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CONCEPTUALIZING AND FIGHTING A GLOBAL INSURGENCY:

Extraterritorial Use of Force Against Jihadist Networks in the Cases of al Qaeda and the Islamic State

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ABSTRACT

This thesis seeks to answer the question of how can insurgent networks of/networked jihadist violent non-state actors be legally conceptualized, what limits are imposed by international and US domestic law on campaigns against such networks, and do those limits allow for effective and legitimate counter-terrorism? It will employ a basic interdisciplinary research design, as defined by Mathias Siems, which uses a legal research question as a starting point, but relies on insights from other disciplines to reach an informed analysis.

The thesis will first establish the insurgent nature of jihadist groups such as al Qaeda and the Islamic State by taking the claim of their desire to re-establish the Caliphate seriously. It will establish that 'jihadist international relations' — as opposed to the broader notion of Islamic international relations — divide the world into the *dar al-Islam*, the world of Islam, and the *dar al-harb*, the territory of war, which are in a perpetual state of war. It will show that the attempts to pursue this insurgent aim are increasingly carried out by affiliate organizations.

It will then move on to address the gap in the legal literature, which relates to the problem inherent in the United States' 2001 Authorization of Use of Military Force (AUMF), which authorizes the use of force against al Qaeda and increasingly groups connected to it, but does not provide a mechanism to legally conceptualize when such groups are covered by the AUMF. It will put forward a legal framework to conceptualize relationships between the al Qaeda and Islamic State core groups and their affiliate and associate organizations by drawing on Islamic principles of statehood and by drawing an analogy to established principles on the responsibility of states and international organizations for wrongful acts. It will argue that

affiliate organizations, through offering an oath of allegiance, become *de jure* members of the overall network and that attribution of their conduct to the overall network should therefore not depend on the level of command and control exercised. Actions of associate groups, on the other hand, should only be attributable to such groups if they exercise overall control.

The thesis will then move on to investigate the use of force against affiliate organizations under the *jus ad bellum*, arguing that such of force is possible in self-defence and with the consent of the host state. It will establish that states that become the victim of an armed attack can use force if the host states is unable and unwilling to suppress an imminent armed attack by such groups, and that states can, in certain circumstances, rely on the accumulation of events doctrine, provided that such attacks are carried out by members of the same network. It will furthermore argue that the *jus ad bellum's* necessity requirement should be understood to mandate non-lethal responses, which the thesis refers to as extraterritorial law enforcement, in certain circumstances.

The thesis will then move on to the *jus in bello.* It will reengage with the idea of a "global" armed conflict frequently invoked by the United States. However, the thesis will argue that such conflicts do not encompass the entire globe, but are, in line with the *Tadić* decision of the International Criminal Tribunal for the Former Yugoslavia, limited to the territory under the control of a party to this conflict. It will then draw heavily on US case law to establish when individuals are part of such organizations, and on principles of the law of armed conflict to establish when strikes against those members are lawful.

Finally, it will establish the possibility of extraterritorial law enforcement against such organizations, which refers to extraterritorial operations that have the primary aim of apprehending

individuals suspected of unlawful activity, or contribute to such operations, for the purpose of criminal prosecution. It will be stablished that such operations are lawful in self-defence for the purpose of preventing an imminent armed attack and that US law does not put up any significant obstacles for prosecuting individuals brought to the United States in such a manner.

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ABBREVIATIONS

9/11	11 September 2001
AQ	al Qaeda
AQAP	al Qaeda in the Arabian Peninsula
AQC	al Qaeda Central
AQI	al Qaeda in Iraq
AQIM	al Qaeda in the Islamic Maghreb
ASR	Articles on State Responsibility
AUMF	Authorization of Use of Military Force
DARIO	Draft Articles on the Responsibility of International Organizations
ELE	Extraterritorial Law Enforcement
FBI	Federal Bureau of Investigation
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Court for the former Yugoslavia
IS	Islamic State
ISIL	Islamic State in Iraq and the Levant
LOAC	Laws of Armed Conflict
NIAC	Non-International Armed Conflict
NSC	National Strategy for Counterterrorism
PPG	Presidential Policy Guidance
VNSA	Violent Non-State Actor

INTRODUCTION

On 11 September 2001 (9/11), 19 individuals affiliated with the al Qaeda terrorist organization boarded four flights in the United States with the intent to cause mass casualties by flying civilian airliners into civilian and military targets. Two planes hit the World Trade Center in New York City, one plane crashed into the Pentagon in Washington, D.C., and one—United Airlines Flight 93—was brought down in Pennsylvania after passengers fought the hijackers. In total, the attack killed close to 3,000 people while over 6,000 others were injured.[1] It was one of the most lethal terrorist attacks ever perpetrated.

In response, the United States launched a major global counterterrorist and counterinsurgent campaign. Its goal, according to the 2002 National Security Strategy, was

> to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control, and communications; material support; and finances. This will have a disabling effect upon the terrorists' ability to plan and operate.[2]

This broad aim was refined in the 2011 National Strategy for Counterterrorism, which set out eight overarching goals for US counterterrorism efforts, which can be summarized as follows:

1) Protect the American people, homeland, and interests;

[1] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (W. W. Norton & Company 2004)
[2] Government of the United States, *National Security Strategy* (The White House 2002), p 5

2) Disrupt, degrade, dismantle, and defeat al-Qaeda, its affiliates, and its adherents;
3) Prevent terrorist development, acquisition, and use of weapons of mass destruction (WMD);
4) Eliminate safe havens, which is a 'physical sanctuary of ungoverned or poorly governed territories, where the absence of state control permits terrorists to travel, train, and engage in plotting';
5) Build enduring counterterrorism partnerships and capabilities;
6) Degrade links between al-Qaeda and its affiliates and adherents;
7) Counter al-Qaeda ideology and its resonance and diminish the specific drivers of violence that al-Qaeda exploits; and
8) Deprive terrorists of their enabling means.[3]

The invasions of Afghanistan and Iraq, and an increasing number of lethal drone strikes using UAVs (unmanned aerial vehicles, also known as drones) under President Obama in countries such as Afghanistan, Iraq, Yemen, Somalia, and others, are part of this effort.[4] At the time of writing, the 2001 Authorization for Use of Military Force (AUMF)[5] provides the main statutory basis under US domestic law for all military countermeasures against al Qaeda and, in 2014, also became the main legal basis for countering the Islamic State, which had spread through parts of Syria and Iraq and made its influence

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[3] Government of the United States, *National Strategy for Counterterrorism* (The White House 2011), pp 8-10
[4] See Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (reprint edn, Mariner Books 2012); Jameel Jaffer (ed) *The Drone Memos: Targeted Killing, Secrecy, and the Law* (Kindle edn, The New Press 2016)
[5] Authorization for Use of Military Force. 50 USC 1541 note. Public Law 1070-40, 2001

visible in other areas of the globe.[6] For the first time in US history, Congress had in effect declared war on a diffuse network of non-state actors—al Qaeda—without clarifying which organizations are considered to be part of this network, or providing any discernible geographic or temporal boundaries to how this war might be waged.[7] In reality, this translated into a war waged in multiple countries which, at the time of writing, has lasted for almost 16 years. The conduct of this "war" has raised and continues to raise a multitude of tactical, strategic, and legal issues.

The AUMF, in a mere 60 words, sets out the scope for global US counterterrorism efforts. The relevant paragraph, quoted here in full, holds

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[8]

The only limitation the 2001 AUMF contains is the fact that any 'nation', 'organization', or 'person' covered by it must be linked to the 9/11 terrorist attacks. While such a link might have been easier to establish in the immediate aftermath of the attacks, almost 16 years of combat operations against an increasingly networked actor—spread over numerous countries and tied together by weak organizational links and a shared ideology—make it increasingly difficult to say with any certainty which individuals or organizations should be covered by the AUMF. As such, the current state of the AUMF provides a good

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[6] Mary Louise Kelly, 2016, 'When The U.S. Military Strikes, White House Points To A 2001 Measure' NPR <http://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure> accessed 26 July 2017; *Smith v Obama*, 2016 WL 2347065 (DDC 2016) (Trial Pleading); *Smith v Obama*, Defendant's Memorandum of Law in Support of His Motion to Dismiss, Civ No 16-843 (CKK) (DDC 2016)

[7] Richard F Grimmett, *Authorization For Use Of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History* (CRS Report for Congress RS22357, Congressional Research Service 2007), p 4

[8] AUMF, sec. 2(a)

example for the complexities involved in fighting diffuse terrorist networks in seemingly global conflicts. It is difficult to determine against whom force should be authorized, and once this determination has been made, whether or not any such action would be in accordance with international law. This ambiguity creates legal uncertainty with regards to the fact whether a specific organization has a connection to al Qaeda (or the Islamic State), whether it is therefore linked to 9/11 through its connection to al Qaeda, and whether the United States can therefore lawfully act against it. On the international legal level, this uncertainty carries over into the *jus ad bellum* and *jus in bello*.

This thesis, then, is interested in reconciling the difficulty of legally conceptualizing networks of violent jihadist non-state actors, and authorizing the use of force against them, with the strategic necessity and legal complexity of implementing a global counterinsurgency campaign against such organizations. It will propose a legal framework, based on the law of state responsibility and informed by notions of statehood under Islamic law, to better understand and conceptualize the relationships between both al Qaeda and the Islamic State with their respective affiliate and associate organizations. It will argue that affiliate organizations, through swearing an oath of allegiance, become *de jure* part of either organization, and are, in the case of al Qaeda, thus covered by the AUMF. With regards to the Islamic State, it will be argued that through its break with al Qaeda, as will be shown later in the thesis, it will be argued that it would no longer be covered by the AUMF and, if the United States wanted to continue using force against it, it would be the responsibility of Congress to enact a new Authorization for Use of Military Force against it.

Based on this conceptualization, this thesis will move on to explore the legality of military countermeasures against such

groups under the *jus ad bellum* and the *jus in bello*. It will be shown that both legal frameworks have enough flexibility to incorporate networked non-state actors. The final chapter of this thesis will then be devoted to exploring the possibility of extraterritorial law enforcement operations with the aim of unilaterally apprehending terrorist suspects and bringing them to the United States for trial. While the main scope of enquiry—and contribution—of this thesis will concern the law, it will draw widely on terrorism studies, security studies, international relations, and historic Islamic law literature to properly situate the legal analysis in the necessities of fighting a 'global insurgency', as David Kilcullen put it.[9] To this end, it will be necessary to use Arabic terminology throughout the thesis. In the absence of a working knowledge of Arabic by the present author, no formal transliteration style has been adopted. Rather, the most common phonetic transliterations, especially those commonly used in the literature, will be used.

1. Scope of Enquiry

This "global" insurgency, as will be shown in chapters 1 and 2, is not fought by and against a single unitary actor but rather by and against networks of violent non-state actors (VNSAs) and individuals connected to them. For a global counterinsurgent like the United States, having passed legislation such as the AUMF, a twofold problem arises: First, how to define the insurgent and, second, whether and how to lawfully apply military and law enforcement means extraterritorially against such an insurgent.

[9] David Kilcullen, *Counterinsurgency* (Oxford University Press 2010)

1.1. Research Question and Justification

With that in mind, the overarching research question of this thesis can be formulated as:

How can insurgent networks of/networked jihadist VNSAs be legally conceptualized, what limits are imposed by international and US domestic law on campaigns against such networks, and do those limits allow for effective and legitimate counter-terrorism?

An alarmist 2015 report by the American Enterprise Institute boldly states that 'the United States', and one would assume by extension the entire western world, 'faces a fundamental challenge to its way of life. Al Qaeda and [the Islamic State], two groups that have already killed thousands of Americans and tens of thousands of Muslims, are at war with us as part of a general strategy to create their global caliphate.'[10] While such alarmist statements are endemic in the American national security debate post-September 11, 2001, it cannot be denied that VNSAs currently assume a more prominent role in international security politics than in the past. While states, without a doubt, remain powerful actors, the 20th century saw a steady decline in inter-state warfare. In 2013, when work on this thesis commenced, most armed conflicts occurred between states and VNSAs rather than between states.[11]

What sets the conflicts between the United States and al Qaeda and the Islamic State apart from most of these conflicts, however, is that it is not tied to the territory of a single state. Mumford argues that 'Western notions of insurgency […] have been moulded by the so-called "classic" Maoist rural uprisings of the Cold War era whereby insurgents […] bound themselves

[10] Mary Habeck and others, *A Global Strategy for Combating al Qaeda and the Islamic State* (American Enterprise Institute 2015), p 3
[11] Heidelberg Institute for International Conflict Research (HIIK), *Conflict Barometer 2012* (HIIK 2013)

within the parameters of a particular state or region.'[12] As will be seen in chapter 4, this notion of insurgency is also at the heart of the legal concept of non-international armed conflicts (NIACs).[13] International law struggles with incorporating VNSAs as security threats on the international level. For traditional NIACs, the *jus ad bellum* is mute on the question of whether states may use force against VNSAs located within their territory.[14] The application of the *jus in bello*, however underdeveloped, is well established provided the conflict reaches the required threshold[15], and, similarly, states are free to use the whole spectrum of their law enforcement agencies to counter VNSAs domestically.[16] Finally, the continuing application of international human rights law during armed conflict[17] is not controversial as long as the conflict occurs on the territory of the belligerent state.[18]

However, the conflicts with al Qaeda and the Islamic State, the cases used in this thesis, simultaneously do and do not conform to this assumption. On the one hand, these groups—either directly or through their affiliates—are engaged in often very violent confrontations with local states (the near enemy). On

[12] Andrew Mumford, 'Al Qaeda and Networked International Insurgency' in Aidan Hehir, Natascha Kuhrt and Andrew Mumford (eds), *International Law, Security and Ethics : Policy Challenges in the Post-9/11* (Routledge 2011), p 33
[13] See ch 4 below
[14] Olivier Corten, *The Law Against War* (Hart Publishing 2010); Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014)
[15] See e.g. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949., article 3 common to the Geneva Conventions (common article 3); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977; see also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Paperback edn, Oxford University Press 2014); Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010); Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2004); See ch 4 below.
[16] Office of Legal Counsel, *Department of Defense Law of War Manual* (US Department of Defense 2015), p 1021
[17] *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, ICJ Report 1996, p 226, para 25; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p 136, paras 106-113
[18] This is also the position of the United States, which otherwise explicitly rejects an extraterritorial application of its human rights obligations during armed conflict; see Office of Legal Counsel, *Department of Defense Law of War Manual*, p 24; see also Human Rights Committee, Summary Record of the 1405th Meeting, 31 March 1995, CCPR/C/SR. 1405, para 20

the other hand, David Kilcullen has argued that jihadist groups, having identified the United States, various European states and Israel (the far enemy)[19] as impediments to their of uniting the *ummah*—the global community of Muslims—in the Caliphate[20], are in fact engaged in a global insurgency against the West and local regimes. Mumford similarly has argued that

> al Qaeda and their affiliates share with by-gone insurgents the desire to overthrow an established ruling political and social order, but what transcends previous insurgencies is the sheer scope and span of the Islamist *jihad*. By seeking to depose the 'near enemy' (the perceived 'apostate' Muslim regimes) and strike out at the 'far enemy' (the West), the global *jihad* takes on the hallmarks of an international insurgency.[21]

1.2. Gap in the Literature

The literature concerning sub-state violence is rich, comprehensive, and interdisciplinary. Authors such as Kalyvas have sought to investigate whether political goals or factors such as inter-group grievances can explain the violence in a civil war.[22] Counterinsurgency theorists tried to identify which tactics and strategies work best against insurgent groups[23] and, following the invasions of Afghanistan and Iraq, states incorporated these insights (again) into military doctrine.[24] Economists wondered

[19] Fawaz A Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge University Press 2009)
[20] Kilcullen, *Counterinsurgency*
[21] Mumford, 'Al Qaeda and Networked International Insurgency', p 33
[22] Stathis N. Kalyvas, *The Logic of Violence in Civil War* (Cambridge University Press 2006); see also World Bank, *Conflict, Security, and Development. World Developmet Report 2011* (The World Bank 2011) Kalyvas, *The Logic of Violence in Civil War*; see also World Bank, *Conflict, Security, and Development. World Developmet Report 2011*
[23] David Galula, *Counter-Insurgency Warfare: Theory and Practice* (Frederick A. Praeger 1964); Robert Thompson, *Defeating Communist insurgency: The Lessons of Malaya and Vietnam* (F. A. Praeger 1966); Roger Trinquier, *Modern Warfare: A French View of Counterinsurgency* (Bernard B Fall tr, Pall Mall Press 1964); David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One* (Oxford University Press 2009); Kilcullen, *Counterinsurgency*; John Mackinlay, *The Insurgent Archipelago* (Hurst 2009) Galula, *Counter-Insurgency Warfare: Theory and Practice*; Thompson, *Defeating Communist insurgency: The Lessons of Malaya and Vietnam*; Trinquier, *Modern Warfare: A French View of Counterinsurgency*; Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*; Kilcullen, *Counterinsurgency*; Mackinlay, *The Insurgent Archipelago*
[24] Department of the Army, *FM 3-24 Counterinsurgency* (2006); Ministry of Defence of the United Kingdom, *Security and Stabilisation: The Military Contribution. Joint Doctrine Publication 3-40* (2009); United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (United States Deparmtent of State 2009) Department of the Army, *FM 3-24 Counterinsurgency*; Ministry of Defence of the United Kingdom, *Security and Stabilisation: The Military Contribution. Joint Doctrine Publication 3-*

whether political or economic factors are determinant for the onset and continuation of violence in civil wars[25] and whether economic incentives can contribute to counterinsurgency efforts.[26] Terrorism scholars focused on a variety of issues with regards to this particular tactic of sub-state violence, including its causes, motivations, as well as how such groups are organized.[27] Finally, international lawyers have devoted significant effort to generally study whether states have a right of self-defence against non-state actors[28] and tried to determine the limits of permissible force in non-international armed conflicts.[29]

Ultimately, political scientists and journalists have been more open than legal scholars to embrace the idea of a global insurgency. This is apparent in Mumford's argument above, but he is not the only one. David Kilcullen has argued along similar

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40; United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide*

[25] P. Collier, 'Greed and grievance in civil war' (2004) 56 Oxford Economic Papers 563; P. Collier, A. Hoeffler and D. Rohner, 'Beyond greed and grievance: feasibility and civil war' (2008) 61 Oxford Economic Papers 1 Collier, 'Greed and grievance in civil war'; Collier, Hoeffler and Rohner, 'Beyond greed and grievance: feasibility and civil war'

[26] Eli Berman, *Radical, Religious, and Violent: The New Economics of Terrorism* (MIT Press 2009); E. Berman and others, 'Do Working Men Rebel? Insurgency and Unemployment in Afghanistan, Iraq, and the Philippines' (2011) 55 Journal of Conflict Resolution 496 Berman, *Radical, Religious, and Violent: The New Economics of Terrorism*; Berman and others, 'Do Working Men Rebel? Insurgency and Unemployment in Afghanistan, Iraq, and the Philippines'

[27] Bruce Hoffman, *Inside Terrorism* (Revised and Expanded edn, Columbia University Press 2006); Martha Crenshaw, 'The Causes of Terrorism' (1981) 13 Comparative Politics 379; Max Abrahams, 'What Terrorists Really Want' (2008) 32 International Security 78; Marc Sageman, *Understanding Terror Networks* (University of Pennsylvania Presss 2004); Barak Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences* (Oxford University Press 2016) Hoffman, *Inside Terrorism*; Crenshaw, 'The Causes of Terrorism'; Abrahams, 'What Terrorists Really Want'; Sageman, *Understanding Terror Networks*; Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences*

[28] Carsten Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism' (2003) 27 The Fletcher Forum of World Affairs 35; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010); Gregor Wettberg, *The International Legality of Self-Defense Against Non-State Actors* (Peter Lang 2007); Jordan J Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan' (2010) 19 Journal of Transnational Law & Policy 237; Ashley S Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 Virginia Journal of International Law 483; Daniel Betlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 American Journal of International Law 769; Noura S Erakat, 'The New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-Defense' (2014) 56 Arizona Law Review 195

[29] See e.g. Sivakumaran, *The Law of Non-International Armed Conflict*; Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*; Dinstein, *Non-International Armed Conflicts in International Law*; David Kretzmer, Aviad Ben-Yehuda and Meirav Furth, ''Thou Shall Not Kill': The Use of Lethal Force in Non-International Armed Conflicts' (2014) 47 Israel Law Review 191

lines[30], as did several others.[31] While legal scholars have generally acknowledged the fact that the threat by jihadist terrorism is real, they have largely dismissed the argument of a "global war" on the basis that al Qaeda is, in their view, not a globally active organization.[32] One of the most frequently given arguments is that al Qaeda Central (AQC)—the organization responsible for 9/11 and mentioned in the AUMF and now thought to be in hiding in Waziristan—does hardly exist anymore after years of military action against it. What had risen instead were affiliate organizations like al Qaeda in the Arabian Peninsula (AQAP), al Qaeda in the Islamic Maghreb (AQIM), among others, with little tangible (or potentially unclassified) concrete evidence and indeed legal framework to guide the interpretation of their relationship with AQC. In fact, there is no legal framework akin to the Articles on the Responsibility of States for Internationally Wrongful Acts or the Draft Articles on the Responsibility of International Organizations[33] for VNSAs. While political scientists have engaged with the issue of affiliate organizations[34], especially Barak Mendelsohn's study on the expansion of the al Qaeda 'franchise' stands out[35], legal scholars have

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[30] Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*; Kilcullen, *Counterinsurgency*
[31] Jason Burke, *Al-Qaeda: The True Story of Radical Islam* (Penguin Books Limited 2007); Jarret Brachman, *Global Jihadism* (Routledge 2009); Gerges, *The Far Enemy: Why Jihad Went Global*; Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2015); Audrey Kurth Cronin, 'ISIS Is Not a Terrorist Group' (2015) March/April Foreign Affairs 87; Rukmini Callimachi, 'Not 'Lone Wolves' After All: How ISIS Guides World's Terror Plots From Afar' *The New York Times* (4 February 2017) <https://www.nytimes.com/2017/02/04/world/asia/isis-messaging-app-terror-plot.html> accessed 5 February 2017
[32] Mary Ellen O'Connell, 'The Legal Case Against the Global War on Terror' (2004) 36 Case Western Reserve Journal of International Law 349; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Second edn, Cambridge University Press 2010); Sivakumaran, *The Law of Non-International Armed Conflict*; Jelena Pejic, 'Armed Conflict and Terrorism: There is a (Big) Difference' in Ana María Salinas de Frías, Katja LH Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012)
[33] Responsibility of States for internationally wrongful acts : resolution / adopted by the General Assembly, 8 January 2008, A/RES/62/61
[34] Daniel L Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations' (2014) 23 Security Studies 431; Daniel L Byman, *Breaking the Bonds between Al-Qa'ida and Its Affiliate Organizations* (Brookings Institution 2012); John Rollins, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Congressional Research Service 2011)
[35] Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences*

mostly ignored the issue. Hence there is a significant gap in the literature, especially because the understanding that these organizations form part of a greater whole are at the heart of how the United States understands what al Qaeda—which for the purposes of the AUMF includes the Islamic State—is. If al Qaeda would have succeeded in establishing and consolidating the Caliphate the response to legal arguments brought forward by the United States since 2001 would probably have been different. As will become apparent later in this thesis, the international community for example reacted more sympathetic to arguments of self-defence in the case of the Islamic State[36], which starting in 2014 established itself as an Islamist proto-state in parts of Iraq and Syria, than it did to similar arguments in the case of al Qaeda. Fundamentally, the main problem for international lawyers and political scientists alike arises not out of the fact that this conflict is with a unitary and coherent non-state actor of "global" reach, but rather with a network of VNSAs or a networked VNSA—or indeed both. The former is a loose confederation of like-minded groups working towards a similar political goal while being operationally independent. A network of VNSAs may at times cooperate and compete with others. The latter is a network of individual units, for the purposes of this thesis affiliate organizations[37], operating under the umbrella of a central group that exercises a certain level of command and control, even if only *de jure* but not *de facto*.

[36] See ch 3 below
[37] See ch 2 below

1.3. Methodology

This thesis will strive to take an interdisciplinary approach to the problem at hand, while not losing sight of the fact that at the heart of most issues addressed here are legal problems.

In order to properly answer the issues presented by the research question of this thesis, it will need to integrate insights from various disciplines, including international relations, security studies, terrorism studies, and Islamic studies. This thesis will reengage with the notion of a global war. It will also aim to provide a conceptual framework for trans- or international non-state violence, within the confines of the particularities inherent in global jihadism. The question raises normative, legal as well as strategic and tactical issues, all of which are deeply interrelated and therefore difficult to disentangle. The topic of this thesis obviously has to be seen within the broader context of the role of non-state actors in international relations. However, this question in its entirety, unfortunately, will have to remain outside of the scope of enquiry of this thesis. The lack of uniformity among non-state actors prevents a generalizable answer if one does not want to lose sight of the problem at hand. Nevertheless, considering the growing influence of non-state actors in international politics, this will be a growing concern for scholars in the future. The focus on al Qaeda and the Islamic State is justified because, through their ideology, they are two of the few VNSAs which have an international outreach and a global vision.

In the taxonomy of Mathias Siems, this thesis adopts a 'basic interdisciplinary research design', which uses a legal research question as a starting point, but relies on insights from

other disciplines to reach an informed analysis.[38] Siems identifies two different types of basic interdisciplinary research designs: those addressing 'micro-legal questions' and those addressing 'macro-legal questions'.[39] The former asks specific legal questions, but relies on other means, such as empirical research, to address it. The latter is concerned with, 'for instance, the way in which an entire area of law is structured, or the meaning of words and concepts such as 'law', 'justice' and 'rights'.[40] This thesis is an example of the former. It starts out with a legal research question and aims to answer it using a doctrinal and policy-oriented research method, which will be expanded in more detail below, but aims to contextualize the results with theoretical and empirical insights from other disciplines. In the example of this thesis, it would be impossible to either legally conceptualize jihadist networks, or assess whether states can take the required action within the confines of the law, without looking beyond the law. While the balance between the law and other disciplines will vary throughout the thesis, this basic approach will not. Fundamentally, this thesis sets out to explore whether a problem defined by policy imperatives can be addressed within the letter of the law.

It has to be stated from the outset that the definition of the policy problem as the ability to conduct a transnational counterinsurgent campaign against violent networks of jihadist actors, will be mainly descriptive. The main analysis and contribution of this thesis will be to legal scholarship. It is not the stated aim of this thesis to make a contribution to the disciplines of security and terrorism studies, in which the policy-related sections of this thesis are embedded, beyond the legal ability of

[38] Mathias M Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert' (2009) 7 Journal of Commonwealth Law and Legal Education 5, pp 6f
[39] Ibid, p 6
[40] Ibid

states to address these problems. Rather, this thesis will contribute to legal scholarship by taking account of the necessities of policy in which the law operates.

