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A Comparative Examination of Counter-Terrorism Law and Policy

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Terrorism continues to beset the Western world. The United States and its allies have fought Islamic extremist groups for 15 years, if the September 11, 2001 attacks mark a starting point. If we consider the 1993 bombing of the World Trade Center as the beginning, the struggle has now lasted almost a quarter century. During those years, the nature of the threat has evolved from a small terrorist group in 1993, to a network with global reach operating from a safe haven in 2001, to a proto-state in control of substantial population and territory in 2016. Today Islamic State, known also as ISIS, ISIL or Daesh, has seized significant land in Syria and Iraq, wages war using conventional and unconventional weapons throughout the Middle East, and has supported terrorist attacks from Paris and Brussels in Europe to California in the United States.

Counter-terrorism policies have changed in response. Before September 11, 2001, the United States responded to terrorism primarily with existing law enforcement authorities, though in isolated cases it pursued military measures abroad. In this respect, it lagged behind the approach of European nations, which had confronted internal terrorism inspired left-wing ideology or separatist goals. After the 9-11 attacks, the United States expanded its policies to include a military response with the aim of preempting terrorist activity before it materialized on domestic soil. The

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Obama administration's campaign of drone strikes in the Middle East and Africa against al Qaeda, Taliban, and ISIS leaders represents the culmination of this approach. Nevertheless, the federal government continued to rely primarily on criminal justice tools when terrorism succeeded in reaching U.S. borders. It has arrived at a hybrid system which tracks geography – the difference between at home and abroad – rather than enemy capability in the robustness of its powers.

The European experience has been different. Beset as they were much earlier by dangerous domestic terrorism, nations such as France and the United Kingdom developed far more robust legal authorities well before the United States. The United States has not adopted many of these methods, and perhaps could not, due to the separation of powers and federalism structures in the U.S. Constitution. After the 9-11 attacks, however, European nations have struggled to adapt to the international dimensions of Islamic terrorism. They have incrementally expanded the existing powers used to address homegrown threats by Marxist-Leninist groups or secessionist movements, but have failed to successfully adopt a more preventive strategy aimed at the foreign roots of the current terrorist threat.

I. The United States

For decades, the United States had dealt with terrorism primarily as a crime subject to the law enforcement and the criminal justice system. In response to previous al Qaeda attacks, the United States dispatched FBI agents to investigate the "crime scene" and tried to apprehend terrorist "suspects." Federal prosecutors succeeded in putting a few of them on trial in federal court in New York.[1] Ironically, the federal judge issued rulings on the 1993 World Trade Center bombing just weeks before the hijacked planes crashed into the towers. Efforts to capture or kill al Qaeda leader Osama bin Laden throughout the 1990's were shelved, out of concerns that the Justice Department did not have enough evidence to satisfy the legal

1) E.g., *United States v. bin Laden*, 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

standard for a criminal arrest. Bipartisan studies of the failings that led up to the September 11 attacks almost all refer to the inadequacy of the criminal justice approach to prevent or deal effectively with an ideologically motivated military organization like al Qaeda.

On September 11, 2001, four coordinated attacks had taken place in rapid succession, aimed at critical buildings at the heart of our national financial system and our nation's capitol. The terrorists who hijacked these airplanes in some ways had conventional military objectives—to decapitate America's political, military, and economic headquarters. They failed at the first, partially achieved the second (the American Airlines flight from Dulles airport to Los Angeles struck a recently modernized and reinforced section of the Pentagon, resulting in far lower casualties and destruction), and succeeded at the third. The attacks killed more people than had died at Pearl Harbor, approximately three thousand, with thousands more injuries. They also disrupted air traffic and communications, closed the national stock exchanges for days, and caused billions of dollars in damage.

If a state of war existed between the United States and al Qaeda, the United States would not longer find itself limited to domestic law enforcement authorities. The United States can use its war powers to use force to kill enemy operatives and their leaders, detain them without trial until the end of the conflict, interrogate them without lawyers or *Miranda* protections, and try them without civilian juries. No doubt these measures seem unusual, even draconian, but the rules of war provide nations with their most forceful tools to defend their people from attack. The fundamental question, which still sits at the center of the debate over U.S. counter-terrorism today, is whether a nation can wage an international armed conflict against a non-state.

1.

If a nation-state had carried out the same attacks on the same targets, there would be no question about whether a state of war would exist. If, during the Cold War, the Soviet Union had sent KGB agents to drive airplanes through American skyscrapers, the United States would have retaliated, it would have gone on a war footing, and its mutual self-defense agreements with other countries would have been triggered. Why should

status as an international terrorist organization rather than a nation-state make a difference as to whether war exists? While al Qaeda was not a household word before the September 11 attacks, the United States had suffered repeated attacks at its hands. These include the suicide bombing of the U.S.S. Cole in 2000, the bombing of American embassies in Kenya and Tanzania in 1998, the attack on a U.S. military housing complex in Saudi Arabia in 1996, and the bombing of the World Trade Center in 1993. Only good intelligence and law enforcement work, helpful allies, and luck had frustrated planned attacks on American airliners over the Pacific Ocean, Los Angeles airport during the millennium, and various American embassies and personnel in Europe and Asia.

Critics of the American response focus on the unconventional nature of the attacks. The attacks bore important differences with wars of the past. The attackers wore no uniforms, carried no arms openly, and did not operate as part of regular military units. Instead, Mohammed Atta and his eighteen fellow hijackers disguised themselves as civilians, used civilian aircraft as weapons, and launched their attacks by surprise from within our borders. Deliberately targeting and killing civilians is deeply immoral, violating the core principle of the law of war—that combatants are only to target each other and must attempt to minimize harm to innocent civilians.[2)]

The attacks were both vicious and skillful. Al Qaeda's operatives infiltrated past U.S. immigration and border controls, operated within the borders for years, and gained the skills needed to fly airplanes at schools in the U.S. without detection by American intelligence or law enforcement. They simultaneously hijacked four aircraft within minutes of each other, and succeeded in hitting three of their targets with devastating effect. Even though they were going to their certain deaths, the hijackers maintained operational security for years, and managed to take the United States completely by surprise. Without any conventional armed forces or the military resources of a nation-state, al Qaeda inflicted a level of destruction on the United States within the grasp of the conventional forces of only a few nations.

2) Jean Bethke Elshtain, Just War Against Terror: The Burden of American Power in a Violent World (2003).

The most singular and defining characteristic of the hijackers is their statelessness. Al Qaeda is a network of terrorists who wish to engineer fundamental political and social change in the Middle East. They fight on behalf of a network of Islamic radicals who have dedicated themselves to a jihad against the West. Many were from Saudi Arabia, one of the United States' closest allies in the Middle East. Some members, including bin Laden, were veterans of the successful resistance to the Soviet occupation of Afghanistan. With the help of Saudi funding, the Reagan administration had helped train and arm mujahadeen resistance fighters from many different Arab countries to defeat the Soviets. When the war ended, some of these fighters banded together with the aim of overthrowing Arab regimes at home. They seethed at the rise of the Christian West and the decline of the Islamic caliphate, which had once stretched from India to Spain. They attributed the reversal of Islam's fortunes to the military strength of the United States and the cooperation of Arab regimes, which they saw as corrupt and untrue to fundamentalist Islamic principles.

Al Qaeda members are bound not by national allegiance, but a shared view of the world. They understand recent history as a manichaean struggle between Islam and the West.[3] To them, the United States is the cause of the conflicts and reverses suffered by the Islamic world. Al Qaeda thinkers believe America must be forced to withdraw from the Middle East and its citizens converted to Islam. Attacking the United States serves the objective of undermining its Arab allies in Egypt, Saudi Arabia, and Jordan and replacing them with a fundamentalist Islamic caliphate.[4] "Our fight against these governments is not separate from our fight against" the United States, bin Laden said.[5] Al Qaeda had articulated its goals at least as early as 1996, when bin Laden issued a fatwa—an interpretation of Islamic law—calling on Muslims to drive American troops out of the Middle East. Two years later, bin Laden and his number two, Egyptian doctor Ayman al

3) They are inspired by the thinking of Sayyid Qutb, a leading thinker in the Muslim Brotherhood movement. The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 51 (W.W. Norton, 2004) (hereinafter "9/11 Commission Report").

4) *Id*.

5) *Id*.

Zawahiri, declared war against all Americans, saying that it is "the individual duty for every Muslim who can do it in any country in which it is possible to do it" to kill an American.[6] In an ABC interview shortly thereafter, bin Laden said that "the worst thieves in the world today and the worst terrorists are the Americans. Nothing could stop you except perhaps retaliation in kind."[7] The question was never whether al Qaeda wanted to attack the United States and kill its citizens. The question was only if it had the wherewithal to carry out its threats.

Al Qaeda operates in an unconventional and, as strategic analysts like to say, asymmetric manner. Its operatives do not wear uniforms, nor do they form conventional units or force structures. Rather, their personnel, material, and leadership are organized in covert cells. Al Qaeda has no interest in meeting American armed forces on the battlefield, but seeks to achieve its political aims via surprise attacks primarily on civilian targets using unconventional weapons and tactics. Victory for al Qaeda does not mean defeat of the enemy's forces and a negotiated political settlement, but demoralizing our society and coercing it to act in ways that al Qaeda prefers.

Another factor that distinguishes the conflict with al Qaeda from previous wars is jurisdiction. In earlier modern American conflicts, hostilities took place on a foreign battlefield. The United States home front was largely safe behind two oceans. Today the battlefield may be anywhere. Possessing no territory, population, or regular armed units, al Qaeda depends on the covert use of global transportation and commercial channels to move its men and resources across borders undetected. This erases the traditional boundaries between the battlefield and the home front. It is in fact not a new form of war, partaking of covert activity and guerrilla tactics long known to the world of espionage, but it is certainly a new form of war in practice.

The United States has certainly faced violence from non-state actors before. It used the criminal justice system to handle pirates, domestic terror groups, the mafia, and drug cartels. But there is a line, however indistinct, between crime and war. Crime is generally committed for personal gain or

6). *Id*. at 47.

7) *Id*. at 51.

profit rather than a larger political goal. Drug cartels employ murder, kidnapping, robbery, and destruction to create a distribution network, grab turf from other gangs, intimidate rivals or customers, and even retaliate in military fashion against law enforcement. Al Qaeda resembles organized crime like the Mafia in some respects, but the Mafia is unconcerned with ideology and is primarily out to satisfy its greed.

War involves opposing political objectives. The United States went to war in World War II to achieve regime change in Germany and Japan; they went to war to conquer territory. It resorted to armed force in Korea, Vietnam, and Panama, among other places, to stop the spread of harmful ideologies or to remove corrupt regimes. Like a nation, al Qaeda's attacks are highly organized, military in nature, and are aimed at achieving ideological and political objectives.[8] Crime can certainly be involved in its fundraising efforts, such as stealing money or defrauding charities, but Al Qaeda uses this money for military and intelligence efforts rather than the mere accumulation of wealth. An enemy's conscious political object also distinguishes war from an emergency, which can arise from an act of God, such as Hurricane Katrina or a pandemic, or impersonal market forces, such as the Great Depression.[9]

The difference in purpose dictates different tools. The FBI and the DEA—not the U.S. armed forces—has primary responsibility for interdicting drug smuggling (although the military sometimes plays a supporting role). They seek to disrupt the operations of drug cartels with traditional tools of law enforcement: interviewing witnesses, collecting physical evidence, and carrying out surveillance. An investigation usually occurs only after a crime has occurred. Deadly force may be used only if necessary to defend the law enforcement agent's life, or another's, against an imminent attack. In war, nations use special powers to prevent future attacks on their citizens and territory, not to punish past conduct. Law enforcement tries to solve crimes that have occurred in the past. National

8) U.S. Dep't of State, Fact Sheet: The Charges Against International Terrorist Usama bin Laden (Dec. 15, 1999), available at http://usinfo.state.gov/topical/pol/terror/99129502.htm.

9) Ackerman believes 9/11 was neither crime nor war, but an emergency. This could be a simple problem of categorization. If an emergency because of terrorist attack allows the government to exercise the same powers as in wartime, then labeling the post-9/11 world an emergency rather than a war is of no real difference.

military and intelligence agents seek to stop deadly, foreign attacks that may happen in the future.

Critics of the war on terror often point to the fact that the attacks of September 11 began and ended in the U.S. and are thus only domestic criminal acts. This cavil, however, ignores the fact that the September 11 attacks were planned, controlled and financed by a foreign organization. Nor does the domestic site of the 9/11 attacks render them acts of crime rather than war. True, the bombing of the Oklahoma City federal building was a war-like attack, but it was carried out by a citizen associated with a group that was far too small and incoherent to suggest any need for war. Domestic violence can sometimes rise to the level of a rebellion or insurrection and qualify as war, like the Civil War. If anything, the domestic location of the attacks should cause us deep concern, because it shows that a foreign enemy has pierced our defenses.

Crime is an endemic, diffuse social problem that has afflicted all of mankind in all times. By contrast, war is a set of discrete and violent acts undertaken by a nation or entity for political gain. Were the attacks organized and systematic enough to be considered "armed conflict"? The gravity and scale of September 11 surely crossed that threshold. One international treaty defines armed conflict as attacks that rise above "riots, isolated and sporadic acts of violence and other acts of a similar nature."[10] The Bali, Madrid and London episodes, together with the bombings in Iraq and Israel are part of a sustained and coordinated campaign against the United States and our allies by a single network in pursuit of an ideological agenda.

