as one of “significant mission creep” driven from the ground up.⁹⁶ Another former official said U.S. troops became invested in their local partners, and felt the need to defend them, even when those partners were engaged in offensive operations. As partner forces in Somalia lacked their own airpower, the U.S. forces needed to provide it.⁹⁷

Moreover, the line between such “collective self-defence” strikes and close air support was not always clear. A former U.S. official explained: “Collective self-defence is really close air support without authorisation”.⁹⁸ Troops on the ground generally make the determination of what constitutes “self-defence” and executive branch offi-

⁹¹ Crisis Group interview, Congressional staff member, July 2021.

⁹² Crisis Group interview, former U.S. official, July 2021. See also Charlie Savage, *Power Wars: The Relentless Rise of Presidential Authority and Secrecy* (New York, 2016).

⁹³ Crisis Group interview, former U.S. officials, July 2021.

⁹⁴ Crisis Group interviews, former U.S. officials, July 2021. See also Chad Garland, “Green Beret’s Silver Star sheds light on U.S. ground combat in Somalia”, *Stars and Stripes*, 7 July 2021.

⁹⁵ Crisis Group interviews, current and former U.S. officials, July 2021.

⁹⁶ Crisis Group interview, former U.S. official, July 2021.

⁹⁷ Crisis Group interview, former U.S. official, July 2021.

⁹⁸ Crisis Group interview, former U.S. official, July 2021.

cials in Washington are usually reluctant to second-guess their judgments.⁹⁹ In the case of Somalia, however, Washington-based officials did do some second-guessing. Another former official noted that, in engaging in “unit self-defence” strikes – defending U.S. forces – or “collective self-defence” strikes, defending partner forces, U.S. forces “got ahead of what Washington had blessed or thought it had blessed”.¹⁰⁰

Several current and former U.S. officials cite a May 2016 U.S. airstrike on an Al-Shabaab training camp as a milestone in U.S. hostilities in Somalia.¹⁰¹ This “collective self-defence” strike reportedly killed around 150 Al-Shabaab fighters.¹⁰² It did not appear to have been approved in advance in Washington. One former official observed of this strike that during the Obama administration, the U.S. had gone from conducting a handful of surgical strikes on specific Al-Shabaab leaders approved by the president to a massive airstrike killing over 100 unidentified fighters, likely authorised by a U.S. Navy captain.¹⁰³

Following this strike, and at least a year after U.S. forces had begun engaging in ground combat operations and “collective self-defence” strikes outside the PPG’s review process and policy standards, the Obama administration announced that it considered Al-Shabaab an associated force of al-Qaeda under the 2001 AUMF.¹⁰⁴ In doing so, the Obama administration found a tidy way to account for its failure to report previous hostilities as required by the War Powers Resolution for actions taken by the president when acting under Article II of the constitution. If the 2001 AUMF covered Al-Shabaab, there was no need to file hostilities reports under the Resolution.

This decision meant that Al-Shabaab as a whole, not just members deemed to be dual-hatted with al-Qaeda, could be targeted under the statute. Whereas previously the U.S. might have quietly supported the military operations of foreign partners against Al-Shabaab, and undertaken occasional strikes on senior leaders, now the U.S. war on terror formally included the group in its entirety.¹⁰⁵

⁹⁹ Crisis Group interviews, current and former U.S. officials, July 2021.

¹⁰⁰ Crisis Group interview, former U.S. official, June 2021.

¹⁰¹ Crisis Group interviews, current and former U.S. officials, July 2021.

¹⁰² Thomas Gibbons-Neff, “U.S. airstrike kills more than 150 at Somalia terrorist camp, military says”, *The Washington Post*, 7 March 2016.

¹⁰³ Crisis Group interview, former U.S. official, July 2021.

¹⁰⁴ “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, op. cit.

¹⁰⁵ At the end of 2016, the Obama administration publicly disclosed the complete list of entities that the U.S. military was then using force against under the 2001 AUMF: “al-Qa’ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa’ida or the Taliban in Afghanistan; AQAP; al-Shabaab; individuals who are part of al-Qa’ida in Libya; al-Qa’ida in Syria; and ISIL”. Ibid.

IV. Trump Administration: Intensification and Further Expansion

The United States further expanded and intensified counter-terrorism hostilities under the administration of President Donald J. Trump, though with decreased transparency, including with respect to policy and legal standards.

A. *Continuity but Less Transparency*

Although the Trump administration opposed any reform of the statutory framework for counter-terrorism operations, it did replace the Obama-era Presidential Policy Guidance. According to several current and former U.S. officials, counter-terrorism operators were emboldened by Trump's campaign rhetoric regarding counter-terrorism tactics.¹⁰⁶ While operating agencies generally wanted nothing to do with Trump's suggestions that he might greenlight abusive interrogation techniques "worse than waterboarding", they welcomed the prospect of shedding the constraints imposed by the Guidance under the Obama administration. The Trump administration, when it took office, was receptive to calls from operators to do so.¹⁰⁷

Chris Costa, senior director for counter-terrorism on the National Security Council staff in 2017-2018, explained that the Trump administration launched a review of the policy framework for counter-terrorism operations early on with the goal of ensuring that it was flexible and adaptable.¹⁰⁸ The Obama administration's Guidance had required extensive inter-agency approvals and the military lobbied for a more flexible approach.¹⁰⁹ One former U.S. official recounts that within the Pentagon, the Joint Staff and combatant commands were particularly outspoken in their desire to dispense with the Guidance.¹¹⁰ The requirement of "near certainty" that a strike would kill the targeted individual and avoid civilian casualties was considered unduly demanding from the operators' perspective because of the time and resources they entailed, particularly in terms of intelligence, surveillance and reconnaissance aircraft.¹¹¹

The review preceding the Trump administration's new framework took a year.¹¹² The framework that the administration eventually adopted was titled "Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets". One former U.S. official tells of debates within the Defense Department on whether the principles should depart from the "near certainty" of no non-combatant casualties standard imposed by the Obama administration's Guidance, though the results of those debates are not public.¹¹³ Whether and to what extent the transition from one policy framework to the next increased the risk of civilian casualties from individual

¹⁰⁶ Crisis Group interviews, current and former U.S. officials, July-August 2021.

¹⁰⁷ Matt Apuzzo and James Risen, "Donald Trump faces obstacles to resuming waterboarding", *The New York Times*, 28 November 2016.

¹⁰⁸ Crisis Group interview, July 2021.

¹⁰⁹ Ibid.

¹¹⁰ Crisis Group interview, former U.S. official, August 2021.