This thesis will adopt a doctrinal method the establish the state of the law and combine it with a policy-oriented approach to evaluate the effectiveness of the law. Westerman argues that in the doctrinal tradition, the '*function* of the theory, namely to provide a guideline and a perspective from which the object can be described in a meaningful way, is exercised by the legal system itself'.[41] However, this assertion goes too far when applied to this thesis. While not concerned with theoretical and philosophical questions about the nature of the law, it is not free of theory. If theory is understood, as described by Westerman above, as a guideline that enables a meaningful description, the theoretical underpinning of the investigation of the policy-effectiveness of the state of the law necessarily comes out the security and terrorism studies literature—specifically the body of literature that refers to counterinsurgency. Furthermore, the 'identification of relevant legislation, cases and secondary materials in law can be seen as analogous to a social science literature review'[42]

Slaughter and Ratner have argued that 'the principle divide' in legal research methods is between those 'that conceptualize law primarily as a body of rules and those that see it as a more dynamic set of processes'.[43] They go on to say that other options include 'ontological versus purposive inquiries—what

[41] Pauline Westerman, 2009, 'Open or autonomous? The debate on legal methodology as a reflection of the debate on law.' SSRN <http://ssrn.com/abstract=1609575> accessed 10 September 2016, p 3, emphasis in original

[42] Mike McConville and Wing Hong Chui, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods in Law* (Edinburgh University Press 2007), 22

[43] Anne-Marie Slaughter and Steven R Ratner, 'The Method is the Message' (1999) 93 American Journal of International Law 410, p 410

law *is* versus what it is *for*—and instrumentalist versus noninstrumentalist—whether it can usefully be *for* anything.'[44] The doctrinal method referred to above falls into the first category which sees law as a body of rules. The 'principal or even sole aim is to describe a body of law and how it applies'.[45] McConville and Hong Chui argue that the doctrinal method is qualitative in nature as it 'recognises that law is reasoned and not found'.[46] The doctrinal part will provide the foundation for the policy-related analysis, which 'includes a consideration of the social factors involved and/or the social impact of current law and practice'[47] This is a position close to American legal realist theory, which emphasises the incorporation of practical considerations over the mechanical application of formal legal rules.[48]

Against this backdrop, this thesis will integrate three levels of inquiry throughout. As a first step, each chapter will carefully consider the relevant literature to arrive at the general policy problem to be addressed by the law in the chapter. The second and third line of inquiry, which will be conducted in an integrated fashion, will consist of the above-mentioned doctrinal analysis of the state of the law, coupled with an evaluation of the policy-effectiveness of these rules on the basis of two case studies, which will be outlined below.

Incorporating the theoretical considerations into each individual chapter, rather than setting them out in their entirety at the outset, provides two distinct advantages: First, in the spirit of the interdisciplinarity of this thesis, it allows to tailor the policy observations to the area of law it applies to. As such, it does not treat either inquiry as separate, but sees it as interconnected problems. Second, on a practical level, it allows both the

[44] Ibid, p 410
[45] McConville and Hong Chui, 'Qualitative Legal Research', 19
[46] Ibid, 22
[47] Ibid, 20
[48] Oliver W Holmes, 'Path of Law' (1897) 10 Harvard Law Review 457, p 469

reader and the author to better see the connections between the outlined policy problem, and the ability of states to address these problems within the law.

This thesis therefore seeks to take serious the concept of a transnational insurgency and explore its implications under international law. It will provide a framework through which to characterize and understand the legal status of both a networked VNSA and a network of VNSAs. States have utilized the full spectrum of force at their disposal to counter such groups, including but not limited to military force, law enforcement agencies, intelligence agencies, diplomatic efforts, and development agencies. The focus here will be on the first two. Due to the nature of such groups it is inevitable their individual units are either in parts or entirely outside of the territory of the "far enemy". Counteractions against such networks will therefore necessarily occur extraterritorially. This thesis will explore the implications of the networked structure in three areas: First, the possibility of counteractions against network units under the *jus ad bellum*. Second, the status of network units and the individuals they are composed of under the *jus in bello*. Third, departing from the armed conflict paradigm that underpins the first two, the possibility of extraterritorial law enforcement.

2. Structure

This thesis follows three broad lines of enquiry, which will structure it into three parts. The first, consisting of two chapters, will provide engage with the notion of a global jihadist insurgency on a theoretical and conceptual level. Chapter 1 will provide the Islamic background against which the relationship between the various affiliate organizations can be developed. Using early Islamic understandings of statehood, it will develop

a framework of 'jihadist international relations', which inform how we should understand the command and control functions between the affiliates and the central leadership. The term 'jihadist international relations' is used deliberately to differentiate such approaches from other variations of Islamic international relations and Islamic law, which have undergone significant developments throughout history and since the early days of the Caliphate in the 7th and 8th century. First, it will argue that strong regional control and authority, which we can observe in the distribution of power in the current network of al Qaeda, is entirely consistent with how early Islamic scholars characterized statehood. This, it will be argued, should inform how we judge whether or not the network should be understood as a single armed group or as separate groups. This adds analytical clarity to the outer bounds of the global insurgency.[49] Second, it will be shown that jihadist international relations are incompatible with the Westphalian system of sovereign states and the prohibition of the use of force found in Article 2(4) of the UN Charter[50] in as far they divide the world between the *dar al-Islam*, the world of Islam, and the *dar al-harb*, the territory of war, which are in a perpetual state of war. It will furthermore be shown that it is this ideology and world view that lies at the foundation of making jihadist actors a threat to international peace and security, since the *dar al-harb* is subject to an offensive jihad with the purpose of being incorporated into the *dar al-Islam.*[51]

Following from this, chapter 2 will turn to the various organizations that make up the global insurgency and develop a

[49] See ch 1 and 2 below
[50] Charter of the United Nations and Statute of the International Court of Justice (1945), art 2(4)
[51] D. B. Macdonald, 'Dar al-Harb' in M. Th. Houtsma and others (eds), *EJ Brill's first encyclopaedia of Islam, 1913-1936*, vol 2 (reprint edn, E.J. Brill 1993); D. B. Macdonald, 'Dar al-Islam' in M. Th. Houtsma and others (eds), *EJ Brill's first encyclopaedia of Islam, 1913-1936*, vol 2 (reprint edn, E.J. Brill 1993)

framework to assess whether the network of affiliate organizations can be understood as a unitary actor. Organizations, opposed to states, do not have sovereign territory which they occupy, they have no legal personality, and their membership and structure are subject to change. Furthermore, as in the cases of al Qaeda and the Islamic State, other groups frequently subject themselves to or withdraw from either organization. They may pledge allegiance, fall out, reorganize, rename, or otherwise change their goals or their ideology. Ultimately, apart from the myriad of political, legal, and strategic issues of a transnational campaign against a network of/networked VNSA raises, it raises a significant definitional problem.

In practice, the leader of a particular organization will swear *bay'ah*, an oath of allegiance, to the leader of the central leadership of either IS or al Qaeda and subsequently the latter will exercise some sort of *de jure* and/or *de facto* command and control relationship over the former. The degree to which such authority can actually be exercised will obviously depend on various factors, but *de jure* these organizations will be subjugated to a central leadership. Developing a legal framework that guides our understanding of organizational coherence within those organizations, and the degree of responsibility of one organization over the actions of another, will in turn bring more clarity to this issue and can inform, for example, which organizations should be covered by the 2001 AUMF.[52] While frameworks exist for attributing responsibility to agents of states[53] and international organizations[54], no similar framework exists for non-state actors. What is proposed here is to apply these

[52] AUMF, sec 2(a)
[53] Responsibility of States for internationally wrongful acts : resolution / adopted by the General Assembly, 8 January 2008, A/RES/62/61
[54] International Law Commission, Draft articles on the responsibility of international organizations, with commentaries, Yearbook of the International Law Commission, 2011, Vol 11, Part 2, A/66/10

existing frameworks in an analogous fashion to jihadist organizations. This endeavour is complicated by the fact that despite formal acts such as swearing an oath of allegiance, the groups in question will usually be separated by geography, and communication between them will be limited. Thus, despite a *de jure* relationship, *de facto* groups may still be independent, which has to be incorporated into the analysis. It will nevertheless be argued that we should understand these networks as single actors, but that the limited authority the central leadership can exercise should qualify which counteractions should be available to states.

Having set the scene in Part 1, Parts 2 and 3 will consider a state's ability to fight these internationalized hybrid conflicts, keeping in mind the strategic goals and the organizational structure of jihadist groups, within the framework of international law. In line with the overall argument that these conflicts concern both the military as well as law enforcement agencies, Parts 2 and 3 will deal with these areas respectively. Part 2 consists of two chapters, considering both the *jus ad bellum* as well as the *jus in bello.* Chapter 4 will establish when and under what circumstances states can defend themselves against non-state actors extraterritorially. Military engagements against jihadist organizations may take the form of either drone strikes or large-scale military operations, such as the ongoing operation in Syria and Iraq. They might, at times, be conducted with the consent of the territorial state or in self-defence if the territorial state is either unable or unwilling to act in the aftermath of an armed attack emanating from its territory. Nevertheless, while the overall argument of this thesis is that hybrid conflict are simultaneously matters of the military and law enforcement, it will be crucial to establish when states may use one or the other.

For matters of international stability, it would be unwise to postulate that, as soon as a state has suffered some kind of armed attack, it has the authority to respond militarily on the territory of another state. Rather, this thesis will investigate whether there is a room for extraterritorial law enforcement within the framework of self-defence, an issue that will be picked up again and expanded on later in the thesis.

Chapter 4 will turn to a discussion of the *jus in bello* aspects of this global conflict. After 9/11, the most urgent questions in this regard concerned the internment of al Qaeda members. While this question has never fully been resolved and the Obama Administration, despite issuing an executive order in 2009[55], was never able to close the detention centre at Guantanamo Bay[56], the most visible and contentious aspect of this global conflict have become drone strikes. While the arguments of the Bush administration of being in a truly global armed conflict have mostly been discredited[57], questions remain to what extent a non-international armed conflict can become internationalized. International humanitarian lawyers distinguish between two types of conflicts: international armed conflicts (IAC) and non-international armed conflicts (NIAC). The former occurs between states, the latter between governments and non-state actors or between the latter. Historically it is the former that we traditionally associate with war, whereas the latter only rose to the level of a war once the belligerency of the non-state actor was recognized.[58] IACs occurred on the international level, NIACs within a state. This differentiation to a large extent still holds true, especially because many non-state actors do not

[55] Exec. Order No. 13492, 74 Fed. Reg. 4897 (22 January 2009)
[56] See e.g. Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*
[57] Noam Lubell, 'The War (?) against Al-Qaeda' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012)
[58] Sivakumaran, *The Law of Non-International Armed Conflict*

have international aspirations. In the cases of al Qaeda and the Islamic State, however, it will be necessary to evaluate to what extent NIACs can truly internationalize and therefore assess their potential geographical scope. Furthermore, it will be necessary to evaluate what status members of these groups have under international law and what role human rights can play in mitigating some of the more adverse effects of applying the laws of armed conflict (LOAC) on a broader scale.[59]

Part 3 will then turn to the law enforcement dimension of this conflict, which as stated earlier forms an integral part of states' responses to jihadist networks. As a 2016 Europol report illustrates, a higher incidence of terrorist attacks in western cities perpetrated by the Islamic State, or individuals loosely linked to it, is likely.[60] As the November 2015 terrorist attack in Paris has shown, countering such attacks will require international action and cooperation as well as domestic responses against home grown radicalization. Chapter 5 will focus on one aspect of an extraterritorial law enforcement response to such threats and analyse a state's ability to bring individuals seen as a threat or suspected of terrorist offenses within the jurisdiction of the United States for subsequent prosecution. While the chapter will revisit issues of the *jus ad bellum*, the focus will be on its relationship with law enforcement action rather than lethal force. The chapter will first establish that apart from the legality of extraterritorial law enforcement action, there are significant strategic and tactical advantages to detain and prosecute terrorist suspects instead of using lethal force. In order to establish such advantages, the chapter will first look at the ability of the United States to prosecute individuals brought within

[59] See e.g. Jonathan Horowitz, 'Reaffirming the Role of Human Rights in a Time of "Global" Armed Conflict' (2015) 30 Emory International Law Review 2041
[60] Europol, *Changes in Modus Operandi of Islamic State Terrorist Attacks* (Europol Public Information 2016)

the jurisdiction of the United States by means that potentially violate international law. It will look at US case law and argue that there are no significant obstacles under US domestic law to rely on the civilian justice system in such cases. The chapter will then turn to the question of whether unilaterally arresting or detaining such individuals can be reconciled with international law. It will be argued that if one is to accept a lower threshold for permissible use of force in actions against non-state actors, this has to be accompanied with a lower range of actions that can be considered necessary to counter such threats. In the context of this thesis, this will refer to what is commonly referred to as abduction or extraordinary rendition.[61]

3. Relevance

Few issues have received as much attention as the "war" against al Qaeda after 2001 and critics may therefore argue that there is no need to give the topic further attention. Indeed, the scholarly attention given to many of the issues that will be dealt with in this thesis has been significant. However, the transformation of al Qaeda from an organization centred in Afghanistan to a disparate network of affiliate organizations has received relatively little consideration.[62] The franchising of the Islamic State, while not going unnoticed[63], has received even less at-

[61] See ch 5 for a discussion of the terminology
[62] See e.g. Christina Hellmich, *Al-Qaeda: From Global Network to Local Franchise* (Zed Books 2011); Byman, *Breaking the Bonds between Al-Qa'ida and Its Affiliate Organizations*; Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations'; Daniel L Byman and Jennifer Williams, 2015, 'ISIS vs. Al Qaeda: Jihadism's Global Civil War, 24 February 2015' The National Interest <http://nationalinterest.org/feature/isis-vs-al-qaeda-jihadism%E2%80%99s-global-civil-war-12304> accessed 14 June 2015; Barak Mendelsohn, 'Al-Qaeda's Franchising Strategy' (2011) 53 Survival 29; Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences*
[63] See e.g. Aaron Y Zelin, *The Islamic State's Archipelago of Provinces* (The Washington Institute for Near East Policy 2014)

tention. To the best of the author's knowledge, there is no systematic study that approaches al Qaeda and its affiliate organizations as a single movement. Legal scholarship rather treats them as independent organizations and therefore international lawyers often dismiss the possibility of a global armed conflict from the outset. While this will have to be evaluated in this thesis, this position does not match up with how states, primarily the United States, have approached the global insurgency by al Qaeda. Similarly, as will be shown in this thesis, it does ignore how al Qaeda perceives its relationship with its affiliate organizations. This is a serious shortcoming, considering that out of the five organizations responsible for most terrorist attacks in 2014, at least three had a direct connection with either the Islamic State or al Qaeda.[64]

The topic of this thesis will sadly stay relevant, considering that the number of terrorist attacks globally remains high. 2014 proved to be more violent and lethal than 2013. While the number of terrorist attacks went up by 35 %, the lethality of these attacks increased by 89 % globally.[65] Again, in the case of al Qaeda, affiliate organizations are responsible for most of these attacks. In the case of the Islamic State, continuous military pressure and the ideological pressure to expand could lead to the creation of a similar network of affiliate organizations, which is in the early stages of creation.[66] Both organizations have controlled or are actively controlling territory. In Yemen, al Qaeda

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[64] These five groups are the Islamic State itself, al-Shabaab in Somalia, Boko Haram in Nigeria, the Taliban in Afghanistan and Maoists/Communist Party of India, see National Consortium for the Study of Terrorism and Responses to Terrorism (START), 2015, 'Annex of Statistical Information, Country Reports on Terrorism 2014' <http://www.state.gov/documents/organization/239628.pdf> accessed 3 December 2015, p 11f
[65] Ibid, p 3
[66] See e.g. Zelin, *The Islamic State's Archipelago of Provinces*

in the Arabian Peninsula (AQIM) proved to be a continuous challenger to Yemeni national territorial integrity[67], a situation that has received renewed urgency in the face of a Saudi Arabian intervention against the Shiite Houthis in 2015 and AQAP's ability to capitalize on this situation.[68] In Mali, al Qaeda in the Islamic Maghreb (AQIM) played a significant part in the partition of the country that could only be halted due to swift military action by France.[69] Already in 2011, continued trans-border attacks by the Somali al-Shabaab militia triggered an intervention by Kenya.[70] The Islamic State, initially dismissed by Obama as a 'jayvee team'[71], managed to gain a foothold in large swaths of territory stretching over Syria and Iraq culminating in the declaration of the Caliphate[72], the ultimate end goal of almost every jihadist insurgency. It did so with utmost brutality and military efficiency[73], assisted by former members of the Iraqi military who joined the Islamic State after de-baathification efforts put in place by the American occupation force in 2003 made it impossible for them to continue their careers in the regular armed forces of Iraq.[74] Leading up to 2015, the Islamic State managed to establish itself as a regional proto-state, threatening Iraqi territorial sovereignty and a subsequently requiring international coalition action in collective self-defence of the country.[75] While the Islamic State seems to be in retreat at

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[67] See e.g. Gregory D Johnsen, *The Last Refuge: Yemen, Al-Qaeda, and the Battle for Arabia* (Kindle edn, Oneworld Publications 2013); W Andrew Terrill, *The Struggle for Yemen and the Challenge of Al-Qaeda in the Arabian Peninsula* (Strategic Studies Institute 2013)
[68] Helene Cooper and Eric Schmitt, 'Al Qaeda Is Capitalizing on Yemen's Disorder, U.S. Warns' *The New York Times* (Tokyo, 8 April 2015)
[69] See e.g. Alexis Arieff, *Crisis in Mali* (R42664, Congressional Research Service 2013)
[70] See e.g. International Crisis Group, 'The Kenyan Military Intervention in Somalia' [2012] Africa Report No 184
[71] David Remnick, 2014, 'Going the Distance' The New Yorker accessed 15 September 2015
[72] Abu Bakr Al-Husayni Al-Qurashi Al-Baghdadi, 2014, 'A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan' <https://ia902501.us.archive.org/2/items/hym3_22aw/english.pdf> accessed 9 July 2014
[73] See William McCants, *The Isis Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State* (Kindle edn, St. Martin's Press 2015), ch 2
[74] Coalition Provisional Authority Order Number 2: Dissolution Of Entities, 23 May 2003, CPA/ORD/23 May 2003/02
[75] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/2014/691, 22 September 2014

the time of writing, the number of terrorist attacks in Western cities is increasing.[76]

Both organizations continue to pose a threat to Western security, particularly the security of Western citizens, both inside and outside of the countries they operate in.[77] Most significantly, in response to French involvement in Mali and Syria, the Islamic State took the fight to France, killing 129 people in coordinated attacks across Paris on 13 November 2015.[78] French president Francois Hollande called it 'an act of war perpetrated by a terrorist army'[79] and promised his country a 'merciless' war against the Islamic State.[80] France, still shaken from the events in Paris, activated the European Union's mutual defence arrangements under article 42(7) of the Treaty on European Union[81], which was unanimously approved by a meeting of European defence ministers in Brussels on 17 November 2015.[82] In response, the parliaments of several European nations voted to join operations in Syria.[83] At the time of writing, 60 nations have

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[76] Anthony H Cordesman, *Trends in European Terrorism: 1970-2016* (Center for Strategic & International Studies 2017); Gudrun Harrer, 'Der "Islamische Staat" verliert, aber langsam' *Der Standard* (18 August 2017) <http://derstandard.at/2000062850257/Der-Islamische-Staat-verliert-aber-langsam> accessed 18 August 2017; Europol, *European Union Terrorism Situation and Trend Report 2017* (Europol 2016)

[77] See e.g. BBC, 2015, 'Mali hotel attack in Bamako: Two held' BBC News <http://www.bbc.co.uk/news/world-africa-34936420> accessed 1 February 2016

[78] Anthony Faiola and Souad Mekhennet, 'Paris attacks were carried out by three groups tied to Islamic State, official says' *The Washington Post* (15 November 2015) <https://www.washingtonpost.com/world/string-of-paris-terrorist-attacks-leaves-over-120-dead/2015/11/14/066df55c-8a73-11e5-bd91-d385b244482f_story.html> accessed 15 November 2015

[79] BFMTV, 'Attentats à Paris: Hollande accuse Daesh "d'acte de guerre"' *BFMTV* <http://www.bfmtv.com/politique/attentats-a-paris-francois-hollande-accuse-daesh-d-acte-de-guerre-930121.html#> accessed 4 December 2015, author's translation

[80] John Lichfield, 'Paris attacks: How Francois Hollande's pledge of 'merciless' war on Isis scattered his right-wing critics' *The Independent* (18 November 2015) <http://www.independent.co.uk/news/world/europe/paris-terror-how-francois-hollandes-hard-line-speech-scattered-his-right-wing-critics-a6738476.html> accessed 4 December 2015

[81] Consolidated Version of the Treaty on European Union [2008] OJ C115/13

[82] Council of the European Union, *Outcome of the 3426th Council Meeting, Foreign Affairs, Brussels 16 and 17 November 2015, 14120/15* (2015), p 6

[83] See e.g. HC Deb, *ISIL in Syria, vol 603, col 323* (2 December 2015); Antrag der Bundesregierung Einsatz bewaffneter deutscher Streitkräfte zur Verhütung und Unterbindung terroristischer Handlungen durch die Terrororganisation IS auf Grundlage von Artikel 51 der Satzung der Vereinten Nationen in Verbindung mit Artikel 42 Absatz 7 des Vertrages über die Europäische Union sowie den Resolutionen 2170 (2014), 2199 (2015), 2249 (2015) des Sicherheitsrates der Vereinten Nationen, Deutscher Bundestag, 18. Wahlperiode, 1 December 2015, Drucksache 18/6866; Beschlussempfehlung und Bericht des Auswärtigen Ausschusses (3. Ausschuss) zu dem Antrag der Bundesregierung – Drucksache 18/6866 –Einsatz bewaffneter deutscher Streitkräfte zur Verhütung und Unterbindung terro- ristischer Handlungen durch die Terrororganisation IS auf Grundlage von Artikel 51 der Satzung der

joined the coalition against the Islamic State, although not all in a fighting role.[84] Similarly, Western nations are contemplating military involvement in Libya, due to fears of rising influence of the Islamic State, exercised primarily through its local affiliate organization.[85]

In short, both the ability to counter global insurgencies, as well as the role of affiliate organizations within such a movement, deserve more scholarly attention, especially from the standpoint of state-centric international law and its application to such conflicts, which are with non-state actors but not necessarily restricted to the territory of any single state.

Vereinten Nationen in Verbindung mit Artikel 42 Absatz 7 des Vertrages über die Europäische Union sowie den Resolutionen 2170 (2014), 2199 (2015), 2249 (2015) des Sicherheitsrates der Vereinten Nationen, Deutscher Bundestag, 18. Wahlperiode, 2 December 2015, Drucksache 18/6912

[84] DPA, 'USA wollen Nato an Kampf gegen IS beteiligen' *Der Standard* (22 January 2016) <http://derstandard.at/2000029540936/USA-wollen-Nato-am-Kampf-gegen-den-IS-beteiligen> accessed 22 January 2016

[85] Eric Schmitt and Helene Cooper, 'U.S. and Allies Weigh Military Action Against ISIS in Libya' *The New York Times* (22 January 2016) <http://www.nytimes.com/2016/01/23/world/africa/us-and-allies-said-to-plan-military-action-on-isis-in-libya.html> accessed 28 January 2016

1 | Jihadist International Relations

In his 2016 book on the Islamic State, formerly known as al Qaeda in Iraq (AQI) and later as the Islamic State in Iraq (ISI) and the Levant (ISIL), the journalist Graeme Wood reproduced an interview with a follower of the Islamic State, who stated the importance of Islamic scripture and prophecies for understanding jihadist movements.

> What stands out to me that others don't seem to discuss much, is how the Islamic State, Osama [bin Laden] and others are operating as if they are reading from a script that was written 1,400 years ago. They not only follow these prophecies, but plan ahead based upon them. One would therefore assume that the enemies of Islam would note this and prepare adequately, but [it's] almost as if they feel that playing along would mean that they believe in the prophecies too, and so they ignore them and go about things their own way… [The] enemies of Muslims may be aware of what the Muslims are planning, but it won't benefit them at all as they prefer to keep their heads in the sand, or to fight imaginary war [sic] based up rational freedom-loving democrat vs irrational evil terrorist madmen. We know that these in charge will ignore [you] and screw things up anyway.[1]

Later chapters of this thesis will provide a legal framework for the relations among jihadist organizations and the legality of counteraction against these organizations on the basis of this. This chapter, while itself not concerned with international law, will seek to provide the historic and theological background to put these relationships into the proper context and look at the legal foundations under Islamic law driving these organizations in their global insurgency. After all, while no piece of work on al Qaeda and the Islamic State is complete without mentioning the ultimate aim of reestablishing the Caliphate through offensive

[1] Graeme Wood, *The Way of the Strangers: Encounters with the Islamic State* (Kindle edn, Allen Lane 2016), loc 265

or defensive jihad, very rarely have legal scholars concerned with counterterrorism gone beyond the surface of these concepts or tried to factor them into their analysis.[2] This is a serious shortcoming in as far as without a clear understanding of these organizations' goals and the historical concepts they are invoking, it is impossible to adequately characterize their inter-group relationships or discuss the strategic necessity of countermeasures.

In order to understand the importance of affiliation in these cases, it will be argued, one has to remember the insurgent nature of jihadist organizations and their ultimate aim to establish the Caliphate. While there is no single answer to the question of what form and shape the jihadists' Caliphate would take, the literature provides enough clarity for this chapter to argue that, drawing on Islamic state theory, the rise of disparate regional entities does not necessarily undermine the idea of the Caliphate. Drawing on the arguments brought forward by Islamic legal scholars in the context of the disintegration of the original Caliphate, it will be argued that there is sufficient flexibility in the idea of the Caliphate to allow for a global insurgency of affiliated but organizationally distinct organizations. It is then put forward that the network should be understood as a network of insurgent organizations engaged in a process of state building, with varying degrees of success, whereas the individual organizations assume a role comparable to political entities within a federal state. It is worth pointing out in this context that the Islamic State refers to its affiliates as 'provinces' (*wilayat*).[3] Such an approach also finds support in the importance jihadists

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[2] See e.g. Niaz A Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq* (Palgrave Macmillan 2008); N. A. Shah, 'Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism' (2007) 12 Journal of Conflict and Security Law 95 for a discussion of Islamic international law

[3] BBC Monitoring, 2015, 'Islamic State builds on al-Qaeda lands (9 March 2015)' BBC World News accessed 13 March 2015

ascribe to the *ummah*, the global community of believers, rather than individual nations states. As one jihadist explains: 'We realized we were a nation […] otherwise, what would make me leave Saudi Arabia—and I am of Yemeni origin—and go fight in Bosnia.'[4]

Once the insurgent nature of jihadist groups such as al Qaeda and the Islamic State and the nature and form of the Caliphate has been established, the chapter will turn to the question of how such a state would behave in its international relations. Would it, as Walt suggests[5], simply become a regular member of the community of Westphalian states over time? While there is no way to predict long-term developments, in the short and intermediate timeframe it seems unreasonable, on the one hand, to stress that jihadist groups reject the Westphalian organization of the (Muslim) world and, on the other, expect that they would subordinate themselves to its legal order. This chapter therefore sets out to explore concepts about the structure of international relations contained in early Islamic law in order to place recent political developments, especially the rise and conduct of the Islamic State, into this context and develop an understanding of 'jihadist international relations'.