Although it seems circular, one way to know if the line between crime has been crossed is simply whenever there is a military response. Choice driven by necessity creates war, not a hovering zeitgeist called "law." If only the military has the capability to do what must be done, like destroy enemy camps in Afghanistan, and it is sent to do it, then it is war. The fact of a military response is one way international law decides if an action

10) The 1996 Amended Protocol II to the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons art. 1(2), S. Treaty Doc. No. 105-1, at 39 (1997).

constitutes war.[11] In fact, if terrorism were a criminal problem, the U.S. could barely use the military at all, thanks to a law called the Posse Comitatus Act, which prohibits the use of the armed forces to enforce our laws except in times of narrow emergencies.[12] Though diplomacy and law enforcement will play important roles, few truly believe that they alone can bring al Qaeda to justice and prevent future attacks. War is violence on a large scale, of the kind we saw on September 11, undertaken for political reasons by a foreign state or entity, which requires a military response.

The terminology "war on terrorism" causes confusion by suggesting that we are at war with a combat method, not a concrete enemy, as former CIA Director James Woolsey has pointed out. He likens a "war against terrorism" to a "war against kamikazes." The war on terror to many ears also sounds a lot like the avowedly metaphorical "war on drugs" that has always been fought as a criminal matter.[13] American political leaders have watered down "war" in the interests of mobilizing political campaigns to solve persistent social problems. But the United States is not at war with every terrorist group in the world, or all who employ terrorist tactics, or a social problem, but with al Qaeda.

Rhetoric aside, that the United States is engaged in an international armed conflict with the al Qaeda terrorist organization is perfectly clear, however much politics may fog the issue. Critics are entitled to try to get a federal court to rule that this is not war, or that war rules do not apply, or that the U.S. must use only criminal law enforcement tools. So far, the courts have not upheld this position. The Supreme Court's 2004 decision on enemy combatants was read by some as dealing a blow to the Bush administration's interpretation of the war on terrorism. *Rasul v. Bush* held that the federal courts will—for the first time—review the grounds for detaining alien enemy combatants held outside the United States.[14] In

11) *See* 3 U.S. Practice in International Law § 2, at 3443 (1995). *See also* G.I.A.D. Draper, The Red Cross Conventions 15-16 (1958).

12) Posse Comitatus Act, 18 U.S.C. § 1382.

13) Describing September 11 as "mass murder," as President Bush did in one speech, also suggests crime fighting rather than war. Statement by the President in His Address to the Nation, Sept. 11, 2001, http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html.

14) 124 S. Ct. 2686 (2004).

Hamdi v. Rumsfeld, the Justices required that American citizens detained in the war have access to a lawyer and a fair hearing before a judge.[15)]

However, on closer examination, *Hamdi* actually affirmed the administration's basic legal approach to this war and left the executive branch plenty of flexibility to prevail in the future. Despite enormous political pressure from the media and activist litigators, the Justices did not turn the clock back to September 10, 2001. They agreed that the United States was indeed at war, one authorized by Congress. As Justice O'Connor wrote for the Court's plurality:

> There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the September 11] attacks, are individuals Congress sought to target in passing the [Authorization to use Military Force]. We conclude that detention of individuals falling into that limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.[16)]

The Justices implicitly recognized in *Hamdi* that the United States may use all the tools of war—including detention without criminal trial—to fight a new kind of enemy that has no territory, no population, and no desire to spare innocent civilian life.

On this point, the Court affirmed the shared view of the political branches. In the wake of the 9-11 attacks, the President and Congress moved quickly to recognize the state of war between the United States and al Qaeda. In his address to a joint session of Congress on September 20, 2001, President Bush declared: "On September the 11th, enemies of freedom committed an act of war against our country."[17)] And in

15) 124 S. Ct. 2633 (2004).

16) *Hamdi*, 124 S. Ct. at 2640.

17) Address to a Joint Session of Congress and to the American People, Sept. 20, 2001,

November, 2001, President Bush issued an executive order which stated: "International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces."[18)]

Congress agreed. On September 18, Congress enacted an Authorization for the Use of Military Force (AUMF), if not a declaration of war in name, and declaration of war in purpose. It pronounced the September 11 attacks "grave acts of violence" that "pose an unusual and extraordinary threat to the national security and foreign policy of the United States" and justified a military response: "such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." (Under international law, the right to self-defense is triggered by an armed attack or the threat of one.) Congress recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."

If the views of the Bush administration's critics were to prevail, and the September 11 and other terror attacks amounted only to crimes, the American legal system would grant al Qaeda terrorists *better* legal treatment than that afforded to combatants who follow the rules of war. The mechanisms of criminal justice forbid government searches of suspects or their possessions without a warrant issued by a neutral magistrate. Police cannot arrest a criminal without probable cause and upon arrest must provide a suspect with *Miranda* warnings, a lawyer, and the right to remain silent. A suspect has the constitutional right to a speedy trial by a jury, and in that proceeding, can demand that the government turn over all of its information about the crime and the suspect to him. He can cross-examine that information and call his own witnesses into open court. The government must provide all exculpatory evidence to the defendant and access to witnesses who have any information relevant to the trial. A

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available at: http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

18) Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

convicted defendant can appeal to higher courts to challenge the verdict and then file for a writ of habeas corpus seeking federal judicial review of any constitutional errors in the trial.

To protect the innocent, the Constitution's Bill of Rights is expensive, tilts in favor of the suspect, and imposes high standards of proof on the government. While police can arrest based on "probable cause," a suspect must be released if prosecutors cannot proceed to trial. Courts can only convict if a jury finds that the government has shown "proof beyond a reasonable doubt," which often means something close to 99 percent certainty. Federal courts and the Supreme Court supervise these rules, which can take years of trials and appeals. If police make a mistake, even in good faith, such as seizing evidence without a proper warrant or failing to read a *Miranda* warning correctly, the courts will sanction the government by releasing the suspect regardless of the threat he poses to society.[19] As Justice Cardozo once observed, "the criminal is to go free because the constable has blundered."[20]

The Framers established this constitutional system because of their concerns over the power of the government. It expresses a worry that the national government would use otherwise unlimited powers to engage in the suppression of political opposition. But it would be a mistake to believe that the Constitution's framework for criminal justice should apply to war. The former involves the fundamental relationship between the people and its government, and so ought to be regulated by clear, strict rules defining the power given by the principal to its agent. The latter, however, encompasses the means to confront an alien enemy who is not part of the American political community, and so should not benefit from the regular peacetime rules that define it. Applying criminal justice rules to terrorists would gravely impede the killing or capture of the enemy as well as compromise the secrecy of the U.S.'s military efforts.

According to the Supreme Court, a nation at war is entitled to detain as enemy combatants those "who associate themselves with the military arm

19) E.g., *Mapp v. Ohio*, 367 U.S. 643 (1961). The exclusionary rule has been effectively criticized by Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 20-31 (1997).

20) *People v. Defore*, 150 N.E. 585, 587 (1926).

of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts."[21] A nation at war may kill members of the enemy's armed forces. But law enforcement personnel may only use force in defense of their lives or those of others.[22] Once captured, an enemy combatant can be detained until the end of the conflict. Combatants have no right to *Miranda* warnings, a lawyer, or a criminal trial to determine their guilt or innocence under laws of war. They are simply being held to prevent them from returning to the fight.

2.

Once the United States determined it had entered a state of war, it could use the tools of war. When a nation goes to war, it seeks to defeat the enemy in order to prevent future harms to society inflicted by enemy attacks. Because war deals with prospective concerns, it must rely less on exact information and more on probabilities, predictions, and guesswork. Often the military attempts to destroy a building because it estimates with varying degrees of certainty that enemy soldiers are hiding within it or enemy munitions are located there. It does not wait to attack until it has proof beyond a reasonable doubt, or even probable cause; that would risk allowing the enemy forces to escape, to strengthen their position, or to live to attack the country's own forces or citizens another day. War by its nature seeks prevention, not punishment. The rules of war do not concern themselves so much with a nation's restraint of government authority to benefit its citizens, but the restraint of nations toward each other in the conduct of war. We will illustrate the differences between the law enforcement and military approaches with the example of the use of force, which has generated the most controversy over the last decade of the struggle with al Qaeda.

President Bush authorized drone strikes in a secret order less than a week after the September 11 attacks.[23] He obliquely referred to its purpose

21) *Hamdi*, 124 S. Ct. at 2640 (quoting Ex Parte Quirin, 317 U.S. 1, 20 (1942)).

22) *See*, e.g., *Tennessee v. Garner*, 471 U.S. 1 (1971) (use of force against suspect must be reasonable)

23) *See* Bob Woodward, Bush at War 101 (2002).

on September 17, 2001, when responding to the press about the reservist call-up. "Do you want bin Laden dead?" a reporter asked. "There's an old poster out West, as I recall, that said, 'Wanted Dead or Alive,'" the President replied.[24] The President's order authorized the CIA to seek to kill or capture the leaders of al Qaeda and other allied terrorist organizations.[25] As with all approvals of covert activity, the executive order was required by law to be set down in writing, with copies sent to the House and Senate intelligence committees.[26] The order also included a list of the leading al Qaeda figures to be targeted, such as Osama bin Laden and Ayman al-Zawahiri.[27]

Satellite imagery, sophisticated electronic surveillance, unmanned drones, and precision-guided munitions allow American intelligence and its military forces to strike enemy targets virtually anywhere in the world at any time. Today, the United States can reach beyond the traditional battlefield. It no longer relies on strategic bombing of the enemy and its support structure. Once U.S. intelligence agents receive information that, for instance, an enemy leader is in a safe house in western Pakistan or in a car in Yemen, they can deploy force in hours, if not minutes, rather than the days or weeks it used to take to plan and execute attacks. These capabilities allow the United States to match the unconventional organization and tactics of al Qaeda with a surgical response that can target its leaders without the extensive harm to civilians that has characterized previous wars.

Precision strikes against enemy leaders have been the focus of media scrutiny and critical commentary.[28] For example, in May 2010, Philip

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24) *Id.* at 100.

25) *Id.* at 101.

26) *See* National Security Act of 1947, 50 U.S.C. § 413b (2006); *See generally* W. Michael Reisman & James E. Baker, Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad in International and American Law (1992).

27) James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda; Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. Times, Dec. 15, 2002, at A1, *available at* http://www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html.

28) *e.g.*, Josh Meyer, *CIA Expands Use of Drones in Terror War,* L.A. Times, Jan. 29, 2006, at A1, *available at* http://articles.latimes.com/2006/jan/29/world/fg-predator29; Chris Downes, *'Targeted Killings' In an Age of Terror: The Legality of the Yemen Strike*, 9 J. Conflict &

Alston, the U.N. Special Rapporteur on Extrajudicial Killings, issued a report suggesting that the United States' use of drones may violate international human rights law and the laws of war.[29] Critics argue that targeted killing also violates U.S. law banning assassinations.[30] They also argue that, even if technically legal, targeted attacks are unwise because they risk reprisals against Americans.[31]

Many of the claimed successes in the war on terrorism have come about thanks to targeted strikes against specific al Qaeda targets. Despite its campaign criticism of Bush's approach to the war, the Obama administration has accelerated the use of drones.[32] According to media reports, it has resorted to strikes not just in Iraq and Afghanistan but also in Pakistan and Yemen.[33] Leon Panetta, the director of the Central Intelligence Agency, has publicly stated that the drone strikes in Pakistan are "the only game in town in terms of confronting or trying to disrupt the al Qaeda

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Sec. L. 277 (2004).

29) Philip Alston, United Nations Gen. Assembly, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings 9–11 (May 28, 2010), http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf.

30) *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981); *See, e.g.*, Downes, *supra* note 15, at 284–91; Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 Case W. Res. J. Int'l L. 325, 331–32 (2003); Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 Naval War C. Rev. 127, 129, 133–35 (2007).

31) *e.g.*, Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 Wash. U. Global Stud. L. Rev. 77, 115 (2010).

32) *Obama Has Increased Drone Attacks*, CBS News.com (Feb.12, 2010), http://www.cbsnews.com/stories/2010/02/12/politics/main6201484.shtml.

33) *e.g.*, Helene Cooper & David E. Sanger, *U.S. Will Widen War on Militants Inside Pakistan*, N.Y. Times, Dec. 17, 2010, at A1, *available at* http://www.nytimes.com/2010/12/17/world/asia/17afghan.html?_r=1&pagewanted=2; Karen DeYoung & Joby Warrick, *Drone Attacks Inside Pakistan Will Continue, CIA Chief Says*, Wash. Post, Feb. 26, 2009, at A10, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/25/AR2009022503584.html; David Ignatius, *Is Killing Our Only Option for Terrorists?*, Wash. Post, Dec. 2, 2010, at A25, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120106294.html; Greg Jaffe & Karen DeYoung, *U.S. Drones on Hunt in Yemen*, Wash. Post, Nov. 7, 2010, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120106294.html; David E. Sanger & Peter Baker, *Obama Reorients Approach of National Security Strategy*, N.Y. Times, May 28, 2010, at A8, *available at* http://www.nytimes.com/2010/05/28/world/28strategy.html.

leadership."[34] In the new administration's first year, the number of drone attacks reportedly exceeded the total under the Bush administration's eight years.[35] In March 2010, Harold Koh, who had criticized the Bush administration's policies on detention, interrogations, use of drones, and other issues while serving as the dean of the Yale Law School, now vigorously and publicly defended drone strikes as the legal adviser of the State Department.[36]

Civil liberties lawyers have complained loudly of the treatment of captured enemy alien combatants held at Guantánamo Bay, in Afghanistan, or in Iraq.[37] But few protested the summary killing of an American citizen by remote control until 2010, when civil liberties groups filed a lawsuit on behalf of al-Awlaki.[38] The same civil liberties lawyers now argue that, with

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34) *U.S. air strikes in Pakistan called 'very effective,'* CNN.com (May 18, 2009), http://www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes.

