THE STRUCTURE OF TERRORISM THREATS AND THE LAWS OF WAR

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INTRODUCTION

The threats of transnational terrorist networks in recent years have prompted calls for reexamining the law of war and its application to non-state entities.[1] The challenge of fitting counterterrorist operations—and the acts of terroristic individuals or entities themselves—into existing legal frameworks predates the September 11, 2001 attacks,[2] but the globe-spanning nature of the al Qaeda threat has raised the level of complexity and the stakes involved. Some states, forced to act quickly to respond to twenty-first century escalation of attacks and meet emerging threats, have struggled to fit their actions into the international law of armed conflict.[3]

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1. *See*, *e.g.*, John Bellinger, Legal Advisor to the U.S. Sec'y of State, Legal Issues in the War on Terrorism, Address Before the London School of Economics (Oct. 31, 2006), *in* 8 GERMAN L.J. 735, 736 (2007) (raising the question of "whether the existing legal frameworks contained in the Geneva Conventions of 1949 and domestic criminal laws are well-suited to deal with international terrorism in the 21st century."); Anthony Dworkin, *Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism*, 13 EUR. COUNCIL ON FOREIGN REL. 1 (2009).

2. *See* W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 528 (2006); Abraham D. Sofaer, Terrorism, the Law, and the National Defense, Sixth Annual Waldemar A. Solf Lecture in International Law (May 4, 1989), *in* 126 MIL. L. REV. 89, 93 (1989) ("[T]he inherent right of self defense potentially applies against any illegal use of force, and that it extends to any group or State that can properly be regarded as responsible for such activities.").

3. *See* Memorandum from George W. Bush on Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (considering applicability of Geneva Conventions to conflicts against the Taliban and al Qaeda); Barak Ravid & Anshel Pfeffer, *Government Looking to Set Int'l Rules for Fighting Terror*, HAARETZ, Oct. 22, 2009, *available at* http://www.haaretz.com/hasen/spages/1122546.html (describing incipient Israeli initiative to "see the laws governing warfare adjusted to combating terrorism."); *see also* Harold Hongju Koh, Legal Adviser, U.S. Department of State, "The Obama Administration and International Law, Remarks at the Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010, *available at* http://www.state.gov/s/l/releases/remarks/139119.htm [hereinafter Koh Remarks] ("In the conflict occurring in Afghanistan

Legal academics have embraced this challenge as well. Some have considered the question in view of the nature and purposes of the international law of armed conflict,[4] while others have emphasized broader changes in the international order.[5]

Most legal debate has focused on the degree to which transnational terrorism does or does not resemble military and national security threats posed by state or localized guerrilla armies. Proponents of applying the law of armed conflict argue that modern terrorist organizations wage violence at a magnitude or sophistication previously achievable only by states or within local areas. Proponents of adapting the law of armed conflict argue that its basic principles fit contemporary circumstances reasonably well but that its specific rules should be modified. Opponents of adapting the law of armed conflict counter that the traditional law of armed conflict is adequate to regulate the use of force against terrorist organizations and fear that efforts at "revision" may provide intellectual cover for backsliding of humanitarian and liberty protections.[6] And opponents of even applying the

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and elsewhere, we continue to fight the perpetrators of 9/11: a nonstate actor, al Qaeda (as well s the Taliban forces that harbored al Qaeda).").

4. *See, e.g.*, Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 323-24 (2004) ("[Self-defense standards were] originally intended to apply to war and peace between recognized States; the concept of non-State actors was not contemplated . . . . [T]he concept of active self-defense could be a natural starting point for developing this 'new regime.'"); Eric A. Posner, *Terrorism and the Laws of War*, 5 CHI. J. INT'L L. 423 (2004-05) (emphasizing reciprocity rationales for adherence to *jus in bello* and arguing that these are not present in conflicts against nonstate terrorist organizations).

5. *See, e.g.*, Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 755-60 (2004-05) (advocating "a modernized law of armed conflict"); David Kretzmer, *Targeted Killing of Supsected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 Eur. J. Int'l L. 171 (2005) (advocating a "mixed model" combining the law of armed conflict and international human rights law); Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L LAW & POL. 1, (2004) (arguing for a new legal category of armed conflict that can accommodate the issues arising from extra-state armed conflicts); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443 (2007-08) (arguing that present regimes governing internal and international armed conflict should be augmented by a "voluntarist war convention"); Jane E. Stromseth, *New Paradigms for the Jus Ad Bellum?*, 38 GEO. WASH. INT'L L. REV. 561, 567-68 (2006) ("[T]he meaning of 'imminent' attack that is central to accepted understandings of anticipatory self-defense needs greater clarification in the context of terrorism . . . ."); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 749-50 (2004) (questioning whether international legal doctrine will constrain states' use of force against terrorist threats).

6. *See, e.g.*, Deborah N. Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, 41 CREIGHTON L. REV. 663 (2008) (considering reasons why international law should not be applied in current U.S. terrorist-detention situations); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27 FLETCHER F. WORLD AFF. 55, 57 (2003) ("[T]o conclude that humanitarian law cannot accommodate terrorism and the efforts to combat it when these phenomena amount to armed conflict (the very circumstance that humanitarian law is meant to address) would be wrong.").

law of armed conflict at all argue that contemporary terrorism threats are insufficiently analogous to state threats to merit its application.[7]

Where this debate, about whether and how the law of armed conflict might warrant adaptation, has fallen short is in its insufficient integration of analytical developments within the counter-terrorism community. This includes both intelligence assessment and relevant specialized social sciences.[8] Legal debate has tended to rely on a snapshot view of terrorism, or to speak in terms of "terrorist threats" as a monolithic category. This debate often fails to consider diverse sub-categories of actors and how terrorism or other non-state threats of tomorrow may look very different from those of yesterday and today. United States government rhetoric may be partly to blame for the conceptual haziness inherent in references to "terrorist groups," "terrorism," or even just "terror" as an undifferentiated policy construct.

This article considers a major debate in the American and European counterterrorism analytic community—whether the primary terrorist threat to the West is posed by hierarchical, centralized terrorist organizations operating from geographic safe havens, or by radicalized individuals conducting a loosely organized, ideologically common but operationally independent fight against western societies—and this debate's implications for the law of armed conflict.

While the broad consensus is that both phenomena are of great concern and not neatly separable, each view of the main terrorism threat to Western developed states poses a different set of challenges to current law of war models. If the main terrorist threat to the United States and its European allies reflects the former, "top-down" model, then existing law of war principles are a useful starting point, and with modest reform may be adapted to combating international terrorist organizations.[9] If the main terrorist threat resembles the latter, "bottom-up" model, existing law of war principles have much less to offer, and according to many proponents of that model their application is likely to be strategically counterproductive.[10] And if both threats exist side by side or overlap, requiring application of

7. This is not an exhaustive list of major positions in the debate. For example, a "middle" position is that states should apply the law of armed conflict only in locales where the sustained level of violence is sufficient to meet an armed conflict standard and should apply criminal law where it is not.

8. *Cf.* Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1747 (2009) ("[D]espite counterinsurgency's ubiquity in military and policy circles, legal scholars have almost completely ignored it.").

9. *See infra* Part I (considering the evolution of the terrorist threat).

10. *See infra* notes 47-52 and accompanying text (discussing how aggregation of extremist groups may be counterproductive).

separate legal paradigms, then legal debates will need to focus on where the lines between them should be drawn.

An important caveat is that this examination is modestly limited to terrorist threats to developed Western countries, particularly in Europe and the United States, given the intense transatlantic debate about the legal propriety of "war" authorities.[11] It does not address, for example, local insurgencies and geographically confined terrorist organizations such as those that operate in South or Southeast Asia, though some of the insights are applicable to those cases, too. It is also limited to discussion of law of armed conflict approaches to regulating counterterrorism, putting aside the very large school of thought that criminal law enforcement is the more legally and strategically appropriate response.[12] A persuasive case might be made that the difficulties and dangers of regulating counter-terrorism operations with the law of armed conflict, rather than criminal law, favor a policing and law enforcement approach to the entire problem. This paper does not deal with that important debate.