This label has been deliberately chosen to mark a distinction to Islamic international relations, which would necessitate taking the conduct of existing Islamic states into the analysis. Like every legal regime, Islamic international law developed over time and concepts first formulated in the 8th or 9th century have been refined or even reverted over the course of history. While not taking these developments into the analysis might be

[4] Thomas Hegghammer, *Jihad in Saudi Arabia* (Cambridge University Press 2010), p 61
[5] Stephen M Walt, 2015, 'What Should We Do if the Islamic State Wins?, 10 June 2015' Foreign Policy <https://foreignpolicy.com/2015/06/10/what-should-we-do-if-isis-islamic-state-wins-containment/> accessed 14 June 2015

seen as a weakness for systematically studying Islamic international law in general, it is necessary for gaining an understanding of how jihadist groups see the role of the Caliphate in international relations. The reason for this lies in the political goal of Salafi jihadist organizations to "purify" Islam and unite the *ummah*, the global community of believers, in the Caliphate as it existed during the times of the Prophet and the early Caliphs. Of interest, therefore, is an analysis of the jihadist interpretation of what Al Ghunaimi has called the 'classical doctrine' of Islamic international law.[6]

The chapter will therefore describe how the international system is structured according to the classic doctrine. It will show that rather than being divided into any number of sovereign states, the world according to the jihadists is divided into the *dar al-Islam*, or the world of Islam, and the *dar al-harb,* or the territory of war, which are perpetually at war. This fundamental distinction forms the heart of jihadist international relations, which are based on *jihad.* Defined by David Cook as 'warfare authorized by a legitimate representative of the Muslim community for the sake of an issue that is universally, or nearly universally, acknowledged to be of critical importance for the entire community against an admitted enemy of Islam'[7], it has entered the vocabulary of political scientists, lawyers, policy as well as lawmakers alike—although often with little reflection or clarity. This has gone as far as creating the label 'jihadism' for a broad variety of groups, even though this is a modern neologism.[8] While there is no consensus among scholars whether *jihad* is synonymous with the use of force or whether *jihad* has

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[6] Mohammad Talaat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff 1968)
[7] David Cook, *Understanding Jihad* (University of California Press 2005), p 3
[8] Jarret Brachman, *Global Jihadism* (Routledge 2009), p 5

an often overlooked peaceful dimension[9], the term here will be primarily be used in a way as it relates to the use of force.[10] Given the breadth of 'international relations', which extend to, *inter alia*, political, economic and cultural relationships between states[11], an exhaustive analysis will not be possible within the confines of this chapter. In line with the overall scope of inquiry of this thesis and the violent nature of jihadist groups, the analysis here will therefore be restricted to issues that pertain to the use of force of the Caliphate's international relations. It will be shown that by virtue of its internal laws[12] an Islamic political entity rejecting international law and solely relying on the classic doctrine would be able to use force in its international relations and, to some extent, be required to do so.

1. Jihadist Insurgency and the Caliphate

Insurgency, as a political concept, is a 'strategic effort to subvert, overthrow and then recast an existing status quo via a combination of political and violent means'.[13] It is a revolutionary endeavour to reshape political structures according to a political ideology, whereas 'political' has to be understood in the broadest possible sense. It is an effort to create political change within a state or to create entirely new states. It may use either terrorist tactics or conventional military force, or a combination

[9] S. S. Ali and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10 Journal of Conflict and Security Law 321, p 329-331

[10] The notion of Islamic laws, on the use of force or otherwise, relates to those found in the *Qur'an* and does not incorporate interpretations by contemporary Muslim states. This should not be seen as endorsing the view that only those early interpretations are truly Islamic, but merely as a practical decision recognizing that this is the view taken by most jihadist groups.

[11] Not taking into account relations on the sub-state level, see e.g. Thomas Risse-Kappen (ed) *Bringing transnational relations back in: Non-state actors, domestic structures and international institutions* (Cambridge University Press 1995)

[12] Islamic law does not *per se* differentiate between domestic and international law. The sharia is a comprehensive system of laws regulating all elements of human existence.

[13] Andrew Mumford, 'Al Qaeda and Networked International Insurgency' in Aidan Hehir, Natascha Kuhrt and Andrew Mumford (eds), *International Law, Security and Ethics : Policy Challenges in the Post-9/11* (Routledge 2011), p 32

thereof[14], in support of a political movement. The important point to make is that insurgency aims to transform ideology, even if it is couched in religious language, into political goals, however utopian they may be. Both al Qaeda as well as the Islamic State are commonly portrayed as "terrorist" organizations in popular as well as academic discourse, without generating much debate on whether this terminology is appropriate.[15] As will become apparent, both groups should rather be classified as insurgents aiming to become the state, even though not necessarily within the current borders of the states they operate in. Thus, a look at the underlying concepts of the model of statehood pursued by these organizations can help to understand how connections between affiliated organizations should be characterized.

1.1. Jihadist Insurgency

Both al Qaeda and the Islamic State are adherents of Salafi Islam. Salafists believe that only the *Qur'an* and the teachings of the prophet Mohammed are valid sources of Islamic law.[16] While not all Salafists are jihadists[17] and generally speaking not all jihadists are Salafists[18], violent groups similar to al Qaeda generally belong to the Salafist tradition. While Salafi jihadists like al Qaeda or the Islamic State are not the only jihadist

[14] John Mackinlay, *The Insurgent Archipelago* (Hurst 2009), p 4
[15] For an exception see Audrey Kurth Cronin, 'ISIS Is Not a Terrorist Group' (2015) March/April Foreign Affairs 87
[16] See Shiraz Maher, *Salafi-Jihadism: The History of an Idea* (Hurst 2016) for a comprehensive overview of the genesis of 'Salafi Jihadists'
[17] Michael W. S. Ryan, *Decoding Al-Qaeda's Strategy: The Deep Battle Against America* (Columbia University Press 2013), p 18; It has to be noted that the term 'jihadism' does not have a specific religious meaning but is a modern neologism. In contemporary usage, it is meant to refer to a group of Muslims focusing on the violent side of jihad in pursuit of a political agenda. See Brachman, *Global Jihadism*, p 5
[18] The *Shi'a* Hamas and Hezbollah describe themselves as being engaged in a jihad against occupying powers, while both do not qualify as Salafists as Salafists necessarily belong to the *Sunni* school of Islam. See e.g. Matthew Levitt, *Hamas. Politics, Charity, and Terrorism in the Service of Jihad* (Yale University Press 2006); Augustus Richard Norton, *Hezbollah* (Princeton University Press 2007)

groups with a global presence[19], it is worth remembering that current political and military campaigns by the United States and her allies have largely focused on such groups. Therefore, the focus here will be on those groups.

For Kilcullen, organizations like al Qaeda are part of a 'globalized Islamist insurgency'[20] with the aim of overthrowing apostate regimes in pursuit of re-establishing the Caliphate. Indeed, most analysts agree that it is the aim of Salafi jihadists, including the Islamic State and al Qaeda, to establish an Islamic state ruled by *shari'ah* law to unify the global community of Muslims. At the most general level, this entity is usually referred to as the Caliphate, a very deliberate reference to the Islamic political entities formed after the death of the Prophet Muhammed in 632 AD.[21] Especially the Rashidun Caliphate, established in 632 AD by Abu Bakr and led in succession by companions of the Prophet until 656 AD, when civil war led to its beginning demise in 661 AD with the establishment of the Umayyad Caliphate.[22] The first four caliphs are commonly referred to as the 'rightly guided' caliphs and assume a special role both in jihadist thinking, as well as Islamic law.[23]

Already Osama bin Laden, in his 1996 declaration of war on the United States, called for the 'unification of the *nation's* ranks under the banner of one God'.[24] The nation bin Laden had

[19] For a discussion of the global footprint of Hezbollah see Matthew Levitt, *Hezbollah: The Global Footprint of Lebanon's Party of God* (Kindle edn, Georgetown University Press 2013)
[20] David Kilcullen, *Counterinsurgency* (Oxford University Press 2010), p 165
[21] See Noah Feldman, *The Fall and Rise of the Islamic State* (Paperback reprint edn, Princeton University Press 2012), ch 1; See e.g. Madawi Al-Rasheed, Carool Kersten and Marat Shterin (eds), *Demystifying the Caliphate: Historical Memory and Contemporary Contexts* (Oxford University Press 2015), ch 1
[22] Nelly Lahoud, *The Jihadis' Path to Self-Destruction* (Columbia University Press 2010), p 69
[23] 'Rightly Guided Caliphs', in John L Esposito (ed), *The Oxford Dictionary of Islam* (Oxford Islamic Studies Online) <http://www.oxfordislamicstudies.com/article/opr/t125/e2018> accessed 23 July 2017; Oliver Leaman, *The Qur'an: an Encyclopedia* (Routledge 2005), p 607
[24] Osama Bin Laden, *Compilation of Usama bin Laden Statements 1994 - January 2004* (FBIS Report 2004), p 28, emphasis added

in mind was not restricted to a single jurisdiction, but the *ummah*, the global community of believers.[25] This idea lives on in Ayman al-Zawahiri, who thinks that 'it is the hope of the Muslim nation to restore its fallen Caliphate and regain its lost glory'.[26] Unification of the *ummah* is also reiterated in the words of Abu Bakr al-Baghdadi, leader of the Islamic State, who divides the world into two camps, the *ummah* and the rest, and wants to unite the former in the '*khilafah*'.[27] It can therefore be confidently argued that Salafi jihadist groups can be characterized as insurgent groups, seeking to overthrow political regimes with the aim of forming new political entities.

This is an inherently insurgent aim, regardless of whether the road to this goal leads through Cairo or Washington.[28] It is surprising, therefore, that the idea of the Caliphate, its political structure, and historic precedents have not generated more interest among scholars of al Qaeda and the Islamic State. This is a serious shortcoming for two reasons: First, some scholars characterize the regionalization of al Qaeda (and, to a lesser degree, the Islamic State) into affiliate organizations as a sign of the organization's demise.[29] However, it will be argued below, while this development certainly entails a redistribution of power within the network, it does not signal the demise of the network if it is understood as a single actor. Second, much of

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[25] Olivier Roy, *The Failure of Political Islam* (Carol Volk tr, Harvard University Press 1994), p 13

[26] Al-Zawahiri quoted in Seth G Jones, *Re-Examining the Al Qa'ida Threat to the United States, Testimony presented before the House Foreign Affairs Committee, Subcommittee on Terrorism, Nonproliferation, and Trade on July 18, 2013 (updated after testimony)* (RAND Corporation 2013), p 3

[27] Abu Bakr Al-Husayni Al-Qurashi Al-Baghdadi, 2014, 'A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan' <https://ia902501.us.archive.org/2/items/hym3_22aw/english.pdf> accessed 9 July 2014

[28] See sec 3 below; see also Fawaz A Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge University Press 2009) for a comprehensive discussion on the near vs. the far enemy

[29] Christina Hellmich, *Al-Qaeda: From Global Network to Local Franchise* (Zed Books 2011)

Al-Zawahiri's desired pan-Islamic Caliphate is territory in which groups affiliated with al Qaeda operate (see figure 1[30]). According to news reports, the Islamic State has laid claim to the same territorial area even though it does not occupy much of this territory itself, but often similarly acts through affiliate organizations.[31] It has to be acknowledged that, given the ideological alignment between al Qaeda and its affiliates, as well as the Islamic State and its affiliates, there is a temptation to see a globally connected movement where one could instead see disconnected actors. This fact, to some extent, has its roots in the actions and statements of the militants themselves. In 1996, during Osama bin Laden's time in Sudan, the 'Islamic Army Shura'[32], consisting of what is now sometimes referred to as al Qaeda Central (AQC)[33] and representatives of other jihadist organizations from throughout the Muslim world[34], recommitted to the 1996 declaration of war on the United States.[35] While it is questionable to what extent unity ever existed within the Islamic Army Shura, the 1990s were characterized by increased interaction and cooperation between various groups.[36] What is unclear is the extent to which the unification of the *ummah* in the Caliphate and the rise of regional

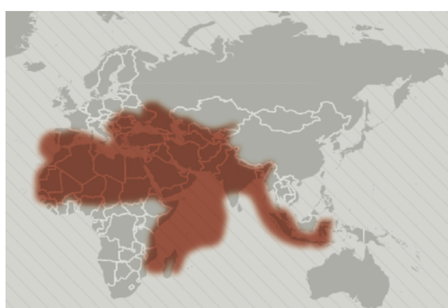

Figure 1: Map of Zawahiri's Caliphate

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[30] Jones, *Re-Examining the Al Qa'ida Threat to the United States, Testimony presented before the House Foreign Affairs Committee, Subcommittee on Terrorism, Nonproliferation, and Trade on July 18, 2013 (updated after testimony)*, p 3

[31] See e.g. Erin Banco, 2014, 'That Map Of The ISIS 5-Year Conquest Plan? Flawed, Experts Say' International Business Times <http://www.ibtimes.com/map-isis-5-year-conquest-plan-flawed-experts-say-1621422> accessed 13 November 2014

[32] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (W. W. Norton & Company 2004), p 58

[33] Nelly Lahoud and others, *Letters from Abbottabad: Bin Ladin Sidelined?* (Harmony Program at the Combating Terrorism Center at West Point 2012)

[34] Gerges, *The Far Enemy: Why Jihad Went Global*, p 55

[35] Bin Laden, *Compilation of Usama bin Laden Statements 1994 - January 2004*, pp 56-58

[36] See Nelly Lahoud, *Beware of Imitators: al-Qu'ida Through the Lens of its Confidential Secretary* (Harmony Program at the Combating Terrorism Center at West Point 2012); David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One* (Oxford

affiliate organizations are conflicting goals. If they are not, understanding how the Caliphate was organized should help to bring more clarity to the characterization of connections between affiliate organizations and the respective core groups.

In opposition to the overall trend of increased globalization of jihadist activity, al Qaeda itself decentralized and regional movements gained importance after 9/11. These movements often blend local grievances with global aims in order to win the support of local populations. As Shiraz Maher has pointed out: 'proximity now confers legitimacy'.[37] The role of AQC in these localized insurgencies is to be the 'vanguard', to use Sayyid Qutb's term[38], and act as a central command and control unit. The literature usually describes the al Qaeda network with i) AQC in the middle as a coordinational element and then in outward-oriented concentric circles, ii) affiliate organizations, iii) sympathetic organizations, and iv) individuals who share the ideology.[39] This network model is not restricted to al Qaeda. The Islamic State has demanded allegiance both from al Qaeda affiliates and more generally from all Muslims.[40] In November 2014, it officially expanded into various countries and proclaimed 'the dissolution of the names of the groups in them and declaring them to be new provinces of the Islamic State'.[41] Over

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University Press 2009), National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*

[37] Shiraz Maher, 'Bin Laden's Final Triumph. From Riyadh via London to Damascus, Baghdad and ISIS – the Jihadist Surge' *New Statesman* (29 August 2014) 22, p 24

[38] Sayyid Qutb, *Milestones* (Reprint edn, Islamic Book Service 2008-2009 [2001]), p 12

[39] Seth G Jones, *A Persistent Threat. The Evolution of al Qa'ida and Other Salafi Jihadists* (RAND Corporation 2014), p 9; Ryan, *Decoding Al-Qaeda's Strategy: The Deep Battle Against America*; Joachim Krause, 'Al Qaida nach bin Laden – Die strategische Relevanz des islamistischen Terrorismus' in Stefan Hansen and Joachim Krause (eds), *Jahrbuch Terrorismus 2011/2012* (Barbara Budrich 2012), p 41; John Rollins, *Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy* (Congressional Research Service 2011)

[40] J M Berger, 2014, 'The Islamic State vs. al Qaeda' Foreign Policy <http://www.foreignpolicy.com/articles/2014/09/02/islamic_state_vs_al_qaeda_next_jihadi_super_power> accessed 3 September 2014

[41] Islamic State, 'Expansion of the Islamic State' (*Jihadica.com*, 2014) <http://www.jihadica.com/wp-content/uploads/2014/12/%D9%88%D9%84%D9%88-%D9%83%D8%B1%D9%87-%D8%A7%D9%84%D9%83%D8%A7%D9%81%D8%B1%D9%88%D9%86.pdf> accessed 10 January 2015; translation contained in Cole Bunzel, 'Battlefield Yemen: The Islamic State's

the course of 2015, it received various pledges of allegiance from a multitude of jihadist organizations.[42]

Arguably, such fragmentation is the opposite of uniting the *ummah* in a Caliphate. This raises the question of how coherent the Caliphate, as a political entity, has to be. Ryan, interpreting the writings of Sayyid Qutb, argues that the Caliphate not necessarily has to be a unified state but could potentially take the form of a federation of political units, governed by *shari'ah* law, with the caliph as the spiritual head.[43] Thus, the rise of regional insurgent affiliates could very well be interpreted as al Qaeda being on track with its strategic plan. It has to be recalled that originally al Qaeda did not seek to impose the Caliphate on a global level, but instead always prioritized the overthrow of local regimes.[44] If this is the case, it stands to reason that such organizations should not be treated as completely separate and unconnected entities. Conversely, the branching out of the Islamic State through accepting pledges of allegiance by other groups and integrating them as 'provinces' into their organization points towards a system where such groups are not independent but united through agreements based on Islamic law. In this case, it could also be argued that instead of seeing al Qaeda and its affiliates as separate organizations, it could be seen as a jihadist federation.

Al Qaeda, opposed to the Islamic State, was meant as a means to an end and never intended to become the state itself.[45] It does not claim that the Caliphate has already been

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Challenge to AQAP' (*Jihadica.com*, 12 December 2015) <http://www.jihadica.com/battlefield-yemen/> accessed 10 January 2015

[42] Daniel Milton and Muhammad al-'Ubaydi, 'Pledging Bay`a: A Benefit or Burden to the Islamic State?' (2015) 8 CTC Sentinel 1

[43] Ryan, *Decoding Al-Qaeda's Strategy: The Deep Battle Against America*, pp 29f

[44] Martin Rudner, 'Al Qaeda's Twenty-Year Strategic Plan: The Current Phase of Global Terror' (2013) 36 Studies in Conflict & Terrorism 953, p 959

[45] William Braniff and Ryan Pereira, 2014, 'A Tale of Two Caliphates' START <http://www.start.umd.edu/news/tale-two-caliphates> accessed 1 September 2014

established. In an interview released by the organization formerly known as the al Nusrah Front, a high ranking official, Abu Sulayman al Muhajir, makes clear that the *khilafah* does not yet exist, but that al Qaeda is working towards it.[46] Al Qaeda sees itself as a militant organization focused on the violent side of jihad and does not want to preoccupy itself with 'humanitarian or other matters'.[47] In contrast to the core organization, the affiliates have at times succeeded in conquering territory and implemented their interpretation of *shari'ah* law. However, Bin Laden did seem to think that affiliate organizations should concern themselves with matters of state building. In stark contrast to the humanitarianism-shunning approach initially adopted by al Qaeda, in a 2010 letter to 'Atiyya, bin Laden advises to implement irrigation projects by the al Qaeda affiliate al Shabaab in Somalia in order to win the hearts and minds of the local population.[48]

Similar strategic approaches can be seen in al Qaeda documents uncovered by the Associated Press in Mali in 2012 and 2013. A letter from al Qaeda in the Islamic Maghreb (AQIM) emir Abdoulmalek Droukdel, potentially written in 2011, to AQIM and Ansar Dine fighters, advises to implement the *shari'ah* only 'gradually', include as many parts of society as possible into the governance of the areas under control, and to not alienate the local population.[49] According to Mary Habeck, both AQIM and Ansar Dine heeded this advice.[50] A 2012 letter

[46] Abu Sulayman al-Muhajir, 'An Inrerview with Sheikh Abu Sulayman al-Muhajir' (*AL Basira Media Productions*, 2014) <https://www.youtube.com/watch?v=YQJukdfBSSw> accessed 22 September 2014, at 25:00

[47] *Al-Qa'ida: Constitutional Charter, Rules and Regulations*, (Document #: AFGT-2002-600175, CTC Harmony Program), article 3(3), p 3

[48] Osama Bin Laden, *Letter from Osama bin Laden (aka Zmaray) to `Atiyya (aka Mahmud), US vs NASEER, 425-10-CR-019-S-4-RJD* (6 August 2010), pp 2-3

[49] Associated Press, 'Al-Qaida Papers: Al-Qaida's Sahara Playbook' Documentcloud <https://assets.documentcloud.org/documents/838898/aqp-sahara-playbook.pdf> accessed 29 May 2018, pp 3-5

[50] Mary Habeck, 'What do the Mali al Qaeda documents tell us about the group?' Foreign Policy <http://foreignpolicy.com/2013/02/16/what-do-the-mali-al-qaeda-documents-tell-us-about-the-group/> accessed 28 May 2018

from al Qaeda in the Arabian Peninsula (AQAP) emir Abu Basir Nasir al-Wuhayshi, congratulating Droukdel on AQIM's 'victories in the Islamic Maghreb', goes further and urges Droukdel to follow AQAP's lead in winning over the people through 'conveniences of life' and by 'taking care of their daily needs like food, electricity, and water'.[51] Wuhayshi goes on to explain that '[p]roviding these necessities will have a great effect on people' and 'will make them sympathize with us', ultimately convincing them that 'their fate is tied to ours'.[52] Like Droukdel, Wuhayshi warns against a rash and harsh implementation of sharia law.[53]

This suggests that there is at least some consideration for good governance in the al Qaeda 'jihadosphere', which might ultimately lead to statehood. In fact, the Islamic State proclaimed itself to be a state even when it was still an al Qaeda affiliate.[54] Its leader Abu Bakr al-Baghdadi, now self-appointed caliph, promised '[M]uslims everywhere […] a state and khilafah, which will return [their] dignity, might, rights, and leadership'.[55] Considered one of the most powerful groups within the jihadi landscape[56], it is by no means the only group committed to re-establishing the Caliphate. In fact, this is a political goal commonly shared among jihadist and especially the affiliates.[57]

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[51] Associated Press, 'Al-Qaida Papers' The Long War Journal <https://www.longwarjournal.org/images/al-qaida-papers-how-to-run-a-state.pdf> accessed 29 May 2018, p 3
[52] Ibid
[53] Ibid
[54] Richard Barrett, *The Islamic State* (The Soufan Group 2014), p 12
[55] Al-Baghdadi, 'A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan', p 5
[56] Missy Ryan, 'Islamic State threat 'beyond anything we've seen': Pentagon' *Reuters* (21 August 2014) <http://www.reuters.com/article/2014/08/22/us-usa-islamicstate-idUSKBN0GL24V20140822>
[57] Marc Sageman, *Understanding Terror Networks* (University of Pennsylvania Presss 2004), p 1; For al-Shabaab, for example, see S.J. Hansen, *Al Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005-2012* (Oxford University Press 2013), p 5; Nigeria Security Network, *Special Report: North-East Nigeria on the Brink* (2014) for Boko Haram; Bill Roggio, 2012, 'AQAP commander says 'the Islamic Caliphate is coming'' The Long War Journal <http://www.longwarjournal.org/archives/2012/01/aqap_commander_says.php> accessed 19 September 2014 for al Qaeda in the Arabian Peninsula (AQAP)

1.2. Monolithic vs. Federalist Caliphate

Above anything else, what is implicit in the notion of the Caliphate is a return to *shari'ah* law as a constitutional element in the (yet to be formed) political entity. As Feldman develops in his impressive work on Islamic statehood, an Islamic state differentiates itself primarily through seeing the *shari'ah* as the highest legal source, originating directly from god, from which all authority flows.[58] Within this Islamic state, the separation of powers is guaranteed by entrusting the *'ulama*, a group of religious and legal scholars, with the interpretation of the *shari'ah* and a separate political figure as the executive.[59] In line with the universal nature of Islamic law, the early Islamic geopolitical order shows an inclusionary tendency.[60] This can be exemplified in two ways. For one, the main political unit within the Islamic system is the *ummah*, which in theory is not restricted to any particular nation or ethnic group of people[61] and for which the *shari'ah* is the ultimate source of law. As with most systems of divine law, Islamic law is 'inherently personal rather than territorial'[62] and is binding on Muslims wherever they are. This does not mean, however, that the concept of a coherent polity is foreign to Islam. As Khadduri has pointed out, early Islamic scholars soon realized the importance of organizing society within a state that not only could protect the individual from outside dangers and, by pooling individual resources, provide for the basic necessities of life, but also, as later postulated by Hobbes,

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[58] Feldman, *The Fall and Rise of the Islamic State*, p 6f
[59] Ibid
[60] See e.g. Katja LH Samuel, *The OIC, the UN, and Counter-Terrorism Law-Making* (Hart Publishing 2013), p 347
[61] Majid Khadduri, *War and Peace in the Law of Islam* (Lawbook Exchange edn, The Lawbook Exchange 2006 [1955]), p 17
[62] Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (John Hopkins University Press 1966), p 7

protect individuals from the danger they face from one another.[63] Thus the Caliphate[64] under the leadership of a Muslim sovereign[65] assumes central importance in the classic Islamic doctrine for its political and religious role, as it enables Muslims to live within a state that positively enables its citizens to adhere to the divine legal system. Some go even so far as arguing that the establishment of the Caliphate is a religious obligation for Muslims as 'He who dies without an imam [or caliph] dies the death of a pagan', according to Mohammed.[66]

Would such a state have to be centralistic, unified, and monolithic? In 2001, Osama bin Laden declared in an interview for Jihad Online News Network that al Qaeda wants the 'revival of [the Islamic] nation under the Islamic Caliphate' to defend it against the crusade by the West, for which purpose the 'nation must unify its efforts'.[67] The repeated use of the word 'Caliphate' in the singular could be taken to suggest that it is indeed a monolithic state most groups—or at least al Qaeda—are after. The rise of regional entities would thus constitute a serious threat to this political goal. However, if one looks at the history of Islam, the picture becomes blurred. Between 622 AD and 1918, the Islamic state went through various stages of organization, with decentralization as early as 900 and further fragmentation beginning around 1500.[68] The internal organization of the state was continually contested and can generally be divided into two camps: i) the monoistic doctrine and ii) the pluralists.[69] Proponents of the former stressed that since there is only one god, from whom all authority flows, there can only be

[63] Khadduri, *War and Peace in the Law of Islam*, p 4ff
[64] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 10
[65] D. B. Macdonald, 'Dar al-Islam' in M. Th. Houtsma and others (eds), *EJ Brill's first encyclopaedia of Islam, 1913-1936*, vol 2 (reprint edn, E.J. Brill 1993)
[66] Cited in Khadduri, *War and Peace in the Law of Islam*, p 24
[67] Bin Laden, *Compilation of Usama bin Laden Statements 1994 - January 2004*, p 242
[68] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 20
[69] Ibid, p 21

one authority, which is vested in the caliph. The pluralists, on the other hand, rejected this and argued that where natural barriers, such as oceans, divide the *ummah,* a political division would be permissible. Thus, the pluralists saw no problem in allowing the rise of political subentities governed by *independent* caliphs. The majority, however, rejected this view.