¹¹¹ Crisis Group interview, former U.S. official, August 2021.

¹¹² Crisis Group interview, Chris Costa, former National Security Council counter-terrorism director, July 2021.

¹¹³ Crisis Group interview, former U.S. official, August 2021.

strikes is difficult to assess, in part because of the higher operational tempo of air-strikes under the Trump administration in Syria, Yemen and Somalia.¹¹⁴ Data collected by the New America Foundation suggests that the faster pace of airstrikes in Somalia and Yemen was accompanied by an increase in overall civilian casualties.¹¹⁵ What is clear is that the institution of the Trump-era principles did remove some of the bureaucratic procedures for approving lethal operations and delegated authority to the operating agencies.¹¹⁶

In contrast to the Obama administration, the Trump administration did not disclose the principles' broad parameters but instead classified their very name and existence.¹¹⁷ It was only under the Biden administration that this information, along with a redacted version of the document itself, was released as a result of Freedom of Information Act litigation.

One feature of the Trump administration framework has come to light and continues to be of relevance into the Biden administration. The policy constraints the framework establishes carve out “lethal action taken in unit self-defence of U.S. or foreign partner forces” from its requirements.¹¹⁸ This explicit carveout appears to remain in effect and to have allowed the U.S. military to continue making strike decisions in Somalia under the Biden administration without White House coordination.

Although the Obama administration released a public list in 2016 of all groups it was then taking direct action against under the 2001 AUMF, the Trump administration retreated from this practice.¹¹⁹ In a March 2018 report to Congress, the Trump administration explained that the report's classified annex contained information about the application of the 2001 authorisation to particular groups and individuals.¹²⁰ Although the administration later publicly shared selective information about certain new groups it had deemed associated forces – including al-Qaeda's Sahel branch, al-Qaeda in the Islamic Maghreb – its reports continued to indicate that “specific information about the application of the 2001 AUMF to particular groups” was classified.¹²¹

B. *More Strikes and Ground Combat in Africa*

Lethal counter-terrorism operations intensified and expanded during the Trump administration. In its early years, the Trump administration continued to draw upon the Obama administration's playbook for the military campaign against ISIS in Iraq

¹¹⁴ Crisis Group interview, former U.S. official, August 2021.

¹¹⁵ Bergen, Serman and Salyk-Virk, “America's Counterterrorism Wars”, *op. cit.*

¹¹⁶ Crisis Group interview, Chris Costa, July 2021.

¹¹⁷ *Ibid.*

¹¹⁸ “Principles, Standards and Procedures for U.S. Direct Action Against Terrorism Targets”, National Security Council, 2017.

¹¹⁹ Finucane, “Putting AUMF repeal into context”, *op. cit.*

¹²⁰ “Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations”, U.S. National Security Council, March 2018.

¹²¹ The Trump administration publicly acknowledged using force under the 2001 AUMF against ISIS in Niger in 2017 and adding al-Qaeda in the Islamic Maghreb to the “associated forces” roster under the 2001 statute. “Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations”, U.S. National Security Council, 2020.

and Syria.¹²² It pressed ahead with the battle to retake Raqqa, the capital of ISIS's so-called caliphate, during which the United States conducted an intensive campaign of air and artillery fire in support of partner forces, principally the Syrian Democratic Forces. In addition, during the Trump administration, U.S. armed forces continued to follow ISIS outside Iraq and Syria. In 2017 alone, the U.S. engaged in hostilities against ISIS or self-proclaimed ISIS affiliates for the first time in Somalia, Yemen and Niger.¹²³

The change in the policy framework during the Trump administration and the inclusion of new ISIS affiliates under the 2001 authorisation appears by some counts to have led to a dramatic acceleration in the operational tempo of airstrikes in both Yemen and Somalia. According to statistics compiled by the New America Foundation, in Yemen, the Trump administration conducted slightly more airstrikes in four years (188) than the Obama administration had launched in eight (185).¹²⁴ In Somalia, the Trump administration during one term conducted quadruple the number of strikes (202) the Obama administration had carried out over two (48).¹²⁵

As the pace of strikes increased, the Pentagon encountered very little resistance from other U.S. government agencies. Coordination procedures had been pared down from where they stood under the PPG, but it was also a function of administration culture. Under the Trump administration, State Department officials got the message from their superiors not to say no to the operators by pushing back on proposed operations.¹²⁶

The Trump administration also quietly continued to pursue advise, assist and accompany missions of the sort that had led the conflict in Somalia to expand. In addition to Somalia, U.S. troops – presumably accompanying partner forces – engaged in skirmishes in Libya, Mali, Tunisia, Cameroon and Niger.¹²⁷ A former senior official told Crisis Group that Pentagon leadership very much wished to keep these operations under wraps, with Secretary of Defense James Mattis giving the instruction to “keep Africa off the front page”.¹²⁸

The most widely reported incident relating to one of these missions occurred in October 2017, when U.S. armed forces conducting a partnered operation with Nigerian troops came under attack in Tongo Tongo, Niger by members of the Islamic State in

¹²² Crisis Group interview, former U.S. official, August 2021.

¹²³ “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, U.S. National Security Council, April 2018.

¹²⁴ Bergen, Sterman and Salyk-Virk, “America’s Counterterrorism Wars”, op. cit.

¹²⁵ Ibid.

¹²⁶ Crisis Group interview, former U.S. official, July 2021.

¹²⁷ See Garland, “Green Beret’s Silver Star sheds light on U.S. ground combat in Somalia”, op. cit.; Kyle Rempfer, “Army special operator received valor award for actions concurrent with hostage crisis in Mali”, *Army Times*, 16 July 2019; Lilia Blaise, Eric Schmitt and Carlotta Gall, “Why the U.S. and Tunisia keep their cooperation secret”, *The New York Times*, 2 March 2019; and Kyle Rempfer, “How US troops survived a little-known al-Qaida raid in Mali two years ago”, *Military Times*, 16 April 2020. Crisis Group interview, former U.S. official, July-August 2021. Stephanie Savell of Brown University shared information about the methodology of the Costs of War Project’s maps relating to U.S. counter-terrorism operations and the media reports underlying these maps.

¹²⁸ Crisis Group interview, former U.S. official, August 2021. Mattis declined an interview request from Crisis Group.

the Greater Sahara. Media reports have characterised the fight as an ambush, but a former U.S. official describes it as a “meeting engagement”, which is “a combat action that occurs when a moving force, incompletely deployed for battle, engages an enemy at an unexpected time and place”.¹²⁹ Four U.S. soldiers were killed.