35) Scott Shane, *C.I.A. to Expand Use of Drone In Pakistan*, N.Y. Times, Dec. 4, 2009, at A1, *available at* http://www.nytimes.com/2009/12/04/world/asia/04drones.html; *See also* Cooper & Sanger, *supra* note 23.

36) *Compare* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm ("U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."), *with* Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 Ind. L. J. 1145 (2006) (stating that "[t]he President cannot, on his own constitutional authority, authorize violations of jus cogens norms (basic human rights)" as part of his criticism of the Bush administration's intelligence policies), *and* Harold Hongju Koh, *Setting the World Right*, 115 Yale L.J. 2350 (2006) ("We now downplay torture and violations of the Geneva Conventions committed by ourselves or our allies as necessary elements of the war on terror, claiming that freedom from fear is now the overriding human rights value."), *and* Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am. J. Int'l L. 337 (2002) ("[B]y failing to deliver justice that the world at large will find credible, the Military Order undermines the U.S. ability to lead an international campaign against terrorism under a rule-of-law banner.").

37) *See,* Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, 85 Int'l L. Stud. 343, 346 (2009), https://www.usnwc.edu/Research---Gaming/International-Law/RightsideLinks/Studies-Series/documents/Vol-85-Web1.aspx; *See, e.g.*, Marjorie Cohn, *Trading Civil Liberties for Apparent Security is a Bad Deal*, 12 Chap. L. Rev. 615 (2009).

38) Complaint for Declaratory and Injunctive Relief (Violation of constitutional rights and international law—targeted killing), *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469), 2010 WL 3478666, *available at* http://www.aclu.org/files/assets/alaulaqi_v_obama_complaint.pdf.

few exceptions, drone strikes violate the U.S. Constitution. They reason that the rules that apply to uniformed combatants do not apply to an undefined war with a limitless battlefield. They concede instead that the United States may apprehend and try American citizens, such as al-Awlaki, under the "most extraordinary circumstances," such as when they join an enemy at war.[39] The lawsuit follows a report by the United Nations Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions, which concluded that the use of drones to carry out targeted killings violates the laws of war, a claim echoed by some American legal scholars.[40]

Critics also believe that such uses of force violate executive orders and make bad policy. Executive Order 12,333 states that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[41] After the attacks to kill Uday and Qusay, George Gedda of the Associated Press asserted that "pursuing with intent to kill violates a long-standing policy banning political assassination." He claimed that the attack violated the rule: "It was the misfortune of Saddam Hussein's sons that the Bush administration has not bothered to enforce the prohibition."[42] Intelligence analyst Thomas Powers argued in the *New York Times* that efforts to kill Iraqi's Baathist regime leaders would invite retaliation: "Mr. Hussein is not the only figure in danger of sudden death in Iraq at the moment, and it is a tossup who is in greater danger—Mr. Hussein or Paul Bremer."[43] Others speculate that the

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39) *Id.* at ¶¶ 1, 2, 4 ("Outside the context of armed conflict, the intentional use of lethal force without prior judicial process is an abridgement of [the right to life] except in the narrowest and most extraordinary circumstances…both the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury.").

40) *See* Keith Johnson, *U.S. Defends Legality of Killing with Drones*, Wall St. J., Apr. 5, 2010, at A11, *available at* http://online.wsj.com/article/SB10001424052702303450704575159864237752180.html.

41) Exec. Order No. 12,333, 46 FR 59,941, 59,952 (Dec. 4, 1981).

42) George Gedda, *Policy Against Assassinations Was No Barrier*, Phil. Inquirer, July 24, 2003, at A07.

43) Thomas Powers, *Target Practice; When Frontier Justice Becomes Foreign Policy*, N.Y. Times, July 13, 2003, §4, at 1, *available at* http://www.nytimes.com/2003/07/13/weekinreview/target-practice-when-frontier-justice-becomes-foreign-policy.html. Paul Bremer was the chief U.S. civilian administrator in Iraq.

use of drones against al Qaeda leaders in Pakistan has the effect of encouraging terrorist support and recruitment.[44] Some human rights advocates believe that such attacks violate international law because the targets are civilians, not uniformed soldiers. Therefore, they must be handled by the criminal law—making any pre-emptive attacks illegal.

These criticisms rest on profound misconceptions of the nature of the war on terrorism and the rules of warfare. Because the United States is at war with al Qaeda, it can use force— especially targeted force—to conduct hostilities against the enemy's leaders. This does not violate any American law—constitutional, congressional, or presidential—or any ratified treaty. Precise attacks against individuals have long been a feature of warfare. These attacks further the goals of the laws of war by eliminating the enemy and reducing harm to innocent civilians. Legality aside, targeted killing or assassination can be the best policy in certain circumstances. In the new type of war thrust upon the United States by the 9/11 attacks, the enemy resembles a network, not a nation. The better strategy is to attack the individuals in that network; there are no armed forces to target, and destroying training camps alone will amount to no more than "pounding sand."

Launching a missile to kill al Qaeda commanders, even American citizens such as Anwar al-Awlaki, is legal. They are members of the enemy forces, the equivalent of officers. The U.S. military and intelligence services are legally and morally free to target them for attack whether they were on the front lines or behind them. Killing an enemy commander will better promote the principles behind the rules of civilized war than other means. Over the centuries, the laws and customs of war have developed to reduce the harm to noncombatants and limit the use of force to that which is proportional to military objectives. By specifically targeting enemy leaders, the United States can render enemy forces leaderless and frustrate their operations, prevent the enemy from mounting effective plots and campaigns, and reduce both civilian and military casualties.

Using targeted killing as a primary tactic also takes better account of the new kind of war facing the United States. Al Qaeda does not mass its operatives into units onto a battlefield, or at least it has not after its setbacks

44) *See* Michael L. Gross, Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict 109, 112–13 (2010).

in Afghanistan in the fall and winter of 2001. Instead, al Qaeda will continue to disguise its members as civilians, hide its bases in remote mountains and deserts or among unsuspecting city populations, and avoid military confrontation. The only way for the United States to defeat al Qaeda is to destroy its ability to function—by selectively killing or capturing its key members.

Al Qaeda is a social network of friends, acquaintances, or companies interlocked through various cross-ownerships and relationships; it is not unlike the Internet, which gives it remarkable resiliency. A killed or captured leader seems to be quickly replaced by the promotion of a more junior member and, as in Iraq, other arms of the network spring to the fore. Most nation-states would have collapsed after the kinds of losses inflicted by the armed forces and the CIA over the last decade: thousands of operatives killed, two thirds of al Qaeda's leadership killed or captured, and its open bases and infrastructure destroyed in Afghanistan.[45] But al Qaeda operatives continue to attempt to infiltrate the United States, and they have succeeded in carrying out new terrorist attacks in London, Madrid, and Bali.[46]

Al Qaeda exhibits the typical characteristics of what is known as a free-scale network.[47] A free-scale network is not created at random. It is made up of nodes—connected to each other for some purpose—around hubs, which are nodes with multiple connections to other nodes. They are not command-and-control hierarchies like the Defense Department. In terms of the Internet, hubs are highly trafficked websites with connections to many

45) *See* Paul R. Pillar, *Counterterrorism After Al Qaeda*, 27 WASH. Q. 101, 101–02 (2004), http://www.twq.com/04summer/docs/04summer_pillar.pdf.

46) *See generally* Alex Morales & Robert Hutton, *Two London Bombers Known Before 2005 Suicide Attacks*, BLOOMBERG (May 11, 2006, 3:09 PM),

http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1Y_PLfoJJWU&refer=uk (discussing the London subway bombing); Int'l Sec. Studies, *The 3/11 Madrid Bombings: An Assessment After 5 Years*, WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS (April 10, 2009), http://www.wilsoncenter.org/index.cfm?topic_id=1416&fuseaction=topics.item&news_id=518495 (discussing the terrorist bombings in Madrid); *Bali Bombing Suspect Umar Patek 'Arrested in Pakistan,'* BBC NEWS ASIA-PACIFIC (last updated March 30, 2011, 6:08 AM), http://www.bbc.co.uk/news/world-asia-pacific-12900555 (discussing the recent capture of an al Qaeda member in connection with the 2002 Bali bombing).

47) *e.g.*, ALBERT-LÁSZLÓ BARBÁSI, LINKED: THE NEW SCIENCE OF NETWORKS 70 (2002).

other sites, such as Google.com, Yahoo.com, and MSN.com. Users visit them often in order to connect to other sites, and a great many other sites connect to them as well. In a social or professional network, hubs are people that are widely known, who set trends or whose work influences a great many others.

Decentralization is another attribute. Because of decentralization, a network can quickly collect and process information from a myriad of sources located in different places and connected only by a common interest or affinity. If a node disappears, others simply move their connections. Networks can remain remarkably immune to attack. Randomly destroying its nodes will not cause it to collapse, and the loss of a single hub will not bring down the whole network. Therefore, because it has no real single leader, it can function even after suffering severe losses.

Al Qaeda is just such a network. Each node is a terrorist seeking to connect with another through a desire to promote Islamic fundamentalism in the Middle East by any means necessary, including violence. Its hubs are leaders, such as bin Laden and Zawahiri, and facilitators, such as Khalid Sheikh Mohammed and Ramzi Binalshibh.[48] Capturing or killing an al Qaeda member is important for the discovery of other cells and plots to which he is connected. However, taking out single operatives is not crippling; other parts of the network can continue to function.

The United States must target al Qaeda hubs. Random, individual attacks on a free-scale network will not work. Turning off random websites will have almost no effect on the Internet, but closing down a Google.com or Yahoo.com might have a serious effect on Internet usage and traffic. Similarly, killing or capturing an ordinary al Qaeda operative will cripple one cell, but al Qaeda will only replace that cell with others. Even significant al Qaeda facilitators eliminated one at a time will permit replacements to be trained or communications and contacts shifted to other leaders. To cripple al Qaeda, the United States must gather timely and accurate information and attack its most important planners and leaders

48) *See* Nat'l Comm'n on Terrorist Attacks Upon the U.S., The 9/11 Commission Report 47–70 (2004), http://www.9-11commission.gov/report/911Report.pdf (describing the origins of al Qaeda); *id.* at 145–50 (describing Khalid Sheikh Mohammed); *id.* at 161 (describing Ramzi Binalshibh).

simultaneously. Otherwise, targeted killing at best will prevent an imminent attack, but it will not stop them all.

The most important factor to consider is uncertainty. When deciding whether to target someone, American intelligence officials cannot be one hundred percent sure the person is in fact an al Qaeda leader or that the information about his location and timing is correct beyond any doubt. Even if it has collected all information possible—and information has a cost, just like any other good or service—the United States is still dealing with the probability that something will happen in the future. Terrorists' plans can change at the last minute. American intelligence may have identified the wrong man, or it may have made a simple mistake (as with the erroneous bombing of the Chinese embassy in Belgrade during the Kosovo war).[49)]

Using force to prevent future harms can never be done perfectly. No military can choose the right target every time, nor can any military hit its target every time. Soldiers might shoot someone who turns out to be a noncombatant, but was lurking around a known enemy location, or they might fire their cannons at the wrong building. In domestic law enforcement, which is governed by tougher standards, a police officer who fires his weapon on the reasonable belief that his attacker holds a gun is not punished by law, even if it turns out that his belief was in error. We ask that our soldiers make reasonable decisions when they choose their targets and decide how much force to use. Similarly, our policymakers consider all of these factors when they decide whether to use deadly force against a suspected al Qaeda member. They must balance matters like the effect of an attack on allied governments, local populations, and nearby civilians against the benefit of eliminating an al Qaeda leader and frustrating the plans he might have been organizing, while also keeping in mind the probability of success in the attack.

Killing an individual, of course, is not legal in all circumstances. Nor is it illegal in all circumstances. Killing an individual can be legal when it is carried out by the state as criminal punishment of a convicted first-degree

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49) Daniel Williams, *NATO Missiles Hit Chinese Embassy; Alliance Again Pounds Belgrade*, Wash. Post, May 8, 1999, at A01, *available at* http://www.washingtonpost.com/wp-srv/inatl/longterm/china/stories/embassy050899.htm.

murder by a capital jury. It can be legal when a police officer shoots an attacker armed with a weapon. It can be illegal when it is murder, as with any of the thousands of premeditated murders that occur in the United States every year. It is illegal when it is "assassination." But killing the enemy in wartime is legal.