Yet the political realities of the time constrained the implementation of the best-case scenario, just as they do now, and hence a compromise had to be found. This required a modification of what was understood by the notion of central authority while simultaneously permitting the rise of political subentities under local authority. The *Shafi'i*[70] jurist al-Mawardi (974-1058), in trying to balance religious demands of unity with political realities, argued that *self-appointed* provincial rulers should be recognized in order to preserve the outward unity of the state while simultaneously stressing the ultimate authority of the caliph[71] as the successor of the prophet[72] and thus the supreme political figure within the Islamic state.[73] While Mawardi was quite clear that there could only be one Caliphate[74], he devoted an entire chapter in his *Ordinances of Government* to the administration of regions through *emirs. Emirs*, in contrast to *wazirs* whose functions resemble those of government ministers[75], 'assume a general responsibility for a particular territory and for specific and clearly defined tasks'.[76] *Emirs*, according to Mawardi, perform broad governmental duties

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[70] School of Islamic jurisprudence within Sunni Islam, based on the work of the Arab scholar Al-Shafi'i; see Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (Brill 1997), ch 4
[71] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 21
[72] Ira M Lapidus, 'State and Religion in Islamic Societies' (1996) 151 Past & Present 3, pp 13-16, 19
[73] Helmer Ringgren, 'On the Islamic Theory of the State' (1972) 6 Scripta Instituti Donneriani Aboensis 103, p 106
[74] Abu'l Hasan 'Ali ibn Muhammad ibn Habib al-Basri al-Mawardi, *The Ordinances of Government (Al-Ahkam al-Sultaniyyah walwilayat al-Diniyyah)* (Wafaa H Wahba tr, Paperback edn, Garnet Publishing 2000 [450]), p 7
[75] Ibid, ch 2
[76] Ibid, p 32

within their provinces. The *emir* generally acts as the commander in chief of the army within his province. He is responsible for its organization, its deployment as well as its pay, unless already paid for by the Caliph. In border-regions he is even empowered to wage war against neighbouring states. Furthermore, the *emir* appoints judges, administers justice, and collects tax.[77]

This slight digression into historic Islamic state theory was necessary to put the current tendency of decentralization within the jihadist movement into context. It provides an alternative to the analysis that fragmentation and the rise of al-Qaeda 'franchises' undermines the goal of uniting the *ummah* by putting more weight on local objectives.[78] Just as in Islamic history, this process should be understood as a reaction to political realities and as something that, if anything, makes the movement more resilient. As Feldman has pointed out, unity within the Islamic state was historically guaranteed through adherence to *shari'ah* law and a formal pledge to the supreme authority of the Caliph, even if in reality most political authority rested with the regional ruler.[79] The relative independence of affiliate organizations, both within the al Qaeda network and, possibly, within the Islamic State, should therefore not be seen as necessarily undermining the idea of the Caliphate. In conclusion, this points to a possible political structure with the *Caliph* at the centre, but strong and semi-independent *emirs* in charge of the regions. Put in modern terms, the Caliphate could be described as a federal entity with tremendous political power vested in the regions. Critics may therefore argue that the Caliphate is a 'legal fiction'[80], because the Caliph potentially wields no direct political

[77] Ibid, p 32
[78] See e.g. Hellmich, *Al-Qaeda: From Global Network to Local Franchise*, p 163
[79] Feldman, *The Fall and Rise of the Islamic State*, p 37
[80] Ibid

power, which is instead vested in regional emirs. Indeed, it is questionable to what extent the Caliphate as a whole could be seen as an effective state.[81] Nevertheless, al Qaeda has used this fragmentation as a successful tool to project power even when under pressure from government counteraction.[82]

2. Jihadist International Relations

In the Westphalian system, the fundamental political unit is of course the state, as outlined in the Charter of the United Nations and in most international relations theories.[83] Relations between those political units are based on sovereign equality[84], on the peaceful resolution of disputes[85], and the prohibition of the use or threated use of force against the territorial integrity or political independence of other states[86] unless authorized by the Security Council[87] or in self-defence.[88] Even though it may be trivial, it is necessary to observe that the fundamental operational principle in the Westphalian system is territorial separation. Boundaries between political units[89] are the necessary foundation for sovereign equality and the norm for the norm of

[81] See James Crawford, 'The Criteria for Statehood in International Law' (1976) 48 British Yearbook of International Law 93 for a general discussion about statehood

[82] See US House of Representatives, *Global Al-Qaeda: Affiliates, Objectives, And Future Challenges, Hearing Before the Subcommittee On Terrorism, Nonproliferation, and Trade of The Committee On Foreign Affairs House of Representatives, Serial No. 113–44, 18 July 2013* (GPO 2013), Barak Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences* (Oxford University Press 2016)

[83] See e.g. Kenneth N Waltz, *Theory of International Politics* (Addison-Wesley Publishing Company 1979); Barry Buzan, *People, States, and Fear: An Agenda for International Security Studies in the Post-Cold War Era* (L. Rienner Publishing Company 1991); Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Pub. 1998); Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (3rd edn, Palgrave 2002); Alexander Wendt, 'Anarchy is what States Make of it: The Social Construction of Power Politics' (1992) 46 International Organization 391

[84] Charter of the United Nations and Statute of the International Court of Justice (1945), art. 2(1)

[85] Ibid, art. 2(3)

[86] Ibid, art. 2(4)

[87] Ibid, art. 42

[88] Ibid, art. 51

[89] Even though they do not have to be precisely defined, see *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), Judgement 20 February 1969* ICJ Reports 1969, p 3, para 46

non-intervention to function. The importance of territorial separation within the Westphalian system is easily demonstrated, for example by the explicit reference to 'territorial integrity' and connected to it 'political independence' in Article 2(4) of the Charter, or implicitly in the condition of effectiveness, which according to Crawford forms the basis for all other criteria for statehood.[90] This argument can further be supported by the fact that certain states function reasonably well even in the absence of formal recognition.[91] However, while the existence of borders between political units is crucial, complete control over territory by those political units does not seem to be a necessary precondition for statehood in every single case, given that in large parts of the world the Westphalian notion of the state is only a legal fiction.[92] Consequently, in the classic doctrine of sovereignty, the lack of control over territory does not invalidate the norm of non-intervention.[93]

How do jihadist political entities fit into this framework? In the 1990s, Samuel Huntington predicted a clash of civilizations and attempts to fundamentally remake the global order by Islamic groups and states[94], a development that has never materialized. To the contrary, and to the jihadists' disdain, the aftermath of the Arab spring largely consolidated the existence of Arab nation states even while their leaderships were toppled and their constitutions received a fundamental rewriting.[95] Viewed in this light, it is especially remarkable that the Islamic State (IS) managed to establish itself as a regional proto-state

[90] See Crawford, 'The Criteria for Statehood in International Law', p 111
[91] China between 1949 and the 1970s as well as contemporary Taiwan are cases in point.
[92] See e.g. Rosa Brooks, 'Failed States, or the State as Failure?' (2005) 72 University of Chicago Law Review 1159
[93] See e.g. Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999), p 3ff for a general discussion on different forms of sovereignty.
[94] Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster 1996)
[95] Nelly Lahoud and Muhammad al-'Ubaydi, *Jihadi Discourse in the Wake of the Arab Spring* (Harmony Program at the Combating Terrorism Center at West Point 2013)

in 2014, levying taxes and drawing a majority of the up to 25,000 foreign fighters globally in 2015.[96] Leaving issues of statehood under international law aside for the moment, the relative success of IS raises the question of how such a proto-state would fit into the international system of Westphalian states. This question is especially pertinent since, unlike many other unrecognized political entities, IS does not, at the time of writing, aim to become an equal member of the community of sovereign states. Rather, it aims to revive classic Islamic understandings of statehood and the structure of international relations, a position not uncommon within the jihadist sphere. In an undated letter released by the US Office of National Intelligence in 2015, Osama bin Laden instructed the *ummah* to '[refuse] to accept anyone as lord according to what [the West] refers to as international law, or the new world order and systems which revolve within its orbit'.[97] So, unless one assumes that jihadist groups are only paying lip-service to the classic Islamic doctrine, one could reasonably expect such groups, if and when they manage to establish state-like structures within a given territory, to behave differently in the international system if, and this is crucial, the classic Islamic doctrine was structured around different core concepts.

2.1. Islamic International Law

The classic Islamic understanding of "international" relations, rather than looking at a world of sovereign political units, structures the world along the lines of the dualism of the *dar al-Islam* (abode of Islam) and the *dar al-harb*, the abode of war.[98]

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[96] United Nations Security Council, *Analysis and recommendations with regard to the global threat from foreign terrorist fighters, S/2015/358* (2015), paras 24-26
[97] Osama Bin Laden, *Message to Muslim Brothers in Iraq and to the Islamic Nation* (Office of the Director of National Intelligence), p 4
[98] Ali and Rehman, 'The Concept of Jihad in Islamic International Law'

As the name of the latter suggests, Islamic international law—or the *Siyar,* as it is called—envisages a state of perpetual belligerency[99] until the Islamic polity encompasses the entire world. Consequently, Islamic law would at some point in time be applicable to all mankind and therefore make territorial limitations obsolete.[100] This idealized version of Islamic strength, despite territorial gains in the expansionist period of Islam, did not always match up with the political realities faced by Muslim rulers. Realpolitik, at times, dictated the conclusion of peace agreements, for which there was scriptural and historical basis.[101] Economic interaction demanded that while in non-Muslim territory, Muslim merchants were required to respect non-Islamic laws[102], while still being subject to the *shari'ah*. Geographically, the Islamic state could no longer grow without jeopardizing its internal unity.[103] The military strength of the *dar al-harb* made its forceful incorporation into the *dar al-Islam* unfeasible and Muslim governments had to face the reality that they had to extend some sort of recognition to foreign governments.[104] *Shafi'i* jurists argued that by entering into a treaty the non-Islamic territories became part of the *dar al-sulh*, or territory of peaceful arrangement, while the *Hanafi* School maintained that these territories became part of the *dar al-Islam* and subject to its protection.[105] In order to achieve such protection, however, the *dar al-sulh* had to be in a tributary relationship with the *dar al-Islam* and accept its superiority.[106]

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[99] Macdonald, 'Dar al-Harb'
[100] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 7
[101] Macdonald, 'Dar al-Sulh', p 919
[102] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 52
[103] Ibid, p 59
[104] Ali and Rehman, 'The Concept of Jihad in Islamic International Law', p 333; see also Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 59
[105] Macdonald, 'Dar al-Sulh', p 919; see also Nassef Manabilang Adiong, 'International Relations and Islam' in Nassef Manabilang Adiong (ed), *International Relations and Islam: Diverse Perspectives* (Oxford Scholars Publishing 2013), p 6; see also Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*
[106] Macdonald, 'Dar al-Sulh', p 919

The fact that the Islamic state had to interact with outside communities necessitated the development of a legal basis on which those relations could be based. In the first instance, scholars looked at military campaigns by the Prophet and his early successors to learn from their practices.[107] The *Siyar*, like the *shari'ah* in general of which it forms a part, draws on the *Qur'an* and the *Sunna* (traditions of the Prophet) as its primary sources, but also *Ijma* (consensus of opinion) and *Qiyas* (analogical deduction) as secondary sources.[108] Some scholars, such as Hamidullah, include an even wider range of sources, including treaties, pacts, conventions, internal legislation, arbitral awards and offers given to commanders on the field.[109] Taken together, the *Siyar* can be characterized as meaning to 'conduct of the state in its relationships with other communities'[110] as well as among individuals. Following the general principle of universality in Islamic law, the *Siyar* does not require reciprocity. 'Essentially, the siyar [sic] form[s] an Islamic law of nations, not a law binding on all nations in the modern sense of the term.'[111] Critics have voiced concern that using the rules of the *Siyar* as a comparative instrument to international law is misleading since they are, 'contrary to the modern law of nations, not "international" in the sense that they came into existence on the ground of a legal order *inter* nations'[112] and lack the territorial element of modern international law. For the purposes of this analysis, however, these remarks do not weaken the argument since the aim here is not to establish the applicability of the *Siyar* to modern Muslim states. Rather, the aim here is

[107] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 38
[108] S. S. Ali, 'Resurrecting Siyar through Fatwas? (Re) Constructing 'Islamic International Law' in a Post-(Iraq) Invasion World' (2009) 14 Journal of Conflict and Security Law 115, p 118
[109] Hamidullah cited in Ali and Rehman, 'The Concept of Jihad in Islamic International Law', p 324
[110] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 39
[111] Ibid, p 41
[112] Anke Iman Bouzenita, 'The *Siyar* — An Islamic Law Of Nations?1' (2007) 35 Asian Journal of Social Science 19, p 44, italics in original

to establish how it might affect the conduct of fundamentalist jihadist groups who, as we have seen above, do not recognize the legitimacy of international law.[113]

It should be noted that despite later efforts to pacify the relations between the Muslim and non-Muslim world, the concept of *jihad* is central to the *Siyar*.[114] Although *jihad,* as it relates to the conduct of the state[115], may also have a non-violent dimension and can take the form of 'intensive religious propaganda which may be construed as a continuous process of psychological and political warfare without resort to use of force in the military sense'[116], it simultaneously had an intrinsically violent nature in early Islamic law. As will become apparent below, the *Siyar* went through various developmental shifts through the early years of the Islamic state, from a defensive posture during the Medinaean period to a more imperial and expansionist outlook after the solidification of the Apostolic state[117] and the Caliphate under the first three Caliphs beginning in 632 AD. Even though much of the *Siyar* was not codified until much later during the Umayyad and Abbasid periods (661 to 1571 AD), the importance of the early period, especially as it relates to jihadist groups aiming to "purify" Islam and take the *ummah* back to the days of the early Caliphate[118], cannot be overstated. Ultimately the *Siyar* provides for the expansion of the polity through the *jihad al-talab* or offensive jihad and the defence of

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[113] But, as Ali has rightly pointed out, both legal systems, regardless of whether they are based on territorial states or religious communities, aim to legislate beyond national boundaries. See Ali, 'Resurrecting Siyar through Fatwas? (Re) Constructing 'Islamic International Law' in a Post-(Iraq) Invasion World', p 124
[114] Ali and Rehman, 'The Concept of Jihad in Islamic International Law', p 328
[115] In opposition to the spiritual aspect of *jihad* faced by an individual; see Cook, *Understanding Jihad*, ch 2
[116] Ali and Rehman, 'The Concept of Jihad in Islamic International Law', p 333
[117] The literature usually distinguishes between the Islamic state while still under the leadership of the Prophet Mohammed and the Caliphate, starting with the first Caliph Abu Bakr in 632 AD.
[118] Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State* (The Brookings Project on U.S. Relations with the Islamic World Analysis Paper No. 19, Brookings Institution 2014), p 7

the polity through the defensive jihad or *jihad al-daf*.[119] The latter is particularly interesting, since it does not only relate to the conduct of the state in its international relations, but, beginning in the 1960s jihadist theorists have reinterpreted the defensive jihad as an individual obligation for the establishment of the Islamic state.[120]

Both the actions as well as the words of IS suggest that the proto-state's understanding of the world is closer to the classic doctrine than it is to sovereign equality. During his sermon in 2014, self-appointed Caliph Al-Baghdadi said that the world is divided into the 'camp of Islam and faith, and the camp of kufr (disbelief) and hypocrisy' and 'Syria is not for the Syrians, and Iraq is not for the Iraqis. The earth is Allah's'.[121] To further this end, he called on his followers: 'O soldiers of the Islamic State! For your brothers all over the world are waiting for your rescue, and are anticipating your brigades'.[122] This necessarily raises the question of how the use of force against the *dar al-harb* is regulated under Islamic law?

2.2. The Use of Force under Islamic Law

The use of force under Islamic law is undeniably tied up with the concept of *jihad,* even though, as Bassiouini has pointed out, its meaning has changed considerably over the centuries.[123] The "revelation" of the *Qur'an* took place between 611-632 AD, ending with the death of the Prophet. According to Bassiouini, a distinct change in tone can be observed around 622 AD after the migration to Medina.

[119] Lahoud, *The Jihadis' Path to Self-Destruction*, p 10
[120] Ibid, ch 1
[121] Al-Baghdadi, 'A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan', p 4
[122] Ibid, p 3
[123] M Cherif Bassiouini, *The Shari'ah and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014), p 204f

2.2.1. Use of Force in Self-Defence

While earlier verses[124] had a conciliatory tone and were not aimed at inciting violent resistance[125], verses revealed at the beginning of the Medinaean period take into account the fact that the community had to defend itself by force against attackers. Nevertheless, to Bassiouini there is a general prohibition of aggression in Islamic law.[126] This point is made with reference to verse 2:193, which reads

> Fight them until there is no more persecution, and worship is devoted to God. If they cease hostilities, there can be no [further] hostility, except towards aggressors.127

and from which he infers that the use of force, under Islamic law, is only permitted in self-defence.

However, "defensive" has to be understood in the broadest possible sense. The command given in the second sentence of verse 2:193 holds that 'If they cease hostilities, there can be no [further] hostility, except towards aggressors'.[128] What is puzzling in this sentence is that it is either repetitive or there is a distinct set of aggression which does not include hostilities, for if a belligerent party ceases hostilities, almost by definition, it cannot longer count as an aggressor. Conversely, if a party continues to be an aggressor, it would seem logical that hostilities have not in effect ceased. Therefore, it is not clear what constitutes aggression for the purposes of the *Qur'an*. Al Ghunaimi, for example, introduces the notion of 'ideological aggression', which rests on 'the assumption that the element of violence or the use of armed force is not necessarily required to qualify an act as aggressive'.[129]

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[124] *The Qur'an*, (M A S Abdel Halee tr, Oxford University Press 2008), verses 25:52, 29:6, 69:11
[125] Bassiouini, *The Shari'ah and Islamic Criminal Justice in Time of War and Peace*, p 207
[126] Ibid, p 165
[127] *The Qur'an*, p 21f, verse 2:193
[128] Ibid, p 21f, verse 2:193
[129] Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, p 209

However, self-defence here can also refer to the obvious case of defending the *dar al-Islam* against physical violence emanating from the *dar al-harb.* The *Qur'an* proclaims that 'God will defend the believers'.[130] Nevertheless, the *Qur'an* does not seem to place ultimate trust in divine intervention and therefore embraces human agency, expressly holding that '[t]hose who have been attacked are permitted to take up arms because they have been wronged'.[131] In this reading, the use of force under Islamic law is similar to the prohibition of the use of force under the UN Charter[132], to which one exception is 'the inherent right of individual or collective self-defence if an armed attack occurs'.[133]

Despite the similarities, some scholars argue that the norms of self-defence in both legal systems do exhibit some differences. For one, under international law, responses to aggression must adhere to the principles of necessity and proportionality[134], which are not mentioned in Article 51 but form part of customary international law.[135] While the general scope and content of both principles is not well defined, despite the broad consensus regarding their validity[136], self-defence clearly does not authorize a victim state to engage in an all-out conflict with the aggressor. On the one hand, proportionality limits the extent of measures taken in self-defence. On the other, the right of self-defence ceases when and if the Security Council takes action.[137] Islamic Law, Mahmoudi argues, knows no such limitation.[138]

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[130] *The Qur'an*, p 212, verse 22:38
[131] Ibid, p 212, verse 22:39
[132] UN Charter, art 2(4)
[133] Ibid, art 51
[134] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010), p 8
[135] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment ICJ Reports 1986, p 14, para 194
[136] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, n 136
[137] UN Charter, art 51
[138] Said Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World' (2005) 7 Journal of the History of International Law 55, p 57

Read within the broader context of the *surah*, there is evidence to suggest that Mahmoudi's assertion does not hold up. Verse 2:190 commands:

> Fight in God's cause against those who fight you, but do not overstep the limits: God does not love those who overstep the limits.[139]

Verse 2:190 therefore implicates that Islamic law does contain at least two restrictions to the use of force: First, the *ad bellum* requirement of proportionality does indeed exist in some form in Islamic law since the 'limits' are so broad to encompass everything from a prohibition to initiate hostilities to disproportionate responses once hostilities have broken out.[140] Second, similar to modern rules of non-international armed conflicts, *in bello* rules such as proportionality and distinction impose further restrictions on the conduct of warfare.[141]

Nevertheless, it stands to reason that the understanding of self-defence seems to be broader under Islamic law than under international law, which is necessary given that the nature of its referent object is not only political but also religious. Defensive jihad not only protects territorial integrity, but also the *ummah's* ability to live in accordance with divine law. Thus, any infringements on the ability of Muslims to live under *shari'ah* law might be construed as 'ideological aggression' in this view. As such, the *Qur'an* gives permission to 'those who have been driven unjustly from their homes only for saying, "Our Lord is God"'[142] to pick up arms. More importantly, in the absence of immediate attacks on individuals, it authorizes the defence of those believers who are oppressed for their faith but unable to defend themselves.[143] This can be clearly observed in the statements of the

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[139] *The Qur'an*, p 21, verse 2:190
[140] Ibid, p 21, note c
[141] Bassiouini, *The Shari'ah and Islamic Criminal Justice in Time of War and Peace*, p 165; see also chapter 5 of this thesis
[142] *The Qur'an*, n 130, p 212, verse 22:40
[143] Ibid, p 57, verse 4:75

jihadists. Al-Baghdadi, for example, prefaces his calls for violence and state building with the perceived humiliation encountered by the *ummah*, which included both having to live under non-Islamic rule as well as the experience of physical violence in many parts of the world.[144] While the present author explicitly does not want to extend any merit to their claims or justify their actions, both Al-Baghdadi and Osama bin Laden repeatedly framed their calls for action as defending the *ummah*.

2.2.2. Rebellion and Islamic Law

This last point warrants further discussion in the context of rebellion against a Muslim leader. Rebellion, and countermeasures against it, should be seen as forming part of the defensive jihad since rebellion, especially in the case of jihadism, is often justified along the lines of the ability of the *ummah* to live in accordance with *shari'ah* law. The defensive jihad, in this view, provides protection to those fighting for protecting the *ummah* as a political and religious community. Generally, Islamic law would prohibit the use of force against fellow Muslims. More to the point of the establishment of the Caliphate, however, jihadists sidestep the prohibition of the use of force by claiming that they are fighting against apostate regimes.[145] This *takfir* ideology aims to put fellow Muslims outside of the protection of Islamic law.[146] As far as the Islamic State is concerned, this includes the entire Shia population.[147]

[144] See Al-Baghdadi, 'A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan'
[145] Lahoud, *The Jihadis' Path to Self-Destruction*, p 15
[146] *Takfir* is the process of declaring a Muslim an unbeliever. For a general discussion see ibid
[147] See e.g. Daniel L Byman and Jennifer Williams, 2015, 'ISIS vs. Al Qaeda: Jihadism's Global Civil War, 24 February 2015' The National Interest <http://nationalinterest.org/feature/isis-vs-al-qaeda-jihadism%E2%80%99s-global-civil-war-12304> accessed 14 June 2015

Jihadists often draw on precedent set by the Muslim scholar *Ibn Taymiyya*[148] to declare their governments to be legitimate targets by arguing they are not following *shari'ah* law. This line of argument was first made prominent among the jihadists by the Egyptian scholar Sayyid Qutb, who was a leading member of the Muslim Brotherhood before being executed by the government of Egyptian President Nasser. Qutb was among those most vocal in claiming that all regimes in the Arab world had lost their legitimacy.[149] He argued that the Islamic world had drifted back into a state of *jahiliyyah*, the state of chaos and barbarism that existed before Islam[150], because Muslim regimes violate the principle of *hakimiyya*, which postulates that all authority must flow from God and that Muslims therefore need to oppose all other forms of secular or hybrid laws and constitutions.[151] The call to violence presents a contradiction in itself, since *Sunni* traditions would normally shun *fitna*, or the chaos that ensues through violent political competition.[152] Put simply, along the lines of Roosevelt's infamous yet unverified quip that a ruler 'may be a bastard, but he's our bastard'[153], a bad ruler is better than no ruler.[154] This however only extends to rulers who are worthy and sincere Muslims. Accusing their governments of introducing secular law and cooperation with the *dar al-harb,* the jihadists thus claim that the *dar al-Islam* has fallen back into a state of *jahiliyyah*. Consequently, they have to reject their authority and, by doing so, they circumvent the prohibition

[148] The Islamic scholar Taqi al-Din Ahmad ibn Taymiyya (1263-1328) issued a fatwa legitimizing waging war on the Mongols, which had previously converted to Islam, since they continued to follow the Yasa legal code instead of the *shari'ah*. See Sageman, *Understanding Terror Networks*, p 9
[149] Qutb, *Milestones*, ch 2
[150] Ibid, p 11
[151] Ryan, *Decoding Al-Qaeda's Strategy: The Deep Battle Against America*, pp 31f
[152] Historically it refers to the chaos that ensued through the historical split of Islam into the Sunni and the Shia schools.
[153] President Roosevelt reportedly dismissed concerns by Secretary of State Sumner Welles about the Nicaraguan dictator Anastasio Somoza.
[154] Sageman, *Understanding Terror Networks*, p 8

of war and furthermore make participation an individual obligation.[155] While it unfortunately goes beyond the scope of this chapter to subject the jihadists' *takfir* claims to more scrutiny under religious law, it is worthwhile to point out that the focus on the 'near enemy'[156] opened up jihadist groups to criticism, since the primary victims of the inward-directed violence were Muslims, both Sunni and Shia.[157]

Looking at the regulations concerning the lawful use of force by the Islamic state in order to put down a rebellion can provide insights on the extent to which apostates lose their protection under Islamic law. Mawardi provides three categories of groups that force may be used against. The first group relates to apostates, who are individuals who are nominally Muslims but have renounced their faith. Fighting apostates, historically, was a way to protect the territorial integrity of the Islamic state by preventing territories from breaking away, even though, as some have argued, the *dar al-Islam*, even if ruled by apostate rulers, does not automatically revert back to being part of the *dar al-harb*. According to Macdonald, a territory that was once part of the *dar al-Islam* does not become part of the *dar al-harb* unless in situations fulfilling three conditions: i) observance of non-Muslim legal decisions while Muslim legal opinions are being discarded; ii) the country immediately adjoins the *dar al-harb* with no Muslim country as buffer in between; and iii) no protection for Muslims or those who have surrendered to Muslim rule (*dhimmis*).[158] The threshold, especially for the observance of Muslim legal rulings, seems to be low, as Macdonald shows by giving the example of India. Despite being ruled by 'the accused ones' and belonging externally 'to these Satans'[159], it is

[155] Lahoud, *The Jihadis' Path to Self-Destruction*, p 16
[156] See section 3 below
[157] See Lahoud, *The Jihadis' Path to Self-Destruction*, pp 21ff
[158] Macdonald, 'Dar al-Harb', p 918
[159] Dictionary of Technical Terms, cited in ibid, p 918

nevertheless considered part of the *dar al-Islam.* The reason for this, according to Macdonald, is that as long as even a single legal decision of Islam (*hukm*) is observed, the territory remains part of the Muslim world.

Mawardi's *Ordinances of Government,* on the other hand, seems to situate apostate territories neither in the *dar al-Islam* nor in the *dar al-harb*, but instead holds that '[t]he rules pertaining to apostasy set it apart from the rules of the land of Islam […] and the land of war […].'[160] However, as far as the use of force is concerned, this does not actually make a difference, since 'apostates […], like the idolators [i.e. those who have never embraced Islam] [must] be fought ruthlessly under all circumstances'.[161] The Muslim state is therefore under an obligation to fight them. Still, according to Mawardi, their status is not the same as for the inhabitants of the *dar al-harb*. Hence, it stands to reason that their territory remains part of the *dar al-Islam despite* their apostasy.[162]

The *Siyar*, however, does not give the ruler *carte blanche* to attack apostates indiscriminately. As long as individuals are scattered and largely within the control of the state, they should be given a chance of repentance and reintegration into the Muslim community.[163] Even though it is not explicitly described in these terms, early Islamic law here clearly lays out an argument that would be recognizable by those currently arguing for a law enforcement counterterrorism approach. Only when apostates assemble 'in a place away from Muslims where they become a power to reckon with […] they must be fought for apostasy' after they have been given a chance to correct their ways.[164] After

[160] al-Mawardi, *The Ordinances of Government (Al-Ahkam al-Sultaniyyah walwilayat al-Diniyyah)*, p 63
[161] Ibid, p 63
[162] Ibid, p 63
[163] Ibid, pp 61; 64
[164] Ibid, p 61

this they should be treated like the idolaters. What still sets them apart is that under no circumstances, unlike the idolaters, may apostates be integrated into the *dar al-sulh*.