The incident came as something of a shock to members of Congress and the U.S. public, who were largely unaware that U.S. forces were engaging in combat in the Sahel and West Africa. A former U.S. official who briefed Congressional staff on the incident recounted that staff appeared unsure whether the military had the authority to be conducting such operations in Niger.¹³⁰

But military insiders were hardly surprised to see events take this turn. According to one former U.S. official, confrontations like that in Tongo Tongo were an “occupational hazard of partnered operations”.¹³¹ Moreover, “SOCAF [Special Operations Command Africa] had been doing [missions] like Niger for years”, meaning going out on combat patrols and getting embroiled in firefights.¹³² In an interview with *Politico*, retired Brigadier General Donald Bolduc, who formerly commanded most U.S. special forces in Africa, asserted that: “I’ve got guys in Kenya, Chad, Cameroon, Niger [and] Tunisia who are doing the same kind of things as the guys in Somalia, exposing themselves to the same kind of danger”.¹³³ Current and former U.S. officials identified for Crisis Group other such incidents in Cameroon and elsewhere in Niger.¹³⁴

Some former officials highlighted what one described as a “big battle” between U.S. forces and a different ISIS affiliate, the Islamic State in West Africa Province, which is a splinter of Boko Haram, in December 2017.¹³⁵ U.S. Green Berets with Operational Detachment Alpha 3212 accompanied local Nigerien forces, including a proxy force, when they became involved in another “meeting engagement” in the Lake Chad region of south-eastern Niger bordering Nigeria and Chad.¹³⁶ Although U.S. forces were a few hundred metres back from the forward line of troops, they nonetheless engaged in combat, including by providing supporting mortar fire.¹³⁷

The executive branch did not report either of the Niger incidents or other incidents arising from partnered operations to Congress within 48 hours, as the War Powers Resolution requires. In the case of the Tongo Tongo incident, it eventually clarified

¹²⁹ Crisis Group interview, former U.S. official, July 2021.

¹²⁹ Crisis Group interview, former U.S. official, July 2021.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Morgan, “Behind the secret U.S. war in Africa”, *op. cit.*

¹³⁴ U.S. officials told Crisis Group of an incident that took place in northern Cameroon in 2017, when U.S. Navy SEALs accompanied Cameroonian partners to a compound flying an ISIS flag. While the SEALs took up overwatch from some 300m away, the Cameroonian troops approached the compound and called out to its occupants to present themselves. A man emerged from the compound with an AK-47, and a Cameroonian soldier tried to fire upon him, but the soldier’s gun reportedly jammed. Acting in what a former official characterised as “collective self-defence” of the Cameroonian forces, one of the SEALs shot and killed the man with the AK-47. Crisis Group interviews, former U.S. official, July-August 2021.

¹³⁵ Crisis Group interviews, former U.S. officials, July-August 2021.

¹³⁶ Crisis Group interview, former U.S. official, August 2021.

¹³⁷ Crisis Group interviews, former U.S. officials, July-August 2021.

that the operation was being conducted under authority of the 2001 AUMF, presumably meaning that the government had taken the view that it was at war with the ISIS Sahel affiliate. In the case of the December 2017 confrontation, there was little public explanation for the incident and none for its legal basis. The Trump administration publicly reported the incident in cursory fashion in March 2018, and, after questioning by *The New York Times*, provided a brief statement.¹³⁸ Nor is it clear whether the U.S. government now considers itself to be at war with ISIS branches in either the Sahel or West Africa.

While Congress has since tightened reporting requirements about partnered operations, much of this reporting happens outside the public eye. Thus, these operations – and the extent to which they could have represented or might still represent a new front in the war on terror – remain under-scrutinised by the legislative branch.

The recent completion of a U.S. military air base for drones at Agadez, Niger may presage counter-terrorism airstrikes in the Sahel in support of U.S. or partner forces.¹³⁹ A former U.S. official noted that basing is the “untold story of U.S. direct action.”¹⁴⁰ “Collective self-defence” strikes are a feature of U.S. operations in Somalia because of the proximity of bases for aircraft.¹⁴¹ In contrast, U.S. forces in the Sahel have not (until recently) generally had access to such air assets and thus were not able to call in airstrikes.¹⁴² According to former U.S. officials, the future use of this airbase is unclear.¹⁴³ One former official observed that, despite the absence of a clear mission, Agadez was a counter-terrorism base for direct action.¹⁴⁴ As a current official observed, “once you have the facility, you want to use it or the host government wants you to use the capabilities on their behalf”.¹⁴⁵ Several former U.S. officials warned that the air base at Agadez could itself become a target for jihadist attack, as happened at Manda Bay airbase in Kenya in January 2020.¹⁴⁶

C. *Ancillary Self-defence in Syria: Further Stretching the AUMF*

In addition to targeting a growing list of armed groups on the basis that they were within the scope of the 2001 AUMF, the Trump administration also used military force against Syrian and “pro-Syrian government forces” in 2017 and 2018 under the claimed authority of the 2001 statute. U.S. forces and local partners, who were de-

¹³⁸ “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations”, U.S. National Security Council, March 2018; Charlie Savage, Eric Schmitt and Thomas Gibbons-Neff, “U.S. kept silent about its role in another firefight in Niger”, *The New York Times*, 14 March 2018.

¹³⁹ Crisis Group interviews, former U.S. officials, July 2021.

¹⁴⁰ Crisis Group interview, former U.S. official, July 2021.

¹⁴¹ Crisis Group interview, former U.S. official, July 2021.

¹⁴² Crisis Group interviews, former U.S. officials, Congressional staff, July 2021.

¹⁴³ Crisis Group interviews, former U.S. officials, July 2021.

¹⁴⁴ Crisis Group interview, former U.S. official, July 2021.

¹⁴⁵ Crisis Group interview, U.S. official, July 2021.