The United States has the right, as a nation, to use force to defend itself. However, under the United Nations Charter, member states must refrain "from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[50] No exceptions were granted, such as for preventing humanitarian disasters or rooting out terrorist organizations, except for two: interventions authorized by the U.N. Security Council "as may be necessary to maintain or restore international peace and security"[51] and "the inherent right of individual or collective selfdefence."[52] According to long state practice, and hence customary international law, this right applies not only after a nation has suffered an attack, but also in anticipation of an "imminent" attack.[53] Despite the arguments of some well-known international law scholars to the contrary, every state has, in the words of Secretary of State Elihu Root, "the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect itself."[54] The United States need not wait until an al Qaeda attack has occurred before it can launch a missile against a terrorist camp or send a special operations team to take out a terrorist leader.

Imminence is not a purely temporal concept. The concept traces its origins to the 1837 *Caroline* affair, in which British forces pursued Canadian insurgents into American territory, destroyed a vessel, and killed dozens of U.S. citizens.[55] After that incident, the United States and Great Britain

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50) U.N. Charter art. 2, para. 4.

51) U.N. Charter art. 42.

52) U.N. Charter art. 51.

53) *See* John Yoo, *Using Force*, 71 U. Chi. L. Rev. 729, 741, 775 (2004).

54) Memorandum from Norbert A. Schlei, Assistant Att'y Gen., Office of Legal Counsel, for the Att'y Gen., (Aug. 30, 1962), *reprinted in* Norbert A. Schlei, *From the Bag: Anticipatory Self-Defense: A 1962 OLC Opinion on Lawful Alternatives for the U.S. in the Cuban Missile Crisis*, 6 Green Bag 2d 195, 196 (2003).

55) *See* Christine Gray, International Law and the Use of Force 105 (Malcolm D. Evans &

agreed in 1841 that a pre-emptive attack was justified if the "necessity of self-defense [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation."[56] Imminence classically depended on timing. Only when an attack is soon to occur, and thus certain, can a nation use force in pre-emptive self-defense. What about the magnitude of harm posed by a threatened attack? According to conventional doctrine, a nation must wait until an attack is imminent before using force, whether the attack is launched by a small band of cross-border rebels, as in the *Caroline* affair, or by a terrorist organization armed with biological or chemical weapons. Terrorist groups today can launch a sudden attack with weapons of devastating magnitude. To save lives, it is now necessary to use force earlier and more selectively.

Imminence as a concept also fails to deal with covert activity. Terrorists deliberately disguise themselves as civilians. Their organizations have no territory or populations to defend, and they attack by surprise. This makes it virtually impossible to use force in self-defense once an attack is "imminent." There is no target to attack in the form of the army of a nation-state. The best defense will be available only during a small window of opportunity when terrorist leaders become visible to the military or intelligence agencies. This can occur, as in the case of bin Laden, well before a major terrorist attack occurs. Imminence doctrine does not address cases in which an attack is likely to happen, but its timing is unpredictable. Rules of self-defense need to adapt to the current terrorist threat.

In addition to imminence, we need to account for the degree of expected harm, a function of the probability of attack times, the estimated casualties, and damage. There is ample justification for factoring this in, just as it ought to be a factor in ordinary acts of self-defense, as when one is attacked with a gun, as opposed to a set of fists. At the time of the *Caroline* decision in the early nineteenth century, the main weapons of war were single-shot weapons and artillery, cavalry, and infantry. There was an inherent

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Phoebe N. Okowa eds., 3rd ed. 2000).

56) Letter from Daniel Webster, U.S. Sec'y of State, to Henry Fox, British Minister in Wash. (Apr. 24, 1841), *reprinted in* British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print pt. I, ser. C, vol. 1, at 159 (Kenneth Bourne and D. Cameron Watt eds., 1st ed. 1986).

technological limit on the destructiveness of armed conflict.

The speed and severity possible today means that the right to preempt today should be greater than in the past. Weapons of mass destruction have increased the potential harm caused by a single terrorist attack from hundreds or thousands of innocent lives to hundreds of thousands, or even millions. This is not even counting the profound, long-term destruction of cities or contamination of the environment and the resulting long-term death or disease for large segments of the civilian population. WMDs can today be delivered with ease—a suicide bomber could detonate a "dirty bomb" using a truck or spread a biological agent with a small airplane. These threats are difficult to detect, as no broad mobilization and deployment of regular armed forces will be visible. Probability, magnitude, and timing are relevant factors that must be considered in determining when to use force against the enemy.

This same logic explains why most applauded President John F. Kennedy's decision to blockade Cuba during the 1962 missile crisis with the Soviet Union.[57] President Kennedy did not wait until the Soviet missiles in Cuba were on the launching pad and being fueled for flight. Rather, he acted earlier, during a brief window of opportunity, to head off the threat before the Soviet missiles could become operational.[58] In doing so he risked a U.S.-Soviet war. Today, while the potential harm from a terrorist attack is at least as high as the possibility of a nuclear missile attack from Cuba in 1962, the use of force involved in an assault team or cruise missile to target and kill Osama bin Laden and his lieutenants falls far short of JFK's imposition of a naval blockade on Cuba and the risk of full-blown war between the superpowers.

Another important principle of the rules of war is that targeted attacks to kill the enemy are permitted. In fact, it is one of the primary tools used by militaries to defeat the enemy. As Hugo Grotius, the father of

57) *See* Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 Am. J. Int'l L. 597, 598 (1963); W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 Geo. Wash. L. Rev. 335, 348 (1963).

58) *See* Mark L. Haas, *Prospect Theory and the Cuban Missile Crisis*, 45 Int'l Stud. Q. 241, 260–264 (2001), http://0-www.jstor.org.lawlib.nyls.edu/stable/pdfplus/3096110.pdf?acceptTC=true.

international law, observed in 1646, "[i]t is permissible to kill an enemy."[59] There is no indication that the presidential assassination ban was intended to prevent traditional military operations. Indeed, war would be difficult to win, or would be won at much greater cost to civilians and combatants, if a nation at war could not precisely target members of the enemy armed forces.

In war, the enemy includes foot soldiers and a command-and-control structure that extends up to the commander-in-chief. Also included are personnel and assets not directly engaged in hostilities, such as combat and combat support units, administration, communications, logistical personnel, and suppliers. Anyone who is a legitimate military target can be attacked with a variety of means. "All are lawful means for attacking the enemy," wrote W. Hays Park, one of America's most respected authorities on the laws of war.[60] "The choice of one vis-à-vis another has no bearing on the legality of the attack. If the person attacked is a combatant, the use of a particular lawful means for attack (as opposed to another) cannot make an otherwise lawful attack either unlawful or an assassination."[61] Those same rules govern American attacks upon al Qaeda leaders and planners today. It makes little legal sense for the United States to have the discretion to attempt to attack Qadhafi in response to Libya's terrorism, but to refrain from doing so against bin Laden or Zawahiri.

This is not to say that American agents have a hunting license for anyone suspected of being an al Qaeda operative. The rules of warfare, which give nations and their military the right to use deadly force to defeat an enemy, impose guidelines. These rules are not abstract, sterile, or restrictive, nor are they broken when a missile goes astray or nearby civilians lose their lives. The laws of war take into account that war is not a precise science and that unanticipated harms or loss of life ancillary to a military attack will occur.

A corollary of the right to kill enemy personnel and destroy assets is

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59) *See* Hugo Grotius, The Laws of War and Peace bk. III, § XVIII(1)–(2) (Francis W. Kelsey et al. trans., Lonang Inst. Electronic Ed. 2003) (1625), http://www.lonang.com/exlibris/grotius/gro-304.htm.

60) *See* Parks, *supra* note 35, at 5.

61) *Id.*

that the deaths of civilians that occur as a result of legitimate attacks against military targets are not illegal. This is the source of the idea of "collateral damage," which made its controversial appearance in the Vietnam War. But the rule is as old as war itself. The central principle of the laws of war is that innocent civilians should not be targeted. On the other hand, the rules of war accept the death of civilians in or near legitimate military targets.[62] Law recognizes that war does not yet amount to antiseptic surgery where we can zap cancers with lasers but leave healthy tissue nearby unharmed.

Thus, the United States does not commit murder if it bombs a location that contains both bin Laden and his associates, on the one hand, and their family members on the other. It does not commit murder in Iraq when, in the course of a firefight with Uday and Qusay Hussein, who were holed up in a residential building in the middle of a densely populated city, civilians living next-door are harmed. Rather, it is the terrorists who violate the rules of war by deliberately hiding themselves and their bases of operation within civilian populations, thereby drawing unwilling and unsuspecting innocents into the fighting. In another example of asymmetric tactics, terrorists multiply their strength by relying on the humanitarian morals of the West not to harm civilians. Terrorists know, depend, and capitalize on the fact that American military and civilian leaders are reluctant to launch attacks that might generate large numbers of civilian casualties.

Killing or disabling enemy personnel is of course what warfare is all about, but that does not mean that anything goes. The United States cannot use poison on terrorist leaders, or refuse to accept surrender, or shoot the wounded. One of the early laws of war treaties, known as the 1907 Hague Regulations, prohibits "kill[ing] or wound[ing] treacherously individuals belonging to the hostile nation or army," as well as killing or wounding an enemy who is helpless or has surrendered, or declaring "that no quarter will be given."[63] The U.S. military interprets this provision as "prohibiting

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62) *e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 48–58, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], *available at* http://www.unhcr.org/refworld/docid/3ae6b36b4.html.

63) Convention between the United States and Other Powers Respecting the Laws and Customs of War on Land, art. 23(b)–(d), October 18, 1907, 36 Stat. 2277 [hereinafter War Customs Convention].

assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'"[64] Assassination, which is equated with killing the enemy using treachery, is prohibited.

Banning "treachery" does not prohibit targeting individual enemy soldiers or commanders. This distinction was drawn in the very first effort to codify the rules of war, undertaken by Francis Lieber during the Civil War, and issued as General Orders Number 100 in 1863 to the Union armies.[65] Under the laws of war, "treacherously" refers to deceiving the enemy by disguising one's forces in the form of a noncombatant (and therefore protected from attack) or declaring an enemy outside the protection of the laws of war.[66] It could also include soldiers disguising themselves as civilians or Red Cross workers,[67] or refusing to accept a surrendering combat soldier, or placing a bounty on an enemy's head. The laws of war have never been understood to prohibit targeting specific enemy commanders or other personnel. Nor do they prohibit the use of

64) Dep't of the Army, Field Manual 27-10: The Law of Land Warfare, ¶ 31 (1956), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf. Hague Regulation 23(b) makes it "especially forbidden" to "kill or wound treacherously individuals belonging to the hostile nation or army." War Customs Convention, *supra* note 82. 23(c) makes it forbidden "to kill or wound an enemy, who, having laid down his arms, or having no longer means of defense, has surrendered at discretion." *Id.* 23(d) makes it forbidden "to declare that no quarter will be given." *Id.*

65) Those orders prohibited assassination and declared that "[t]he law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage." U.S. War Dep't Army, General Orders No. 100, § IX, §148 (1863), *reprinted in* Francis Lieber, Instructions for the Government of Armies of the United States in the Field § IX, ¶ 148, at 41 (1898), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Instructions-gov-armies.pdf.

66) *See* Parks, *supra* note 35, at 6.

67) *See* Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 Yale J. Int'l L. 609, 633 (1992). Protocol I to the Geneva Conventions, which the United States refused to ratify in 1987, continues the prohibition against "treachery" by prohibiting "resort to perfidy," which it defines as "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." Protocol I, *supra* note 81, at art. 37.

surprise, ruses, commando teams operating behind enemy lines, or stealthy tactics to kill enemy personnel. American forces could launch commando assaults to kill bin Laden, but they could not refuse his surrender, or dress as aid workers, or shoot him if he is wounded and unable to fight.

Even though al Qaeda members are legitimate targets, the United States could not drop a nuclear weapon to kill them (even if al Qaeda would not feel itself bound by such rules). Under the rules of war, soldiers obey the principles of "necessity," "discrimination," and "proportionality."[68] Necessity demands that nations engage only in destruction necessary to achieve a military objective.[69] Discrimination means targeting combatants and, within the limits of military technology, sparing civilians from the cruelty of war.[70] Proportionality requires that the means used in an attack and degree of destruction reasonably relate to the military goal.[71] War is not an excuse to wreak havoc or display vindictiveness against whole peoples.

Developed by the practice of armies over hundreds of years, these rules place significant limits on warfare. American bombers could not carpet bomb towns or cities to destroy a few al Qaeda cells. The forms of attacks must also abide by various laws of war treaties and steer clear of certain types of weapons that cause "unnecessary suffering," such as explosive bullets, poison, and chemical and biological weapons. But if the United States has a window of opportunity to target bin Laden or his henchmen, it can strike. It need only select means that will cause the least damage

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68) Dep't of the Navy et al., The Commander's Handbook on the Law of Naval Operations § 5.3 (July 2007), http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_%28Jul_2007%29_%28NWP%29.

69) Dep't of the Army, *supra* note 64, at ¶ 3; Dep't of the Navy et al., *supra* note 68, at § 5.3.1.

70) Dep't of the Army, *supra* note 64, at ¶¶ 2, 40.

71) *Id.* at ¶ 41. Protocol I defines proportionality by prohibiting operations that can "be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol I, *supra* note 81, at arts. 51(5)(b), 57(2)(a)(iii). The Navy manual defines proportionality as: "a balancing test to determine if the incidental injury, including death to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained." Dep't of the Navy et al., *supra* note 68, at § 5.3.3.

possible, under the circumstances, to surrounding civilians and buildings.