As a step toward informing that debate, however, this article encourages legal scholarship to engage more directly with social science research on terrorism in guiding analysis of legal questions related to armed force. In doing so, it advances two overarching arguments, applicable to both *jus ad bellum* (law related to going to war) and *jus in bello* (law related to the conduct of war). First, to the extent changes in the strategic environment drive changes in the law, the emerging organizational structures of terrorism threats will partially determine future legal trajectories. Analysis of how the law of armed conflict might be evolving to deal with terrorism should engage in more nuanced and sophisticated examination of how terrorism threats are themselves evolving. Second, normatively, the merits of legal reform proposals depend heavily on the capacity of those proposals to meet strategic needs while protecting humanitarian, liberty, and conflict-resolution interests. That capacity, in turn, depends on how well the assumptions underlying those proposals track accurately the anticipated—but uncertain—future terrorism threat environment.

11. *See* Matthew C. Waxman, *Fighting al-Qaeda: The Continuing Transatlantic Divide*, 51 SURVIVAL 61, 64-65 (2009) [hereinafter Waxman, *Fighting al-Qaeda*].

12. *See, e.g.*, THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, INT'L COMM'N OF JURISTS, ASSESSING DAMAGE, URGING ACTION (2009), *available at* http://www.icj.org/dwn/database/EJP-Report.pdf.

I. TOP-DOWN AND BOTTOM-UP THREATS

Debate rages in the counterterrorism and social and political science communities about the evolution of the terrorist threat.[13] While it is widely accepted that each camp has something important to contribute to the debate[14]—and while the following descriptions are cursory summaries of complex positions—these characterizations nonetheless provide useful lenses through which to consider how divergent views of the terrorist threat affect legal analysis of terrorism and the law of armed conflict.

Some experts assess that the primary terrorist threat to the United States and other developed states will come from al Qaeda and other similar terrorist organizations: hierarchical organizations functioning according to some centralized control and with significant operating bases and leadership cores supporting activities abroad.[15] This view is supported by historical accounts of al Qaeda's rise to become arguably the most powerful terrorist organization in history, which emphasize its sophisticated organization and dependence on territorial safe havens.[16] Centralized leadership and hierarchical organization enable an organization

13. *See* Elaine Sciolino & Eric Schmitt, *A Not Very Private Feud over Terrorism*, N.Y. TIMES, June 8, 2008 (describing debate between respected counterterrorism experts Bruce Hoffman of Georgetown University and Marc Sageman of the Foreign Policy Research Institute), *available at* http://www.nytimes.com/2008/06/08/weekinreview/08sciolino.html; *see also* Joshua Alexander Geltzer, *Six Rather Unexplored Assumptions About al-Qaeda*, 1 CRITICAL STUDIES ON TERRORISM 393, 398-99 (2008) (discussing strategic versus social perspectives in studying terrorism); *see generally* SOCIAL SCIENCE FOR COUNTERTERRORISM: PUTTING THE PIECES TOGETHER (Paul K. Davis & Kim Cragin, eds., 2009) (surveying current social science research related to strengths, weaknesses, organization, and strategies of terrorist groups).

14. *See* Peter Bergen, *Al Qaeda at 20 Dead or Alive?*, WASH. POST, Aug. 17, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/08/15/AR2008081502981.html (quoting former NYPD and CIA official Michael Sheehan who notes that the combination of both phenomena—local "hotheads" and training from "al-Qaeda central"—creates the most lethal terrorist threat); Peter Bergen, *Does Osama bin Laden Still Matter?*, TIME, July 2, 2008, *available at* http://www.time.com/time/world/article/0,8599,1819903,00.html ("[T]here is a very clear, almost mathematical increase in lethality as soon as plotters touch the [Federally Administered Tribal Areas]") (quoting former CIA official Philip Mudd).

15. *See* Bruce Hoffman, *Al-Qaeda Dangerous as Ever*, THE NATIONAL INTEREST, Sept. 10, 2008, http://www.nationalinterest.org/Article.aspx?id=19846; Bruce Hoffman, *The Myth of Grass-Roots Terrorism: Why Osama bin Laden Still Matters*, 87 FOREIGN AFF. 133 (2008) [hereinafter Hoffman, *Myth*]; Michael Leiter, Dir., Nat'l Counter Terrorism Ctr., Eight Years After 9/11: Confronting the Terrorist Threat to the Homeland, Hearing Before the Senate Homeland Security and Governmental Affairs Committee 2 (Sept. 30, 2009) [hereinafter Eight Years After 9/11] (stating that "al-Qa'ida's core in Pakistan represent[s] the most dangerous component of the larger al-Qa'ida network.").

16. For historical accounts, see generally DANIEL BENJAMIN & STEVEN SIMON, THE AGE OF SACRED TERROR: RADICAL ISLAM'S WAR AGAINST AMERICA (2003); STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001 (2004); LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 (2006).

to conduct the type of coordinated attacks that have the greatest lethality and political impact.[17] The centrality of terrorist sanctuaries is an especially important corollary to the "top-down" view of the terrorist threat,[18] and it has weighty implications for U.S. and allied foreign policy, because it suggests that neutralizing those sanctuaries significantly degrades terrorist threats.[19]

Proponents of this assessment emphasize that al Qaeda remains a highly potent enemy,[20] especially because of its continued ability to find sanctuary along the Afghanistan-Pakistan border. To those who hold this view, the December 2009 attempted bombing by a Nigerian citizen aboard a transatlantic airline flight, allegedly orchestrated by operatives of al Qaeda in the Arabian Peninsula, resembles 9/11 more closely than a "homegrown terrorist" attack.[21]

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17. *See* Lydia Khalil, Op-Ed., *The Threat of Homegrown Terrorism*, BOSTON GLOBE, Oct. 27, 2009, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/10/27/the_threat_of_homegrown_terrorism/ (acknowledging threat of homegrown terrorism but concluding that al Qaeda "and its affiliate organizations," because of their ability to implement "sophisticated, coordinated attacks," remain the greatest terrorism threat to the United States).

18. Hoffman, *Myth*, *supra* note 15, at 134-36, 138; Eight Years After 9/11, *supra* note 15, at 2 ("al-Qa'ida's core in Pakistan represent[s] the most dangerous component of the larger al-Qa'ida network").

19. *See* Dennis C. Blair, Dir., Nat'l Intelligence, Annual Threat Assessment of the Intelligence Community for the Senate Select Committee on Intelligence 4 (Feb. 12, 2009), *available at* http://intelligence.senate.gov/090212/blair.pdf ("Sustained pressure against al-Qa'ida in . . . [Pakistan's Federally Administered Tribal Areas] has the potential to further degrade its organizational cohesion and diminish the threat it poses."); NAT'L INTELLIGENCE COUNCIL, NAT'L INTELLIGENCE ESTIMATE: THE TERRORIST THREAT TO THE U.S. HOMELAND (2007) ("Al-Qa'ida is and will remain the most serious terrorist threat to the Homeland, as its central leadership continues to plan high-impact plots . . . . [It] has protected or regenerated [its] . . . safehaven in the Pakistan Federally Administered Tribal Areas (FATA), operational lieutenants, and its top leadership."); Bruce Riedel, *Armageddon in Islamabad*, NAT'L INT., June 23, 2009, *available at* http://www.nationalinterest.org/Article.aspx?id=21644 ("The damage that could be wrought [by a militant Islamist sanctuary in Pakistan] is many magnitudes greater than the capabilities lent to al-Qaeda through having a safe haven in Afghanistan.").

20. *See, e.g.*, Peter Bergen, *Al Qaeda, the Organization: A Five-Year Forecast*, NEW AM. FOUND., July 2008, http://www.newamerica.net/publications/articles/2008/al_qaeda_organization_five_year_forecast_7879 ("The conventional wisdom is that al Qaeda, the organization, has been largely destroyed, replaced by an ideological movement and a new generation of 'homegrown' terrorists implementing attacks such as the 2004 Madrid bombings that killed 191 people. While the rapid spread of the al Qaeda ideological virus in the past several years should be cause for considerable concern, it would be wrong to conclude that the central al Qaeda organization is no longer a threat."). *But see* Thomas Rid & Marc Hecker, *The Terror Fringe*, 158 POL'Y REV. 3, 17 (Dec. 2009-Jan. 2010), *available at* http://www.hoover.org/publications/policyreview/71912517.html ("Will success in the Afghan-Pakistan badlands, however defined and however unlikely in the midterm future, end the radicalization of extremists elsewhere and stop global terrorism? Very unlikely.").