¹⁴⁶ Crisis Group interviews, current and former U.S. officials, July 2021. In January 2020, Al-Shabaab attacked the airfield at Manda Bay, killing three U.S. personnel stationed there. Following the attack, the Trump administration discussed conducting airstrikes on the Al-Shabaab attackers in Kenya. The Kenyan government consented to such action (though it was expected to publicly deny doing so), and the Pentagon had an action plan, but the U.S. never followed through with it.

ployed as part of what was ostensibly a counter-ISIS mission in eastern Syria, were repeatedly attacked or threatened by non-ISIS paramilitary groups, particularly at the Tanf garrison in south-eastern Syria.¹⁴⁷ The U.S. forces responded with airstrikes, including in one battle near Deir al-Zour that killed hundreds of fighters, among them Russian mercenaries.¹⁴⁸

The Trump administration's legal justification for these strikes rested on the novel argument that U.S. forces and their partners were undertaking a mission authorised by the 2001 AUMF and the AUMF therefore provided ancillary authority (which they simply characterised as self-defence) for U.S. forces to defend themselves from non-AUMF groups while on that mission.¹⁴⁹ By relying on the 2001 AUMF as legal authority for these strikes rather than Article II of the constitution, the Trump administration avoided having to report these actions to Congress under the War Powers Resolution and also avoided setting the Resolution's 60-day clock for withdrawing U.S. forces from hostilities.

The Trump administration did not explain the limits of the newly claimed ancillary authority, but it did provide reason to worry about the ways in which its claim could be stretched. The claim appeared to rely on a similar theory of ancillary authority arising from the 2002 Iraq war authorisation to justify its 2020 airstrike on Qassem Soleimani, head of Iran's expeditionary Qods Force – in other words, that the U.S. could target the Iranian general under the 2002 statute because he posed a threat to U.S. forces in Iraq.¹⁵⁰ It is unclear to what extent the Biden administration has accepted this interpretation of either the 2001 or 2002 war authorisations. For a few similar strikes in 2021 against Iran-backed paramilitaries in Iraq and Syria it invoked Article II of the constitution as providing the legal authority to defend U.S. forces – rather than statutory authority.¹⁵¹

¹⁴⁷ Crisis Group interview, former U.S. official, July 2021.

¹⁴⁸ Thomas Gibbons-Neff, "How a 4-hour battle between Russian mercenaries and U.S. commandos unfolded in Syria", *The New York Times*, 24 May 2018.

¹⁴⁹ "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations", U.S. National Security Council, March 2018.

¹⁵⁰ "Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations", U.S. National Security Council, February 2020.

¹⁵¹ "Letter to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers Resolution (Public Law 93-1480)", 29 June 2021.

V. Biden Administration: Re-evaluation or More of the Same?

As Joe Biden assumed the U.S. presidency in January 2021, the national mood had soured on military intervention. As presidential candidates, both he and Donald Trump had campaigned on promises of ending “endless” or “forever” wars.¹⁵² What precisely that entailed, however, was ambiguous. While both candidates were clear that they had no appetite for interventions in the Middle East that involved major ground deployments, and both appeared to want the U.S. to exit Afghanistan, they were both fuzzier about how they would approach the light-footprint operations that characterise much of the war on terror. Even as he withdrew troops from Afghanistan, Biden left open the possibility that U.S. counter-terrorism operations would continue against perceived terrorist threats there, such as the regional ISIS affiliate that brutally struck the Kabul airport as the evacuation was unfolding.¹⁵³

It remains unclear whether the Biden administration will continue a business-as-usual militarised counter-terrorism policy bequeathed by previous administrations or make a break with the past. Certainly, there is reason to re-evaluate the inherited approach. The fortunes of jihadist groups have varied dramatically over the course of the past twenty years. While their ranks have expanded in that period, many pose little or no threat to the United States as opposed to their local arena. At the same time, the U.S. has developed stronger defensive capabilities. The costs of the existing approach, discussed further below, also merit serious consideration.

There are signs of change. Several senior Biden administration officials have previously made clear their views that the U.S. government has centred too much of its foreign policy on militarised counter-terrorism operations.¹⁵⁴ A policy review now under way will revisit some of the protocols for taking military action to combat terrorism. Some administration officials have also suggested a willingness to support legislative reforms that could codify the ad hoc legal framework that has developed over the years.

Yet with no real consensus among current and former officials about the magnitude of the jihadist threat that the U.S. is facing, the efficacy of the military response or even the specific goals that military responses are intended to achieve, there seems to be little appetite for major change. The tumult created by the Afghanistan withdrawal and the ISIS attack on U.S. forces and Afghan civilians in Kabul could also make the administration loath to make alterations to longstanding practices that could have unexpected results. Against this backdrop, it is not at all clear that the various policy and legal exercises that are under way or have been discussed will get at questions concerning the war on terror that deserve reflection and public debate.

¹⁵² Dan Lamothe, “Like Trump, Biden has promised to end the ‘forever war’. The landscape remains complicated”, *The Washington Post*, 9 December 2020.

¹⁵³ “Remarks by President Biden on the End of the War in Afghanistan”, White House, 31 August 2021.

¹⁵⁴ Robert Malley and Jon Finer, “The Long Shadow of 9/11: How Counterterrorism Warps U.S. Foreign Policy”, *Foreign Affairs*, July-August 2018.

A. *U.S. Perceptions of the Jihadist Threat*

As the Biden administration approaches the twenty-year mark of the war on terror, one striking feature of the U.S. policy debate is how little consensus there is on fundamental issues, including the nature of the threat that jihadists pose to the United States. Many former officials say it is difficult to reach a firm view on the threat to the U.S. homeland.¹⁵⁵ Current and former officials noted that in terms of sheer numbers, according to some sources, there are more jihadists today than in 2001.¹⁵⁶ Although ISIS and al-Qaeda in the Arabian Peninsula both had the capacity to mount major coordinated attacks in Europe in the past decade, the U.S. is a more challenging target partly because it lies across the Atlantic Ocean.¹⁵⁷ Further, groups that at one time may have possessed both the intent and capability to conduct operations against the U.S., such as al-Qaeda and ISIS, have lost the capability, in part because U.S. operations have degraded it.¹⁵⁸

This scepticism about jihadist groups' transnational designs echoes Crisis Group's own findings. Al-Qaeda and ISIS-linked groups in principle share the global movements' transnational goals, including attacking the West. In reality, though, Crisis Group's research paints a picture of groups that for some years now have been primarily concerned with national or local struggles.¹⁵⁹ Indeed, some groups may well see transnational force projection as in tension with their local interests because of the risk that the U.S. could stage armed intervention to punish or thwart those with global aspirations. Clearly, such groups pose a huge challenge in many parts of the world – and, perhaps, in some cases to U.S. interests in those parts of the world – but their preoccupation with local battles means that the threat they pose further afield appears significantly diminished from what it was some years ago.

Of transnational militant groups, former U.S. officials cited core al-Qaeda (including elements in north-western Syria), al-Qaeda in the Arabian Peninsula and ISIS as posing the greatest threat to the U.S. homeland.¹⁶⁰ Both current and former officials considered the risk of unsophisticated attacks by lone gunmen to be considerably greater than sophisticated, large-scale attacks akin to the events of 9/11.¹⁶¹ Former and current U.S. officials noted that Shiite paramilitary groups, including Hizbollah, had

¹⁵⁵ Crisis Group interviews, former U.S. officials, June-August 2021.