Advances in military technology allow the United States to avoid the high civilian death tolls of past wars to reach military targets. To destroy Japan's industrial base and induce it to surrender in World War II, the United States killed hundreds of thousands of civilians in firebombing attacks on cities such as Tokyo and Osaka, followed by the loss of life from the atomic bombing of Hiroshima and Nagasaki. American and British bombers destroyed German cities such as Berlin and Dresden, causing the deaths of tens of thousands of civilians. If the Allies could have killed Adolf Hitler with similarly indiscriminate levels of force, they surely would have done so. During the Cold War, America's strategic air and missile commands were prepared to launch assaults that would have killed millions of civilians to deter an attack on the West. The fear factor alone of enormous potential mass-killing, known as the strategy of "mutually assured destruction," was itself a tactic of the Cold War intended to avert such an outcome.[72)]

Today's technology allows the United States to target enemy commanders with pinpoint accuracy. Satellite reconnaissance and electronic eavesdropping allow it to spot the exact location of al Qaeda terrorists. Unpiloted drones can circle areas of known terrorist activity for hours on end, permitting the United States to act instantly on intelligence. Precision-guided munitions can hit targets within a margin of error of only yards, reducing civilian casualties. The United States used the lethal combination of intelligence and advanced weaponry on al-Harethi's car, Saddam Hussein's compound, and Zawahiri's dinner party. Even when attacks have failed, and only second-tier al Qaeda operatives were killed, civilian loss of life has been light in comparison with previous wars.

Al Qaeda will never follow the rules of war. Al Qaeda gains its only tactical advantages by systematically flouting them. American restraint in the use of force, the methods of attack, or the treatment of prisoners does not affect the incentives of al Qaeda members, who seek a goal of salvation in the afterlife. Suicide bombers are not susceptible to deterrence. However, al Qaeda's utterly lawless nature does not free the United States from all

72) *See* Edward N. Luttwak, Strategy and Politics Collected Essays 37 (1980).

constraints. Standard principles of reciprocity counsel that the United States follow customary rules on targeting and the use of force. But there is also ample historical and legal precedent for American policymakers to address creatively the unique threat that al Qaeda poses. There could be some areas in which rules of conduct could be negotiated—terrorist groups in the United Kingdom-IRA and the Israeli-Palestinian conflicts have successfully engaged in prisoner exchanges. But for al Qaeda to agree to play on a level playing field with the United States would be tantamount to its accepting defeat. Instead, the United States will have to draw on some old concepts, such as those used to confront piracy, and marry them to new ones, such as precision targeting through intelligence and technology.

II. Europe

"Between 2009-2013 there were 1010 failed, foiled or completed attacks carried out in EU member states."[73] For the past 50 years, the threat of terrorism always existed in some form in Europe from the UK's IRA, Germany's Red Army Fraction (RAF), Italy's Red Brigades to France's Action Directe, as well as Algerian Islamists attacks in Paris in the 1990s and Palestinian bombings against the French Jewish community. In Spain, terrorist attacks and assassinations that were planned and perpetrated by the military branch of the ETA (Euskadi Ta Askatasuna) caused the death of 829 victims over a period of almost fifty years. [74]

In November 2015, reacting to the massacre of more than hundred of innocent victims perpetrated an hour earlier in various Paris's venues, French President, François Hollande, declared « This is war ». His comment expressed French people's distress and anger caused by the unparalleled scope of the terrorist attacks, it did not accurately describe, however, the nature of the French State's tactics against terrorism. France along with its European neighbors that fell victims to similar terrorist attacks did not

73) http://www.consilium.europa.eu/en/policies/fight-against-terrorism/

74) For instance in 2006 alone, "Eleven member states were targeted by 498 terrorist attacks" cited by ANNA C. BEYER, Counter Terrorism and International Power Relations: The EU, ASEAN and Hegemonic Global Governance, London-New-York, 2010, 262 pp, at 70.

declare war on terror on its national territory.[75] Its military contribution to the fight against ISIS in Irak and in Syria finds no equivalent at home in the conception and implementation of counter terrorism policies. For the most part, European states' responses to this new threat consist in integrating existing criminal law provisions with expanded investigative procedures.

The legal distinction between armed engagement and the criminal prosecution of terrorist acts committed on national territory has delimited the range of available options in the European democracies' fight against terrorism.[76] Public opinion and governments alike often outline the legal and political consequences of this dichotomy that challenges the constitutional principles governing civil society and its institutions.[77] They interpret its mandate as preventing any form of public intervention outside the limits fixed by their respective legal systems. But this interpretation barely addresses the hybrid nature of Al Quaeda and Isis terrorist networks that combine international and domestic strategies with war like actions by the citizen against their own countrymen. The most recent attacks in France and Belgium were planned and funded by Isis but executed with the active support and contribution of European nationals. This challenge forces the states to reconsider their past anti terrorist strategies and ponder complex legal and political choices.[78] It requires the elaboration of adequate and effective responses to the terrorist menace that differs from the acts of domestic terrorism that defined the political environment of the past 50 years. [79]

The threat to the political and legal stability of European democracies is

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75) MITCHELL A. BELFER, The Geopolitics of Bandits and Bureaucrats: The EU's "War on Terrorism", in Europe, the Middle East, and the Global War on Terror: Critical Reflections, edited by ONDREJ BERANEK, 133 pp, at 13-41

76) STEFAN SOTTIAUX, Terrorism and the Limitation of Rights. The ECHR and the US Constitution, Oxford-Portland, 2008, xiii 443 pp.

77) SEUMAS MILLER, Terrorism and Counter-terrorism: Ethics and Liberal Democracy, Oxford, 2009, 222 pp.

78)JOLENE JERARD, *Facing the Challenge of the Evolving Terrorist Threat, in Analysis and Strategies to Counter Terrorism Threat*, ed. M.U.ERSEN and M. KIBAROGLU, Washington D.C., 2011. 63-79.

79) For a general overview of some countries's legislation in the decade after 9/11, *See* JAMES BECKMAN, Comparative Legal Approaches to Homeland Security and Anti-Terrorism, (2013).

compounded by the cultural and social consequences of a fractured civil society. The terrorists' self proclaimed ethnic and religious identity exposes the social fractures of national communities and the breakdown of the multiculturalist model in secular societies. France's recent failed attempt to deprive French nationals who perpetrated terrorist attacks of their citizenship created an intense political debate[80] even if such measure was more symbolic than effective in a counter terrorist strategy. Notwithstanding this French political fiasco, the German government is considering to introduce a similar measure that would deprive dual citizen who are fighting in a terrorist organization abroad of their German citizenship.[81] The significance of the apparent social and cultural fractures is amplified by the terrorist's self-justification and religious radicalism that opposes the values of the secular and democratic tradition and the respective autonomy of the religious and political domains.[82] In this regard as Rene Girard observed "the religious problem is the most radical one in that it goes beyond the ideological divides."[83]

International terrorism presents an unprecedented constitutional challenge for the European states to balance their duty to ensure the security of their citizens with constitutionally protected civil liberties.[84] The legitimacy of the Nation-State was built in part on its ability to provide a safe environment for its citizen. The extension of the Rule of Law doctrine to the definition of the European Welfare State underlined the essential

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80) Projet de loi relative a la lute contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux controles frontaliers, Article 11 (art. 25-1 du code civil) Déchéance de la nationalité française pour les auteurs d'acte de terrorisme ou constituant une atteinte aux intérêts fondamentaux de la Nation" https://www.senat.fr/rap/l05-117/l05-11720.html

81) Extremismus bekämpfen: Islamismus und Salafismus, 20.04.2016 Beschluss des Bundesfachausschusses Innenpolitik vom 16. April 2016 - Extremismus bekämpfen: Islamismus und Salafismus, https://www.cdu.de/artikel/extremismus-bekaempfen-islamismus-und-salafismus

82) RICHARD DIEN WINFIELD, Modernity, Religion and the War on Terror, Burlington, 2007, 143 pp at 39.

83)ROBERT DORAN, *Apocalyptic Thinking after 9/11: An Interview With Rene Girard* in SubStance: Cultural Theory after 9/11: Terror, Religion, Media, Madison, 2010, 170 pp, at 20 .

84) CARLO GUARNIERI, Preserving Rights and protecting the public: the Italian experience, in Courts and Terrorism: Nine Nations Balance Rights and Security, edited by MARY L. VOLCANSEK and JOHN F. STACK, Cambridge, 2012, 269 pp at 169-180.; HELENA KENNEDY, Legal Conundrums in our Brave New World, London, 2004, 57 pp.

significance of security for the functioning of democratic institutions. "Security" the French lawmaker declared in 1995 "is a fundamental right. It is a condition for the free exercise of liberties and of the reduction of inequalities. The state has the duty to provide security while ensuring, over the whole territory of the Republic, the defense of its institutions and national interests, the respect of laws, the maintenance of peace and public order, and the protection of people and goods".[85] Likewise the British government stated that: "The primary responsibility of any government must be to ensure the safety of its citizens. This must include looking at what powers the law enforcement agencies may need in future instead of waiting until current powers have been proved inadequate in an area as significant as national security."[86] The random violence of unpredictable attacks on the State's citizens prompted European governments and citizens to assess the nature and extent this public duty as the tragedies of the past two decades have shown the limitations of democracies' responses against terrorism.[87]

The terrorist attacks on 9/11 revealed a higher "level of threat, which required new legislative actions."[88] Within the following years, various acts of terrorism prompted new legislations but the governments' reactive approach prevented them from engaging in more proactive policies based upon a fundamental reevaluation of the nature of these threats. These legal reforms reflected the determination of public authorities to take into account the permanence of international terrorist threats but did not

85) "La sécurité est un droit fondamental. Elle est une condition de l'exercice des libertés et de la réduction des inégalités. L'Etat a le devoir d'assurer la sécurité en veillant, sur l'ensemble du territoire de la République, à la défense des institutions et des intérêts nationaux, au respect des lois, au maintien de la paix et de l'ordre publics, à la protection des personnes et des biens." It was reaffirmed in the LOI n° 2001-1062 du 15 novembre 2001 relative à la sécurité quotidienne, Art. 1.

86) http://www.official-documents.gov.uk/document/cm72/7215/7215.pd

87) DIRK LAMNER, *Wie weit reicht das Sicherheitsprechen des Staates*? in KURT GRAULICH and DIETER SIMON, Terrorismus und Rechtsstaatlichkeit: Analysen, Handlungsoptionen, Perspektiven, Berlin 2007,, xiii and 429 pp, at 315-332.

88)ANNA OEHMICHEN, Terrorism and Anti-Terror Legislation: The Terrorised Legislator?, a comparison of counter-terror legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany and France, Antwerp-Portland, 2009, 439 P. p. 166.

anticipate the nature and form of future attacks. In the aftermath of 9/11, several European countries revised their existing anti terrorist provisions following the *Framework Decision on combating terrorism* issued by the Council of the European Union in April 2002. The council promoted the adoption of a series of new criminal procedures and cooperative initiatives between the member states. It described terrorism as "one of the most serious violations" to "the principle of democracy and the principle of the rule of law, principles which are common to the Member States" and "a threat to democracy, to the free exercise of human rights and to economic and social development."[89)]

In the UK, the 2000 terrorism Act was amended by the Anti Terrorism, Crime and Security Act that was amended and expanded by successive Acts[90)] The London bombings in 2005 add a new sense of urgency and prompted a legislative impulse to strengthen the existing legal provisions.[91)] Germany extended its counter-terrorism provisions beyond the limits of criminal law by adopting two Anti Terror platforms at the end of 2001.[92)] Article 4a of the Federal Criminal Code affirmed the jurisdiction of the federal authorities in the prevention of international terrorist "offenses (in 129a paragraph 1 and 2 of the Criminal Code) intended to intimidate the population, a government agent or an international organization by force or threat of force or to destroy or significantly affect the political, constitutional, economic or social structures of a state or an international organization and damage by its effect a state or an international organization."[93)]

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89)Council Framework Decision of 13 June 2002 on combating terrorism *Official Journal L 164 , 22/06/2002 P. 0003 – 0007,* eurlex.europa.eu/legalcontent .

90) http://www.legislation.gov.uk/2001?title=terrorism

91) http://www.legislation.gov.uk/ukpga/2000/11/contents: "terrorist" means a person who— (a)has committed an offence under any of sections 11, 12, 15 to 18, 54 and 56 to 63, or (b)is or has been concerned in the commission, preparation or instigation of acts of terrorism.

92) Criminal Law Code § 129a StGB – Bildung terroristischer Vereinigungen

93) Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten (Bundeskriminalamtgesetz - BKAG) § 4a BKAG: "Es kann in diesen Fällen auch Straftaten verhüten, die in § 129a Abs. 1 und 2 des Strafgesetzbuchs bezeichnet und dazu bestimmt sind, die Bevölkerung auf erhebliche Weise einzuschüchtern, eine Behörde oder eine internationale Organisation rechtswidrig mit Gewalt oder durch Drohung mit Gewalt zu nötigen oder die politischen, verfassungsrechtlichen, wirtschaftlichen oder sozialen Grundstrukturen eines Staates oder einer internationalen

The Madrid attack on 11 March 2004, killing almost 200 people and injured many others led to the adoption of Organic Law 4/2005 that took into account new forms of terrorism and the threat of terrorist bombing. More recently in 2015, a new law[94] Italy updated its anti terrorism and anti mafia laws passed in the 1970's with new provisions that were eventually finalized in April 2015. In response to the European council's 2002 decision In Italy, a decree-law from October 2001 adopted "urgent provisions to counteract international terrorism" and prosecute "Anyone promoting, establishing, organizing, directing or financing associations aimed at committing acts of violence with the purpose of terrorism or subversion of democracy."[95] Within a few years, in 2005, a second decree-law "Pisanu" amended article 270 of the penal code to take into account the new forms of international terrorism and to redefine terrorist acts as " the conducts which, by their nature or context, may seriously damage a country or an international organization and are committed for the purpose of intimidating a population or compelling a Government or international organization to perform or abstain from performing any act, or destabilizing or destroying the fundamental political, constitutional,

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Organisation zu beseitigen oder erheblich zu beeinträchtigen, und durch die Art ihrer Begehung oder ihre Auswirkungen einen Staat oder eine internationale Organisation erheblich schädigen können."