21. Eric Schmitt & Eric Lipton, *Officials Point to Suspect's Claim of Qaeda Ties in Yemen*, N.Y. TIMES, Dec. 26, 2009, *available at* http://www.nytimes.com/2009/12/27/us/27terror.html; Richard Esposito & Brian Ross, *Investigators: Northwest Bomb Plot Planned by al Qaeda in Yemen*, ABC

Other terrorism experts see the highly centralized, "core" al Qaeda as *sui generis* and substantially weakened; they see future terrorist threats as likely to be homegrown and decentralized, inspired by movements abroad but not controlled or significantly supported from abroad.[22] One of this view's best-known advocates, Marc Sageman, believes that "al Qaeda in the West has been on the decline since its apogee of 2001."[23] Sageman argues that while homegrown terrorists may be ideologically inspired by core al Qaeda, the latter's offensive capacities have been largely blunted, and independent operators have surpassed al Qaeda and its affiliates in terms of number of attacks perpetrated in the West. He recently testified that:

> 78% of all global neo-jihadi terrorist plots in the West in the past five years came from autonomous homegrown groups without any connection, direction or control from al Qaeda Core or its allies. . . .The paucity of actual al Qaeda and other transnational terrorist organization plots compared to the number of autonomous plots refutes the claims by some heads of the Intelligence Community . . . that all Islamist plots in the West can be traced back to the Afghan Pakistani border.[24]

Most observers and participants in the top-down/bottom-up debate recognize that these competing perspectives reflect two relevant aspects of the terrorist threat rather than mutually exclusive visions.[25] They are perspectives along a continuum, not binary alternatives. Al Qaeda or virtually any non-state threat is, at any given moment, a hybrid

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NEWS, Dec. 26, 2009, http://abcnews.go.com/Blotter/northwest-bomb-plot-planned-al-qaeda-yemen/story?id=9426085.

22. *See* Marc Sageman, *Does Obama Still Call the Shots?: Debating the Containment of al Qaeda's Leadership*, 87 FOREIGN AFF. 163, 163-64 (2008) (responding to Hoffman's critique of Sageman's assertions in LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY); *see also* JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL 237-80 (2004) (considering decentralized terrorist organizational structures). *See generally* MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY (2008) [hereinafter LEADERLESS JIHAD].

23. Dr. Marc Sageman, Senior Fellow, Foreign Policy Research Inst., Confronting al-Qaeda: Understanding the Threat in Afghanistan and Beyond, Testimony to the Senate Foreign Relations Committee 6 (Oct. 7, 2009), *available at* http://foreign.senate.gov/testimony/2009/SagemanTestimony091007p.pdf.

24. *Id.* at 6-7 (referring to statements by former CIA Dir. Michael Hayden). Within al Qaeda itself, prominent strategist Abu Mus'ab al-Suri also purportedly favored a decentralized approach to jihad over hierarchical, top-down organizations, which had proved too easy for counterterrorism authorities to dismantle. *See* BRYNJAR LIA, ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL-QAIDA STRATEGIST ABU MUS'AB AL-SURI 352 (2008).

25. *See e.g.*, ASSAF MOGHADAM, THE GLOBALIZATION OF MARTYRDOM: AL QAEDA, SALAFI JIHAD, AND THE DIFFUSION OF SUICIDE ATTACKS (2008).

incorporating elements of both models, and the relative weight of top-down and bottom-up features in this mixture may vary as operational conditions change. As Martha Crenshaw has explained:

> Al-Qa'ida has always been an organization that depended as much on local initiative as on top-down direction, and in the aftermath of 9/11 it has dispersed even more. Its complex organizational structure is something between a centralized hierarchy and a decentralized flat network. It is a flexible and adaptable organization that has survived well beyond the lifespan of most other terrorist organizations.[26]

Recently, for example, al Qaeda has tended to rely on affiliate organizations dispersed across several continents—al Qaeda in the Arabian Peninsula, Lashkar-e-Taiba in Pakistan, al-Shabab in Somalia—to provide financial, technical and other forms of support to local "franchises."[27] Some small groups of suspected terrorists in recent plots, even if not formally part of or taking orders from al Qaeda, appear to have received some inspiration and training support from al Qaeda agents or close allies. [28]

The top-down versus bottom-up debate may be partially attributable to the different threat profiles facing the United States and Europe,[29] with Americans generally more worried about another 9/11-style attack masterminded by core al Qaeda and Europeans generally perceiving a greater threat from homegrown terrorism.[30] These different terrorism threat perceptions on the part of the United States and its European allies help explain why the United States has characterized the fight against al Qaeda

26. Martha Crenshaw, Ctr. for Int'l Sec. & Cooperation, Stanford Univ., Reassessing the Evolving al-Qa'ida Threat to the Homeland,Statement to the Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, Committee on Homeland Security, 1 (Nov. 19, 2009), *available at* http://homeland.house.gov/SiteDocuments/20091119111255-63126.pdf.

27. *See Under Pressure, Al-Qaida Reaches Out to Affiliates* (NPR radio broadcast Jan. 11, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=122436089.

28. *See e.g.*, David Von Drehle & Bobby Ghosh, *An Enemy Within: The Making of Najibullah Zazi*, TIME, Oct. 12, 2009, at 24 ("Zazi suggests that the network of Osama bin Laden, weakened though it might be, can still project violence into the U.S."). It is alleged that two of the perpetrators of the July 7, 2005 London bombing plot, Mohammed Sidique Khan and Shehzad Tanweer, also attended training camps in Pakistan, again demonstrating how greatly contact with experienced al Qaeda operatives enhances the lethality of homegrown terrorists. *See* Daniel McGrory, Zahid Hussain & Karen McVeigh, *Top al-Qaeda Trainer 'Taught Suspects to Use Explosive'*, TIMES (London), Aug. 12, 2006, *available at* http://www.timesonline.co.uk/tol/news/uk/article606838.ece.

29. *See* ANTHONY DWORKIN, *Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism* 2 (May 2009) (Eur. Council on Foreign Relations, Policy Brief), *available at* http://ecfr.eu/page/-/documents/ECFR_counterterrorism_brief.pdf ("Americans see terrorism primarily as an external threat, while for European societies it has a large internal dimension.").

30. *See* Rid & Hecker, *supra* note 20, at 16-17.

as a "war," while its European partners view it through the prism of law enforcement.[31] But these differences in threat assessment may be narrowing. David Kilcullen, a renowned Australian terrorism expert, notes, "[c]ontrary to popular belief, most terrorist incidents on European soil since 9/11 have *not* been purely home-grown, but have drawn on sponsorship, support or guidance from" al Qaeda.[32] Meanwhile, senior U.S. government officials have acknowledged that, in view of the spate of terrorism plots uncovered inside the United States in 2009,[33] "home-based terrorism" and violent radicalization of citizens are no longer primarily European concerns.[34]

Nonetheless, insofar as both views command support in the counterterrorism community, these two poles provide useful alternative lenses for assessing the implications of the variability of terrorist threats.[35] Projecting legal debates through these competing threat lenses reveals different sets of inferences about law of armed conflict evolution and its merits.

II. IMPLICATIONS FOR *JUS AD BELLUM*

Many states and scholars would agree that non-state terrorist attacks (or, perhaps, threats of terrorist attacks) *may* give rise to a right of armed self-defense, and that the right of self-defense *may* include authority to use force against terrorist targets, or even against a harboring state.[36] The big

31. *See* Jeremy Shapiro & Daniel Byman, *Bridging the Transatlantic Counterterrorism Gap*, WASH. Q., Autumn 2006, at 33, 43-44; Waxman, *Fighting al-Qaeda*, *supra* note 11, at 64.

32. David J. Kilcullen, *Subversion and Countersubversion in the Campaign Against Terrorism in Europe*, 30 STUD. IN CONFLICT & TERRORISM 647, 649 (2007).

33. *See* MITCHELL SIBLER & ARVIN BHATT, N.Y. POLICE DEP'T, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 5 (2007) ("Rather than being directed from al-Qaeda abroad," the Department's report argued, echoing Sageman, that post-9/11 plots against the West had "been conceptualized and planned by 'unremarkable' local residents/citizens who sought to attack their country of residence, utilizing al-Qaeda as their inspiration and ideological reference point.").

34. Sebastian Rotella, *U.S. Sees Homegrown Muslim Extremism as Rising Threat*, L.A. TIMES,Dec. 7, 2009, *available at* http://articles.latimes.com/2009/dec/07/nation/la-na-us-radicalization7-2009dec07 (quoting Secretary of Homeland Security Janet Napolitano); *see* DANIEL BYMAN, DEADLY CONNECTIONS: STATES THAT SPONSOR TERRORISM 187-88 (2005).