¹⁵⁶ Crisis Group interviews, former U.S. officials, July 2021.

¹⁵⁷ Crisis Group interviews, current and former U.S. officials, July 2021.

¹⁵⁸ Crisis Group interviews, former U.S. officials, June-July 2021. See also "Annual Threat Assessment of the U.S. Intelligence Community", Office of the Director of National Intelligence, 9 April 2021, p. 23. "We assess that ISIS and al-Qa'ida remain the greatest Sunni terrorist threats to US interests overseas; they also seek to conduct attacks inside the United States, although sustained US and allied [counter-terrorism] pressure has broadly degraded their capability to do so".

¹⁵⁹ See, for instance, Crisis Group Africa Report N°265, *Al-Shabaab Five Years after Westgate: Still a Menace in East Africa*, 21 September 2018; Sam Heller, "Rightsizing the Transnational Jihadist Threat", Crisis Group Commentary, 12 December 2018; and Crisis Group Africa Reports N°289, *Sidelining the Islamic State in Niger's Tillabery*, 3 June 2020; and N°303, *Stemming the Insurrection in Mozambique's Cabo Delgado*, 11 June 2021.

¹⁶⁰ Crisis Group interviews, former U.S. officials, July 2021.

¹⁶¹ Crisis Group interviews, former U.S. officials, July 2021.

the most formidable capabilities to conduct external attacks, if not necessarily the intent to attack the U.S. homeland.¹⁶²

Both U.S. officials and Congressional staff expressed concerns about potential terrorist threats from Africa, particularly the Sahel and West Africa, due to instability and the strength of jihadist groups in the region.¹⁶³ Several of these officials assessed that though there was no immediate threat to the U.S. homeland from these regions, it was conceivable that one would emerge within a decade, with one official likening West Africa in 2021 to Afghanistan in the 1990s.¹⁶⁴

U.S. officials are divided over whether any of these groups pose a sufficient threat to the U.S. homeland to merit war upon them. Several former officials cautioned against the United States prematurely declaring victory in the war on terror.¹⁶⁵ In contrast, another official assessed that attacking the U.S. homeland is no longer a major jihadist goal.¹⁶⁶ A current U.S. official judged that the threat to the U.S. homeland had always been overstated.¹⁶⁷ In his view, al-Qaeda got very lucky on 9/11 and that attack was an exceptional event. In the same vein, yet another U.S. official characterised the 9/11 attacks as al-Qaeda's "one lucky punch" that would be hard to reprise.¹⁶⁸ This official also questioned whether ISIS would have targeted the West had the U.S. not initiated its air campaign against the group in 2014, a point echoed by other former U.S. officials.¹⁶⁹

In general, current and former officials found it challenging to offer a firm assessment of the threat to the U.S. homeland from jihadism, or of the effectiveness of the use of force, as opposed to other measures the U.S. has taken, in preventing another jihadist attack on the United States.¹⁷⁰ In addition to uncertainty about groups' intentions and capabilities, officials noted that there have been significant advances in defensive U.S. counter-terrorism tools after 9/11.¹⁷¹ Such tools include no-fly lists, improved coordination between intelligence agencies and law enforcement, and measures as simple as armoured and locked cockpit doors in civilian airliners.¹⁷² One former official noted that since 9/11, the U.S. has created civilian security agencies such as the Department of Homeland Security and the Transportation Security Administration, as well as focusing federal, state and local law enforcement on terrorism, and that all these steps likely played some role in mitigating the threat to the U.S.¹⁷³

Former U.S. officials and Congressional staff interviewed by Crisis Group were doubly wary of offering definitive assessments because they lack access to current classified intelligence. While Crisis Group similarly lacks such access, its research on

¹⁶² Crisis Group interviews, current and former U.S. officials, July 2021.

¹⁶³ Crisis Group interviews, current and former U.S. officials and Congressional staff, June-July 2021.

¹⁶⁴ Crisis Group interviews, former U.S. officials, June-July 2021.

¹⁶⁵ Crisis Group interviews, former U.S. officials, June-July 2021.

¹⁶⁶ Crisis Group interview, former U.S. official, July 2021.

¹⁶⁷ Crisis Group interview, U.S. official, July 2021.

¹⁶⁸ Crisis Group interview, U.S. official, July 2021.

¹⁶⁹ Crisis Group interviews, current and former U.S. officials, July 2021.

¹⁷⁰ Crisis Group interviews, current and former U.S. officials, June-July 2021.

¹⁷¹ Crisis Group interviews, current and former U.S. officials, June-July 2021.

¹⁷² Crisis Group interview, current and former U.S. officials, June-July 2021.

¹⁷³ Crisis Group interviews, former U.S. officials, June-July 2021.

Salafi jihadists in recent years indicates that these groups are primarily focused on local or at most regional concerns, as stated above.

B. Prospects for Policy Reform

After taking office in January 2021, the Biden administration has imposed a pause on direct action operations outside of Iraq, Syria and Afghanistan while it re-evaluates the policy framework for such strikes.¹⁷⁴ While this review is under way, requests for strike approval outside those countries are routed to the White House.¹⁷⁵ Reportedly, the Pentagon has requested approval for strikes against Al-Shabaab in Somalia and been denied.¹⁷⁶ At the same time, however, the military's Africa Command retains decision-making authority for "unit self-defence" and "collective self-defence" strikes, and carried out three such collective self-defence strikes on Al-Shabaab in July and August 2021 in support of an operation by Somali government forces in Galmudug.¹⁷⁷

At the time of publication, the scope of the U.S. National Security Council-led counter-terrorism policy review, which appears to have been slowed by the Taliban victory and its aftermath, is unclear.¹⁷⁸ The National Security Council is looking at which standards and procedures from the Obama-era Presidential Policy Guidance and the Trump-era Principles, Standards and Procedures it wishes to continue and which it wishes to replace or amend. At least some officials at the State Department, however, wish to include partnered operations in the review.¹⁷⁹ Operators have made clear that they do not want to revert fully to what they regard as intrusive and cumbersome coordination procedures under the PPG, and U.S. officials interviewed by Crisis Group thought the review would likely endorse procedures that fall somewhere between the Obama and Trump approaches in terms of requirements for inter-agency and White House review.¹⁸⁰

Indeed, the standards for civilian casualties under the new framework are an area of active debate. One U.S. official with knowledge of the review thought it likely that the new framework would tighten Trump-era standards for civilian casualties, meaning the degree of certainty that no civilians would be killed by a strike.¹⁸¹ But officials will likely be conscious of trade-offs. For example, requiring a higher degree of certainty that no civilians will be killed involves more intensive use of drones or other

¹⁷⁴ Charlie Savage and Eric Schmitt, "Biden secretly limits counterterrorism drone strikes away from war zones", *The New York Times*, 3 March 2021; "Unclassified Annex: Notification on the Legal and Policy Frameworks for the United States' Use of Military Force and Related National Security Operations", White House, 4 April 2021.