94) Ley Orgánica 2/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, en materia de delitos de terrorismo. BOLETIN OFICIAL DEL ESTADO 77(31 de marzo 2015) "El terrorismo internacional de corte yihadista se caracteriza, precisamente, por haber incorporado esas nuevas formas de agresión, consistentes en nuevos instrumentos de captación, adiestramiento o adoctrinamiento en el odio, para emplearlos de manera cruel contra todos aquellos que, en su ideario extremista y violento, sean calificados como enemigos. Estas nuevas amenazas deben, por tanto, ser combatidas con la herramienta más eficaz que los demócratas pueden emplear frente al fanatismo totalitario de los terroristas: la ley. Este terrorismo se caracteriza por su vocación de expansión internacional, a través de líderes carismáticos que difunden sus mensajes y consignas por medio de internet y, especialmente, mediante el uso de redes sociales, haciendo público un mensaje de extrema crueldad que pretende provocar terror en la población o en parte de ella y realizando un llamamiento a sus adeptos de todo el mundo para que cometan atentados."

95) Decreto-legge 18 ottobre 2001, n. 374, Disposizioni urgenti per contrastare il terrorismo internazionale" http://www.parlamento.it/parlam/leggi/01438l.htm. *See* also, SERGIO ZEULI, TERRORISMO INTERNAZIONALE: COMMENTO ORGANICO AL D.L. 18-10-2001, n. 438, Napoli, 2002, 233 p.

economic and social structures of a country or an international organization, as well as other activities defined as terrorist or committed for purposes of terrorism by conventions or other rules of international law binding on Italy."[96)]

The recent approval by the Italian Senate in April 2015 of the new "anti-terrorism decree" introduced several legal measures specifically aimed at combatting international terrorism. The new provisions depart from the more traditional amendment to the Criminal Code in relation to terrorist offenses given "the extraordinary necessity 'to adopt urgent measures, including punitive nature, in order to prevent recruitment into terrorist organizations and carrying out terrorist acts, strengthening altresi 'the attivita' of Information System for the Security of the Republic."[97)] Belgium updated its 1998 anti terrorism legislation[98)] in 2003 with new provisions inserted in its criminal code[99)] that were further expanded after the deadly attacks in Brussels in March 2016.[100)] Additionally, Belgium, France and Italy[101)] implemented a public security plan that includes the use of the armed forces not only in ensuring the security of strategic sites but also in assisting the law enforcement agencies with public security. The measures "Sentinelle" in France and "vigilant guardian" in Belgium reflect however

96) http://www.camera.it/parlam/leggi/05155l.htm, art. 270: "*1. Sono considerate con finalità di terrorismo le condotte che, per la loro natura o contesto, possono arrecare grave danno ad un Paese o ad un'organizzazione internazionale e sono compiute allo scopo di intimidire la popolazione o costringere i poteri pubblici o un'organizzazione internazionale a compiere o astenersi dal compiere un qualsiasi atto o destabilizzare o distruggere le strutture politiche fondamentali, costituzionali, economiche e sociali di un Paese o di un'organizzazione internazionale, nonche' le altre condotte definite terroristiche o commesse con finalità di terrorismo da convenzioni o altre norme di diritto internazionale vincolanti per l'Italia.*»

97) http://www.gazzettaufficiale.it/eli/id/2015/02/19/15G00019/sg

98) 30.11.1998 Loi organique des services de renseignement et de sécurité: that defined terrorism as " le recours à la violence à l'encontre de personnes ou d'intérêts matériels, pour des motifs idéologiques ou politiques, dans le but d'atteindre ses objectifs par la terreur, l'intimidation ou les menaces " (article 8, 1°b)

99)www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1998113032

100) Chambre des représentants. Projet de loi relatif à des mesures complémentaires en matière de lutte contre le terrorisme. DOC 54 1727/004. 07.04.2016 www.lachambre.be/FLWB/PDF/54/1727/54K1727004.pdf

101) Law of April 2015, article 6 on the "Intensification and extension of the use of military personel who are part of the armed forces."

the ambiguous use of the army in areas that fall traditional under the jurisdiction of the law enforcement agencies. The reassuring presence of armed soldiers in the cities' street should not distract from the fact that in Western democracies the primary mission of the armed forces is not to safeguard domestic public security but to engage enemy forces outside the national territory. Their operational structure, rules of engagement and chain of command are defined by this primary mission and their human and budgetary resources are not adapted to police operations that require different types of on site presence and skills for which soldiers are not trained.[102] The short term psychological benefit of a military presence in addressing the fears of a population traumatized by the barbarous violence of terrorist murderers should be carefully weighted against the actual risk for these countries of significantly undermining the strength and the capacity of their military power.

Prior to 2001, anti-terrorist legislation mainly dealt with domestic terrorism. This past experience served as the basis for the development of the new policies. For instance, Germany's response to terrorism based on its experience in combatting the attacks and wave of assassinations perpetrated by the "Rote Armee Fraktion" of the Baader group shaped its criminal law. Likewise, in 1986, France's first anti-terror law defined terrorism as "any individual or collective action that severely disturbs the public order through intimidation or terror."[103] The government's fight against ETA's armed struggle define Spain's initial legal response to terrorism.[104] The recent declaration of the Spanish lawmakers, in March 2015, introduced the new counter terrorist statute in these terms: "The experience of the struggle against terrorism has given us the possibility to rely upon a penal legislation that is efficient against acts of terrorism perpetrated by organized groups such as ETA or the GRAPO, these are

102) On the French "Operation Sentinelle" see the excellent report by Elie Tenenbaum, *La Sentinelle égarée? L'armée de terre face au terrorisme»*., and the various legal and political issues created by the French government's decision. https://www.ifri.org/en/publications/etudes-de-lifri/focus-strategique/.

103) *Loi n° 86-1020 du 9 septembre 1986 relative à la lutte contre le terrorisme et aux atteintes contre la sureté de l'état* http://www.legislationline.org/topics/country/30/topic/5

104) Committee Of Experts on Terrorism (CODEXTER), Council of Europe, Profiles on Counter-Terrorist Capacity, Spain, May 2013 (available at:

well structured terrorists groups that are structured around one or more leaders, with a clear organic structure and repartition of distinct roles in the organization and with clear hierarchical relationship that are defined and observed by the members of the terrorist group."[105] Terrorists are defined as "those who belonging, acting in the service of or collaborating with armed groups, organizations or groups whose objective is to subvert the constitutional order or seriously alter public peace."[106]

A comparative review of current legislation in the European countries that are the victims of terrorism reveals similar legislative patterns in the conception and implementation of legal measures for the prevention and the repression of terrorist acts. These similitudes reflect not only the states' common penal philosophy but express also shared political values that govern the public authorities' preference for relying upon existing criminal law provisions and procedure while considering terrorism a domestic threat. The greater part of anti-terror legal measures is grouped in the Criminal Codes and Criminal Procedure Codes in the European countries that are part of the civil law tradition.[107] This choice results from the combination of political, legal, institutional and social factors that influenced the governments' decision-making process.

First, Democratic justifications put aside, the decision to consider terrorism as a domestic threat and to remain within the legal framework of the existing legislation is an expedient that reduces the risks of political crisis. From the ruling party's standpoint it presents the advantage of preempting unrest in the legislature and limiting the constitutional

105) *See* for instance the recent Ley Orgánica 2/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, en materia de delitos de terrorismo. BOLETIN OFICIAL DEL ESTADO 77(31 de marzo 2015): "La experiencia de la lucha contra el terrorismo en España nos ha permitido contar con una legislación penal eficaz en la respuesta al terrorismo protagonizado por bandas armadas como ETA o el GRAPO, esto es, grupos terroristas cohesionados alrededor de uno o varios líderes, con estructura orgánica clara, reparto de roles dentro de la organización y relaciones de jerarquía definidas y asumidas por los integrantes del grupo terrorista."

106) Criminal Code Article 571.

107) For legislation prior to 9/11, *See* MURIELLE RENAR, Les Infractions de Terrorisme Contemporain au regard du Droit Pénal, Villeneuve d'Ascq, 1996, 349 pp.; J.-P. MARGUENAUD, *La qualification pénale des actes de terrorisme*, Revue de Sciences Criminelles (1990) at 1.

challenges that might undermine the cooperation of the players on the political chessboard. Secondly, the decision not to deviate from the domestic approach tends to favor institutional continuity over the creation of new administrative structures that would be more adapted to the fight against international terrorism. This administrative conservatism relies upon the existing divisions that delimit the area of competence between the diverse jurisdictions of police and public security forces that are often protective of their own prerogatives. The institutional continuity benefits also from the implementation of legal procedures that result from the structure of the jurisdictional order. Thirdly, resorting to penal rules respects the overall consistency of the legal system without creating a concurrent system of rules that would create an extraordinary procedure under a state of exception. Finally from the society's perspective, there are reasons to believe that the existing legislation that is often the result of a political compromise, would be more protective of civil liberties than any type of exceptional measures that could undermine the social fabric of pluralist communities.

However, the politically expedient choice to apply measures initially developed to combat domestic terrorism produces also diverse undesirable consequences. On one hand, at the international level, it hampers the States' transnational cooperation as it upholds the fiction that terrorist attacks are a domestic and not an international problem. In doing so, it promotes a nationalist approach that encourages isolationism in the false belief that home-grown solutions that are more protective of national interest have a better chance of success. The failure of this strategy is particularly noticeable in dealing with the issue of extraterritoriality.[108] The limited international competence of national jurisdictions results often in the impunity of the terrorist criminal whose activities successfully exploit the jurisdictional vacuum created by their transnational dimension.

On the other hand, at the national level, these choices maintain the

108) *See* for instance Section 89b of the German Criminal Code, *Establishing contacts for the purpose of committing a serious violent offence endangering the state*." Outside the territory of the member states of the European Union this shall apply only if the act of establishing or maintaining contact is committed by a German citizen or a foreign citizen whose existence is based within the territory of the Federal Republic of Germany"

institutional partition into diverse criminal jurisdictions and do not facilitate the cooperation between the services in charge of public security. The dysfunction of the systems of communication is compounded by the rapid obsolescence of the administrative procedures and outdated data banks that impair the international exchange of information in the identification of radicalized individuals. For instance, the failure of to identify one of the authors of the Paris attacks during a traffic stop on the freeway when he was on his way back to Belgium, is one of the most glaring breakdown in the communication of essential information. The detection and surveillance of the individuals who received military training in Syria or Irak and returned to Europe represents one of the greatest challenges to the national intelligence services. The freedom of movements of radicalized suspects and potential terrorists between Europe and the Middle East exposes the structural failures in the existing systems.

Overall, diverse measures are adopted in the two main areas of investigation and preventive detention. They include the expansion of investigative powers and the right to detain suspected terrorists without charge for longer period of time. Several countries added provisions to their Criminal Procedure Code to provide more effective procedures in the gathering of evidence. Amendment to prior legislation affected mainly the legal requirements for search of premises, search of persons and seizure of information. In cases involving terrorism, new provisions in the French Criminal procedure code have extended the police powers in home searches,[109] seizures,[110] police custody,[111] and video-surveillance.[112] The extension of the "state of emergency" by the law of 21 July 2016 significantly expanded the scope and number of home searches and

109) Law n°96-1235 du 30 december 1996 concerning pre charge detention and night searches in terrorist matters. amended in 2001.Articles 76, 78-2-2 (vehicle inspection), 706-80 (nation-wide surveillance), 78-2 (identity checks on trains), 706-81 to 687 (infiltration operations), 706-696 (tapping of phones, authorized by the liberties and detention judge) and 706-97 to 706-97-6 (sound-recording and image-fixing devices by order of investigating judge after consultation of public prosecutor and consent of the liberties and detention judge) of the Code of Criminal Procedure

110) LOI n° 2001-1062 du 15 novembre 2001 relative à la sécurité quotidienne https://www.legifrance.gouv.fr/eli/loi/2001/11/15/INTX0100032L/jo/texte

111) Article 706-88 of the Code of Criminal Procedure

112) Law of 21 January 1995

seizures.