35. *See* Kim Cragin, *Cross-Cutting Observations and Some Implications for Policymakers*, *in* SOCIAL SCIENCE FOR COUNTERTERRORISM: PUTTING THE PIECES TOGETHER, *supra* note 13, at 367, 373-76 (discussing points of agreement and disagreement, and their policy implications, among those who think of terrorism in terms of organizations versus networks).

36. *See* S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (condemning 9/11 attacks and "[r]ecognizing the inherent right of individual or collective self-defence in accordance with the [UN] Charter"); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (reaffirming same); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 51 (2002) ("viewing the September 11 incidents as constituting an armed attack is fully

debate is over what set of conditions give rise to these authorities. For that debate to be of much practical significance, however, it ought to engage more deeply the nature and configuration of terrorist threats and the degree to which past events are indicative of future conflicts.

One branch of this use of force question concerns under what conditions a non-state terrorism threat gives rise to a right of self-defense against a *state*. For example, one position is that a right to use force against a state arises from the actions of a terrorist group only when the state is tightly interwoven with or otherwise exercises effective control over that group – a similar standard to that embraced by the International Court of Justice ("ICJ") in a 1986 case involving alleged Nicaraguan and U.S. support for rebel groups in Central American states.[37] Even under this narrow view, the use of force against Taliban-governed Afghanistan in 2001 could be justified because the Taliban regime and al Qaeda were so closely intertwined.[38]

Other positions include that the use of force against a state is permitted even when a state only provides some lower threshold of support

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consistent with the animating principle of Article 51, which was to allow states to exercise an inherent right to respond to acts that strike at the heart of a state's national security"); *see also* Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 368-69 (acknowledging reasons for denying the applicability of self-defense to actions against terrorists on the territory of a state from whom they do not receive support); Mark Drumbl et al., *Self-Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L L. PROC. 141 (2003) (presenting how several I.L. scholars consider the jus ad bellum implications of the response to the 9/11 attacks, including the lawfulness of the U.S. response, and anticipatory and preemptive self-defense generally). *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 138 (July 9) (arguing that Article 51 is not triggered to give Israel a self-defense claim because Palestinian attacks are not imputable to a State, and the threat originates from territory on which Israel itself exercises control); Jonathan L. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835 (2001) (arguing that the U.S. should have sought Security Council authorization before using force against the Taliban).

37. *See* Military and Paramilitary Activities (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 102-04 (June 27); *see also* MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 182-86 (2008) (discussing legal standard and basis for specific military actions undertaken by the United States, United Kingdom, Iran, Turkey, and Ethiopia in response to terrorist attacks); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999) (holding that for acts of "armed bands of irregulars or rebels" to be attributed to a State "it is sufficient to require that the group as a whole be under the overall control of the State").

38. *See* BYMAN, *supra* note 34, at 187-88 ("[F]rom May 1996 until the end of . . . 2001, al-Qa'ida was based in Afghanistan and enjoyed tremendous support from the ruling Taliban regime there. . . . By any sensible definition of state sponsorship, the Taliban's Afghanistan qualifies as a highly energetic and enthusiastic sponsor."); NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 125 (2004) ("Relations between Bin Ladin and the Taliban leadership were sometimes tense, but the foundation was deep and personal. Indeed, Mullah Omar had executed at least one subordinate who opposed his pro-Bin Ladin policy.") [hereinafter THE 9/11 COMMISSION REPORT].

for a non-state terrorist organization, the most extreme version of which would hold that the mere extended presence of a terrorist organization on a state's soil could cross that threshold by constituting passive support.[39] However, some might draw a distinction between attacks against a state itself and a right to act against a terrorist group's agents and infrastructure on the territory of a state, when a state fails to take sufficient steps to prevent terrorism threats from growing or operating within its borders.[40] Along similar lines, once self-defense has been lawfully invoked, a state might also assert a right to strike enemy terrorist agents sheltered in neutral territory if the neutral state is unable or unwilling to neutralize them.[41]

Once such theories are put into practice, whether self-defensive rights of force extend to targets within a state or to a state itself ought to depend in part on the specific functional relationship between the terrorism danger and the activities (or non-activities) of a "host" state. What type of support—active or passive[42]—contributes significantly to the probability or intensity of threat? Answers to that question turn on assumptions about how terrorist entities organize to wage violence. At the same time, a "host" state's capacity to neutralize terrorism threats will often depend heavily on how a terrorist entity or set of entities combine organizationally. For example, intelligence gathering or financial crackdowns may be more easily targeted at terrorist networks with strong interrelationships than at loosely affiliated ones. Again, a critical inquiry becomes how consequential is a state's action or inaction to mitigating the quantum of threat faced by

39. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 57-59 (2002) (discussing 1982 Israeli invasion of Lebanon to combat the PLO and international criticism of Israel's legal position); Steven R. Ratner, Jus Ad Bellum *and* Jus In Bello *After September 11*, 96 AM. J. INT'L L. 905, 908 (2002) (arguing "none of the tests . . . [used by the ICJ, ICTY, or ILC to establish state responsibility] . . . supports the harboring theory of the United States" on the use of force in self-defense in response to the 9/11 attacks) (alteration in original).

40. *See* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, And Beyond*, 35 CORNELL INT'L L.J. 533 (2002) (concluding use of military force against bin Laden and followers in Afghanistan is legitimate self-defense under international law); *see also* TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 285-360 (2006) (discussing causation); Robert Barnidge, *The Due Diligence Principle Under International Law*, 8 INT'L COMMUNITY L. REV. 81 (2006) (examining the responsibility of states and state actors, focusing on the due diligence principle).

41. *See* David W. Glazier, *Playing by the Rules: Combating al Qaeda within the Law of War*, 51 WM. & MARY L. REV. 957, 1017-18 (2009). *But see* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶¶ 141-153 (Dec. 19) (rejecting similar self-defense claims).

42. *See* BYMAN, *supra* note 34, at 219 (noting "great[] contribution a state can make to a terrorist's cause [by] not act[ing] against it," including not policing borders, permitting fundraising, and allowing recruitment).

other states, the answers to which rest on assumptions about how the enemy or threat is constituted.

If one believes that the main terrorism threats emanate from territorial sanctuaries that allow for operational planning, training, etc. (as top-down assessment proponents do), then even passive failure to eradicate terrorist havens is more reasonably viewed as an essential facilitating factor.[43] Centralized or tightly coordinated structures are assumed to be crucial to conducting large-scale or widespread violence, and to represent vulnerabilities to counter-terrorism efforts. This might suggest that merely allowing terrorist groups to operate from one's sovereign territory should be weighted more heavily in assessing state responsibility for terrorist attacks.[44]

If, on the other hand, one believes that territory and fixed bases are largely incidental to the operations and lethality of global terrorist networks, or if one believes that terrorist threats are decentralizing (as bottom-up assessment proponents do), then one would likely be skeptical that a state's failure to prevent terrorist extremists (even those who self-identify with violent activities abroad) from operating within its territory should factor significantly in international self-defense analysis. A terrorist threat's structural fluidity or deconcentration may be the source of its strength and resilience. One would then worry that extending self-defense rights against states that merely fail to eradicate terrorists from operating within their borders would unnecessarily grant radically expansive license to use force. (Of course, though, even terrorism experts who contend that territorial sanctuaries are becoming less important to terrorism threats might acknowledge that the diminishment of this threat is attributable to

43. *See* S.C. Res. 1373, *supra* note 36, ¶ 2(a) (deciding that all States shall "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts"); *see also* BYMAN, *supra* note 34, at 54 ("[A] haven is often the most important form of assistance a state can provide . . . ."). This raises the question of what degree of sanctuary would suffice. As Byman notes, "[a] haven may involve allowing one of two operatives to find shelter . . . or it may include allowing a group to run dozens of training camps and a massive recruitment center. Thus, judgments on the scope and importance of state support must weigh both the type and degree of support given." *Id.*

44. *See* S.C. Res. 1373, *supra* note 36, ¶ 2(d) (deciding that all States shall "[p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens"); *see also* Stephanie Barbour & Zoe Salzman, *'The Tangled Web': The Right of Self-Defense Against Non-State Actors in the* Armed Activities *Case*, 40 N.Y.U. J. INT'L L. & POL. 53 (2008); Michael D. Banks, *Addressing State (Ir-)responsibility: The Use of Military Force as Self-Defense in International Counterterrorism Operations*, 200 MIL. L. REV. 54 (2009) (identifying requirements for such a terrorist threat to trigger self-defense right under Article 51 of UN Charter); Vincent-Joël Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2005) (discussing shift from standard model of state responsibility to "indirect responsibility" or "strict liability" for failing to prevent terrorist attacks originating on one's territory and proposing strict liability model).