¹⁷⁵ Crisis Group interview, U.S. official, July 2021.

¹⁷⁶ Crisis Group interview, U.S. official, July 2021.

¹⁷⁷ See "U.S. Africa Command conducts strike against Al-Shabaab", press release, U.S. Africa Command, 20 July 2021; and "U.S. Africa Command supports Somali partners against Al-Shabaab", press release, U.S. Africa Command, 23 July 2021.

¹⁷⁸ Crisis Group interviews, U.S. officials, July 2021.

¹⁷⁹ Crisis Group interview, U.S. official, July 2021.

¹⁸⁰ Crisis Group interviews, U.S. officials, July 2021. U.S. officials also noted that many of the Obama administration's key counter-terrorism figures are now serving in the Biden administration. Their approach to direct action is likely informed by their prior experience, including with the PPG.

¹⁸¹ Crisis Group interview, U.S. official, July 2021.

aircraft for surveillance, which are assets that the military might wish to deploy to other theatres as it repositions itself for competition with China and Russia.¹⁸² Should the administration continue conducting counter-terrorism strikes in Afghanistan (which seems highly likely), the challenge of doing long-range surveillance and targeting from “over-the-horizon” bases in the Gulf will also be demanding in terms of drone assets. These trade-offs are being examined both by counter-terrorism experts and as part of a broader Global Force Posture Review that is operating in parallel.¹⁸³

What is less clear, however, is whether either review will address more fundamental questions about the war on terror. Such a process might include an assessment of the threats the U.S. is facing from jihadist groups relative to other national security challenges, the extent to which military action is a necessary or appropriate tool for managing these threats, and whether the security benefits of being perpetually at war in so many theatres outweigh the costs.¹⁸⁴ Observers do not seem to think the process is headed toward such a reckoning, however. According to one U.S. official, there is “no big picture reassessment of what it means to be at war with these actors”.¹⁸⁵ Nor is it clear that a substantial increase in operational transparency is in the offing. Thus far, the Biden administration has continued the Trump administration’s practice in classifying the full list of groups covered by the 2001 AUMF.¹⁸⁶

Although it remains possible that the review will produce certain surprises, as of now, it appears unlikely to be an engine of major change. As opposed to a thoroughgoing reassessment of strategy and legal authority, the review appears to be an exercise within limits established by the previous two administrations.

C. *Prospects for Legal Reform*

As the Biden administration reviews aspects of the U.S. counter-terrorism policy framework, it has also publicly committed to working with Congress “to ensure that outdated authorizations for the use of military force are replaced with a narrow and specific framework”.¹⁸⁷ At a 3 August 2021 hearing of the Senate Foreign Relations Committee, Deputy Secretary of State Wendy Sherman expressed the administration’s interest in dialogue with Congress on potential reforms of the 2001 use of force authorisation.¹⁸⁸

What reform might mean, however, is another open question. Some former officials and other experts have urged Congress and the administration to come together around a revised authorisation that would contain stronger constraints on the executive branch.¹⁸⁹ Such a revised statute might, for example, identify precisely which

¹⁸² Crisis Group interview, U.S. official, July 2021.

¹⁸³ Crisis Group interview, U.S. official, July 2021.

¹⁸⁴ Crisis Group interview, U.S. official, July 2021.

¹⁸⁵ Crisis Group interview, U.S. official, July 2021.

¹⁸⁶ Finucane, “Putting AUMF repeal into context”, *op. cit.*

¹⁸⁷ “Statement of Administration Policy”, White House, 14 June 2021.

¹⁸⁸ “Authorizations of Use of Force: Administration Perspectives”, Senate Foreign Relations Committee, 3 August 2021.

¹⁸⁹ The majority of former and current U.S. officials interviewed by Crisis Group, including those who had conducted counter-terrorism direct action, acknowledged the need to revise or replace the 2001 AUMF. Former officials, however, had a very wide range of views on the nature of any revi-

groups the U.S. can target through military means, name the countries in which it can use force, and terminate absent reauthorisation at the end of a specified period (likely two or three years) to ensure that war cannot continue indefinitely on autopilot without members of Congress being required to take a position on it.¹⁹⁰ In addition to making a broader group of elected officials more accountable for decisions of war and peace, such a framework would also create the platform for a periodic airing of the pros and cons of continuing conflict, allowing outside experts to register their views and giving the public a larger opening to weigh in as well.

It is not clear, however, that either the executive branch or Congress would support this approach. Certainly, the Biden administration's actions do not suggest a strong push toward meaningful reform. According to Congressional staff and a U.S. official who spoke to Crisis Group, the administration's private position is that Congress should take the lead in formulating specific proposals to reform the 2001 AUMF.¹⁹¹ Some in the administration suggest that the president needs to preserve "political capital" for projects that have a greater likelihood of success.¹⁹² There may also be a calculation that if the administration waits for Congress to move on reform, it may be able to stall the effort indefinitely. Moreover, to the extent the Biden administration has taken a position on the contents of a new AUMF, it appears to favour retaining maximum operational flexibility, albeit possibly with greater transparency.¹⁹³

As for Congress, there is as yet no consensus among legislators for reforming the 2001 AUMF. Many members believe that the executive branch has stretched the interpretation of the 2001 AUMF and that Congress had abdicated its responsibilities by allowing the executive branch to use the 2001 AUMF as a blank check. Yet one Congressional staff member described three camps on the matter – those who wish to rein in the executive branch, those who support the current division of responsi-

sions. One suggested that a new AUMF should cover not just al-Qaeda and ISIS but also Shiite militant groups as potential terrorist threats. Some thought that Congress should ratify the status quo. One former official warned against geographic restrictions in a new AUMF, as such limits could invite terrorists to find sanctuaries safe from U.S. targeting. Crisis Group interviews, current and former U.S. officials, July-August 2021.