The terrorist attacks in Brussels in March 2016 and the use of this country as a base for terrorists units planning attacks in France or elsewhere fostered a renewed sense of urgency in amending the Belgium penal procedure code in order to address these new threats in a country which was until now ill equipped to deal effectively with transnational terrorism. The recent decision to modify the rule regulating home searches and to allow them during the night between 9:00 pm and 5:00 am reflect the government and the public opinion awareness of the terrorist threat. It repelled the former interdiction of night searches (between 9:00 pm and 5:00 am) that presumably prevented the Belgian police from apprehending the surviving member of the terrorist group responsible for the deadly Paris attacks in November 2015.[113] Italy' decree-law and the law of conversion of 15 December 2001 streamlined bureaucratic procedures and expanded the searches to entire buildings or blocks of buildings when there is reason to believe that they might harbor terrorist suspects.[114] Germany residential searches in the absence of owner's consent are authorized by article 104 of the code of criminal procedure.[115]

Pre charge detention is clearly an essential component of the prevention and public security process. Terrorist conspiracies differ significantly in transnational scope and complexity from typical criminal enterprises. Investigations require more time for the coordination of multiple agencies with diverse competences and the collection of information from various domestic and international sources. Over the past fifteen years the extensions of periods of police detention without a warrant reflect a legislative pattern and concerns for public safety that are common to several European countries. The decision to provide the services in charge of public security with more effective tools in identifying individuals suspected of preparing a terrorist attack and preempting any future

113) https://www.koengeens.be/fr/news/2016/03/30/

114) Decree Law 18 October 2001, art. 3: "Disposizioni sulle intercettazioni e sulle perquisizioni". http://www.parlamento.it/parlam/leggi/01438l.htm

115) § 104 Straf Prozess Ordnung – Durchsuchung von Räumen zur Nachtzeit(1) "Zur Nachtzeit dürfen die Wohnung, die Geschäftsräume und das befriedete Besitztum nur bei Verfolgung auf frischer Tat oder bei Gefahr im Verzug oder dann durchsucht werden, wenn es sich um die Wiederergreifung eines entwichenen Gefangenen handelt."

terrorist threat responds to a double necessity to withstand constitutional challenges and clearly delimit a legal framework that takes into account the complexity and diversity of the investigations and the collection of relevant evidence.

In the UK preventive detention was initially developed in response to the IRA actions in Northern Ireland.[116] The length of pre charge detention was increased up to seven days by the Prevention of Terrorism (Temporary Provisions) Act 1984 but indefinite pre charge detention of terrorist suspects without judicial scrutiny violated article 5(3) of the European Convention on Human Rights (ECHR). Successive Counter Terrorism Acts extended the period from 7 to 42 days (2008) with the requirement for judicial oversight. This period was eventually reduced to the current time of 28 days. It might be extended under proper judicial scrutiny in exceptional circumstances. Judicial approval is conditioned by requirements of diligence and expeditiousness in the investigative process and the necessity to obtain relevant evidence.[117]

In France, preventive detention was first prolonged to 4 days by the statute on daily security in 2001 and 6 days in 2006 "when there exist a serious risk of imminent terrorist action in France or abroad and that the necessity of international cooperation requires it imperatively."[118] This measure has been rarely used since 2006 but to the necessity to protect effectively the public from the growing threat of coordinated attacks by several terrorist units operating in concert requires better capacity to

116)MARY L. VOLCANSEK, *The British experience with terrorism: from the IRA to Al Qaeda* in COURTS AND TERRORISM: NINE NATIONS BALANCE RIGHTS AND SECURITY op. cit, 89-111; SUSANNE FORSTER, Freiheitsbeschrankungen für mutmassliche Terroristen: eine Analyse der Terrorismusgesetzgebung des Vereinigten Königreichs, Berlin, 2010, 342 pp.

117) In its reply to the nineteenth report from the joint committee on Human Rights - session 2006-07, the British government affirmed that : "Once a person has been arrested, their continued detention can only be authorised on the grounds that it is necessary to obtain, examine or analyse evidence, or information with the aim of obtaining evidence. The purpose of the extended detention time is to secure sufficient admissible evidence for use in criminal proceedings." The Government Reply To The Nineteenth Report From The Joint Committee On Human Rights Session 2006-07 H.L. Paper 157, H.C. 394, Counter-Terrorism Policy And Human Rights: 28 Days, Intercept And Post-Charge Questioning, 2007-08, Cm 7215, *at* http://www.official-documents.gov.uk/document/cm72/7215/7215.pd

118) Law n° 2006-64 du 23 january 2006 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers.

disrupt their logistics and support among radicalized religious groups. We observe a similar trend in the increase of the period of detention in police custody of terrorist suspects in other European countries. It might be extended up to 4 days in Italy while in Spain the police may detain a suspect for up to five days without bringing him before a judge who might decide to extend the period up to 13 days. In Belgium, the proposition of the government to increase the period of police detention from 2 days to 3 days has generated as intense political debate.

The extension of investigative powers is often complemented with restrictions on freedom of movements of suspected terrorists. These measures are essential in dealing with criminals who are able to exploit the weaknesses of the international security systems in a Europe without borders. The abolition of border and passport control in the Schengen area that comprises twenty-six European countries makes it difficult if not impossible to control the travels and traffics of terrorist groups. The European Union's decision to enforce the right of freedom of movement in a common market significantly undermines any attempts at developing a concerted European solution to this de facto impunity. The apparent facility of entry and re-entry of Isis terrorist cells in Europe during the past year clearly shows the limits of the current European practice. Porous or inexistent borders between EU member states seem to work mostly to the benefit of the terrorists and not to the benefit of state security agencies that are still constrained by the multiple bureaucratic and structural hurdles that impair transnational cooperation. The large influx of political and religious refugees from the war zones in the Middle East and the resulting displacement of entire local communities further complicate a situation that is only partially controlled by the welcoming countries.

Germany, France and Italy are facing a profound migrant crisis that poses a significant challenge to their asylum's rules and to the homogeneity and stability of their civil society. The conflict between European ideals and the permanence of the international terrorist threat generates much alarm in the European public opinion. Several EU member states are rethinking their open borders policy that allows terrorists and criminal alike to evade the control of poorly coordinated national security agencies. The unexpected success of the pro-Brexit vote in the United Kingdom energized Euroskeptic movements in several countries as it expressed the people's

doubts about the economic and cultural viability of the European Union model without borders which is unable to ensure the safety of its populations. The failure to monitor transnational movements of terrorism suspects underscores the necessity for European states to keep a better control on the movements of their own radicalized citizen who maintain contacts with ISIS and Al Qaeda operatives abroad. The expected defeat of ISIS and loss of its territory in Syria and Irak raise the threat of a return of ISIS fighter to European countries and social networks that would welcome and harbor them. The recent dismantling of dormant cells in Spain, France and Germany underscores the imminence of threats and the imperative necessity to increase the resources and legal tools that should provide the security agencies with better options in identifying returning terrorist fighters.

British public authorities implemented restrictions on freedom of movements of suspected terrorists that were introduced by control orders during the years of the conflict in Northern Ireland. The Prevention of Terrorism Act (2005) implemented Control Orders that imposed various restrictions on free movement . The legal challenges brought against this procedure led to their gradual replacement in 2011 with the Terrorism Prevention and Investigation Measures (TPIM) that are more adapted to the legal requirement imposed by the respect of the rule of law. TPIM may be decided by the Secretary of State with the control of the judiciary in cases of terrorism related activity for the protecting the public and the prevention of further activities in the activity. They comprise diverse options including House detention, Electronic Tagging, Assigned Residence and Forced Relocations. Restrictions on travel within or outside the UK may also be imposed.

In France, the law n° 2014-1353 from 13 November 2014 established a procedure for the interdiction to leave the national territory. Article 224-1 of the Code of Interior security states that any French citizen may be prevented from leaving the French territory if there are serious reasons to believe that he his "moving abroad in order to take part in terrorist actions."[119] This interdiction to leave the French territory is valid for six

119) Code de la Sécurité intérieure, article L 224-1, modified by law 2016-987 from 21 July 2016-art. 11: 'Tout Français peut faire l'objet d'une interdiction de sortie du territoire lorsqu'il

month and requires the confiscation of the passport. It may be prolonged for justified reasons. Violation of the interdiction is punished by a three years imprisonment.

We can find similar provisions in the article 4 of the recent Decree-Law from 18 February 2015 promulgated in Italy.[120] This new legislation introduces "urgent measures to combat terrorism, even in its international form," and to promote international cooperation for "the consolidation of peace and stability."[121] In that same year, the German lawmakers added additional anti-terrorism legislation[122] to limit the movements of radicalized individuals who attempt to travel outside the country "with the intent to receive terrorist training."[123] It also imposed more restrictions on the use of a passport or ID card for nationals and foreigners.

The effective physical control of the movements of terrorists and radicalized individuals may still be difficult to achieve. That it should remain a priority in preventing terrorist attacks does not conceal the fact that the movement of persons is only but one aspect of the terrorist groups' capability to plan and carry on new attacks. Their ability to use the internet and its technology is a fundamental part of their strategy.[124] The

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existe des raisons sérieuses de penser qu'il projette :1° Des déplacements à l'étranger ayant pour objet la participation à des activités terroristes ;

120) DECRETO-LEGGE 18 february 2015, n. 7. Article 4-1b. Modifi che in materia di misure di prevenzione personali edi espulsione dello straniero per motivi di prevenzione terrorismo

121) Op. cit. (supra), Misure urgenti per il contrasto del terrorismo, anche di matrice internazionale, nonché proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle Organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione.

122) Gesetz zur Änderung der Vorbereitung von schweren staatsgefährdenden Gewalttaten [GVVG-Änderungsgesetz- GVVG-ÄndG] (June 12, 2015), BUNDESGESETZBLATT [BGBl.] I at 926; Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes (June 20, 2015), BGBl. I, 970)

123) Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes (June 20, 2015), BGBl. I, 970.) § 6a;

124) https://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf: at 1 "Technology is one of the strategic factors driving the increasing use of the Internet by terrorist organizations and their supporters for a wide range of purposes, including recruitment, financing, propaganda, training, incitement to commit acts of

interception of information and the disruption of their communication networks is an essential investigative tool for countering the terrorism threat. Reconciling the extension of this form of intelligence gathering with the principles of criminal procedure has become one of main concerns for European countries and the international community. The transnational nature of online terrorist activity requires increased cooperation between the EU member states. But successful counter terrorist strategy should still rely upon each countries' readiness to develop its technological capacity and the legal tools that will facilitate its use. Therefore computer surveillance and the use of intercept evidence complete the set of investigative measures that are indispensable to protect the public against terrorist threats.

The UK long established ban on the use of intercept evidence in court has proven to be a serious hindrance in the successful prosecution of terrorist groups which rely successfully on the internet and the social medias to coordinate their attacks and persuade local "lone wolves" to commit deadly onslaughts. The Regulation of Investigatory Powers Act in 2000 authorized the interception of all forms of communications by security and intelligence agencies obtained under a warrant of the Secretary of State. [125] But section 17 of that same Act confirmed the inadmissibility of this type of evidence in the judicial process. In the face of this established doctrine, the British government is considering various models to reconcile the legal and operational requirements. In 2009 the Home Secretary, Alan Johnson, stated that "the issues involved are complex and difficult, and addressing them commensurately challenging." But he reaffirmed "the importance of our interception capabilities to national security and public protection". [126] The legal and political issues are still being debated. In December 2014, the governmental review of intercept as evidence that was based on a comparative study of the models implemented in other European

terrorism, and the gathering and dissemination of information for terrorist purposes."

125) The Use of Intercept Evidence in Terrorism Cases Standard Note: SN/HA/5249 Last updated: 24 November 2011 Author: Alexander Horne , Home Affairs Section at researchbriefings.files.parliament.uk/documents/SN05249/SN05249.pdf

126) Home Office, Intercept as Evidence: A Report, Cm 7760, December 2009. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228715/7760.pdf

countries, concluded that these "models used in these countries had limited relevance to the UK" as "The review could not identify an intercept as evidence model which would meet legal and operational requirements." [127)]

The British legal treatment of intercept evidence is not widely shared in other EU countries where the use of intercept material as evidence is more common. France introduced additional provisions to the Article 230 of its code of criminal procedure. Law 2014-1353 from 13 November 2014, addresses the need for technical assistance in the gathering information from encrypted data under judicial scrutiny.[128)] Several article of the Code of interior security govern the access and use of data processed and stored by telecommunication operators. Article L241 affirms that "The secrecy of correspondence issued through electronic communications is guaranteed by law." But the following article (L242) makes clear that in exceptional circumstance the interception of electronic communications may be authorized in the interest of national security and the prevention of organized terrorism. These provisions will be amended on January 1 2017 when the new law of July 16th, 2016 enters into effect. Its article 15 (amending article L851 of the code of interior security) defines the new the modalities for the interception of communications and authorizes "for the purposes of the prevention of terrorism alone, the collection in real time on the networks of operators of information or documents relating to a person previously identified liable to be connected with a threat." This collection of information may be extended to any person belonging to the entourage of the person concerned by the authorization.[129)]

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127) https://www.gov.uk/government/publications/intercept-as-evidence-review

128) Art. 230-1: "lorsqu'il apparaît que des données saisies ou obtenues au cours de l'enquête ou de l'instruction ont fait l'objet d'opérations de transformation empêchant d'accéder aux informations en clair qu'elles contiennent ou de les comprendre, ou que ces données sont protégées par un mécanisme d'authentification, le procureur de la République, la juridiction d'instruction, l'officier de police judiciaire, sur autorisation du procureur de la République ou du juge d'instruction, ou la juridiction de jugement saisie de l'affaire peut désigner toute personne physique ou morale qualifiée, en vue d'effectuer les opérations techniques permettant d'obtenir l'accès à ces informations, leur version en clair ainsi que, dans le cas où un moyen de cryptologie a été utilisé, la convention secrète de déchiffrement, si cela apparaît nécessaire."