past self-defensive force that has been used to strike at terrorist groups in those sanctuaries).[45]

Another way of framing the self-defense question—assuming that a non-state terrorist attack or threat may give rise to authority to use force against the responsible terrorist actor on the territory of another state—concerns the geographic scope of that self-defense. If the non-state terrorist threat is internationally dispersed, how far does self-defense authority extend? Answering these questions depends again on some critical assumptions about the organizational structure of transnational terrorist threats.[46]

A major issue is one of aggregation: to the extent that a non-state terrorist actor conducts its operations, including planning, in geographically dispersed locales by groups or cells, what functional relationships among those sub-entities ought legally to tie them together for the purposes of self-defense analysis? Is common ideology enough to say that a right of self-defense against some is a right of self-defense against all?[47] Must they be part of a single command structure? Or are operational links—say exchanging information, common training, or sharing resources—sufficient for the right of self-defense against one group to extend to another? If the law of self-defensive force is fundamentally about responding to actual or imminent threats, then the answers to these theoretical questions ought to turn heavily on empirical understanding of the terrorist enemy and how it acquires and expands its lethality and reach, which are questions that the counter-terrorism community is debating and re-assessing.

Take, for example, the U.S. position as articulated by then-State Department Legal Adviser John Bellinger in 2006:

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45. *See* LEADERLESS JIHAD, *supra* note 22, at 19 ("Because he has been hiding full time, Osama bin Laden has not been able to appoint and train a new group of top leaders . . . In the past five years, al Qaeda has not been able for the most part to incorporate new recruits among its ranks. . . . Meanwhile, the success of the predator drone strike campaign on the Pakistani border has dramatically thinned the ranks of both al Qaeda leaders and cadres."); Douglas Frantz et al., *The New Face of Al Qaeda: Al Qaeda Seen as Wider Threat*, L.A. TIMES, Sept. 26, 2004, at A1, *available at* http://www.globalissues.org/article/512/the-new-face-of-al-qaeda.

46. *See generally* Brian A. Jackson, *Organizational Decisionmaking by Terrorist Groups*, *in* SOCIAL SCIENCE FOR COUNTERTERRORISM: PUTTING THE PIECES TOGETHER, *supra* note 13, at 209; Christopher Paul, *How Do Terrorists Generate and Maintain Support*, *in* SOCIAL SCIENCE FOR COUNTERTERRORISM: PUTTING THE PIECES TOGETHER, *supra* note 13, at 113.

47. *Cf.* Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 380-81 (Wittes ed., 2009) (suggesting that cases of self-defense might include the targeted killing "of radical imams who are operationally part of al Qaeda").

> There is no principle of international law that limits a state's ability to act in self-defense to a single territory, when the threat comes from areas outside that territory as well. . . .As a practical matter . . . a state must be responsible for preventing terrorists from using its territory as a base for launching attacks. And, as a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defense to address that threat.[48]

That view, which "extend[s] the boundaries of the conflict to take in al-Qaeda's operations around the world," has essentially been maintained by the Obama administration and is a source of tension between the United States and Europe.[49] According to current State Department Legal Advisor Harold Koh, "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses."[50] The United States might believe that its right to use armed force in self-defense in response to 9/11 extends to strikes against al Qaeda operatives on Pakistani territory, when Pakistani forces are incapable of reaching terrorists, since it has been conducting Predator drone strikes under those very conditions (I say "might" because the United States does not publicly acknowledge these strikes outside Afghanistan and the Pakistani government often denounces them).[51] It also may hold that the functional linkages between the Pakistani Taliban and al Qaeda and the Afghan Taliban suffice to extend this justification to the Pakistani Taliban[52]—a position not embraced by European allies[53]—and may have based reported strikes against affiliated militants in Yemen, Somalia, and Syria on similar grounds.[54]

These examples help highlight how the debate about the structure of future terrorism threats has several implications for *jus ad bellum* legal debates about the reach of self-defensive force—debates which tend to refer generically to transnational "terrorist threats." First, the structural heterogeneity of transnational terrorist threats means the development of

48. Bellinger, *supra* note 1.

49. *See* Dworkin, *supra* note 1, at 5.

50. Koh Remarks, *supra* note 3.

51. *See* Jane Perlez & Pir Zubair Shah, *Drones Batter Al Qaeda and Its Allies Within Pakistan*, N.Y. TIMES, April 4, 2010, *available at* http://www.nytimes.com/2010/04/05/world/asia/05drones.html.

52. *See infra* notes 70-73 (discussing Predator drone strikes on Pakistani soil, including against Pakistani Taliban).

53. *See* Nigel Inkster & Robert Whalley, *Law and Order*, 51 SURVIVAL 55, 59 (2009).

54. *See* Eric Schmitt & Thom Shanker, *Officials Say U.S. Killed an Iraqi in Raid in Syria*, N.Y. TIMES, Oct. 27, 2008, *available at* http://www.nytimes.com/2008/10/28/world/middleeast/28syria.html.

customary international law on the use of force in self-defense against "terrorism" or even "state-sponsored terrorism" is likely to be slow and methodologically more challenging than typical interstate issues. In interpreting state-state interactions, the notion of sovereign equality supplies the working assumption that all states share basic attributes of agency and coherence, which makes analogizing to prior fact patterns more straightforward. These assumptions do not hold with respect to non-state terrorist groups, placing on those seeking to rely on past cases the burden of demonstrating that the groups or threats involved were similar with respect to legally salient characteristics. Consistent interpretations of state practice in response to terrorist acts will be especially hard to come by, since interpreters may hold divergent views of the basic structural attributes of the antagonist actor involved. Thus, the accretion of customary international law in this area is likely to be especially slow and even more heavily disputed than in other areas of use of force doctrine.

Second, if the purpose of *jus ad bellum* doctrine is to constrain aggression and destabilizing militarism while permitting states sufficient latitude to protect themselves from actual or imminent threats, then proposed legal-doctrinal reforms based on misjudgments about the nature of terrorism threats carry systemic risks. An adaptation of legal doctrine that widens the territorial reach of self-defense rights or lowers the threshold for authorizing attacks on terrorist targets within states based on exaggerated assessment of terrorist entities' functional linkages risks exposing the international system to too much force. A resistance to adaptation that clings to narrow territorial reach and high thresholds based on underestimating the functional linkages among dispersed terrorist entities risks undercutting states' authority to defend themselves against hostile entities that transcend state or even continental borders.

This discussion so far has argued that the nature and structure of terrorist threats should affect evolution of the law of armed force, but there may be causal implications in the other direction: legal doctrine may affect evolution of the nature and structure of terrorist threats. This article alluded to the possibility that a legal theory permissive of military strikes against terrorist sanctuaries may have contributed to the dispersal and decentralization of al Qaeda since 2001.[55] On the other hand, a legal construct that depends on aggregating related groups under the umbrella of an overarching "terrorist enemy" may also damage the overall counterterrorism effort by playing into their propaganda strategy of ideological unification. Strategists concerned primarily with decentralized

55. *See supra* note 45 and accompanying text.

or bottom-up terrorist threats argue that states should aim to "disaggregate and to differentiate between such groups," and "to highlight and exploit disparities, not to ignore them or even help remove them."[56] This is especially relevant in the case of al Qaeda, which explicitly seeks to aggregate local grievances into a single violent campaign.[57] That is, a self-defense legal theory that aggregates dispersed threats may be inadvertently assisting militant groups whose strategy depends on portraying and publicizing a common banner.

One might respond to this *jus ad bellum* analysis by saying the top-down versus bottom-up debate is a false choice. Terrorist threats fitting either model co-exist, as do many threats in between. Indeed, that is precisely the cautionary point: pegging legal reform to a static prediction about the structure and operation of non-state groups risks constructing a rigid legal architecture on a shifting or fleeting set of strategic exigencies.

From a normative standpoint, a key question is whether it is better to work toward articulating specific *jus ad bellum* tests or conditions with respect to "host" states or to rely on flexible standards to govern resort to force against terrorist agents or assets operating within another's sovereign territory. The answer turns in part on how organizational adaptation of terrorist movements affects their destructive potential.