¹⁹⁰ Tess Bridgeman, Ryan Goodman, Stephen Pomper and Steve Vladeck, "Principles for a 2021 Authorization for Use of Military Force", *Just Security*, 5 March 2021.

¹⁹¹ Crisis Group interviews, Congressional staff members and U.S. official, July-August 2021.

¹⁹² Crisis Group conversations, current and former officials, June-August 2021.

¹⁹³ One Congressional staff member reports that the executive branch wants to use legislation proposed by Senators Bob Corker and Tim Kaine in 2018 as the starting point for any revision of the 2001 AUMF. Crisis Group interview, Congressional staff member, July 2021. This proposal would authorise the use of force against a set list of groups. (In the 2018 draft, these groups included the Taliban, al-Qaeda, ISIS, al-Qaeda in the Arabian Peninsula, Al-Shabaab, al-Qaeda in Syria, the Haqqani Network and al-Qaeda in the Islamic Maghreb.) It also gave the president authority to expand this list by designating "associated forces" to fall within the authorisation. To overturn such a designation, Congress would need to enact a joint resolution of disapproval, which the president could veto; overriding the veto would require supermajority votes in both houses of Congress, which is rarely attainable. The bill also does not include a sunset provision, though it does mandate a quadrennial review of the authority. It does, however, require the executive branch to report the groups against whom the United States is using military force and the countries where such force is being used under the legislation's auspices – something that, as noted above, administrations have not uniformly done.

bility between Congress and the president, and those who simply do not wish to take politically difficult votes on matters of war and peace.¹⁹⁴ Over the past twenty years, the third camp has tended to prevail.

¹⁹⁴ Crisis Group interviews, Congressional staff members, July 2021.

VI. The Way Forward

No U.S. administration will forswear the use of military force to help manage the threats posed by jihadist groups. However much the threat to the United States and its citizens has changed over the past twenty years, few policymakers perceive it to have dissipated entirely.

But that does not mean that Washington needs to or should maintain the status quo. It should be possible for the U.S. government to steer a path between abandoning military force as an anti-jihadist tool and maintaining a war footing that has lasted longer and extended further than those who launched the war appeared to contemplate, and that at least in some places could be doing more harm than good.

Yet finding such a path will require a concerted effort of the type that, at present, is all too easy for the executive branch to avoid. Armed with twenty years of legal theories that largely allow it to define the war's contours in secret, the administration faces little pressure from Congress, the courts or the U.S. public to change. Unlike the Afghanistan campaign, which involved the highly visible presence of U.S. soldiers, the war on terror's light-footprint operations are generally conducted out of the spotlight, swimming into view primarily when something goes terribly wrong, as with the 2017 incident at Tongo Tongo.

The executive branch thus has little motivation to reckon with fundamental questions that, after twenty years of uninterrupted war, deserve an answer: could the U.S. protect itself with a much lower-scale military effort? What would the risks be? What are the costs and benefits of U.S. engagement to the countries where it is operating? Are U.S. operations inadvertently contributing to the chaotic conditions in which jihadists thrive? What are the implications for U.S. democratic norms and values inherent in prosecuting a lengthy war in which normal human rights and civil liberties protections can be suspended? What sort of policy changes might serve the interests of both U.S. security and greater peace?

Without knowing answers to these questions, it is hard to make a confident recommendation that the Biden administration fully wrap up the war on terror or any specific aspect of it. Instead, policymakers should focus on creating a framework that will both make it possible and encourage current and future administrations and members of Congress to produce fuller answers – both to each other and to the public.

First, the Biden administration should prepare the ground for engaging seriously with Congress on reforming the 2001 AUMF. To this end, it should widen the aperture of its policy review to the extent necessary to interrogate fundamental questions that get at whether the United States should be using force in particular countries against specific groups, rather than focusing primarily on how operations are conducted. It should also take a broad view of the operations to be considered, in particular looking at partnered military operations involving the introduction of U.S. armed forces into hostilities as well as measures taken in unit and collective self-defence.

With regard to the conduct of hostilities, the Biden administration should learn lessons from the 29 August 2021 U.S. airstrike in Kabul, which appears to have killed

ten civilians, including children.¹⁹⁵ It should interrogate why, after years of experience conducting drone strikes, U.S. operators in this case demonstrated neither the capacity to distinguish between civilians and combatants nor the ability to determine after the fact whom they had killed. As the administration considers what safeguards to put in place going forward, it should err on the side of greater protections for civilians and a serious push to improve the military's after-action examination of such incidents. Further, the seeming inevitability of additional such tragedies in the U.S. counter-terrorism war should lead the Biden administration to proceed very cautiously in considering where the security benefits from continuing to wage the war on terror outweigh their risk to innocent lives.

Secondly, to ensure that Congress and the U.S. public at least understand and are able to debate how the executive branch interprets and relies upon the 2001 AUMF, the Biden administration should publicly disclose:

- ❑ All groups against which it now believes the 2001 AUMF authorises the use of force;
- ❑ Every country in which the U.S. is now using force under the 2001 AUMF;
- ❑ Every country in which the U.S. is using or has recently used force (even if only episodically) in connection with advise, assist and accompany missions, and the statutory or constitutional authorities that were determined to authorise each engagement;
- ❑ Every partner force on behalf of which the U.S. believes it is authorised to use force in collective self-defence; and
- ❑ All extant executive branch legal opinions relied upon for the use of force in counter-terrorism operations.

Thirdly, the Biden administration should prepare to make a public case to Congress for where and against whom it should be authorised to conduct operations in a revised use of force authorisation. For each place and group for which it seeks use of force authority, the Biden administration should make the case for why military force is necessary and why other counter-terrorism tools are insufficient to counter the threats. In considering where such authority is necessary, the administration should assess where it is likely that U.S. armed forces deployed alongside foreign partners, even on ostensibly non-combat missions, are nonetheless likely to engage in combat.¹⁹⁶ It should also seek to share more information with the public about strikes that it has already undertaken, and fighting that it has been involved in, including under the rubric of partnered operations.

Fourthly, the Biden administration should stop waiting for Congress to make the first move on 2001 AUMF reform, and instead begin the process in partnership with reform-minded members. In formulating a replacement statute, drafters should be

¹⁹⁵ Matthieu Aikins, Christoph Koettl, Evan Hill and Eric Schmitt, "In U.S. drone strike, evidence suggests no ISIS bomb", *The New York Times*, 10 September 2021; Alex Horton et al., "Examining a 'righteous' strike", *The Washington Post*, 10 September 2021.