The second group force might be used against, according to Mawardi, are insurgents. Contrary to apostates, insurgents have not renounced their faith but are showing disobedience to the sovereign.[165] However, as in the case of apostates, military force should not be used against them as long as they are not beyond the reach of the state. Only if they isolate themselves in a remote area *and* refuse to obey the rules, they must be fought.[166] Verse 49:9 provides that

> 'If two groups of the believers fight, you [believers] should try to reconcile them; if one of them is [clearly] oppressing the other, fight the oppressors until they submit to God's command, then make a just and even-handed reconciliation between the two of them: God loves those who are even-handed.' [167]

Verse 49:9 has therefore been interpreted as allowing a ruler to put down a rebellion[168] while imposing certain limitations. Fighting insurgents is intended to deter rather than kill them; they may not be attacked while retreating; their injured and captives may not be killed and their women and children may not be enslaved. The Muslim sovereign is not allowed to get help from protected non-Muslim subjects for fighting insurgents, while such assistance is open for fighting apostates and foreign enemies. Most importantly, 'theirs is still Muslim territory which protects its residents even though they may rebel'.[169]

The third group, constitutes common criminals such as highway robbers, plunderers, murderers, and those who attack wayfarers. Mawardi prescribes serious punishments for them,

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[165] Ibid, p 64
[166] Ibid, p 64
[167] *The Qur'an*, p 338, verse 49:9
[168] See also N. A. Shah, 'The Use of Force under Islamic Law' (2013) 24 European Journal of International Law 343, pp 345f
[169] al-Mawardi, *The Ordinances of Government (Al-Ahkam al-Sultaniyyah walwilayat al-Diniyyah)*, p 68f

including death.[170] While such acts pose a threat to the citizens of a state, common crimes fall outside of the purview of this thesis and this group will therefore not be dealt here.

Taken together, defensive jihad is the legitimate use of violence under Islamic law against invading armies by the ruler, while simultaneously also enabling the inhabitants of the *dar al-Islam* to pick up arms in the absence of the authorization of a political ruler should this be necessary.[171] It appears that in Islamic law the concept of self-defence is broader than international law, since it extends to domestic situations as well. Such a view, however, has to be rejected since the *shari'ah* does not distinguish between the international and the domestic sphere, but rather is the sole source of law. Hence, it combines rules of international law with the monopoly of violence traditionally found in domestic law.

2.2.3. Offensive Use of Force

So far, the discussion has centred on the defensive elements of Islamic warfare, even though it was hinted that the exact meaning of what constitutes defensive warfare is up for debate. Nevertheless, from a Western point of view, one could expect that an Islamic political entity completely adhering to a strictly defensive understanding of warfare would not become a threat to international peace and security, an argument which does not have much merit looking at the territorial expansion of IS. Critics could obviously contend that while IS claims to conduct its affairs in accordance with *shari'ah* law, it misinterprets its provisions and in fact acts against both the letter and the

[170] Ibid, pp 68-71
[171] See Shah, 'The Use of Force under Islamic Law', pp 345f ; see also Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 15 for a general introduction into Islamic international relations

spirit of the *shari'ah*.[172] While from a strictly doctrinal point of view this assertion might hold, it is questionable to what extent the prohibition on the offensive use of force has ever been adhered to in Islamic history. Bassiouini, for example, goes to considerable lengths to describe how *jihad* was restricted to self-defence over long periods during the time of the Prophet. However, he ends his discussion with a reference to the Prophet's campaign to take Mecca in 630 AD, which does not fit the description of self-defence unless one takes the broadest understanding of the concept possible. In his defence, Bassiouini points out that 'thereafter *jihad* came to justify conquest'.[173] Similarly Al Ghunaimi claims to repudiate a more expansionist and imperial reading of the *Qur'an*, even though this claim contradicts his account of the expansion of the Muslim state under Caliph *Abu Bakr*, who managed to bring all of Arabia under Islamic sovereignty by the time of his death in 634 AD.[174] This fact, in the present author's opinion, cannot easily be ignored for current purposes. Malik stressed that warfare in Islam, rather than promoting a culture of imperialism and violence, aims at establishing ultimate peace.[175] But, as Malik puts it, 'to obtain the conditions of peace, justice and faith […] it is essential to destroy the forces of oppression and persecution'.[176] While Malik is clearly utilizing the language of the *Qur'an,* ultimately the jihadists' interpretation of persecution, oppression, and aggression might differ significantly compared to other Muslims or indeed Western states. If the *Qur'an* indeed mandates non-ag-

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[172] See e.g. Muhammad Al-Yaqoubi, *Refuting ISIS: A Rebuttal of its Religious and Ideological Foundations* (Sacred Knowledge 2015)
[173] Bassiouini, *The Shari'ah and Islamic Criminal Justice in Time of War and Peace*, p 210
[174] Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, p 23
[175] S. K. Malik, *The Quranic Concept of War* (Adam Publishers & Distributors 1986), pp 33-35
[176] Ibid, p 35

gression in international relations, this command has been ignored over large stretches of Islamic history, including by the Prophet himself.

It therefore seems unconvincing that the classic doctrine would sanction the permanent peaceful co-existence of political entities which do not recognize the supremacy of Islam, as in 'Muslim legal theory Islam and shirk (associating other gods with Allah) cannot exist together in this world'.[177] As Cook has pointed out, if the scholars and theologians arguing that Islam permits war only in self-defence would be right, how could the early Caliphate have extended the way it did[178] without violating its own laws.[179] A similar point was made by Omar Abdel Rahman, former emir of *al-Jama'a al-Islamiya* (Islamic Group), in his defence for the murder of Anwar Sadat. 'Like Qutb, Abdel Rahman sarcastically debunked this official heresy and asked the judges if the imperial expansion of the Islamic empire was "defensive"?'[180] It therefore seems justified to argue that some if not all jihadist groups do not subscribe to the view that the only form of permissible warfare is defensive. If, on the other hand, they do, this stretches any conventional understanding of defensive force beyond its breaking point.

Indeed, especially the Islamic State has declared territorial expansion as one of its core goals. In 2014, the American news outlet ABC News publicized a map (see figure 2), which supposedly represented IS's five-year expansion plan.

[177] Khadduri, *War and Peace in the Law of Islam*, p 59
[178] See e.g. Cook, *Understanding Jihad*, p 9ff
[179] Ibid, p 95
[180] Gerges, *The Far Enemy: Why Jihad Went Global*, p 5

Figure 1: IS Five-Year Expansion Plans According to ABC News[181]

This map, while it has since been debunked as false, was put online and enthusiastically distributed by sympathizers and activists with no official connection to the group.[182] Nevertheless, there can be no doubt that the group had plans to significantly widen its sphere of influence given that its slogan is *baqiya wa tatamaddad* (remaining and expanding).[183] Looking at the areas the group has operated in in 2015 (see figure 3), either directly or through one if its *wilayats* (provinces), it does not seem far-fetched to claim that the group had begun to conduct an offensive jihad.

Figure 2: Geographic Areas of IS Activity[184]

Supporters of the concept of the offensive jihad often cite verse 9:5, commonly referred to as the "Verse of the Sword",

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[181] Colleen Curry, 2014, 'See the Terrifying ISIS Map Showing Its 5-Year Expansion Plan, 3 July 2014' ABC News <http://abcnews.go.com/International/terrifying-isis-map-showing-year-expansion-plan/story?id=24366850> accessed 22 July 2015

[182] Aaron Y Zelin, 2014, 'The Clairvoyant: Colonial Caliphate: The Ambitions of the "Islamic State", 8 July 2014' Jihadology <http://jihadology.net/2014/07/08/the-clairvoyant-colonial-caliphate-the-ambitions-of-the-islamic-state/> accessed 22 July 2015

[183] Ibid

[184] Harleen Gambhir, *ISIS Global Intelligence Summary, January 7 - February 18, 2015* (ISW 2015), p 2

in support of it. Modern proponents of offensive jihad include authors such as Sayyid Qutb, who saw it as the 'universal revolution' to 'replace the dominance of non-Islamic systems'.[185] As a proselytist religion, early Islam saw itself engaged in a permanent state of war with the *dar al-harb,* only to the terminated by the incorporation of all non-Muslim territories into the *dar al-Islam.*[186] Offensive jihad was the tool of this expansion and considered a *collective* duty for all Muslims. It is subject to authorization by a political entity and subject to its direction. Specifically, individual participation in an offensive jihad was subject to the authority of the political ruler.[187] Verse 9:5 stipulates that

> 'When the [four] forbidden months are over, wherever you encounter the idolaters, kill them, seize them, besiege them, wait for them at every lookout post; but if they turn [to God], maintain the prayer, and pay the prescribed alms, let them go on their way, for God is most forgiving and merciful.'[188]

Sura 9 begins with the revocation of the immunity granted to non-Muslim tribes[189] and extensively regulates the relationship between Muslim and non-Muslim communities. According to Cook, it provides the foundation for Islamic dominance over Christians and Jews[190] who, as 'people of the book', might be spared violent relations if they accept Muslim superiority and pay a poll tax or, alternatively, convert to Islam.[191] The levying of the poll tax in exchange for physical security, at least according to media reports, was revived in areas controlled by IS.[192]

The validity of the concept of offensive jihad, however, is disputed. As Shah points out, such readings of the *Qur'an* may be ahistoric and do not take the context in which the verses where written into consideration. Shah furthermore argues that

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[185] S Qutb, *In the Shade of the Quran*, cited in Shah, 'The Use of Force under Islamic Law', p 352
[186] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 17
[187] Lahoud, *The Jihadis' Path to Self-Destruction*, p 15
[188] *The Qur'an*, p 116, verse 9:5
[189] Ibid, p 116, verse 9:1; see also Cook, *Understanding Jihad*, p 10f
[190] Cook, *Understanding Jihad*, p 10
[191] *The Qur'an*, p 116, verse 9:29
[192] Joseph Thorndike, 2014, 'How ISIS Is Using Taxes To Build A Terrorist State, 18 August 2014' Forbes accessed 10 April 2015

the actions of the first Caliph *Abu Bakr* are not taken into account. Rather than setting out general obligations for all Muslims, verses 9:5 and 9:29 proscribe the settlement of specific geopolitical situations that had arisen at the time of the revelation of the *Qur'an*. The category of polytheists alluded to in 9:5 is not open, as a cursory reading might suggest, but refers to a very specific subset of groups with which the Prophet Muhammad had concluded peace treaties. Similarly, the background for the treatment of the people of the book referred to a suspected Roman invasion.[193]

Nevertheless, the concept of the offensive jihad seems to be well supported by some scholars. Shaybani's *Siyar*, for example, demands an invitation to accept Islam before the *dar al-harb* may be lawfully attacked[194], but it does not in itself contain a provision that could be interpreted as restricting the lawful use of force to cases of self-defence. Furthermore, the *Siyar* clearly does not oppose annexation, allowing the territory to be either distributed among those who conquered it or incorporate it into the general territory of the state.[195] Two things have to be kept in mind here. First, Islamic law, like every body of law, is not static but has undergone significant changes in interpretation over time, which might reconcile differences between Shaybani's *Siyar*, written at the end of the 8th century, and Shah's account of Islamic public international law. The position that offensive jihad is generally permitted and more accurately constitutes an obligation on the Muslim ruler seems to be well established within the scholarly debate.[196] Second, it must be borne in mind that there might be a significant difference between Islamic law as it is now and the interpretation of Islamic

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[193] Shah, 'The Use of Force under Islamic Law', p 349, 351
[194] Shaybani in Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 95, para 55
[195] Shaybani in ibid, p 95, paras 90-91
[196] See ibid; Ali and Rehman, 'The Concept of Jihad in Islamic International Law'

law by Salafi jihadists, who subscribe to "original" understandings of Islamic law.

As repeatedly stated throughout this chapter, the idea that Islamic law, as it existed during the early days of Islamic conquest, would contain a prohibition of offensive warfare sits uneasy with the military campaigns of the time. As Al Ghunaimi describes, by the time of the death of the first Caliph Abu Bakr the Islamic State had consolidated its hold on the Arabian Peninsula and his successor, 'Umar ibn al Khattab, 'felt able to carry out [the Islamic state's] missionary task. Due to the international conditions of that time, 'Umar had no alternative but to resort to war to put into effect the Islamic reformative philosophy'.[197] Given that Al Ghunaimi generally advocates a position of defensive warfare alone, this statement is puzzling as it basically vindicates offensive war if it is the only way to achieve a policy, even though this policy is not strictly necessary to repel an armed attack. There are two possible answers for this: First, the time of the first Caliphs was generally a violent period and the proclamation of a new religion represented a direct threat to the established empires which necessitated waging aggressive wars in self-defence, as contradictory as that may sound. Al Ghunaimi elaborates that the Prophet, for most of his reign, was mistreated by the Meccans and Muslims in general were prosecuted, and therefore the conduct of the Prophet has to be construed and justified on the basis of self-defence.[198] Furthermore, the practice of the Prophet, according to him, was restricted to the Arabs and thus not a matter of "international" or foreign affairs since the Arabs assume a special role within Islamic theory. His argument, in short, is that the development of a nation does not constitute an aggressive war if it is an internal

[197] Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, p 23
[198] Ibid, pp 165-180

affair.[199] It is contended, however, that without a policy of military expansion there would be no state and thus the expansion of the city-state of Medina into a pan-Arabic political entity should not be seen as an internal affair, even though the Muslim forces were seen as liberators in many of the newly integrated territories.[200] But even if this argument is accepted, it is doubtful whether this would change anything for a group like IS. Al Ghunaimi's argument is that the extensive outside military and political pressures necessitated a military response by the Islamic state, since doing otherwise would jeopardize the Muslim state building project. Viewed from Raqqa, the former capital of IS's proto-state, the world must bear resemblance to the hostile environment of the early Caliphate. If one keeps in mind that, in the eyes of IS, the strict implementation of *shari'ah* law is both a religious command and a state building tool[201], while externally it is perceived as a threat, one can at least understand how IS's might construct its actions as "defensive".

A second possible explanation is that the actions of the Prophet and the first Caliphs have either been unlawful from the point of view of *shari'ah* law or there exists a second type of secular war in Islamic law, detached from the holy war of *jihad*. But even if one understands the category of Islamic law as broader than the *shari'ah* to include, *inter alia,* edicts of rulers and fatwas by individual legal experts, Islamic law nevertheless derives its validity and legitimacy from the *shari'ah*.[202] It seems unlikely, therefore, that later jurists such as Shaybani would have drawn on a body of Islamic common law to justify the

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[199] Ibid, p 181
[200] Ibid, p 23
[201] See e.g. Tim Arango, 'ISIS Transforming Into Functioning State That Uses Terror as Tool' *The New York Times* (Istanbul, 21 July 2015) <http://www.nytimes.com/2015/07/22/world/middleeast/isis-transforming-into-functioning-state-that-uses-terror-as-tool.html> accessed 21 July 2015
[202] Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, pp 41f

conquests of the Islamic state if this common law would have contradicted the general prohibition on the use of force as discussed above. While this possibility cannot be completely discarded, it seems nevertheless unconvincing even if speaking truth to power is a complicated matter.

This raises the question of whether the notion of perpetual warfare carries with it an obligation to actually carry it out. It has already been seen above that the Islamic state is under an obligation to fight apostates, unless they assemble in remote places and other means are available to bring them back into the fold of the Islamic state.[203] In outlining the obligations of the Caliph, Mawardi declares that 'he must fight those who resist the supremacy of Islam after being invited to embrace it, until they convert or sign a treaty of subjugation.'[204] This point is made even stronger later on in his treatise, where Mawardi explains that apostates […], *like the idolators* [sic], [must] be fought ruthlessly under all circumstances'.[205] This obligation extends to provincial rulers, who have to engage in offensive jihad even in the absence of authorization by the central authority. The reader may recall, at this point, the almost federal nature of jihadist configurations introduced above. It has already been stated there that provincial governors, as the heads of regions within a supposed state or as leaders of affiliated armed groups in a more contemporary context, have a wide-ranging autonomy from the central authority. How does this autonomy manifest itself in the area of the use of force? Again, we can turn to Mawardi, who has dealt with this issue in some detail. He distinguishes between general and special, or limited, governor-

[203] al-Mawardi, *The Ordinances of Government (Al-Ahkam al-Sultaniyyah walwilayat al-Diniyyah)*, p 63
[204] Ibid, p 16
[205] Ibid, p 63, emphasis added

ship, which is characterized by limited authority and powers delimited by the sovereign.[206] Governors, both general and limited, have a responsibility to manage and maintain the army, but there are important differences between both of them. Mawardi makes clear that the latter are not authorized to raise an army from scratch and, in provinces bordering enemy territory, wage war without the authorization by the Caliph unless in self-defence.[207] The fact that Mawardi felt it necessary to specifically limit the war powers of special governors, opposed to a blanket prohibition on action without central authorization, suggests that general governors are under the same expansionary obligation as the Caliph himself and may therefore act without his authorization. This argument is even stronger in the case of general governorship by usurpation, in which case the Caliph legitimizes the political rule of a governor who took a province by force, in exchange for the governor's acknowledgement of the formal religious authority of the Caliph.[208] In essence exclusive, the governor by usurpation is 'an independent and exclusive controller of political matters and administration, while the Caliph, by his permission, becomes the implementer of the dictates of religion'.[209] In a system where the dividing line between politics and religion are not always easy to draw this arrangement creates other problems, but it stands to reason that usurped governors retain the power to wage war.

3. The Near vs the Far Enemy

All the concepts discussed so far in this chapter can be observed in how jihadist groups have used force. Early proponents

[206] Ibid, p 32
[207] Ibid, pp 32, 35
[208] Ibid, p 36
[209] Ibid, p 36

of jihadism, according to Gerges, can be characterized as 'religious nationalists' with no interest in pursuing operations outside of their own countries of origin.[210] Their immediate concern was toppling apostate rulers, not the unification of the Arab world or attacking the West. From the beginning, jihadists argued that they were engaged in a defensive jihad against their apostate regimes and, since no worthy political authority able to authorize jihad existed, it was the individual duty of each Muslim to resist the apostates.[211] Only later would proponents such as Zawahiri and Osama bin Laden fundamentally redefine jihadi strategy by arguing that jihadi efforts should focus on primarily the United States, since the US actively supported regional regimes and thus, in order to bring those regimes down, they would have to strike the United States first.[212] The near vs far enemy dichotomy, however, should not be seen as synonymous with offensive and defensive jihad. Rather, the focus on either of the two represents a strategic consideration on behalf of jihadist groups trying to re-establish the Caliphate. With regards to al Qaeda, there seems to be renewed tension in this matter. Back in 2010, the central leadership was strongly pushing affiliate organizations to redirect their efforts to the far enemy, while groups argued for a renewed focus on local and regional adversaries for a variety of reasons. In a 2010 letter, which was introduced as evidence by the government against Abid Naseer, Atiya Abd al-Rahman (aka 'Atiyya), complained to bin Laden that his focus on war with the US was not shared with other al Qaeda members in Yemen.

> 'Let us focus on the means and practical mechanisms for implementing your ideas, may God bless you. Issue: That we should strike the Americans, but not strike the apostates; we have explained our opinion, and you know it. […] It seems to me that talking about not escalating reflects a lack of clarity and it will not be practical. The young men want

[210] Gerges, *The Far Enemy: Why Jihad Went Global*, p 45f
[211] Lahoud, *The Jihadis' Path to Self-Destruction*
[212] Gerges, *The Far Enemy: Why Jihad Went Global*, p 49ff

> to go to the "front" and they want "operations". […] In sum: Our brothers are now actually at war with the state, and with the Americans, of course. They have even started hitting Security facilities in Abyen, as you must have heard a few days ago. Is it proper to say: stop the escalation, we do not want war in Yemen!? I do not support this choice. None of the brothers here, who gave you their opinions, supports it. We definitely see it as a mistake.'[213]

Similarly, in the Maghreb theatre, bin Laden advised that the offer of a truce by 'some sides' in the Maghreb should be taken, since he 'would like to neutralize whomever we possibly can during our war with the biggest enemy, America'.[214] This shows that, even among rigid jihadists, strategic considerations can shape policy. However, both for IS and al Qaeda the desired endgame should not be doubted. Bin Laden was quite clear what the ultimate end of the group's efforts would be. In the same letter, he advises that the pledge of allegiance by the Somali al Shabaab organization should be based on 'be based on waging jihad to establish the Caliphate'.[215] Thus, in the al Qaeda universe, force seems to be used both against the near and the far enemy as part of their defensive jihad. Al Qaeda, opposed to IS, is not in a position to pursue an offensive jihad simply because it is not even claiming that it has established the Caliphate.

The Islamic State, similarly, is pursuing a near and a far enemy strategy. According to the Institute for the Study of War, IS operates in three distinct geographical areas (see figure 2). First, the interior represents the areas where it has established itself as a proto-state. It consists of its heartland in the Levant, consisting of Iraq and Syria as well as support networks in Jordan and Turkey. Furthermore, ISIS, according to ISW, had started attempts to extend its sphere of influence beyond Iraq and Syria into Jordan and Turkey.[216] The interior is part of al

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[213] `Atiyya (aka Mahmud), *Letter from `Atiyya (aka Mahmud) to Osama bin Laden (aka Abu `Abd Allah), US vs NASEER, 423-10-CR-019(S-4)(RJD)* (17 July 2010), p 2, para 1
[214] Bin Laden, *Letter from Osama bin Laden (aka Zmaray) to `Atiyya (aka Mahmud), US vs NASEER, 425-10-CR-019-S-4-RJD*, p 4
[215] Ibid, p 1
[216] Gambhir, *ISIS Global Intelligence Summary, January 7 - February 18, 2015*, p 1

Sham, or 'Greater Syria'[217], where IS also envisages that the ultimate battle with the West, as predicted in the Koran, is going to happen.[218] Second, after IS declared itself to be a state, it stands to reason that it is now actively pursuing an offensive jihad in the near abroad in order to extend the Caliphate relying on its own political authority. Partly, this has also been achieved by accepting pledges of allegiance from groups in Egypt, and Nigeria, among others,[219] thus including these *wilayats* (provinces) into their proto-state. Bunzel cites speeches by Abu Omar al-Baghdadi from 2007, in which he emphasizes the offensive nature of the groups' actions, especially against the region's *Shi'a*.[220] In line with IS's *takfir* ideology, according to which the *Shi'a* are idolaters, this approach is consistent in itself[221] with the framework of offensive jihad. These offensives have the potential to put them into conflict with al Qaeda in the Arabian Peninsula (AQAP) and al Qaeda in the Islamic Maghreb (AQIM), as well as the states in these regions.[222] Third, the group has also proven to be willing to act against the far enemy in order to discourage Western intervention in the region, which has been unsuccessful.

4. Conclusion

The main approach of this chapter was to place the stated insurgent goal of jihadists—the establishment of the Caliphate—in its proper historic and legal context. First, this chapter has shown that early Islamic theories on statehood, rooted in the

[217] Ibid, p 1
[218] See Graeme Wood, 'What ISIS Really Wants' *The Atlantic* (March 2015) <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/> accessed 20 February 2015
[219] See ch 2 below
[220] Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, p 10
[221] This does not claim that *Shi'a are* in fact idolaters, but merely that they are in this particular worldview.
[222] Gambhir, *ISIS Global Intelligence Summary, January 7 - February 18, 2015*, p 3

political necessities of the time, provide for the possibility of a decentralized and federalized Caliphate under the leadership of a central political and religious figure—the Caliph—while also allowing for the existence of strong political and operational control in the periphery. Mawardi's approach to Emirs and their relationship with the Caliph outlined above can be directly applied to the leaders of affiliate organizations and their relationship with the central leaderships of either al Qaeda or the Islamic State. Chapter 2 will therefore take this insight into account and develop a framework, on the basis of modern international law, to characterize these relationships along those lines. Thereby, a counterinsurgent like the United States can more adequately characterize and understand these relationships and adjust policy accordingly.

It is of course acknowledged that, on the one hand, al Qaeda has not formally declared the existence of the Caliphate and the Islamic State, on the other hand, is on the verge of losing all gains made since 2014. Nevertheless, two things are clear: First, the political goals of both organizations represent a clear insurgent goal with the aim of overthrowing and recasting the geopolitical status quo. Second, whether or not this political goal, informed by these organizations' unique interpretation of history and Islamic legal precedents, is in line with mainstream Islamic legal orthodoxy or approved by establish Islamic legal and political authorities, which it is apparently not, is beside the point. What is more important, in this regard, is that these organizations consider their worldview internally consistent and it therefore informs their policies. After all, jihadist organizations are more likely to adhere to the *Siyar* than they are to look to modern international law.

It is of course acknowledged that while the extension of the Islamic state does not *per se* require the use of military force,

provided that the enemy either voluntarily embraces Islam or subjugates itself to Muslim rule, it has often been the policy of choice. This is still a clear violation of the political independence of other states or groups[223] to use the modern vocabulary. Furthermore, the wording of Mawardi's interpretation of *shari'ah* law leaves little doubt that this is an *obligation* of the Caliph and thus of the state. While it may be argued that this sits uneasy with the *Qur'an* and its predominant interpretation by modern jurists, Muslim and Western alike, it fits neatly into the conduct of the Islamic state under the Prophet and the early Caliphs. The idea that the classic doctrine promotes a form of negative peace[224] therefore has to be rejected. Ultimate peace within the classic doctrine, thus, seemingly can only be established through the spread of Islam and, in the case of Christians and Jews, through the payment of the poll tax and subjugation to the Islamic polity.[225] Needless to say that one cannot infer from this that a group like IS, if it manages to hold on to its territory and establish itself as a more permanent feature in international relations, would continue such a campaign *ad infinitum* if doing so might raise the very prospect of its own destruction. Again, Islamic history would provide rich precedent for eventually establishing peace along demarcation lines and accepting the equality of other states. Khadduri refers to *Ibn Taymiyya*, who is widely cited among jihadi circles, to establish that the Islamic state faced 'the futility of waging a permanent war against disbelief at a time when foreign enemies were menacing at the gates of Islam.'[226] Be that as it may, taken together, the concepts of the defensive and offensive jihad establish an 'Islamic

[223] See UN Charter, art. 2(4)
[224] Negative peace is usually seen as the absence of violence, see Johan Galtung, *Theories of Peace: A Synthetic Approach to Peace Thinking* (International Peace Research Institute, Oslo 1967)
[225] Khadduri, *War and Peace in the Law of Islam*, p 59
[226] Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, p 59

law for the conduct of state [as] the law of an imperial state which would recognise no equal status for the party (or parties) with whom it happened to negotiate or fight.'[227] This imperial state, as was shown in the chapter, might be a loose federation. In any case, for the time being the analysis above suggests that jihadist groups will remain a threat to security and thus states will have to continue to act. Chapter 2 will synthesize the insights gained on the federalized nature of jihadist groups into a legal framework to characterize the status of affiliate and associate organizations within this federation, before Part 2 moves on to discuss the legal competence of states to conduct countermeasures against it.