On the one hand, reliance on the general principles of necessity and proportionality may ultimately offer a more stable limitation to self-defense authority (or, for that matter, a more stable set of criteria to guide UN Security Council deliberations) than a set of brighter-line rules pertaining to non-state threats. The ICJ's "effective control" test, for example, may have been a fair attempt to articulate a requirement that struck a general balance suited for civil wars and local rebellions spilling across borders (though I am doubtful even of that). But the rapid and continuing evolution of contemporary non-state entities could render such inflexible legal rules

56. *See* Rid & Hecker, *supra* note 20, at 19.

57. *See* Scott Shane, *A Year of Terror Plots, Through a Second Prism*, N.Y. TIMES, Jan. 13, 2010, *available at* http://www.nytimes.com/2010/01/13/us/13intel.html (quoting National War College terrorism expert Audrey Kurth Cronin: "The proper response is to stop calling all these plots 'Al Qaeda' . . . We're inadvertently building up the brand"); *see also* David Kilcullen, *Subversion and Countersubversion in the Campaign against Terrorism in Europe*, 30 STUD. IN CONFLICT & TERRORISM 647, 660 (2007) (aggregating all linked groups into the "enemy" camp can be counterproductive; "[a] well-targeted, discriminating response that distinguishes between terrorism, subversion, and mere radicalism, and neither overstates nor ignores the threat is indispensable."); David Miliband, U.K. Sec'y of State for Foreign & Commonwealth Affairs, After Mumbai, Beyond the War on Terror, Address made at Taj Hotel in Mumbai, India (Jan. 15, 2009), *in* http://davidmiliband.info/speeches/speeches_09_01a.htm ("The more we lump terrorist groups together and draw the battle lines as a simple binary struggle between moderates and extremists or good and evil, the more we play into the hands of those seeking to unify groups with little in common . . . .").

obsolete in short order if they fail to meet security imperatives. On the other hand, reliance on general principles and standards lacks clarity and easy application in any particular instance, and risks loosening of general constraints on military force and its dangerous spillover effects. The balance between these competing risks depends heavily on the extent to which terrorist threats take different and varying structural forms and the extent to which that structural form is tied to terrorist effectiveness.

III. IMPLICATIONS FOR *JUS IN BELLO*

A flexible approach to self-defense—or a recognition that multiple forms of transnational terrorism threats exist side by side and may produce very different self-defense analyses also existing side by side—would obviate the need to settle one way or another the debate about how the most potent terrorist threats are generally structured. Presuming, however, that the decision is made to treat a specific terrorist threat contingency as an armed conflict, and the analysis moves to *jus in bello* questions, applying law of armed conflict rules and standards still requires difficult judgments about the structure of the adversary.

Similar questions of legal aggregation discussed above in the context of self-defense and the recourse to force may also be determinative in considering the appropriate outer bounds of military conduct under the law of armed conflict. If one believes that the law of armed conflict may be an appropriate framework for regulating counterterrorism operations—including capture and detention of or use of lethal force against enemy terrorist agents—a key question then becomes the substantive scope of that authority: against which individuals and under what circumstances does it apply, and what does it permit a state to do against them? Again, many efforts to answer these questions have treated terrorist organizations as a monolithic category. This discussion should take a step back to understand more fully the range of terrorist threats and the degree to which underlying assumptions of law of armed conflict models fit or do not fit the structural characteristics of continuing or emerging terrorism threats.

One major school of thought, advocated by the International Committee of the Red Cross ("ICRC"), holds that lethal military force is authorized only against military personnel or those civilians engaging in "direct participation in hostilities."[58] Applied to terrorism threats, this

58. Int'l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Adopted by the Assembly of the Int'l Comm. of the Red Cross on 26 Feb. 2009 ¶12 Vol.90/ No. 872 (Dec. 2008.) (*prepared by* Nils Melzer). *See also* Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV.

standard then raises the questions of how to define "hostilities" and what it means to "participate directly" in them. Constrictive interpretations of this standard have come under criticism from the United States and others who view it as poorly adapted to the nature of terrorist operations and insufficiently respectful of military necessity.[59]

In a March 2009 federal court filing in the detention context, the Obama administration proposed a flexible standard for the substantive extent of its law of war authority in its armed conflict with al Qaida and its allies.[60] Falling under the asserted detention authority were persons "who were 'part of,' or who provided 'substantial support' to, al-Qaida or Taliban forces and 'associated forces'" that are engaged in hostilities against the United States or its coalition partners[61]—a standard similar to that used by the Bush Administration.[62] The memorandum noted the difficulty of drawing clear lines, stating that "[i]t is neither possible nor advisable . . . to attempt to identify, in the abstract, the precise nature and degree of 'substantial support,' or the precise characteristics of 'associated forces,' that are or would be sufficient to bring persons and organizations within the foregoing framework."[63] Both the ICRC approach and this U.S. government standard involve implicit assumptions about how the adversary is structured and organized to wage violence.[64]

1001, 1017-27 (2007) (discussing the "inadequacy of the civilian/combatant distinction," the difficulty posed by the concept of "direct participation in hostilities," and the problem of the lack of reciprocity).

59. *See* Shane Harris, *Are Drone Strikes Murder?*, NAT'L J., Jan. 9, 2010, at 21, 24.

60. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (TFH) (D.D.C. March 13, 2009) [hereinafter DOJ Guantanamo Memorandum]; *see also* Koh Remarks, *supra* note 3 ("Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF as *informed by the laws of war*.") (italics in original).

61. DOJ Guantanamo Memorandum, *supra* note 60, at 3.

62. *See* William Glaberson, *U.S. Won't Label Terror Suspects as 'Combatants'*, N.Y. TIMES, Mar. 14, 2009, *available at* http://www.nytimes.com/2009/03/14/us/politics/14gitmo.html (quoting former Bush Administration lawyer Steven Engel).

63. DOJ Guantanamo Memorandum, *supra* note 60, at 2.

64. *See* Koh Remarks, *supra* note 3:

> [W]e have based our authority to detain . . . on whether the factual record in the particular case meets the legal standard. This includes, but is not limited to, whether an individual joined with or became part of al Qaeda or Taliban forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al Qaeda, or taking positions with enemy forces. Often these factors operate in combination. While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at "functional" membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

Whereas *jus ad bellum* is fundamentally about promoting peaceful resolution of conflicts and balancing restraints on aggression with legitimate self-defense, *jus in bello* is about balancing protection of humanitarian or liberty values with military necessity.[65] Specific rules of the law of armed conflict historically derived from generalizable features of warfare premised heavily on hierarchically-organized antagonists that exercise some control over constituent agents. For example, it permits capture and detention of enemy fighters for the duration of hostilities, because it can generally be assumed that incapacitating individual members of the enemy organization diminishes its fighting capacity and until the war ends it may be assumed that released capturees would likely return to the fight; releasing them at the end of hostilities is generally low-risk under the premise that their commanders would no longer send them to fight. Concepts of "membership" or "on behalf of" are often—though not always—easy to apply in conventional warfare, and can be straightforwardly analogized in conflict against a terrorist enemy that shares basic attributes of unified command or war effort. When those basic assumptions fray, however, so do the balances struck in law of armed conflict doctrine.

Jus in bello debates concerning counter-terrorism cannot be divorced from analysis of underlying strategic context that in turn incorporates a nuanced understanding of enemy structure. Two examples highlight the difficulty of applying or adapting the law of armed conflict to military operations absent a firm understanding of the enemy threat's structure: targeting and detention.

A. Targeting

The CIA's Predator drone program presents a stark example of the conceptual challenges posed by applying law of war targeting standards to global terrorist networks. Since President Obama's inauguration, the U.S. government has reportedly expanded the American drone warfare program.[66] Kenneth Anderson writes that "U.S. officials seem to believe that by adhering to IHL's [International Humanitarian Law] formal, technical definition of 'combatant' to select a lawful target they have done

65. *See* Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 7-9 (2010).

66. *See* Jane Mayer, *The Predator War: What are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009; Scott Shane, *C.I.A. to Expand Use of Drones in Pakistan*, N.Y. TIMES, Dec. 4, 2009, *available at* http://www.nytimes.com/2009/12/04/world/asia/04drones.html (discussing CIA drone strikes in Pakistani tribal areas).

an especially good and rigorous parsing of the legal requirements."[67] "[T]he international law community," however, considers this approach to be "a relaxation of the ordinary standard of international human rights law, including prohibitions on murder and extrajudicial killing."[68] Unlike detention, for which litigation has produced detailed public elaboration of the government's legal standards, the drone program is shrouded in secrecy, though presumably targeting decisions are based on similar law of armed conflict standards in assessing who is or is not an enemy fighter.[69] What set of suspected facts about an individual or his conduct put him in the category against whom lethal force is authorized under the law of armed conflict?