¹⁹⁶ Curtailing the possibility of combat by U.S. armed forces on partnered operations could involve modification of specific rules of engagement. Absent Congressional authorisation, in cases where U.S. forces are drawn into combat, the executive branch should promptly report hostilities under the War Powers Resolution.

conscious of addressing those features of the 2001 authorisation that created the conditions for a twenty-year war that has expanded significantly. Because the president has broad constitutional authorities to defend the country and its citizens from attack, the statute need not – and should not – include an elastic mechanism to allow the president to alter the war’s contours by unilaterally designating new “associated forces”. Instead, the new statute should be specific about the groups with which the United States is at war and the countries where it is fighting. It should specify what U.S. forces are tasked with and require robust public reporting about progress toward accomplishing that mission. It should also require presidents to return to Congress for permission to expand the conflict – and to obtain reauthorisation every few years.

Critics may argue that such a framework would inhibit the kind of entrepreneurial counter-terrorism activity that some associate with keeping the country safe from a repeat attack of 9/11 proportions. But the burden should be on proponents to prove that these activities are still necessary. Policymakers should also take into account that the current framework, which has permitted the war’s frontiers to expand with too little examination, has risks and costs, too. There is the risk that the U.S. wages war in a way that does little to protect its security and aggravates the very dangers that it is trying to mitigate. There is the risk that it is enabling the diversion of resources from worthier initiatives – whether global peace and security efforts, or humanitarian endeavours, or projects to shore up the United States’ increasing political fragility. There is also a cost to human rights and democratic values that accompanies a state of war – especially the lack of transparency and the lowering of peacetime protections for deprivations of life and liberty.

There is no guarantee that forcing the two political branches to cooperate more formally on matters of war and peace will lead to more of the latter than the former. The U.S. Congress did, after all, authorise the Vietnam, Afghanistan and Iraq wars. But if U.S. politicians are to fully learn the lessons of those overreaching wars, and put them into practice, then they must have a vehicle for doing so. Policy formed in the insular world of the executive branch is unlikely to be such a vehicle. Inter-branch debate – in view of the public, and subject to democratic accountability – seems the better bet.

VII. Conclusion

For twenty years, the United States has resorted to military force for counter-terrorism missions, in at least a dozen countries and against a range of groups, some of whom had little or nothing to do with the attacks of 11 September 2001. While some such actions may well have reduced the risk posed by jihadists to the U.S., others almost certainly have not. Moreover, successive administrations have opened new fronts in the war that do not always seem to have a tight connection to the objectives that Congress had in mind when authorising President Bush to take the country to war two decades ago.

The growth of this war has been enabled in part by the executive branch's evolving legal interpretations of the 2001 Authorization for Use of Military Force. But while the lawyering arguably reflects a form of executive branch overreach, Congressional "underreach" has also contributed. Ever since enacting the 2001 AUMF in the days following the 9/11 attacks, Congress has been missing in action, failing to mount an effective effort to reform, revise or repeal this open-ended authorisation. Congressional inertia has allowed the executive branch to treat the AUMF as a vessel for its own preferences without much concern for legislators' original intent.

Thus, twenty years after the 9/11 attacks and ten years after U.S. commandos killed Osama bin Laden, the executive branch and Congress have yet to reckon fully with whether and where military force remains a necessary counter-terrorism tool. Such a reckoning is long overdue and should be repeated at regular intervals. The country's political leaders – at long last – need to revisit the statutory framework that has underwritten the war on terror.

Washington/New York/Brussels, 17 September 2021

Appendix A: Map of U.S. Military Counter-terrorism Hostilities and Detention Operations since 2001



Appendix B: About the International Crisis Group

The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with some 120 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries or regions at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international, regional and national decision-takers. Crisis Group also publishes *CrisisWatch*, a monthly early-warning bulletin, providing a succinct regular update on the state of play in up to 80 situations of conflict or potential conflict around the world.

Crisis Group's reports are distributed widely by email and made available simultaneously on its website, www.crisisgroup.org. Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board of Trustees – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring the reports and recommendations to the attention of senior policymakers around the world. Crisis Group is co-chaired by President & CEO of the Fiore Group and Founder of the Radcliffe Foundation, Frank Giustra, as well as by former Foreign Minister of Argentina and Chef de Cabinet to the United Nations Secretary-General, Susana Malcorra.

After President & CEO Robert Malley stood down in January 2021 to become the U.S. Iran envoy, two long-serving Crisis Group staff members assumed interim leadership until the recruitment of his replacement. Richard Atwood, Crisis Group's Chief of Policy, is serving as interim President and Comfort Ero, Africa Program Director, as interim Vice President.

Crisis Group's international headquarters is in Brussels, and the organisation has offices in seven other locations: Bogotá, Dakar, Istanbul, Nairobi, London, New York, and Washington, DC. It has presences in the following locations: Abuja, Addis Ababa, Bahrain, Baku, Bangkok, Beirut, Caracas, Gaza City, Guatemala City, Jerusalem, Johannesburg, Juba, Kabul, Kiev, Manila, Mexico City, Moscow, Seoul, Tbilisi, Toronto, Tripoli, Tunis, and Yangon.

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September 2021

Appendix C: Reports and Briefings on the United States since 2018

Special Reports and Briefings

Council of Despair? The Fragmentation of UN Diplomacy, Special Briefing N°1, 30 April 2019.

Seven Opportunities for the UN in 2019-2020, Special Briefing N°2, 12 September 2019.

Seven Priorities for the New EU High Representative, Special Briefing N°3, 12 December 2019.

COVID-19 and Conflict: Seven Trends to Watch, Special Briefing N°4, 24 March 2020 (also available in French and Spanish).

A Course Correction for the Women, Peace and Security Agenda, Special Briefing N°5, 9 December 2020.

Ten Challenges for the UN in 2021-2022, Special Briefing N°6, 13 September 2021.

United States

Deep Freeze and Beyond: Making the Trump-Kim Summit a Success, United States Report N°1, 11 June 2018 (also available in Chinese and Korean).

How to Save the U.S. Refugee Admissions Program, United States Report N°2, 12 September 2018.

Time for a Modest Deal: How to Get U.S.-North Korean Talks Moving Forward, United States Briefing N°1, 17 December 2018.

Ending the Yemen Quagmire: Lessons for Washington from Four Years of War, United States Report N°3, 15 April 2019.

The U.S. Presidential Election: Managing the Risks of Violence, United States Report N°4, 28 October 2020.

Nineteen Conflict Prevention Tips for the Biden Administration, United States Briefing N°2, 28 January 2021 (also available in Arabic).

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