[227] Ali and Rehman, 'The Concept of Jihad in Islamic International Law', p 329

2 | Networked Adversaries

The preceding chapter argued that within the particular context of jihadist groups, it is possible to understand the agglomeration of several groups as a federation of non-state actors sharing a common goal. It described that under classic Islamic law, these groups pledge allegiance to an overarching authority (the Caliph), while possibly maintaining a certain degree of autonomy. It was further argued that such insurgent groups, by only recognizing early understanding of Islamic international law and rejecting the contemporary state-system and its prohibition of the use of force, see themselves in a position to wage an expansionary war in order to establish the Caliphate. Counterinsurgents, therefore, are presented with the particular problem that such actors may be—with al Qaeda and the Islamic State being prime examples—geographically dispersed and only loosely connected on the organizational level. Before being able to turn to more specific questions under the *jus ad bellum* and the *jus in bello* in the following chapters, the fundamental problem therefore relates to the question of how to, on the one hand, define such networks broad enough to include all groups that form part of it, while on the other, be narrow enough to avoid a situation that, in the extreme, authorizes force against

any group that merely shares its ideology with such a network without having organizational ties.

The cases of al Qaeda and the Islamic State (IS) and their affiliate organizations stand out because, contrary to the increased focus on globalization, networks, and global jihadism, relatively few terrorist organizations do in fact form lasting alliances for the purposes of overthrowing the Westphalian system.[1] Until recently, al Qaeda was the only terrorist organization that increased its own area of operations through the use of affiliate organizations.[2] IS, an organization that at times had a turbulent and changing relationship with al Qaeda[3], increasingly tried to extend its own sphere of influence to Egypt[4], Libya[5], and has accepted a pledge of allegiance by the Nigerian group Boko Haram.[6] These groups, it will be shown later in the chapter, are the primary agents of the al Qaeda network. The extent to which IS will follow this path cannot be reasonably estimated at the time of writing.

Thus, it can be postulated that al Qaeda does not primarily act through its core leadership, but through its affiliate organizations. This is often attributed to the fact that the group finds it extremely difficult to operate overtly owing to military pressure by the United States.[7] A similar explanation, drawing on

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[1] Navin A Bapat and Kanisha D Bond, 'Alliances Between Militant Groups' (2012) 42 British Journal of Political Science 793; Tricia Bacon, 'Alliance Hubs: Focal Points in the International Terrorist Landscape' (2014) 8 Perspectives on Terrorism 4

[2] Daniel L Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations' (2014) 23 Security Studies 431

[3] See e.g. Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2015)

[4] Al Jazeera, 2014, 'Egypt armed group pledges allegiance to ISIL' Al Jazeera <http://www.aljazeera.com/news/middleeast/2014/11/egypt-armed-group-pledges-allegiance-isil-2014111062135628610.html> accessed 10 November 2014

[5] BBC Monitoring, 2015, 'Islamic State builds on al-Qaeda lands (9 March 2015)' BBC World News accessed 13 March 2015

[6] Daniel Milton and Muhammad al-'Ubaydi, 'Pledging Bay`a: A Benefit or Burden to the Islamic State?' (2015) 8 CTC Sentinel 1; Thomas Joscelyn, 2015, 'Boko Haram leader pledges allegiance to the Islamic State, 8 March 2015' The Long War Journal <http://www.longwarjournal.org/archives/2015/03/boko-haram-leader-pledges-allegiance-to-the-islamic-state.php> accessed 9 March 2015

[7] See e.g. Carla E Humud and others, *Al Qaeda-Affiliated Groups: Middle East and Africa* (R43756, Congressional Research Service 2014), p 3

an impressive reading of organizational theory, is offered by Byman, who argued that affiliation offers a way for al Qaeda to gain legitimacy and the ability to extend its geographic area of influence.[8] Mendelsohn, who studied the al Qaeda example in more detail, concluded that while the reasons for affiliation vary from case to case, affiliation offers both opportunities but dangers for such organizations. On the one hand, as already described, the core group is able to quickly expand its sphere of influence at little cost, while on the other, it runs the risk of lending its name to a group that will not act in its strategic interest.[9] What sets affiliation apart from other forms of cooperation, however, is that it is, contrary to popular perception, not a widespread phenomenon and applied quite selectively by jihadist groups.[10] Affiliation, therefore, is qualitatively distinct from other forms of cooperation and should be understood as such by counterinsurgents.

Affiliation is a form of 'delegated authority'[11] and, in the jihadist context, requires a pledge of allegiance (*bayat*)[12], which in turn requires integration into an overarching command and control structure of the parent organization.[13] Affiliation, Ingber has argued, is poorly understood and 'remain[s] remarkably undertheorized'[14] despite the importance of the concept for our understanding of how jihadist groups operate. Noteable exceptions are the already mentioned studies of Mendelsohn[15] and

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[8] Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations'
[9] See Barak Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences* (Oxford University Press 2016)
[10] Ibid
[11] Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations', p 441
[12] Milton and al-'Ubaydi, 'Pledging Bay`a: A Benefit or Burden to the Islamic State?', p 2
[13] Thomas Joscelyn, 'Al Nusrah Front official explains al Qaeda's strategy, conflict with former branch' (*The Long War Journal*, 2014) <http://www.longwarjournal.org/archives/2014/04/_the_bayat_all_of.php> accessed 22 September 2014
[14] Rebecca Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda' (2011-2012) 47 Texas International Law Journal 75, p 90
[15] Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences*

Byman[16], who looked at affiliation from an international relations perspective and tried to explain *why* it occurs and *how* non-state actors benefit from it. Both have made significant contributions to the field. The analysis here, however, will be less concerned with which strategic concerns drive such groups to enter into an affiliated relationship, but instead with the legal ramifications of such a decision with regards to the effects on our understanding and characterization of these groups. Are affiliates, for example, entirely distinct from their parent organization and are forcible countermeasures[17] against them or their members only permitted if they themselves strike first? Or, to the contrary, should they be covered by any legal authorization, national or international, against their parent organization. The implications of these questions for states engaged in conflict with either the al Qaeda or the Islamic State network are profound, since both the restrictive and the expansive view can either make necessary counteraction impossible, or alternatively enable them to conduct war everywhere. These *ad bellum* questions will be raised again in chapter 3.

For now, the fundamental question is definitional and concerns the legal inter-group relationship of core and affiliate organizations. The answer to this is especially pertinent in the case of the 2001 Authorization of Use of Military Force (AUMF), which authorizes the President to use force against those 'nations, *organizations*, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks

[16] Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations'
[17] The word countermeasures here is used in the broadest meaning of the term and should not be understood in narrow understanding of the International Law Commission's Draft Articles on State Responsibility; see Draft articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, with commentaries, A/56/10 (2001)

that occurred on September 11, 2001'[18] or detain their members.[19] Arguably, when former President George Bush declared war on al Qaeda in 2001, it appeared to be a coherent organization with clearly identifiable command and control structures, physical infrastructure, and a geographic base in Afghanistan.[20] At the time of writing, however, al Qaeda is far from being a geographically confined actor, but rather a conglomeration of regional insurgent groups under a *de jure* central strategic command.[21] The Islamic State, on the other hand, is a coherent and hierarchical armed group in Iraq and Syria, although it is continuously losing ground[22], but has similarly accepted several pledges of allegiance from various geographically dispersed groups. More importantly, however, the United States continues to use force against IS based on the 2001 AUMF[23], despite the fact that the Islamic State split from the al Qaeda network in 2014.[24] In short, what is needed is a framework to properly conceptualize which organizations are part of a jihadist terrorist network against which force can be used and such a framework must both be rooted in Islamic history and law, which was laid out in the preceding chapter, as well as in legal principles already found in international law. The former is necessary as without incorporating the principles inherent in the operations of jihadist actors it is impossible to properly characterize their relationships with other groups. The latter is important since

[18] Authorization for Use of Military Force. 50 USC 1541 note. Public Law 1070-40, 2001, emphasis added
[19] See e.g. *Hedges v. Obama*, 724 F3d 170 (2nd Cir 2013)
[20] Jason Burke, *Al-Qaeda: The True Story of Radical Islam* (Penguin Books Limited 2007); Even though this this characterisation may only stem from the testimony of Jamal al-Fadl and was influenced by the need to prove the existence of an organization in order to satisfy the demands of the Racketeer Influenced and Corrupt Organizations Act (RICO), see Christina Hellmich, *Al-Qaeda: From Global Network to Local Franchise* (Zed Books 2011), pp 31-32
[21] At least according to its own characterizations, see section 1
[22] See e.g. Gudrun Harrer, 'Der "Islamische Staat" verliert, aber langsam' *Der Standard* (18 August 2017) <http://derstandard.at/2000062850257/Der-Islamische-Staat-verliert-aber-langsam> accessed 18 August 2017
[23] Mary Louise Kelly, 2016, 'When The U.S. Military Strikes, White House Points To A 2001 Measure' NPR <http://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure> accessed 26 July 2017
[24] Charles Lister, *Profiling the Islamic State* (Brookings Institution 2014), p 13

states countering these violent non-state actors on a global scale do not, for obvious reasons, want to lend legitimacy to the jihadists' understanding of international relations.

This chapter will proceed in three parts. First, without rehashing arguments already introduced in the previous chapter, it will be necessary to take a closer look at the internal command and control structures of these networked armed groups, as far as they are known, and the importance of the *bayat*. It will be argued that instead of grouping such organizations by their shared ideology, it is the *bayat* that is the decisive factor that brings certain groups (affiliate organizations) under the *de jure* command and control of either al Qaeda or the Islamic State.

Second, the chapter will then use the International Law Commission's Articles on State Responsibility (ASR)[25] as well as the Draft Articles on the Responsibility of International Organizations (DARIO)[26] as a template to put forward a framework for providing more clarity when and if other organizations should bear responsibility for other network members and may therefore be included in countermeasures such as military action. As Crawford and Olleson describe, the 'basic statement of principle' found in Article 1 of the ASR[27] 'would seem equally applicable by definition to all legal persons'.[28] While it is not suggested here that terrorist organizations possess legal personality under international law, even though Mammen has proposed such an approach[29], this has led to an 'accountability gap' according to

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[25] Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001)

[26] International Law Commission, Draft articles on the responsibility of international organizations, with commentaries, Yearbook of the International Law Commission, 2011, Vol 11, Part 2, A/66/10

[27] Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001), art 1, says ' Every internationally wrongful act of a State entails the international responsibility of that State.'

[28] James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility' in Malcolm D Evans (ed), *International Law* (first edn, Oxford University Press 2003), p 446

[29] Lars Mammen, *Völkerrechtliche Stellung von internationalen Terrororganisationen* (Nomos 2008), pp 223-247

Zegveld.[30] Zegveld further clarifies that 'international bodies have not yet defined the rules on attribution of acts and omissions of individuals to armed opposition groups'.[31] The analogy to the frameworks set out above is therefore drawn because they serve a comparable purpose to the one sought here with regards to states and international organizations. It is, however, acknowledged that the comparison should not be stretched too far, as states and international organizations are usually fairly coherent entities with clear lines of authority, while non-state actors—especially ambiguous global networks—not necessarily possess such qualities. Nevertheless, these frameworks are a good starting point to approach the question.

The chapter will suggest a differentiation between affiliate and associate organizations. Affiliates, by pledging allegiance and submitting themselves to the command and control structures of the parent organization—even if it is barely exercised in practice—integrate themselves into this entity's command and control structure, which, it is argued, should be seen as a *de jure* merger. Members of such groups should therefore be seen as organs of the overall network and attribution of their conduct to the overall conduct should therefore not be dependent on whether the central leadership exercises effective control over actual conduct. Associate groups, which are groups that share the ideology of either al Qaeda or the Islamic State and may cooperate with either on an ad-hoc or even more permanent basis without offering a *bayat*, should only be seen as covered by legal instruments such as the AUMF if an entity already covered by it exercises overall control over its actions. From a US point of view, this of course does not affect possible countermeasures after a direct attack by an associate group.

[30] Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002), ch 4
[31] Ibid, p 134

Third, and finally, the chapter will look at whether jihadist networks can be understood as armed groups under the laws of armed conflict (LOAC). While chapter 5 will look at the use of force against such organizations and their members under LOAC in more detail, it is necessary to establish here that LOAC does not preclude the possibility of understanding geographically dispersed networks as armed groups.

1. Networked Armed Groups

Jihadist transnational terrorist networks are, almost by definition, amorphous and not easy to grasp. They often operate in loose alliances held together by a shared ideology and a shared goal. Given the uncertainty created by the fact that very little information on the inner distribution of authority is publicly available and may often be out of date, it is very difficult to establish whether certain groups exercise command and control over others. Yet, there is little doubt that some groups, especially al Qaeda and the Islamic State, extend beyond their formal boundaries and have often, quite successfully, tried to create, co-opt, integrate with, or cooperate with local groups up to the point of the formation of formal alliances. Kilcullen has argued that al Qaeda tried to play the long game, emerging itself into foreign societies and foreign organizations in order to radicalize the population, ultimately turning it against the West.[32] Indeed, there are indications that al Qaeda operatives have been instrumental in the formation or reorientation of several local resistance movements. Fadil Harun, who claims to have been al Qaeda's 'confidential secretary' and whose two-volume manuscript Nelly Lahoud describes as one of the richest primary

[32] David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One* (Oxford University Press 2009), p 28

sources so far[33], reports engagements in East Africa, including Kenya, Tanzania, Sudan and Somalia, as well as Afghanistan, and Chechnya.[34] As Mendelsohn has shown, in many cases the foundation of these affiliate groups was an in-house expansion in which members of AQC were sent to other countries in order to set up these organizations.[35] Groups affiliated or associated with the organization are also operating in Indonesia, Yemen, Mali, and in 2014 al Qaeda announced that it would try to establish a new cell in India.[36]

The Islamic State, on the other hand, demanded the allegiance of all jihadist groups—in fact of all Muslims—once it had declared its Caliphate in 2014.[37] Indeed, several groups, most prominently Boko Haram in Nigeria, pledged their *bayat* to the Islamic State.[38] The Islamic State is a highly hierarchic organization within the areas it controls[39], but it is unclear how this hierarchy is applied to groups that have pledged allegiance. While it must not be forgotten that in many cases the goals of these local cells are local or regional at best, in other cases members of these local offshoots have tried to strike directly against the United States. One such example is al Qaeda in the Arabian Peninsula, which tried to place explosives on a flight to the United States in 2009.[40] From a global counterinsurgents point of view, the question therefore is how to characterize and act upon these opaque levels of organizational integration. On the one hand, there is an inherent danger that grouping organ-

[33] Nelly Lahoud, *Beware of Imitators: al-Qu'ida Through the Lens of its Confidential Secretary* (Harmony Program at the Combating Terrorism Center at West Point 2012), p 3
[34] Ibid, pp 21f
[35] For the example of AQAP see Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences*, p 133ff
[36] Jason Burke, 'Al-Qaida leader announces formation of Indian branch' *The Guardian* (Delhi, 4 September 2014)
[37] Lister, *Profiling the Islamic State*, p 14
[38] See Milton and al-'Ubaydi, 'Pledging Bay`a: A Benefit or Burden to the Islamic State?'
[39] Hassan Abu Hanieh and Mohammad Abu Rumman, *The "Islamic State" Organization: The Sunni Crisis and the Struggle of Global Jihadism* (Friedrich Ebert Stiftung 2015), pp 282f
[40] *US vs. Abdulmutallab*, 2011 WL 4345243 (ED Mich 2011)

izations together based on their shared ideology creates the undesirable danger of an overbroad use of force against such organizations. On the other hand, it is equally unsatisfying to ignore the fact that at least *some* groups operate under the same banner and do, in fact, consider themselves to be part of the same organization.

Nevertheless, at least in the case of al Qaeda, the idea of a structured organization is contested. According to Hellmich, analysts 'shift between the notion of a vague, fragmented network of like-minded individuals connected only by ideology on one hand, and belief in a structured, geographically located organization with a defined core leadership on the other.'[41] The reality may very well be somewhere in between. While Hellmich's objection against presenting al Qaeda as a tightly knit organization based on the lack of available sources is warranted[42], she nevertheless follows Burke's description of the movement of a 'hard core' of individuals forming the inner circle of the organization and a network of 'co-opted groups' all held together by ideology.[43] While such a description may be satisfactory from a general international relations perspective, it does create significant uncertainty from a legal point of view.

Unfortunately, insights into how al Qaeda is organized are generally rare and, if put forward by the organization itself, have to be treated with caution. At its foundation, it was designed to consist of various branches, including a military, financial, political, and media committee, a propaganda wing as well as an intelligence component. On top of the organization is the *emir,* with an advisory council (*shura)* to assist him.[44] The

[41] Hellmich, *Al-Qaeda: From Global Network to Local Franchise*, p 158
[42] Ibid, ch 1
[43] Ibid, p 58; Burke, *Al-Qaeda: The True Story of Radical Islam*, pp 8-13
[44] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (W. W. Norton & Company 2004), p 56; It can be assumed that, had the central organization ever managed to establish the state it sought, it would have been headed by a *caliph*.

founding documents also established a Regional Council (RC) for coordinating local initiatives of al Qaeda.[45] The RC is supposed to be in contact with the Foreign Relations Section (FRS) within the Leadership Council (LC)[46], although it is not clear whether organizationally the FRS is supposed to act as a supervisor or rather as a liaison to the RC. Unfortunately, the document does not define who sits on the RC.

The founding documents of al Qaeda also regulate the relationship of AQ with other jihadist organizations in as far as they allow for cooperation and even merger.

> 'Our relationships with truthful Islamic jihadist movements and groups is to cooperate under the umbrella of faith and belief and we shall always attempt to at uniting and integrating with them or at least coordinating with them and avoiding their animosity.' [sic][47]

Although not specifically outlined in the document, one can infer from subsequent developments that merging would be a one-way process by which the other group becomes part of al Qaeda, not *vice versa,* and that al Qaeda would subsequently exercise at least some command and control powers over the other group. The founding documents also do not tell us how such a merger would look like. For Byman, the unification between al Qaeda and the Egyptian Islamic Jihad is the only case of a merger that has occurred so far.[48] This, it will be argued below however, is a too restrictive understanding of what constitutes a merger.

Unfortunately, we lack broader insight into any agreements drawn up between regional leaders and the central leadership with regards to the extent the latter can exercise command and control over the former. The documents also do not generally

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[45] *Al-Qa'ida: Constitutional Charter, Rules and Regulations*, (Document #: AFGT-2002-600175, CTC Harmony Program), Section 2.C.e., p 13
[46] Ibid, Section 2.B.c., p 13
[47] Ibid, Section B.3.5, p 3; it has to be noted that the internal structure and numbering of the source document is not linear and at times confusing. I will therefore both point to the original page, as indicated in the document, as well as to the section as given in the document.
[48] Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations', p 437

proscribe a specific procedure that has to be followed, although the literature generally outlines that the commander of a regional group has to swear an oath of allegiance to the central leadership. The ultimate goal of this is to 'create a new international pseudotribal system based on the Islamic precedence of [*bayat*] instead of the ties of blood relationship or nationalism'.[49]

Abu Sulayman al Muhajiir, a former radical preacher in Australia who previously acted as a high-ranking *shari'ah* official in the Syrian al Nusrah Front[50] before departing from the organization in 2016[51], describes in an interview the internal structure of the al Qaeda network[52], even though the reliability of the information is obviously questionable. According to al Muhajir, overall authority within the network is vested in the high command, by which he is referring to Ayman al-Zawahiri.[53] Al Qaeda operations are executed in various locations (*al Qalim)* of which regional *emirs* are in charge, although under the strategic guidance of the high command. Al Muhajir maintains that the leader is chosen, but he does not disclose by whom. He furthermore declares that all orders by the high command are binding unless they are *haram*, i.e. they violate Islamic law.[54]

This decentralized structure, on the one hand, has advantages for the overall network since it allows a transnational

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[49] Michael W. S. Ryan, *Decoding Al-Qaeda's Strategy: The Deep Battle Against America* (Columbia University Press 2013), p 183

[50] Thomas Joscelyn, 'Al Qaeda official in Syria was extremist preacher in Australia' (*The Long War Journal*, 2014) <http://www.longwarjournal.org/archives/2014/03/former_islamic_preac.php?utm_source=rss&utm_medium=rss&utm_campaign=al-qaeda-official-in-syria-was-extremist-preacher-in-australia> accessed 22 September 2014

[51] C. J. Werleman, 'Terror spokesman Abu Sulayman al-Muhajir on a new Islamic state' *The Saturday Paper* (3 June 2017) <https://www.thesaturdaypaper.com.au/2017/06/03/terror-spokesman-abu-sulayman-al-muhajir-new-islamic-state/14964120004735> accessed 27 July 2017

[52] Abu Sulayman al-Muhajir, 'An Inrerview with Sheikh Abu Sulayman al-Muhajir' (*AL Basira Media Productions*, 2014) <https://www.youtube.com/watch?v=YQJukdfBSSw> accessed 22 September 2014

[53] Joscelyn, 'Al Nusrah Front official explains al Qaeda's strategy, conflict with former branch'

[54] Ibid

network to rely on 'local operators'[55] while also increasing the resilience of the network to outside intervention. At the same time, exercising command and control over the entire network may prove difficult and keeping all part of the network in line with overall strategic objectives may prove difficult.[56] After all, the reason for Muhajir's interview was to denounce the Islamic State, which had previously fallen out with the al Qaeda network. This may serve as an indication for the difficulties associated with coordinating a decentralized network with varying degrees of authority.

A second issue that arose for the central leadership was the excessive use of force, especially against Muslims, by some of the regional groups, especially al Qaeda in Iraq (AQI) under the leadership of the late Abu Musab al-Zarqawi, who was killed by a US airstrike in 2006.[57] It prompted Osama bin Laden, in 2010, to commission the drafting of a memorandum of understanding (*mudhakkira*) between the central leadership and the various regional entities.[58] The MoU was to be sent out to commanders in order to get their responses to it, before formally committing (*iltizam*) to the contents of the MoU.[59] It would have required regional commanders to consult the central leadership whenever they wanted to start a new offensive, especially against Muslims, as well to coordinate their media initiatives with the central leadership. Furthermore, it set out that regional commanders are responsible for those under their command and

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[55] Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences*, p 46
[56] Ibid, pp 46f
[57] Dexter Filkins and John F Burns, 'At Site of Attack on Zarqawi, All That's Left Are Questions' *The New York Times* (Hibhib, 11 June 2006) <http://www.nytimes.com/2006/06/11/world/middleeast/11scene.html> accessed 22 September 2014
[58] Gideon Rose and Ray Kelly, 'Foreign Affairs Focus: Ray Kelly on Counterterrorism' (5 March 2014) <http://www.foreignaffairs.com/print/138089> accessed 11 March 2014
[59] Nelly Lahoud and others, *Letters from Abbottabad: Bin Ladin Sidelined?* (Harmony Program at the Combating Terrorism Center at West Point 2012), p 13f

that they should take responsibility in case of excessive collateral damage.[60] Lahoud concludes that it is likely that by 2010 a central organization, more in sync with the regional affiliates on the operational level, was being forged, although she cautions that her speculations are not entirely plausible.[61]

In the case of al Qaeda, it nevertheless appears that there is a set of groups linked both by a shared ideology, a common goal, and a public declaration of s being under a central (strategic) command. Several scholars have described the highly centralized and powerful bureaucracy of the Islamic State.[62] Similarly, as will become apparent below, the Islamic State considers affiliated groups as an integral part of its "state". It can therefore be speculated that it would expect hierarchical subjugation to its central leadership and can effectively communicate orders. At this point, it is necessary to recall the argument introduced in the first chapter of a federalist Caliphate. The structure of such jihadist networks should be understood as an insurgent political entity under a central political and religious figurehead with overall authority to settle disputes and provide strategic guidance[63] and significant authority held by regional rulers.

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[60] Ibid, p 13f
[61] Ibid, p 20
[62] Andrew F. March and Mara Revkin, 2015, 'Caliphate of Law, 15 April 2015' Foreign Affairs <https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law> accessed 21 July 2015; Laith Alkhouri and Alex Kassirer, 'Governing The Caliphate: The Islamic State Picture' (2015) 8 CTC Sentinel 17; Danielle F Fung and others, *Managing a Transnational Insurgency: The Islamic State of Iraq's "Paper Trail," 2005 - 2010* (CTC Occasional Paper 2014); Jacob N Shapiro, *The Terrorist's Dilemma: Managing Violent Covert Organizations* (Princeton University Press 2013), ch 4
[63] See e.g. the controversy between the al Nusrah Front and the Islamic State, which ultimately led to the latter leaving the network.

2. The Status of Affiliate and Associate Organizations

While it has been established that certain groups should be seen as organizationally integrated into the overall terrorist networks of either the Islamic State or al Qaeda, it is not entirely clear on which criteria the determination for affiliation should be based. On the one hand, some level of organizational cooperation seems paramount. It is unconvincing to postulate that groups which share nothing but an agenda should be treated as a single actor. Hence some shared structures, for example the ability to at least exercise strategic command and control, should be required. On the other hand, in order to differentiate between ad-hoc coalitions and stronger integrations, the ideological level cannot be discarded. Even though former US Secretary of State John Kerry has cautioned against looking at ideology with regards to the IS AUMF, for it may complicate matters and place an impossible burden of proof on commanders in the field[64], it is argued that questions of affiliation and association would not have to be settled by commanders in the field.