In a recent statement, for instance, State Department Legal Adviser Koh explained that the United States regards its legal authorities to include "lethal force, to defend itself, including by targeting persons such as high-level al Qaeda leaders who are planning attacks."[70] Underlying this statement is a critical assumption that al Qaeda has vertical echelons through which control or influence is exercised, and applying it in specific cases requires assessments about where and how targeted individuals fit within that order.

The Israeli Supreme Court has addressed similar issues in the context of Israel's policy of "targeted killing" of members of Palestinian terrorist groups.[71] The Court noted that the applicable law is "the international law dealing with armed conflicts,"[72] and that under the law of armed conflict "taking . . . part in hostilities" could include, in addition to bearing weapons, "gathering intelligence, or . . . preparing . . . for the hostilities."[73] However, it recognized that the bounds of what constitutes taking a *direct*

67. Anderson, *supra* note 47, at 363. Anderson uses the IHL community's reaction to the United States' November 2002 Predator strike on a car occupied by al Qaeda operative Qaed Salim Sinan al-Harethi—which a UN special rapporteur termed a "clear case of extrajudicial killing"—to highlight the gulf between the American and international humanitarian community's views of this practice. *Id.* at 362-63.

68. *Id.* at 363; *see also* Kretzmer, *supra* note 5, at 173 ("The Yemen attack by the US and the 'targeted killings' by Israeli forces have been castigated by human rights NGOs, and some UN bodies as 'extra-judicial executions'. The states involved argue, on the other hand, that the killings were legitimate acts of war . . . .") (citations omitted).

69. *See generally* Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).

70. Koh Remarks, *supra* note 3.

71. HCJ 769/02 Pub. Comm. Against Torture in Palestinian Soc'y for the Prot. Of Human Rights and the Env't v. Gov't of Isr., [2006] IsrSC (Isr.), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

72. *Id.* ¶ 21.

73. *Id.* ¶ 33.

part in hostilities—and during what *time* civilians committing eligible acts should be considered as sufficient to become legitimate targets—are ambiguous.[74]

These examples highlight that a "participation in hostilities" assessment is complicated even when dealing with a highly centralized, hierarchical terrorist organization like "core" al Qaeda, Hamas, or Hezbollah; where the existing laws of armed conflict can at least provide some useful or stable guidance (though in the cases of Hamas and Hezbollah, the combination of military and civilian components creates another set of targeting law complexities[75]). A relatively easy-to-administer option is to focus on close analogues to membership in an "armed force" in state-state conflict.[76] Indicia such as formal allegiance pledges or participation in common induction or training programs, for example, could be analogized and used to evaluate membership in hierarchical terrorist groups like al Qaeda.[77]

Even if this were workable for a tightly structured adversary, such analysis is of little use in the context of a bottom-up threat emanating from loosely-affiliated radicals, who may share ideological inspiration but not an

74. *Id.* ¶ 34-40. *See also* Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, *in* 85 U.S. NAVAL WAR C. INT'L L. STUD: THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 307, 318 (Michael N. Schmitt ed., 2009) (discussing how irregular combatancy confounds the limitation that persons not members of an armed force, but who directly participate in hostilities, may only be targeted for such time as they are doing so). Schmitt notes the ICRC position (based on Article 51.3 of Additional Protocol I to the Geneva Conventions, which the U.S. has not ratified) that a civilian who participates in hostilities regains the protections accorded civilians by IHL at times when he is not doing so, and the criticism that this creates a "'revolving door' through which the direct participant passes as he or she begins and completes each mission." *Id.* Schmitt prefers an "opt-in/opt-out" approach which "locks the door" once a civilian chooses to "opt-in" to hostilities; he may only "opt-out" again by an affirmative act of withdrawal, or an extended period of noninvolvement. While this is vaguer, Schmitt believes that the latter approach better balances military necessity and humanitarian concerns.

75. *See* Moshe Halbertal, *The Goldstone Illusion*, THE NEW REPUBLIC, Nov. 6, 2009, *available at* http://www.tnr.com/article/world/the-goldstone-illusion.

76. *See* Schmitt, *supra* note 74, at 314 (noting principle of distinction, when confronting a uniformed enemy, clarifies who may be attacked and who may not: "[f]or instance, an unarmed cook may be attacked on sight if he or she is a member of the armed forces").

77. *See* THE 9/11 COMMISSION REPORT, *supra* note 38, at 151-52, 155, 166 (noting pledges of fealty given by various terrorist operatives to Jemaa Islamiya and al Qaeda). The U.S. Government's March 2009 Guantanamo litigation memorandum also discusses formal and functional membership constructs, but without taking a strong position on their utility or discussing their limits; *see* DOJ Guantanamo Memorandum, *supra* note 61, at 6-7; *see also* Al-Bihani v. Obama, No. 09-5051, at 11 (D.C. Cir. 2009), *available at* http://caselaw.lp.findlaw.com/data2/circs/dc/095051p.pdf ("While we think the facts of this case show Al-Bihani was both part of and substantially supported enemy forces, we realize the picture may be less clear in other cases where facts may indicate only support, only membership, or neither. We have no occasion here to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard.").

organizational or operational infrastructure. As new terrorist actors emerge who are "less and less directly tied in a 'corporate' sense to al Qaeda," the claim of affiliation risks becoming a "mere legalism in order to bring them under the umbrella of the [Authorization for the Use of Military Force]" and within the set of legitimate targets under the law of armed conflict.[78] In this scenario, the traditional law of armed conflict criterion—"membership" in an armed force—does not provide useful guidance, since even the minimum requirement of having an institutionalized or stable command structure is absent.[79]

Further complicating this assessment is the possibility—if not the certainty—that al Qaeda or virtually any major non-state threat is, at any given moment, a hybrid incorporating elements of both organizational models. The relative weight of top-down and bottom-up features in this mixture may vary as operational conditions change. The most acute legal challenges might arise in situations where a grouping of terrorist individuals or entities has sufficient coordination to sustain an intense campaign of violence, but not so much coordination that states can clearly identify their contours as a single enemy organization. The issue becomes not simply what an individual is doing, but on whose behalf he is doing it, or what relation those activities bear to what other individuals are doing.

If a command hierarchy is lacking, perhaps other types of linkages might suffice to justify coercive force. The ICRC acknowledges in its analysis of direct participation in hostilities that lack of clear and formal hierarchies and affiliations among non-state actor agents means that in some contexts "membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict."[80] But when applied to terrorist "parties" this may raise more questions than it answers. If terrorists teach and learn tradecraft and bombmaking over the Internet, could repeatedly counseling fellow associates on these topics, or even posting designs on

78. Anderson, *supra* note 47, at 389. Anderson argues that "self-defense," not international humanitarian law targeting standards, provides the right legal framework for targeting decisions.

79. *See* Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4(2)(a) Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (extending POW status to "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements" as long as they fulfill four conditions, including being "commanded by a person responsible for his subordinates.").

80. *See* Int'l Comm. of the Red Cross, *supra* note 58, at 33; *see also id.* at 25 ("Membership in irregular armed forces, such as militias, volunteer corps, or resistance movements belonging to a party to the conflict, generally . . . can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict.").

jihadist websites, constitute substantial support sufficient to justify lethal force? If ideological inspiration from afar is a key trigger for "homegrown jihadist" attacks, could inciting or encouraging attacks over the Internet reasonably be considered "taking a direct part in hostilities"?[81] Some of the risks to rights posed by expansive interpretations are obvious, and similar questions arise also in state-state conventional warfare (take, for example, NATO's controversial 1999 air bombardment of Serbian television and radio transmission facilities, which NATO argued were integral to sustaining Serbian Army operations with propaganda[82]). But if one believes that military force is necessary and proportionate self-defense against a terrorist enemy, there are also security risks to overly narrow approaches to combatancy, and it is difficult to strike an appropriate balance in the abstract without considering the way actors organize to wage war.

B. Detention

To the extent that the law of war is applicable to conflicts against terrorist groups and constituent agents can be held as enemy fighters,[83] many would agree that interpretation and application of its detention rules still require some adaptation. Precisely what modifications are necessary, however, depends in large part on how analysts understand and conceptualize the threat—as a unitary, consolidated actor, or as

81. *See* Sudarsan Raghavan, *Cleric Says He was Confidant to Hasan*, WASH. POST, Nov. 16, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/11/15/AR2009111503160.html (describing Fort Hood shooter Nidal Hasan's relationship with Yemeni cleric Anwar al-Aulaqi).