129), Code de la Securité interieure VIII-5-1, Chapitre Ier : Des accès administratifs aux données de connexion https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI0

A similar authorization was placed under judicial control by article 588ter of the Spanish modified by the Organic Law 13/2015 from October 5th, 2015 on the "Strengthening of procedural safeguards and regulation of measures of technological investigations."[130] In 2005 the implementation of the Terrorism Prevention and Protection Plan (PPPA) had already imposed the obligation on the part of internet providers and telecommunications operators to store, electronic communication data for a period of 12 months.[131] In Italy article 4-bis of the decree Law from February 2015 on the measures in matters of collection and use of telecommuniction data expands the powers of the security and law enforcement agencies in requesting data retention for terrorism cases for a period of 24 months.[132] Belgium's concerns for communications intercept were addressed by the Royal Decree determining the modalities of the obligation of legal collaboration in the case of requests concerning electronic communications by the intelligence and security services (12. October 2010) following the law of 4 February 2010 on the Methods of data collection by the intelligence and security services that amended the law of 30 November 1998 of the intelligence and security services. Article 18-2 outlines the procedure for specific methods of collecting information such as the "intrusion into a computer system, whether or not using technical means, false signals, false keys or false qualities as well as listening, acquiring knowledge and recording communications.[133] These methods are placed under the control of an Administrative Commission in charge of monitoring specific and

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00030935595&idSectionTA=LEGISCTA000030935579&cidTexte=LEGITEXT000025503132&dateTexte=20171231.

130) Boletin Oficil del Estado núm. 239, 6th October 2015, Section I, p. 90192. https://www.boe.es/boe/dias/2015/10/06/pdfs/BOE-A-2015-10725.pdf

131) Committee of Experts on Terrorism, Council of Europe, Profiles on OCUnter terrorism capacity, Spain, May 2013. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064102c

132) *See* PATRIZIA CAPUTO La conservazione dei dati di traffico telefonico e telematico nella normativa antiterrorism ARCHIVIO PENALE 2016, n. 1 Fascicolo n. 1 – Gennaio-Aprile 2016, https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/910754/index.html?part=dossier_dossier1-sezione_sezione12-h2_h26,

133) 4 FEVRIER 2010. - Loi relative aux méthodes de recueil des données par les services de renseignement et de sécurité , http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2010020426

exceptional data collection methods for intelligence and security services.

The German Federal Republic initiated several reform over the last 10 years. Section 20k of the Federal Office of Criminal Investigations Act enacted in December 2008, gave the Federal Office of Criminal Investigation the right to initiate computer surveillance through cookies or Trojan horses.[134] Similarly, the Act for the Amendment of Telecommunications Surveillance (Gesetz zur Neuregelung der Telekommunikationsüberwachung) of 21 December 2007, defined the legal standards for obtaining, storing, and accessing telecommunication data.[135] Some provisions of this law, However, the obligation for telecom companies to retain data from telephone, email, Internet traffic, and cell phone location data for six months[136] and make them available to law enforcement agencies for safety purposes was ruled unconstitutional in 2010.[137] In 2008 the statute on the protection against the threats of international terrorism by the federal Criminal Agency imposed stricter rules on online searches, and telecommunications monitoring.[138]

The German Parliament adopted, on 16 October 2015, a new Data Retention Act ('the Act'), requiring telephone and internet providers to store traffic data for ten weeks, and location data for four weeks. On April 20 2016, the Constitutional court ruled that the authorization of the Federal Criminal Agency to use secret surveillance measure against threats of international terrorism was in principle compatible with the protection of fundamental rights but that the reference to the principle of proportionality was not sufficient to guarantee its proper use.[139] It found that data from

134) http://www.legislationline.org/topics/country/28/topic/5

135) https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2010/bvg10-011.html

136) §§ 113a, 113b of the Telecommunications Act (Telekommunikationsgesetz - TKG) and § 100g of the Code of Criminal Procedure (Strafprozessordnung - StPO)

137) https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2010/bvg10-011.html

138) Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt vom 25. Dezember 2008 (BGBl I S. 3083)

139) BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. (1-29), http://www.bverfg.de/e/rs20160420: "Für Daten aus Wohnraumüberwachungen und Online-Durchsuchungen darf die Verwendung zu einem geänderten Zweck allerdings nur erlaubt werden, wenn auch die für die Datenerhebung maßgeblichen Anforderungen an die

home searches and online monitoring may however be allowed only if the relevant data collection requirements are met in light of assessment of the risk situation. Paying particular attention to the echange of datas between countries, the Court stated that the transmission of data to governmental authorities in other countries was subject to the general principles of constitutional law in the respect of the other countries' legal systems. It conditionned the transfer of data abroad to the assurance that the use of these data by the receiving country will be made in accordance with this country constitutional principle. The German constitutional court decision echoes the legal concerns previously expressed by the European Court of Justice in a similar case.[140] It is the lastest illustration of the delicate balance that European states must achieve between developing an arsenal of legal measures that would effectively protect against terrorist attacks and the necessity to remain dedicated to the democratic ideals that separate them from the barbarous actions of their agressors.[141]

Next to the expansion of investigative powers, the criminalization of new offences constitutes the indispensable counter part of preventive measures in the development of new counter terrorism strategies. Several countries increased the punishment for crimes of a terrorist nature. But these legal reforms do not reflect a significant change in the general conception of penal policies. The fact that international terrorist attacks are perpetrated by the countries' own citizen should not induce the public authorities in the mistaken belief that they are once again facing another wave of domestic terrorism. In this regard, terrorism is not merely another type of crime albeit punishable by harsher sentences. Ss the intensification of investigative procedures begins to show substantial if still limited results in the prevention of new attacks, it is more difficult to predict the success of the repressive policy in dealing with zealous extremists who are willing and ready to die to maximize the destructive impact of their attacks. The

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Gefahrenlage erfüllt sind.

140) ECJ, Joined Cases C-293/12 & C-594/12, Digital Rights Ireland Ltd and Seiglinger, INFO CURIA (Apr. 8, 2014).

141) *See* for instance MICHAEL PAWLIK, DER TERRORIST UND SEIN RECHT: ZUR RECHTSTHEORETISCHEN EINORDNUNG DES MODERNEN TERRORISMUS, Munich, 2008, 51 p.

public instrumentation of their death is a fundamental part of the terrorist strategy and an important factor in the success of their attacks. This suicidal character significantly limits any deterrent force of long sentences of imprisonment in countries that have abolished death penalty. Capital punishment as a deterrent would also be ineffective for the same reason. Moreover, recent report on incarceration policies have shown that the current imprisonment practices that consist in regrouping in one prison all the islamist extremists contributes to the radicalization of even more individuals. Moreover, the procedures of de-radicalization that are being implemented in some countries such as France and Germany, are the object of well founded criticism on their cost and effectiveness. They are met with resistance from the local communities which are being asked to host these centers thus increasing the risks of social fracture and political discontent.

Therefore, even if the criminalization of new offenses represents an indispensable response to the terrorist threat, its effective contribution to counter terrorism should be carefully assessed since the crimes of terrorism and the terrorists themselves do not fit within the traditional categories of offenses and criminals. The criminalization of a category of new offenses such as apology of terrorism or inciting and financing a terrorist enterprise remains indispensable but should not be considered as a unique solution. On one hand, it strengthens the preventive strategy as it permits to identify and neutralize radicalized individuals before they become more actively engaged in terrorist activities. It also weakens the social base that constitutes one of the most elusive aspects of the hybrid domestic and transnational nature of terrorism today. The planning and the execution of the attacks in Paris and Brussels have shown how terrorists relied upon a network of family and friends in their former communities. On the other hand, the limited effect of deterrence of these new categories of offenses combined with the inadequacy of the current practices of incarceration should force the European states to seriously rethink their strategy of criminalization outside the boundaries of the traditional criminal system.

Criminal Codes comprise new categories of offenses related to terrorism, such as conspiracy, incitement, support, assistance, instigation and financing. In France the law of 21 December 2012 introduced new offenses in the Criminal Code for the prosecution of any French nationals

or residents acts of terrorism that were committed abroad,[142] (article 113-13. Criminal Code). It removed the initial requirement that the incriminated act should also constitute an offense in the country where it was perpetrated. In Spain, the organic law 5/2010 reformed several articles of the penal code (art 571 to 579). It introduced new sentences against "Those who promote, constitute, organize or lead an organization or terrorist group" and against "those who who actively participate in the organization or group"(Art. 572). It imposed also harsher sentences (8 to 15 years imprisonment) on the "deposit of weapons or ammunition, the holding or deposit of substances or explosive, flammable, incendiary or asphyxiating devices, or their components, as well as its manufacture, traffic, transportation or supply in any way" (Art. 573 and 574).[143] The law punishes also the financing, solicitation and incitation to terrorism (art. 576 and 579).[144] The offenses of apology of terrorism and recruitment, preparation of a serious violent offence endangering the state, and establishing contacts for the purpose of committing such an offence were also introduced in the German criminal Code (sections 89a, 89b, 129a (5).

For the past 15 years, following the 9/11 terrorist attacks in the US, European countries have developed a more comprehensive set of legal measures against international terrorism. Most of these measures came

142) Law 2012-1432, 21 december 2012 art 2 "La loi pénale française s'applique aux crimes et délits qualifiés d'actes de terrorisme et réprimés par le titre II du livre IV commis à l'étranger par un Français ou par une personne résidant habituellement sur le territoire français." Articles 421-2-1 ,421-2-4, 421-2-2 and 421-6 of the Criminal Code

143) Ley Orgánica 2/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, en materia de delitos de terrorismo. BOLETIN OFICIAL DEL ESTADO 77(31 de marzo 2015) Artículo 574. 1. El depósito de armas o municiones, la tenencia o depósito de sustancias o aparatos explosivos, inflamables, incendiarios o asfixiantes, o de sus componentes, así como su fabricación, tráfico, transporte o suministro de cualquier forma, y la mera colocación o empleo de tales sustancias o de los medios o artificios adecuados, serán castigados con la pena de prisión de ocho a quince años cuando los hechos se cometan con cualquiera de las finalidades expresadas en el apartado 1 del artículo 573."

144) Artículo 576. 1. "Será castigado con la pena de prisión de cinco a diez años y multa del triple al quíntuplo de su valor el que, por cualquier medio, directa o indirectamente, recabe, adquiera, posea, utilice, convierta, transmita o realice cualquier otra actividad con bienes o valores de cualquier clase con la intención de que se utilicen, o a sabiendas de que serán utilizados, en todo o en parte, para cometer cualquiera de los delitos comprendidos en este Capítulo."

initially from past legislations developed in response to existing domestic terrorist threats that had little in common with the type of onslaughts that have been conducted by radicalized Islamist terrorists. Despite increased levels of alertness and preparation, the most recent tragedies in France and in Belgium have shown the limits of the existing measures in preventing deadly attacks and neutralizing radicalized "lone wolfs' who maintain close internet connections with terrorist handlers based abroad. The European States' awareness of the unique nature and scope of these threats is not yet reflected in their counter terrorist strategies as can be seen from the difficulties to implement effective security measures that are compatible with constitutional principles.[145] The historical commitment to the fundamental values of the democratic society should not distract from the necessity to rethink the alleged opposition between public security and civil rights that was fundamental in the context of domestic terrorism but that shows its limits against the hybrid form of terrorism that blends transnational configuration with national execution.

큰따옴표?

An effective and durable response requires a more integrative international cooperation that is not the juxtaposition of existing national initiatives. Likewise this new cooperative model should not lead to the creation of a new bureaucratic layer that would replicate at the transnational level the dysfunctions that already exist at the domestic level. Various states and security agencies are aware of the imperative to develop a system that could rapidly and effectively collect, manage and distribute relevant information. To be sure the criminalization of terrorist offenses in penal codes and the reforms of criminal procedure appears, in the short term, like a reasonable policy that has the benefit of preserving the integrity of existing legal institutions and constitutional principles. Its long-term relevance in a successful counter terrorism strategy remains doubtful not only as a deterrent but also in light of the failure of the current model of incarceration of convicted extremists and terrorists. It also encourage the thinking of these offenses as being part of a multiple jurisdictions system where diverse agencies are tasked with different functions thus limiting

145) *See* for instance, ANDREA DE GUTRY, OLTRE LA REAZIONE: COMPLESSITA E LIMITI NELLA GUERRA AL TERRORISMO INTERNAZIONALE DOPO L'11 SETTEMBRE, Pisa 2003, 393 p.

cooperation between public security services while overlooking their traditional tendency to concurrence each other and defend what they perceive to be their own prerogatives.

Some effort was made in acquiring actionable information and evidence but much remains to be done in insuring its rapid diffusion for its practical use across institutional and national borders. Isis and Al Qaeda's predictable loss of their territorial base in the Middle East will displace the main battleground in cyberspace where communication and information will play an even more essential role in the prevention of future threats. The expansion of the investigative powers of intelligence and security agencies that must actively involved in transnational cooperation clearly remains a challenge despite the initiatives of the European Council and the legal framework developed by the European Union. It is however a fundamental element for the success of the European states' strategy in identifying terrorism suspects and preempting their *"passage à l'acte."*