2.1. Affiliates

Byman defines a '"terrorist affiliate" [as] a terrorist organization that accepts the leadership of another terrorist organization but remains organizationally distinct'.[65] This type of relationship has also been called a 'strategic alliance'.[66] Zimmerman sees al Qaeda affiliates as '[g]roups that have publicly pledged allegiance to the al Qaeda *emir* and have in turn received public

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[64] United States Senate Committee on Foreign Relations, 'Authorization For The Use of Military Force Against ISIL, Hearing December 9, 2014' (2014) <http://www.foreign.senate.gov/hearings/authorization-for-the-use-of-military-force-against-isil> accessed 11 December 2014, at 01:10:30

[65] Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations', p 434

[66] Assaf Moghadam, 'Terrorist Affiliations in Context: A Typology of Terrorist Inter-Group Cooperation' (2015) 8 CTC Sentinel 22, p 23

recognition as being part of al Qaeda by the al Qaeda *emir*.'[67] In turn, she sees as associates '[g]roups that exhibit a sufficient number of characteristics common within the al Qaeda network such as shared resources, overlapping fighter or leadership networks, a common signature, and ideological alignment with al Qaeda'.[68] Only through the *bayat*, the oath of allegiance, and the public acceptance of this by the *emir* of the parent organization, a group becomes an affiliate.[69] This reasoning can be applied to the Islamic State as well. 'In Islamic parlance, the [*bayat*] to the Caliph is a pledge of allegiance that, upon being accepted, formally brings the group or the individual making the pledge under the authority of the Caliph.'[70] The practice of *bayat* has its roots in Islamic history, dating back to Muhammed's travels to Mecca in 627-628. Milton describes that the local tribe of Mecca, the Quraysh, denied Muhammed access to the area, prompting him to send an emissary to negotiate. When the emissary's return was delayed, his followers feared he might have been killed and swore to avenge him to Muhammed in the face of overwhelming Quraysh military power. The pledge was formalized through the joining of hands. The *bayat* became a permanent feature of Islamic politics, decreeing a 'sign of political legitimacy' on the Caliph.[71]

It would therefore be more appropriate to treat the process of affiliation as a *de jure* merger, even though groups may retain some degree of organizational autonomy, which can also be explained by operational necessity. In contrast, association can range from high degrees of cooperation and verbal expressions of support, which must not be mistaken for pledges of

[67] Katherine Zimmerman, *The al Qaeda Network: A New Framework for Defining the Enemy* (American Enterprise Institute 2013), p 15
[68] Ibid
[69] Ibid, p 15
[70] Milton and al-'Ubaydi, 'Pledging Bay`a: A Benefit or Burden to the Islamic State?', p 2
[71] Ibid, p 2

allegiance[72], to low-end tactical cooperation in specific theatres.[73]

It has been suggested that instead of focusing on organizational ties, jihadist networks should rather be understood as networks of individuals based on personal relationships. Referring to declassified communication by al Qaeda core and affiliate members, Zimmerman points out that this view 'does not correspond with the way al Qaeda leaders and operatives discuss their relationships and activities, which includes explicit recognition of a formal organizational structure and centrally provided guidance'.[74] Critics may point to the rift that separated the al Qaeda affiliated groups from the Islamic State[75] and the failed attempts by Zawahiri to negotiate between the Islamic State and the al Nusrah Front[76] as an indication of the limited influence the central leadership wields over affiliates. Nevertheless, this may also be seen as evidence for the existence of organizational structures, even though the effort in this instance was not successful. Be that as it may, it is also worth pointing out that all other affiliates have in fact maintained their allegiance with the core group[77] and have not defected to the Islamic State, which also demanded their allegiance after declaring the Caliphate.[78] If these were purely marriages of conven-

[72] Ibid, p 2
[73] Moghadam, 'Terrorist Affiliations in Context: A Typology of Terrorist Inter-Group Cooperation', p 23f
[74] Zimmerman, *The al Qaeda Network: A New Framework for Defining the Enemy*, p 10
[75] Andrew Phillips, 'The Islamic State's Challenge To International Order' (2014) 68 Australian Journal of International Affairs 495, p 496; see also J M Berger, 2014, 'The Islamic State vs. al Qaeda' Foreign Policy <http://www.foreignpolicy.com/articles/2014/09/02/islamic_state_vs_al_qaeda_next_jihadi_super_power> accessed 3 September 2014
[76] Daveed Gartenstein-Ross, 'GUEST POST: Ayman al-Zawahiri on Jihadist Infighting and the Islamic State of Iraq and al-Sham' (*Jihadology*, 2014) <http://jihadology.net/2014/04/21/guest-post-ayman-al-zawahiri-on-jihadist-infighting-and-the-islamic-state-of-iraq-and-al-sham/> accessed 29 September 2014
[77] See e.g. Joscelyn, 'Al Nusrah Front official explains al Qaeda's strategy, conflict with former branch'
[78] Abu Bakr Al-Husayni Al-Qurashi Al-Baghdadi, 2014, 'A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan' <https://ia902501.us.archive.org/2/items/hym3_22aw/english.pdf> accessed 9 July 2014

ience and the act of affiliation would only be done for opportunistic reasons, one would expect to see more fluctuation within the network.

Keeping in mind the degrees of freedom potentially enjoyed by regions within the original Islamic state, it is suggested that less emphasis should be put on the organizational autonomy which these groups enjoy, but rather treat the act of affiliation as a merger between two organizations within a context that does not allow for a complete unification of organizational structures. The fact that a central command and control centre in Waziristan or Raqqa may only exercise so much authority over subordinate groups in Yemen or Libya should not preclude the possibility that authority is exercised. It would be nonsensical to allow such groups the benefits of brand recognition[79], while not simultaneously submitting all members of the network to some level of responsibility for its actions. The swearing of a *bayat*, rare as it is, including the acceptance of a subordinate role, provides enough basis for treating it as a merger. Association, on the other hand, occurs for more frequently, yet should not produce the same degree of responsibility. Two levels of responsibility for affiliate and associate organizations are therefore proposed, which will be elaborated below. This also serves the purpose of grounding this argument in law, even though concepts from the law of state responsibility have to be applied analogously because no law of responsibility for non-state armed groups exists.

In the case of al Qaeda, affiliates subject themselves to al Qaeda's command and control structure and hand over parts of their autonomy to it.[80] The interview with Abu Sulayman al Muhajiir, the former high-ranking *shari'ah* official in the Syrian al

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[79] See e.g. Byman, 'Buddies or Burdens? Understanding the Al Qaeda Relationship with Its Affiliate Organizations'
[80] Joscelyn, 'Al Nusrah Front official explains al Qaeda's strategy, conflict with former branch'

Nusrah Front,[81] set out that overall authority within the network is vested in the al Qaeda high command[82]—Ayman al-Zawahiri—although the information has to be treated with caution.[83] He furthermore declares that all orders by the high command are binding unless they are *haram*, i.e. they violate Islamic law.[84] It thus stands to reason to treat organizations which pledge allegiance as a single unit, even though the degree of control might be comparatively low. The list of affiliates included al Qaeda in the Islamic Maghreb (AQIM)[85], al Qaeda in the Arabian Peninsula (AQAP)[86], al Shabaab in Somalia[87], and the Syrian al Nusrah Front in 2013.[88] The latter rebranded itself as Jabhat Fath Al Sham in 2016, which was interpreted as a break with the overall organization. Analysts, however, remained sceptical since al Qaeda members remained within the organization and the speech by Abu Muhammad al Julani, *emir* of the Al Nushrah Front, never explicitly stated that it Jabhat Fath Al Sham would break with al Qaeda.[89] For this reason, the organization will be considered as an al Qaeda affiliate and continuously referred to as the Al Nusrah Front. Zimmerman also includes the Islamic Emirate of the Caucasus[90] among the affiliates[91] even though she does not disclose when the act of affiliation would have occurred.

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[81] Joscelyn, 'Al Qaeda official in Syria was extremist preacher in Australia'
[82] al-Muhajir, 'An Inrerview with Sheikh Abu Sulayman al-Muhajir'
[83] Joscelyn, 'Al Nusrah Front official explains al Qaeda's strategy, conflict with former branch'
[84] Ibid
[85] Security Council Committee Pursuant to Resolution 1267/1989, 'Narrative Summaries of Reasons for Listing' <http://www.un.org/sc/committees/1267/entities_other_groups_undertakings_associated_with_Al-Qaida.shtml> accessed 29 September 2014, entity QE.B.138.14., year of affiliation 2006
[86] Ibid, entity QE.A.129.10., year of affiliation 2009
[87] Not listed, Year of affiliation 2010, see also Rick Nelson and Thomas Sanderson, *A Threat Transformed: Al Qaeda and Associated Movements in 2011* (Center for Strategic and International Studies 2011), p 8
[88] Security Council Committee Pursuant to Resolution 1267/1989, 'Narrative Summaries of Reasons for Listing', entity QE.A.137.14.
[89] Thomas Joscelyn, 2016, 'Analysis: Al Nusrah Front rebrands itself as Jabhat Fath Al Sham' The Long War Journal <http://www.longwarjournal.org/archives/2016/07/analysis-al-nusrah-front-rebrands-itself-as-jabhat-fath-al-sham.php> accessed 26 September 2016
[90] Security Council Committee Pursuant to Resolution 1267/1989, 'Narrative Summaries of Reasons for Listing', entity QE.E.131.11.
[91] Zimmerman, *The al Qaeda Network: A New Framework for Defining the Enemy*, p 21

In the case of the Islamic State, which was until recently a geographically homogenous organization exercising tight control over territory[92], no authoritative insight into the organization's relationship with its affiliates has yet surfaced. This being said, statements by spokespersons suggest that the organization essentially treats pledges of allegiance as mergers. Following the public declaration of allegiance by the Nigerian group Boko Haram, IS spokesman Abu Muhammad al Adnani declared that potential recruits not able to join IS in either Syria or Iraq, may now go to West Africa.[93] This is significant since IS sees emigration to the Islamic State as compulsory under Islamic law.[94] Thus, if emigration to territory controlled by Boko Haram is treated the same way as emigration to territory controlled by the parent organization, then at least from the organization's point of view they are one and the same. In the case of the Islamic State, keeping to the two-step process of affiliation is even more important, since it has actively demanded allegiance from all Muslims, including jihadist organizations, and threatened to attack those who refuse.[95] Recalling the makeup of the network introduced earlier, affiliate organizations are on the first organizational level below the central leadership. As Zimmerman suggests, achieving the status as an affiliate should be an exclusive matter of positive action on both sides. It combines swearing allegiance, in the case of jihadist organizations the *bayat,* with a public declaration of affiliation by the *emir* of the

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[92] The Islamic State has managed to establish a tight and very bureaucratic organization, enabling it to implement a military strategy akin to those of some nation-states and offer services and administration under the areas under its control; see oMuhammad al-'Ubaydi and others, *The Group That Calls Itself a State: Understanding the Evolution and Challenges of the Islamic State* (Combating Terrorism Center at West Point 2014), p 20; see also Shapiro, *The Terrorist's Dilemma: Managing Violent Covert Organizations*, ch 4 for a historic analysis of al Qaeda in Iraq (AQI), the predecessor organization to the Islamic State, entity QE.J.115.04
[93] Joscelyn, 'Boko Haram leader pledges allegiance to the Islamic State, 8 March 2015'
[94] Al-Baghdadi, 'A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan', p 6; see also Graeme Wood, 'What ISIS Really Wants' *The Atlantic* (March 2015) <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/> accessed 20 February 2015
[95] Lister, *Profiling the Islamic State*, pp 16-24

superior organization. Becoming an affiliate is a deliberate act and subject to no pressures on either party to offer or accept the oath.

It is generally accepted that states as well as international organizations are responsible for actions of its organs or agents.[96] With regards to violent non-state actors no comparable framework exists, which is unfortunate given their prominent role in contemporary international relations. Some authors have suggested that non-state actors increasingly are bound to uphold human rights obligations while others have looked at the question of criminal responsibility in non-international armed conflicts.[97] The contribution sought here is far more humble. The focus of inquiry here is whether affiliate organizations, if seen as integral parts of an organization as argued above, rather than members of an alliance, could be seen as agents or organs of this organization? This, in turn, could provide a more solid basis for assessing the legality of targeting decisions both under international law as well as under domestic legal instruments, such as the AUMF.

The first point to look, as done above, is to the internal law of an organization, which on the basis of the analysis above, can be answered in the affirmative. If affiliate organizations become provinces (*wilayat*) in a declared (but not recognized) state, then there can be no doubt that they should be seen as organs of that state. The same logic applies to groups, which are put in charge of specific regions (*al Qalim*) and are subordinate to a higher command. This approach is mirrored in both

[96] See arts. 1 and 4 Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001); art. 3 and 6 DARIO

[97] See August Reinisch, 'The Changing International Legal Framework' in Andrea Bianchi (ed), *Non-State Actors and International Law* (Ashgate 2009) for the role of codes of conduct and extraterritorial application of human rights in the enforcement of human rights in the case of transnational corporations, NGOs and international organizations; see William Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2003) 26 Fordham International Law Review 907

the Articles on State Responsibility (ASR) as well as the Draft Articles on the Responsibility of International Organizations (DARIO).[98] Keeping in mind that most al Qaeda affiliates and the Islamic State control and administer territory—or have at least attempted to—the analogy to the state is not as far-fetched as it may initially seem.

Article 4(2) of the ASR sets out that

> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[99]

Similarly, article 6(2) DARIO defines that

> 2. The rules of the organization shall apply in the determination of the functions of its organs and agents.[100]

In the case of jihadist organizations, the source of this is the *bayat*, which formally subordinates or merges one group into the other. As the commentary to article 4 ASR elucidates, problems may arise when organs or entities are in fact acting as state entities, but are classified differently.[101]

Given their autonomy and relative operational freedom, affiliates may best be seen as semi-autonomous units within a strongly federal structure. Critics may argue that the fact that the central leadership exercises only marginal control over the affiliates should exclude it from incurring responsibility for the actions of the affiliates and vice versa. Yet, the commentary to article 4 ASR is quite clear that attribution of wrongdoing extends to lower hierarchical levels and does not depend on the actual authority of a government to compel subordinate units to not violate primary rules of international law.[102] This specifically includes component units of federal states or other autonomous areas, over which the federal government may have no

[98] DARIO
[99] Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001), art 4(2)
[100] DARIO, art 6(2)
[101] Draft articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, with commentaries, A/56/10 (2001), Art. 4, commentary(11)), p 42
[102] Ibid, Art. 4, commentary (6)-(8), pp 40-42

authority.[103] As the French-Mexican claims commission in the *Pellat* case has stated, responsibility

> cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law.[104]

In order to explain the relevance of such an approach, one has to consider one of the underlying policy considerations of al Qaeda in setting up affiliates. While politics in the Middle East are traditionally structured around tribal structures and only to a lesser extent based on formal hierarchies[105], the Islamist strategist Naji explains that the process of affiliation acts as a deterrent because an attack on one is considered an attack on all.[106] This describes a relationship not unlike members of the North Atlantic Treaty Organization (NATO). The Washington Treaty, in Article 5, sets out that 'that an armed attack against one or more of them [...] shall be considered an attack against them all'.[107] Military alliances go beyond the scope of mere re-assurances of assistance and try to overcome the coordinational problem in the case of war. Military alliances are characterized, *inter alia*, by the integration of military command and the streamlining of planning processes, joint operations, sharing of intelligence data, and the establishment of military bases on foreign soil.[108] However, the decision to use force remains to be the sole decision of the sovereign governments.[109]

Indeed, jihadist groups have repeatedly reacted in re-sponse to events outside of their immediate sphere of influence. After the French intervention in Mali, a group associated with

[103] Ibid, Art. 4, commentary (9), p 42
[104] UNRIAA, vol V (Sales No 1952V3), p 534, at p 536 (1929)
[105] Philip Carl Salzman, *Culture and Conflict in the Middle East* (Prometheus Books 2008)
[106] Abu Bakr Naji, *The Management of Savagery* (William McCants tr, John M. Olin Institute for Strategic Studies at Harvard University 2006), p 34, page number in Arabic original as indi-cated in the translation
[107] The North Atlantic Treaty (1949)
[108] Yoram Dinstein, *War, Aggression and Self-Defence* (Fifth edn, Cambridge University Press 2011), p 286
[109] Ibid, p 287

AQIM and other key players in Mali attacked a gas plant in neighbouring Algeria as retribution for French attacks.[110] Yet, there is a crucial difference between military alliances and affiliate networks. While NATO's command and control structure has no mandate to infringe upon the sovereign rights of the member states, affiliate organizations give up parts of their autonomy in return for being members of the network. After all, the declaration of the Caliphate by the Islamic State was described as a local emir overstepping his given powers, thus suggesting a superior authority.[111] A strictly doctrinal interpretation of the structure would therefore suggest a level of integration and hierarchy within the network that would even surpass levels of control found within other supranational entities like the European Union.

From a counterterrorist/counterinsurgent perspective, seeing affiliate organizations as agents of the parent organization has some distinct advantages. First, establishing the existence of command and control structures as well as intentions of covert organizations can be difficult if not impossible. An adversary, who divides its operations among various countries and seemingly autonomous entities, has a tactical advantage over an attacked state. The central leadership may provide strategic guidance to affiliate organizations, yet if affiliates mount an armed attack against a state it may not be able to use force against the central leadership or even camps of the same organization if they are not related to the armed attack and located in another state[112], despite the fact that in light of the deterrence

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[110] David J Francis, *The regional impact of the armed conflict and French intervention in Mali* (NOREF 2013), p 6

[111] Joscelyn, 'Al Nusrah Front official explains al Qaeda's strategy, conflict with former branch'

[112] Carsten Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism' (2003) 27 The Fletcher Forum of World Affairs 35, p 48

idea behind affiliation they may pose a greater threat than other organizations.

Second, this approach seems to be suitable to define relations on the vertical hierarchy axis and provide guidance as to what constitutes permissive action towards higher-level commanders. Even in conflicts among states it may be difficult for the adversary to establish where orders emanated from or how long it took to disseminate them. Leaving issues of *jus ad bellum* aside for the moment, it seems implausible that the central leadership of a network should not be seen as a legitimate target even though it and the affiliate organization have publicly declared that the former has authority over the latter. On the horizontal level it is questionable whether a declaration of allegiance to the higher command should automatically render one affiliate a possible target in case of an armed attack by another affiliate. This problem arises in the context of the AUMF, which authorizes force against al Qaeda and associated forces.[113] It is argued that the term al Qaeda in the AUMF should be understood to cover affiliate organizations, even though they had not existed on 9/11, as they would join a covered organization rather than joining the conflict on their own right.[114] Chapter 3 will show that the *jus ad bellum* should provide a sufficient shield against excessive military action on the territory of sovereign states.

Finally, this approach is somewhat common practice under the UN sanctions regime, which covers organizations conducting 'acts or activities by, in conjunction with, under the name of, on behalf of, or in support of […] Al-Qaida or any cell, affiliate, splinter group or derivative thereof'[115]. It seems reasonable that

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[113] AUMF
[114] Curtis A Bradley and Jack L Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 Harvard Law Review 2047, p 2110
[115] S/RES/1989 (2011), para 1

out of those four categories, only for organizations acting 'under the name of' there would not need to be a determination beyond how an organization calls itself. Unfortunately, the publicly available narrative summaries for listing are not conclusive whether an organization has ever been listed solely for operating under the name of al Qaeda without qualifying under the other listing criteria as well. In the case of the al Nusrah Front, for example, more than a year passed between the formal *bayat* and the inclusion on the Sanctions List.[116] In other cases, such as AQI, listing and swearing allegiance coincide[117], yet it impossible to establish causality from the narratives. Given the fact that *Jama'at al-Tawhid Wa'al-Jihad*, as AQI called itself before swearing allegiance to Osama bin Laden, was engaged in hostilities even before inclusion on the sanctions list, this is at least a possibility. Either way, taking into account the structure of the network, this approach would only be able to apply to affiliate organizations, but would have no bearing with regards to associates.

2.1.1. The US Approach

The question of whether al Qaeda (and the Islamic State) and the networks surrounding them are single actors is especially pertinent with regards to the application of the 2001 AUMF to them. The AUMF authorizes 'all necessary and appropriate force against those nations, *organizations*, or persons' which 'planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001'.[118] The interpretation of both nations and persons is reasonably straightforward since they are finite categories: one either was involved with 9/11 or

[116] Security Council Committee Pursuant to Resolution 1267/1989, 'Narrative Summaries of Reasons for Listing', entity QE.A.137.14.
[117] Ibid, entity QE.J.115.04.
[118] AUMF, sec 2(a), emphasis added

one was not. New evidence may of course always implicate previously seemingly uninvolved persons, however slim the chances for this may be, but these actions must necessarily have occurred and, since the event has passed, future attacks would not be covered by the AUMF. The same is not true for organizations joining the network of an already covered organization. Organizations are necessarily fluid both in terms of individual membership, as new individuals may join, as well as with regards to general enlargement by organizational mergers and splits. Tactically, this requires a nuanced approach since it is similarly undesirable to allow organizations waging war against the US to remove themselves from the purview of the AUMF simply by renaming themselves[119] or casting such a wide net that allows the detention of or use of force against individuals simply on the basis of shared ideology, which was rejected in *Al-Adahi*.[120]

The 2001 AUMF as well as several iterations of drafts of an AUMF for operations against the Islamic State[121] all apply to the respective group as well as affiliated and associated organizations, without clearly defining those concepts and therefore providing little actual guidance for the adoption of countermeasures.[122] The 2011 US National Strategy for Counterterrorism (NSC) the US distinguishes between 'Associated Forces', which it sees as 'a legal term of art that refers to cobelligerents of [al Qaeda]' and which may be targeted based on the AUMF, and

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[119] Frank M Walsh, 'An Enemy by any Other Name: The Necessity of an "Associated Forces" Standard that Accounts for Al Qaeda's Changing Nature' (2015) 32 Arizona Journal of International and Comparative Law 349, p 355
[120] *Al-Adahi v. Obama*, 613 F3d 1102 (DC Cir 2010), p 1108; see also *Hamlily v. Obama*, 616 FSupp2d 63 (DDC 2009), p 75
[121] See United States Senate Committee on Foreign Relations, 'Authorization For The Use of Military Force Against ISIL, Hearing December 9, 2014'
[122] See n 17

other groups against which force may not be used.[123] Unfortunately, the NSC mashes both groups together under the affiliates label and at no point attempts to draw a dividing line between both sets of groups.

Some guidance may be found in a 2014 testimony by Department of Defense (DoD) General Counsel Stephen Preston, who outlined that in order to be covered by the AUMF, a group must be '(1) an organized, armed group [thus incorporating the Tadic requirement of organization[124]] *that has entered the fight alongside al-Qa'ida or the Taliban* and (2) a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners.'[125] In 2015, he furthermore clarified that 'a group [is not] an associated force simply because it aligns with al-Qa'ida.'[126] A similar approach was taken in the IS AUMF.[127] Hence, the US requires a group to align with al Qaeda *and* to actively join the fight before it can use force against it on the basis of the AUMF, even though the determination as an 'associated force' is not exhaustive. Thus, '[t]he fact that an al-Qa'ida-affiliated group has not been identified as an "associated force" for purposes of the AUMF does not mean that the United States has made a final determination that the group is not an

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[123] Government of the United States, *National Strategy for Counterterrorism* (The White House 2011), p 3, footnote 1

[124] *Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeal Judgement, 15 July 1999, see ch 4 of this thesis

[125] Stephen W. Preston, *Prepared Statement of Stephen W. Preston, General Counsel Department of Defense on the Framework Under U.S. Law for Current Military Operations before the Senate Foreign Relations Committee, May 21, 2014* (2014), p 2, emphasis added

[126] Stephen W. Preston, *Remarks by the General Counsel of the Department of Defense on the Legal Framework for the United States' Use of Military Force Since 9/11, April 10, 2015* (U.S. Department of Defense 2015); The US has so far conducted operations against al Qaeda Core, AQAP, the Syrian al Nusrah Front, the Khorosan group as well as individuals 'belonging' to al Qaeda in Somalia and Libya even though it is not elaborated in what function, see Preston, *Prepared Statement of Stephen W. Preston, General Counsel Department of Defense on the Framework Under U.S. Law for Current Military Operations before the Senate Foreign Relations Committee, May 21, 2014*, p 2; Preston, *Remarks by the General Counsel of the Department of Defense on the Legal Framework for the United States' Use of Military Force Since 9/11, April 10, 2015*; Louise Arimatsu and Michael N Schmitt, 'Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape' (2014) 53 Columbia Journal of Transnational Law Bulletin 1;

[127] Authorization for Use of Military Force against the Islamic State of Iraq and the Levant, White House Draft (2015), Available at: http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf, sec 5

"associated force."'.[128] In short, the determination outlined by Preston is a statement of policy and not of law and therefore reflects strategic considerations. Consequently, in the absence of an authoritative statement, it is unclear at any given moment which groups the US considers to be associated forces of al Qaeda (or the Islamic State).

The National Defense Authorization Act (NDAA) for fiscal year (FY) 2014[129], as passed by the House of Representatives, contained a provision that would have required the Secretaries of Defense and State to provide a briefing to the Armed Services Committees of both the House and the Senate regarding the 'definitions and processes to determine if an entity is an affiliate, associated force and/or adherent of al Qaeda'.[130] This provision, however, was not included in the Senate bill and hence did not make it into the final version.[131]

The lack of clarity regarding which groups are seen to be part of the al Qaeda network is problematic, since the US sees itself at 'at war' with al Qaeda[132] and has used the AUMF to apply kinetic force, *inter alia*, in Yemen[133] and Somalia[134] as well as to detain members of affiliate organizations.[135] Such actions would generally only be permissible within an armed conflict, which the International Criminal Court for the former Yugoslavia

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[128] Preston, *Prepared Statement of Stephen W. Preston, General Counsel Department of Defense on the Framework Under U.S. Law for Current Military Operations before the Senate Foreign Relations Committee, May 21, 2014*, p 2

[129] National Defense Authorization Act for Fiscal Year 2014, Public Law 113–66—Dec. 26, 2013

[130] Ibid, p 650

[131] Ibid

[132] Government of the United States, *National Strategy for Counterterrorism*, p 2

[133] Mohammed Jamjoom and Barbara Starr (Year), 'Official: Extensive U.S. involvement in anti-terror operation in Yemen' (*CNN*, 2014) <http://edition.cnn.com/2014/04/22/world/meast/yemen-terror-operation-dna/> accessed 1 May 2014

[134] Gordon Lubold, 2014, 'U.S. Conducts Counterterrorism Operation in Somalia' Foreign Policy <http://complex.foreignpolicy.com/posts/2014/09/02/us_conducts_counterterrorism_mission_in_somalia> accessed 2 September 2014

[135] See e.g. Robert M Chesney, 'Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism' (2013) 112 Michigan Law Review 163, p 165

(ICTY), in the *Tadic* case, has defined as '*protracted* armed violence between governmental authorities and *organised* armed groups or between such groups within a State'.[136] States or organized armed groups may enter a conflict alongside the belligerent and thereby themselves become a party to the conflict.[137] Co-belligerency, however, would first assume that there is an armed conflict. This issue will be picked up again in chapter 4.

The fracturing of al Qaeda into a network of affiliated and associated groups has occupied the District of Columbia courts in their habeas corpus reviews of the AUMF's detention authority of detainees at Guantanamo Bay[138], which was introduced after several Supreme Court decisions[139], so a special focus will be given here to the D.C. courts' case law, since it most closely deals with questions of interpretation of international law in the context of low intensity conflict. This should not be read as dismissive towards the established case law, particularly of the ICTY.[140]

The US Courts have largely accepted the argument of the US government that an organization needs to be a 'co-belligerent' of al Qaeda in order to fall under the AUMF.[141] The Obama administration defines an associate force as i) an organized armed group that has entered the fight alongside of ii) and is a co-belligerent of al Qaeda.[142] The latter invokes the law of neutrality concept of co-belligerency by analogy, which would re-

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[136] *Prosecutor v. Dusko Tadic*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70, emphasis added
[137] Ingber, 'Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda', p 90
[138] Robert M Chesney, 'Who May Be Held? Military Detention Through the Habeas Lens' (2011) 52 Boston College Law Review 769
[139] See *Hamdi v Rumsfeld* 542 U S ____ (2004); *Boumediene v. Bush* 553 U S ____ (2008)
[140] See *Prosecutor v. Haradinaj, Balaj and Brahmaj*, IT-04-84bis-T, Retrial Judgement, 29 November 2012; *Prosecutor v. Dordević*, IT-05-87/1-T, Judgement, 23 February 2011; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Judgement, 10 July 2008; *Prosecutor v. Limaj, Bala and Musliu*, IT-03-66-T, Judgement, 30 November 2005
[141] *Hamlily v. Obama*, p 75
[142] Government of the United States, *Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, Misc. No. 08–442(TFH)* (Mar 13, 2009, D.D.C. 2009), p 7

quire groups to remain neutral and thus outside of the conflict.[143] Involving the law of neutrality, however, would have tremendous unintended consequences, such as prohibiting other states from getting involved in counterterrorism measures like the freezing of assets.[144] While this might be mitigated by other sources of international law, especially Security Council resolutions[145], it is argued that there is no need to invoke the law of neutrality in order to achieve the desired outcome of being able to use force against and detain members of al Qaeda. Furthermore, as the war against al Qaeda increasingly turns to affiliate organizations rather than the core group in Afghanistan, from the context of which the majority of all US cases stem, the administration's conceptualization does not answer how to characterize groups such as al Qaeda in the Arabian Peninsula (AQAP), al Shabaab in Somalia or al Qaeda in the Islamic Maghreb. If al Qaeda merely refers to al Qaeda Central (AQC), how could these groups fight alongside AQC in the literal meaning of the term? It is argued that these groups are not 'associated forces', but rather they *are* al Qaeda. A similar reasoning can be applied to the affiliate groups of the Islamic State.