82. A spokesman for Supreme Allied Commander Wesley Clark at one point declared that "Serb radio and television is an instrument of propaganda and repression . . . . It has filled the airways with hate and with lies over the years, and especially now. It is therefore a legitimate target in this campaign." Craig R. Whitney, *Crisis in the Balkans: The Alliance; NATO's Generals and Civilians Clash Over Bombing TV*, N.Y. TIMES, Apr. 9, 1999, at A8, *available* at http://www.nytimes.com/1999/04/09/world/crisis-balkans-alliance-nato-s-generals-civilians-clash-over-bombing-tv.html; *see also* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 276 (2000) (discussing the legality of the attacks on Serbian television stations); Office of the Prosecutor, ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 71-79 (June 13, 2000), *available at* http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf (discussing the legality of the attacks and recommending that the Office of the Prosecutor not commence an investigation related to the bombing).

83. *See generally* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48 (2009) (discussing various ways besides enemy combatancy the law of armed conflict might be interpreted to authorize and regulate detention of terrorist threats); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict - Criminal Divide*, 33 YALE J. INT'L L. 369 (2008) (discussing legal debates about the appropriateness of law of war detention of terrorist threats).

ideologically-related but organizationally independent threats, or somewhere in between.

For example, the law of armed conflict authorizes detention until the "cessation of hostilities,"[84] but this temporal dimension of detention law is premised on the assumption that released enemy fighters, bound to the commands of their sovereign, will return to fight again as long as hostilities are ongoing.[85] In traditional warfare, we assume a functioning principal-agent relationship between fighters and a government: so long as a government (principal) is engaged in a war, its fighters (agents) presumably will be ordered to resume hostilities if available to do so. Moreover, detention is intended to speed the successful termination of hostilities.[86] These assumptions are obviously problematic in the context of a war against a terrorist organization, which is not likely to come to a definitive end and where the principal-agent relationships are unclear. As Justice O'Connor wrote for the Supreme Court in *Hamdi v. Rumsfeld*: "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that the AUMF includes the power to detain through the end of hostilities] may unravel."[87] The degree to which it may unravel, however, depends on the adversary's makeup and internal constitution.

Traditional bases for enemy prisoner detention might provide useful guidance to the extent that a particular organization is sufficiently coherent and could eventually be defeated in some meaningful sense (or its military

84. *See* Third Geneva Convention, *supra* note 79, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); *see also* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 375 (2004) (considering whether war on terror detainees are protected by the Third Geneva Convention and concluding that "denying detainees POW status has no significant protective consequences, and, as a consequence, yields no important policy advantages to the detaining state").

85. *See* Johnson v. Eisentrager, 339 U.S. 763, 772-73 (1950) ("The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign."). In the middle ages, knights released upon the payment of ransom could be "released on parole forbidding them to take part in hostilities against the captor until ransom was paid," though the observance of such paroles rested on medieval notions of chivalry which, obviously, do not govern modern war, much less the conduct of terrorist groups. *See* ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR 47 (2005).

86. *Cf.* Int'l Comm. of the Red Cross, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29-Dec. 11, 1868 ("[T]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; . . . for this purpose it is sufficient to disable the greatest possible number of men . . . ."), *available at* http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument.

87. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

capacity sufficiently degraded to declare its defeat). For example, the recent demise of the Tamil Tigers, or LTTE, in Sri Lanka is a reminder that asymmetrical conflicts with non-state actors relying on terrorist tactics do sometimes find a decisive end.[88] Terrorism scholars have studied the phenomenon of the termination of terrorist groups; their insights might help legal scholars adapt the principal-agent model of detention to wars against terrorist groups.[89]

On the other hand, the more terrorist entities become decentralized, the more it makes sense to dispense with the principal-agent model altogether. One alternate model would assess continued detention authority on a case-by-case basis, essentially asking whether the conflict continues with respect to a particular, detained individual. As Curtis Bradley and Jack Goldsmith have noted, despite the fact that an end of the conflict with al Qaeda will be difficult to ascertain, "the functional justification under the laws of war for detention itself . . . to prevent the combatant from returning to the conflict" is still applicable.[90] What Bradley and Goldsmith might discard is the "categorical, group-based" assumption that a captured terrorist will return to the fight as long as the group with which he affiliated remains engaged in hostilities.[91] Instead, they propose substituting the

88. *See* C. Bryson Hull & Ranga Sirilal, *Sri Lanka's Long War Reaches Climax, Tigers Concede*, REUTERS, May 17, 2009, *available at* http://www.reuters.com/article/idUSTRE54D1GR20090517; *see generally*, Gaga Gvineria, *How Does Terrorism End?*, *in* SOCIAL SCIENCE FOR COUNTERTERRORISM: PUTTING THE PIECES TOGETHER, *supra* note 13, at 257 (discussing processes and factors contributing to the decline of terrorist movements).

89. *See, e.g.*, Shane, *supra* note 57; SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA (2008).

90. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L.R. 2047, 2124 (2004-2005). *See also* Glazier, *supra* note 41, at 1025 (arguing uncertainty about how length of conflict should not be dispositive, since "[n]o one has ever known how long a conflict would last ex ante"). *Cf.* Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759, 780 (2006-2007) (arguing that noncriminal detention of suspected terrorists captured in the West, away from areas of conventional armed conflict, is appropriately and sufficiently regulated by the Fourth Geneva Convention, which permits detention of "certain persons who are not POWs and are under definite suspicion of activity hostile to the security of a state . . . ."). The Fourth Geneva Convention approach, however, is subject to the same temporal limitations as traditional detention of enemy soldiers under the Third Geneva Convention, since the former also requires that "[i]nternment . . . cease as soon as possible after the close of hostilities." Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 133, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Such an approach still suffers from a) the difficulty of defining the end of an irregular problem, and b) the weakness of the assumption that ideological fanatics are loyal agents who will stand down when their principals do.

91. Bradley & Goldsmith, *supra* note 90, at 2124. *See also* Benjamin Wittes & Colleen A. Peppard, *Designing Detention: A Model Law for Terrorist Incapacitation*, THE BROOKINGS INST. 8, June 26, 2009, *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf ("Generally speaking, military detention is rooted in associational status with a particular enemy entity . . . . [C]reating a workable definition of the detainable class [for

question "whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining hostilities," based on factors including "the detainee's past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile."[92] Perhaps such an approach would effectively balance liberty and security, but again it is difficult to assess that claim independent of a view as to how the enemy is and will continue to be configured to wage war.

CONCLUSION

This article aimed not to provide definitive answers to questions arising out of the adaptation of the laws of war to conflicts against nonstate terrorist threats, but rather to reorient the discussion of legal adaptation in terms of debates about the future threat environment. Because of the competing understandings of terrorist threats—and because of terrorist organizations' mutability—legal consensus on widely applicable rules and standards will likely remain elusive. Different assumptions about the nature and shape of a terrorist threat affects both the choice of which legal framework to apply (i.e., whether law of armed conflict standards are appropriate at all in certain contexts) and the application of corresponding standards to particular individuals.

One might conclude from all this that the difficulties of applying law of armed conflict approaches to complex, multifaceted terrorism threats point in favor of exclusive reliance on law enforcement and intelligence, governed by criminal law and human rights law, as the most workable of imperfect options. But although applying a "war" paradigm—especially one governed by flexible standards—to counter-terrorism operations carries significant risk in any particular campaign and systemic risk to legal constraints on armed force more generally, reliance on or construction of a legal regime poorly matched for strategic necessities will fail to balance competing values in the short-term and will prove unstable in the long-term.

Rather than constructing law of war principles universally applicable to "terrorism," or even "transnational" or "state-supported" terrorism, this analysis generally points in favor of more context-sensitive legal adjustments that take account of structural features of particular, relevant actors. On the one hand, the need to incorporate into legal analysis a

detention of captured terrorists] requires some degree of rethinking of the associational status and conduct-based detention models.").

92. Bradley & Goldsmith, *supra* note 90, at 2125.

sophisticated understanding of terrorist organizational structure and evolution will mean that the process of legal adaptation will and should be slower than hoped for by those who seek legal clarity. On the other hand, however, doing so will yield a better fit of law and strategic necessity in ways that protect humanitarian and liberty values.