It therefore stands to reason, in line with the argument presented above, to treat the network of affiliated groups as single organizations, although one with loose command structures and high degrees of operational autonomy for the constituent parts. Nevertheless, some level of control does exist. Documents obtained from the Islamic State show that individuals were leaving IS controlled territory in order to set up operations in other territories, in this case Libya.[146] At least in 2010, AQAP

[143] Ibid, p 7
[144] Kevin Jon Heller, 'The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It Is a Good Thing, Too: A Response to Chang' (2011) 47 Texas International Law Journal 115
[145] See e.g. S/RES/1373 (2001)
[146] Brian Dodwell, Daniel Milton and Don Rassler, *The Caliphate's Global Workforce: An Inside Look at the Islamic State's Foreign Fighter Paper Trail* (Combating Terrorism Center at West Point 2016), pp 36f

commanders conferred with Osama bin Laden on whether the group should enter the on-going conflict in Yemen.[147] Bin Laden advised commanders in all 'regions' on military strategy and demanded restraint in order not to cause civilian casualties.[148] This of course raises the question of whether, for the purposes of LOAC, it can therefore still be characterized as an armed group.[149]

2.2. Associates

In contrast to affiliates, associates are formally independent organizations even though leadership positions may overlap. In the extreme, associates may enter into an alliance with an affiliate organization and be controlled by it. The case of Mali is illustrative in this regard. The Salafist Group for Call and Combat (GSPC) rebranded itself as the organization of al Qaeda in the Islamic Maghreb (AQIM) in 2007, after a merger with al Qaeda was announced by al-Zawahiri in 2006.[150] In order to expand control, while simultaneously escaping the focus in the spotlight that comes with the al Qaeda name, AQIM was instrumental in setting up the Mouvement pour l'Unification et le Jihad en Afrique de l'Ouest (MUJAO)[151], which never formally pledged allegiance to al Qaeda, and strengthened ties with Ansar Eddine.[152] Over the course of 2012 all three organizations defined a common strategy and set up common offices in the areas then not under the control of the Malian government in Bamako. While it is questionable whether Ansar Eddine should be seen

[147] `Atiyya (aka Mahmud), *Letter from `Atiyya (aka Mahmud) to Osama bin Laden (aka Abu `Abd Allah), US vs NASEER, 423-10-CR-019(S-4)(RJD)* (17 July 2010)
[148] *Letter by Osama bin Laden to 'Atiyya*, (Document #: SOCOM-2012-0000019-HT, CTC Harmony Program)
[149] See sec 3 below
[150] Security Council Committee Pursuant to Resolution 1267/1989, 'Narrative Summaries of Reasons for Listing', entity QE.T.14.01.
[151] Ibid, entity QE.M.134.12.
[152] Ibid, entity QE.A.135.13.

as on organ of AQIM, the close connection between AQIM and MUJAO would suggest that they are not clearly distinguishable. Nevertheless, the absence of a *de jure* relationship would prevent seeing MUJAO as a part of al Qaeda.

In the case of associates, conceptualizing these relationships is best done by assessing how much control an entity exercises over another based on a determination of facts on the ground. Article 8 of the ILC Articles would capture such situations in a traditional state-centred setting. Article 8 defines that

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[153]

While the degree to which wrongdoing gives rise to countermeasures will depend on considerations as to which primary rules were violated, it will similarly be necessary to establish to what extent control over actual conduct was exercised. This would go beyond showing that groups were somewhat or even totally dependent on one another.[154] In *Nicaragua,* with regards to the question if the US can be held responsible for the actions of the rebel group it supported, the International Court of Justice (ICJ) held that a state must have 'effective control'.[155] The position of the court was reiterated in its *Wall* opinion[156], *Congo v Uganda*[157] and *Bosnia and Herzegovina v. Serbia*[158].

The International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Tadic* judgment, on the other hand put forward the 'overall control' test.[159] In this view, it is not required

[153] Draft articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, with commentaries, A/56/10 (2001), Art. 8, p 47
[154] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment ICJ Reports 1986, p 14, para 115
[155] Ibid, paras 109 and 115
[156] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p 136, para 139
[157] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment,* ICJ Reports 2005, p 168
[158] *Bosnia and Herzegovina v. Serbia and Montenegro* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgement, ICJ Reports 2007, p 43, paras 400-402
[159] *Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeal Judgement, 15 July 1999, paras 116-149

that an act of wrongdoing was directly ordered and under the control of an official of a state, or group in this case, but that the group has overall control by establishing chains of command, hierarchies and standards members of the organization have to adhere to. In Cassese's view this may prove helpful in attributing acts of terrorism to states, which is difficult otherwise because of evidentiary problems due to the clandestine nature of such groups.[160] In *Bosnia*, the ICJ considered but largely rejected the overall control test in order not to broaden the law of state responsibility.[161] However, it found that for the purposes of determining whether an armed conflict existed, the overall control test might be suitable, even though it refused to take a position on the matter.[162] Taking this argument further, one could argue that it would be nonsensical to argue, as the ICJ has done, that overall control would be sufficient to trigger an armed conflict, but subsequently to weak a connection to make an organization responsible for the armed conflict it triggered. It is worth noting that the ICJ, in *Nicaragua,* did not consider the provision of support in the form of finances and materiel to amount to an armed attack[163], a fact that is of pivotal relevance in the case of interconnected networks of non-state actors providing mutual support to one another. The ICJ, employing the dependency and control test, established that 'general control' was not sufficient for making an act attributable to the United States. By general control the ICJ subsumed acts of financing, training, supplying and quipping and even the provision of suitable military targets based on intelligence sources.[164]

[160] Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 European Journal of International Law 649, p 666
[161] *Bosnia and Herzegovina v. Serbia and Montenegro*, para 403
[162] Ibid, para 404
[163] *Nicaragua*, para 195
[164] Ibid, para 115

In *Tadic*, the Appeals Chamber took the view that *Nicaragua* had established three distinct categories of people: i) state officials, for which there is automatic responsibility; ii) persons not being formally members of a US agency, but being paid and supervised by US agents while carrying out specific acts, which in turn were attributable to the US; and iii) acts by members of violent non-state actors (the Contras), without a specific link to the US despite receiving support in the form of financial and other resources. Only with regards to the latter category did the ICJ employ the effective control test.[165] Thus, the ICTY concluded that the effective control test laid out the criteria for the dependence and control test, but it did not provide an alternative to it.[166] In the context of the AUMF, such a view could mitigate overly excessive interpretations with regards to military force. As Bradley and Goldsmith explain, the AUMF also extends to organizations, which enter the conflict as 'co-belligerents'.[167] This would mean that only when an organization actually engages in acts of war on the instruction of a covered organization could it be seen as a legitimate military target on the basis of the AUMF. Conversely, even if al Qaeda or affiliates provide resources to non-affiliated organizations, their acts would only render them possible military targets, based on the AUMF, if they actually enter the conflict. This does not mean that counteraction would be impossible, but simply that an alternative legal basis would have to exist. In the context of the analysis above, and in line with the view held by the United States that the limitation to co-belligerents is a matter of policy but not of law[168], groups that have pledged allegiance to al Qaeda would

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[165] *Tadic*, paras 108-109
[166] Ibid, para 112
[167] Bradley and Goldsmith, 'Congressional Authorization and the War on Terrorism', p 2112
[168] Preston, *Prepared Statement of Stephen W. Preston, General Counsel Department of Defense on the Framework Under U.S. Law for Current Military Operations before the Senate Foreign Relations Committee, May 21, 2014*, p 2

not need to be identified as co-belligerents, since they would count as agents of an already covered organization. This is also in line with the first category of people established in *Nicaragua* according to the *Tadic* Appeals Chamber.

2.3. "Lone Actor" Attacks

The other and trickier issue are attacks by individuals or organizations that are not planned and executed on the basis of orders given by leaders of al Qaeda or the Islamic State, but inspired by their propaganda. The San Bernardino shooting and attempted bombing on 2 December 2015, in which 14 people were killed and 22 injured, falls into this category. The two perpetrators reportedly swore oaths of allegiance on social media before finishing the attack.[169] However, in oral testimony given to the Senate Judiciary Committee, former FBI director James Comey classified the attackers as 'homegrown violent extremists'[170] who had radicalized before the rise of the Islamic State[171] and had no operational connection to the organization. This form of attack has become more frequent in the context of the Islamic State since at least 2016.

Based on the discussion above, it would therefore be easy to dismiss any notion of connection with the Islamic State in the exemplary case of the San Bernardino shooting. A purely factual analysis would strongly support this claim. The determination here rather turns on the question of how much weight should

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[169] Thomas Joscelyn, 2015, 'Why the Islamic State tells supporters to swear allegiance before dying' The Long War Journal <http://www.longwarjournal.org/archives/2015/12/why-the-islamic-state-tells-supporters-to-swear-allegiance-before-dying.php> accessed 7 December 2015

[170] Pete Williams and Halimah Abdullah, 2015, 'FBI: San Bernardino Shooters Radicalized Before They Met' NBC News <http://www.nbcnews.com/storyline/san-bernardino-shooting/fbi-san-bernardino-shooters-radicalized-they-met-n476971> accessed 25 May 2016

[171] Adam Goldman, Mark Berman and Missy Ryan, 'San Bernardino shooter's former neighbor who bought rifles is cooperating with authorities' *The Washington Post* (10 December 2015) <https://www.washingtonpost.com/news/post-nation/wp/2015/12/09/san-bernardino-attackers-talked-about-jihad-and-martyrdom-in-2013/>

be given to statements by an organization claiming an attack. Abrahams and Conrad argue that credit claiming, or the absence thereof, has strategic value for terrorist organizations. They argue that '[w]hen operatives strike a target, their leaders claim credit only if the expected political return is positive.'[172] By extension, it seems logical that an organization claiming the positive political capital of an attack for itself should also own the political fallout. In the San Bernardino case, there is considerable confusion whether the Islamic State did in fact claim the attack. In a statement released by the Amaq News Agency on 4 December 2015, which is part of the propaganda wing of the Islamic State, the organization praised the shooters as 'supporters' of the Islamic State.[173] However, in a statement released on 5 December 2015 through the organization's English-language news bulletin Al Bayan, the Islamic State announced that '[t]wo soldiers of the Khilafah executed an attack on the Inland Regional Center in San Bernardino'.[174] Yet, the Arabic version of the same bulletin still labelled the two shooters as supporters.[175] The distinction between soldiers and supporters is an important one. If the organization indeed describes such lone actor attackers as its soldiers, an argument along the lines of the *Hostages* case can be made that lending an official seal of approval to such conduct makes said conduct attributable to the organization[176], even though no direct orders were given.

In the absence of overall control, legal attribution can therefore be made if the central leadership acknowledges and

[172] Max Abrahams and Justin Conrad, 'The Strategic Logic of Credit Claiming: A New Theory for Anonymous Terrorist Attacks' (2017) 26 Security Studies 279, p 281
[173] Thomas Joscelyn, 2015, 'Islamic State-affiliated 'news' agency praises San Bernardino shootings' The Long War Journal <http://www.longwarjournal.org/archives/2015/12/islamic-state-affiliated-news-agency-praises-san-bernardino-shootings.php> accessed 25 May 2016
[174] Al Bayan in Thomas Joscelyn, 2015, 'The Islamic State Claims Responsibility for Paris Attacks' The Long War Journal <http://www.longwarjournal.org/archives/2015/11/the-islamic-state-clams-responsibility-for-paris-attacks.php> accessed 22 April 2016
[175] Ibid
[176] *United States Diplomatic and Consular Staff in Tehran*, Judgement, ICJ Reports 1980, p 3, paras 73-79

adopts an action as its own—primarily in situations where a terrorist organization "claims" an attack.[177] In wording article 11 of the draft articles, the ILC made clear that both acknowledgement and adoption are necessary to trigger responsibility.[178] Such a view finds support in the *Hostages*[179] case. In *Hostages*, the ICJ argued that even calls for violence and congratulating the militants afterwards did not make their acts attributable to Iran.[180] However, by issuing a decree, which made ending the hostage crisis dependent on further action by the United States, Ayatollah Khomeini gave the militants the 'seal of official government'[181] and thus the situation became attributable.

This would mean that simple congratulatory statements made by the central leadership would not be sufficient for attribution. Only if an act was claimed to be an action of al Qaeda or the Islamic State by a competent authority would subsequent action be possible.

3. Terrorist Networks as Armed Groups

The analysis above so far has laid out a framework to conceptualize the relationships between various members of a network and argued that a subset of these network members, affiliate organizations, should be seen as constituent parts of the organization proper. What has been missing, so far, has been a discussion of whether such networked groups may qualify as armed groups under the laws of armed conflict (LOAC). In LOAC, the level of organization of the adversaries is one of the two criteria needed for the existence of an armed conflict.[182]

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[177] Draft articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, with commentaries, A/56/10 (2001), article 11, p 53
[178] Ibid, commentary (9), p 53
[179] *United States Diplomatic and Consular Staff in Tehran*
[180] Ibid, paras 58-61
[181] Ibid, para 73
[182] International Law Association, *Final Report on the Meaning of Armed Conflict*

While one would expect to find a set of definite criteria to evaluate the existence of an armed group, the opposite is true. The case law of the International Criminal Court for the former Yugoslavia (ICTY) provides a non-exhaustive list of criteria that would satisfy the requirement of organization, including but not limited to an official command structure[183], headquarters[184], the existence and distribution of discreet and separate responsibilities of differing entities[185], whether military training is offered to those joining a group[186] and the existence of internal regulations.[187] Further criteria may include uniforms, modes of communication, whether external relations with third parties are handled centrally[188] as well as territorial control.[189] Sivakumaran summarizes that there are three reasons for the requirement of organization. First, organization affects the level of violence a group is able to maintain[190], a finding that also holds for terrorist groups.[191] Second, organization stresses the collective character of violence as opposed to random violence by individuals.[192] Even though the Trial Chamber in the *Delalić* case distinguished cases of civil unrest and terrorism from other forms of protracted violence[193], a distinction should be made between cases where terrorist acts are conducted by individuals and cases where terrorism is used as part of a military strategy.

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in International Law, The Hague Conference (2010), p 3

[183] *Prosecutor v. Limaj, Bala and Musliu*, paras 97, 110; *Prosecutor v. Boškoski and Tarčulovski*, para 271; *Prosecutor v. Haradinaj, Balaj and Brahmaj*, paras 39-41, 410

[184] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Paperback edn, Oxford University Press 2014), p 170

[185] *Prosecutor v. Limaj, Bala and Musliu*, paras 100-101

[186] *Prosecutor v. Haradinaj, Balaj and Brahmaj*, para 37-38

[187] *Prosecutor v. Limaj, Bala and Musliu*, para 110; *Prosecutor v. Dordević*, paras 1571-1572

[188] Sivakumaran, *The Law of Non-International Armed Conflict*, p 171

[189] *Prosecutor v. Haradinaj, Balaj and Brahmaj*, IT-04-84-T, Judgement, 3 April 2008, paras 60, 70-75

[190] Sivakumaran, *The Law of Non-International Armed Conflict*, p 177

[191] Victor Asal and R. Karl Rethemeyer, 'The Nature of the Beast: Organizational Structures and the Lethality of Terrorist Attacks' (2008) 70 The Journal of Politics 437

[192] Sivakumaran, *The Law of Non-International Armed Conflict*, p 177

[193] *Prosecutor v Delalic, Mucic, Delic and Landzo*, IT-96-21-T, Judgement, 16 November 1998, para 184

Third, and most importantly, organization is necessary to implement the laws of war.[194]

With regards to al Qaeda and the Islamic State, it is obvious that one would reach very different answers depending on how broadly one understands these organizations. Sivakumaran observes that the situation in which armed groups operate must be taken into account when assessing the degree of organization.[195] As he pointed out, the ICTY case law on indicia of organization 'are taken from instances of high-intensity non-international armed conflict and may not be a feature of low-level conflicts'.[196]

A horizontal structure with power distributed among various centres, for example, does not necessarily preclude meeting the LOAC standards of organization.[197] The ICRC Commentary on Additional Protocol II is very clear when it states that organization 'does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces'.[198] Rather, it is to be understood as 'some sort of relationship of effective control by which one individual has the power to control the acts of another, in particular the power to prevent or punish particular acts of that other individual'.[199] This effective control neither has to be in a hierarchical structure nor does it even have to emanate from a superior position, i.e. effective control can be exercised by members of the same rank[200], as long as they are in a position to execute orders and respect the laws of war.[201]

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[194] International Law Association, *Final Report on the Meaning of Armed Conflict* in International Law, The Hague Conference, p 29
[195] Sivakumaran, *The Law of Non-International Armed Conflict*, p 173
[196] Ibid, p 170
[197] Ibid, p 173
[198] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Jean S Pictet ed, Martinus Nijhoff Publishers 1987), p 1352
[199] Sivakumaran, *The Law of Non-International Armed Conflict*, p 175
[200] *Prosecutor v Delalic, Mucic, Delic and Landzo*, IT-96-21-A, Judgement, 20 February 2001, para 303
[201] Sivakumaran, *The Law of Non-International Armed Conflict*, p 176

Going back to the criteria above it is argued that it can be argued that both al Qaeda and the Islamic State can be seen as armed groups under LOAC, even though this should not be read in support of the 'global' armed conflict argument of the United States.[202] It is suggested that the better way to address this question is to determine whether the affiliate organizations reach the required threshold, than to look at the central leadership. Inverting the determination, i.e. looking first at whether the constituent groups can be seen as armed groups as opposed to asking whether AQC as the control unit fulfils all the criteria, gives as an answer that is closer to operational realities. In its most basic form, one would expect the existence of a certain command and control structure within these groups and therefore hierarchical relationships between individuals. In the context of detention, the US courts, which for the purposes of the AUMF had to decide whether an individual was 'part of' a covered organization[203], insisted on the existence of such relationships and rejected self-identification as making an individual 'part of' the organization. In the words of the *Hamlily* court, the key inquiry is 'receiving and executing orders'.[204] On the organizational level, this of course presupposes the existence of such structures. While it is difficult to assess, it stands to reason that all al Qaeda affiliates meet this requirement. Captured battlefield documents repeatedly show the existence of at least rudimentary command structures. A recently declassified document for example describes the role of the 'Chief of Staff Committee', which consists of 'group of officers and personnel qualified to work with a military commander leader in leading the military component company that is under his command in peace and

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[202] See ch 4
[203] Government of the United States, *Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, Misc. No. 08–442(TFH)*, p 7
[204] *Hamlily v. Obama*, p 75

in war'.[205] Since it was found in the cache of documents found in the Abbottabad raid on Osama bin Laden's compound it can be assumed that it at least refers to the central leadership. However, there is no reason not to assume that this model would not also be implemented in affiliate organizations, especially if they were in-house expansions. Individuals joining the Islamic State in Syria and Iraq who were previously active in al Qaeda affiliates often provided the names of commanders and special units in which they have served.[206] While it is difficult to verify from the outside, therefore, it seems more likely than not that the individual organizations should be seen as armed groups. If one then, as stated above, understands AQC as the central command and control hub exercising strategic control, al Qaeda can be seen as a group fulfilling many if not all of the criteria set out above. It controls territory, it has hierarchical relationships[207], it provides military training to those joining the organization[208], and despite its fluid nature it has internal regulations governing its conduct. There is even less doubt that the Islamic State, which has a clear governance structure[209] and a military hierarchy[210], controls significant territory[211] and monitors entries and exits[212], should be seen as an armed group. Again, as will be

[205] Anonymous, 'Chief of Staff Committee' Office of the Director of National Intelligence <http://www.dni.gov/files/documents/ubl2016/english/Chief%20of%20Staff%20Committee.pdf> accessed 13 March 2016
[206] Dodwell, Milton and Rassler, *The Caliphate's Global Workforce: An Inside Look at the Islamic State's Foreign Fighter Paper Trail*, p 28
[207] Whether or not these relationships in all instances follow a clear and codified organizational structure is immaterial, since the key issue is one individual being in a position of giving orders to another, see Sivakumaran, *The Law of Non-International Armed Conflict*, p 175
[208] *Al-Adahi v. Obama*, p 1108
[209] March and Revkin, 'Caliphate of Law, 15 April 2015'; Alkhouri and Kassirer, 'Governing The Caliphate: The Islamic State Picture'
[210] Barak Barfi, 'The Military Doctrine of the Islamic State and the Limits of Ba'athist Influence' (2016) 9 CTC Sentinel 18
[211] US Department of Defense, 2015, 'Iraq and Syria: ISIL's Reduced Operating Areas as of April 2015' <http://archive.defense.gov/home/features/2014/0814_iraq/20150410_ISIL_Map_Unclass_Approved.pdf> accessed 20 April 2016
[212] Dodwell, Milton and Rassler, *The Caliphate's Global Workforce: An Inside Look at the Islamic State's Foreign Fighter Paper Trail*

pointed out below, the Islamic State considers its affiliates as an integral part of the organization.

Critics may still argue that an organizational structure that has to rely on secret letters and messengers as the primary method of communication cannot qualify as effective. Yet, it is only through developments in modern technology that armies nowadays are able to instantly communicate over long distances. Throughout history armies had to rely on messengers and written communication to relay orders. It stands to reason that the nature and situation of an armed group should be taken into consideration when assessing the effective criterion. Furthermore, but there are several examples of Islamic State handlers communicating electronically with actual and potential IS-operatives in the field.[213] In the case of Riaz Khan A., a 17-year old refugee in Germany who attacked several passengers on a train in Wuerzburg on 18 July 2016, Riaz A. was in continuous electronic contact with an Islam handler before the attack.[214] In other cases, the Islamic State provided weapons, suggested times, targets, and promised in advance that the Islamic State would claim these attacks.[215] Whether command and control was exercised in such small-scale attack must, obviously, be determined in a case-by-case basis. Nevertheless, even if such control is only exercised virtually, this should not preclude the possibility that even seemingly small-scale attacks may in fact

[213] See e.g. Hans Leyendecker and Georg Mascolo, 'Die Chats der Attentäter von Würzburg und Ansbach mit dem IS' *Süddeutsche Zeitung* (14 September 2016) <http://www.sueddeutsche.de/politik/2.220/terror-die-chats-der-attentaeter-von-wuerzburg-und-ansbach-mit-dem-is-1.3161419> accessed 20 September 2016; Bridget Moreng, 2016, 'ISIS' Virtual Puppeteers: How They Recruit and Train "Lone Wolves"' Foreign Affairs <https://www.foreignaffairs.com/articles/2016-09-21/isis-virtual-puppeteers> accessed 14 May 2017

[214] Leyendecker and Mascolo, 'Die Chats der Attentäter von Würzburg und Ansbach mit dem IS'

[215] Rukmini Callimachi, 'Not 'Lone Wolves' After All: How ISIS Guides World's Terror Plots From Afar' *The New York Times* (4 February 2017) <https://www.nytimes.com/2017/02/04/world/asia/isis-messaging-app-terror-plot.html> accessed 5 February 2017

be carried out under the banner of an armed group. The implications of understanding terrorist networks as armed groups will be explored in more detail in chapter 4.

4. Conclusion

This chapter presented an approach to characterize the relationships between component parts of jihadist networks that are both grounded in Islamic law, as well as international law. The relevance of such a framework lies in the fact that jihadist insurgents often adopt networked structures that need to be captured in and incorporated in legal instruments such as the AUMF. It sought to carefully distinguish between those groups that, based on swearing the *bayat*, become *de jure* constituent members of an organization covered by the AUMF, and groups that fall outside of it. The development of this approach was necessary because no international legal instrument exists that regulates the relationships of violent non-state actors.

Drawing an analogy with Articles 4(2) ASR and 6(2) DARIO it is argued that affiliate organizations should be seen as agents of such groups, in other words they become part of the jihadist federation described in chapter 1 and subject themselves to its overall command and control. For such groups, no new authorization under domestic law would be needed in order to use force against them, even though under restraints under international law, primarily the *jus ad bellum*, may exist. This approach would also provide more clarity with regards to whether an organization is covered by the AUMF, since swearing the *bayat* is a rare occurrence. Based on the evidence advanced here, it can be concluded that affiliated networked organizations exceed the level of integration that would be expected from mere alliances of convenience. Rather, their relationships can

be understood as being part of an overall insurgent network, which, rather than drifting apart, is making progress on the stated goal of establishing the Caliphate. This requires a concerted effort, which treats them as interconnected entities rather than separate unites. Affiliates, opposed to associate organizations, submit themselves to a central command and control structure and thus their actions should be treated as such. Not doing so would give them the benefit of the legitimacy that membership in the network bestows upon them, while not similarly exposing them to the dangers of it. For affiliate organizations, therefore, it is argued that their organs should be subject to the same kind of attribution that is standard for state organs. It has also been shown that such federations can be understood as armed groups under LOAC. In the case of lone actor attacks, which are becoming more and more frequent and coincide with the demise of the Islamic State's strongholds, it is put forward that such attacks should be seen as acts of such networks if they are claimed to have been carried out by it. While this approach may not solve the ultimate problem of preventing such attacks, it would at least deny such networks the political benefits while not also exposing them to risk of counteraction.

For associate groups, on the other hand, it was argued here that their actions should only be attributable to an organization covered by the AUMF if such an organization exercises sufficient control over such organization. The appropriate level of control was argued to be overall control, based on Article 8 ASR and the ICTY's *Tadic* judgment. The reason for adopting this approach lies in the simple fact that it would often be difficult, even though not impossible, to show that effective control was exercised. Nevertheless, associate organizations should not be held responsible for actions which are coordinated and planned

without their collaboration. Similarly, the central al Qaeda leadership should bear no responsibility for actions it did neither order, plan, or execute.

Having thus set the stage, it will be necessary to turn to the *jus ad bellum* to assess under what circumstances counter-actions against such affiliate and associate organizations can be conducted on the territory of other sovereign states.

3 | THE USE OF FORCE AGAINST JIHADIST NETWORKS

While former US President Obama, in his speech at the National Defense University in 2013, announced the repeal of the Authorization for Use of Military Force (AUMF)[1], it continues to be the domestic legal foundation on which the United States claims to act in self-defence against al Qaeda, the Islamic State, and their affiliate organizations.[2] However, as Jack Goldsmith recently pointed out, due to the rise of the Islamic State this conflict is now more entrenched into American politics than ever.[3] Simultaneously, in the decade and a half since President Bush led the country into a military conflict with jihadist violent non-state actors (VNSAs), these actors themselves, as was argued in the previous chapter, have undergone a significant transformation. Within al Qaeda, power has shifted from the central organization based in Afghanistan and Pakistan to the regional affiliates in countries such as Yemen, Mali, Syria, Somalia and others, which almost exclusively are in charge of the operational conduct of the organization. It has already been argued in chapter 2 that, for the purposes of this study, these

[1] Barrack Obama, 'Remarks by the President at the National Defense University' (2013) <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> accessed 10 March 2014; Authorization for Use of Military Force. 50 USC 1541 note. Public Law 1070-40, 2001

[2] See Mary Louise Kelly, 2016, 'When The U.S. Military Strikes, White House Points To A 2001 Measure' NPR <http://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure> accessed 26 July 2017

[3] Jack L Goldsmith, 2015, 'The Forever War Is Entrenched, 19 October 2015' Lawfare <https://www.lawfareblog.com/forever-war-entrenched> accessed 21 October 2015

regional organizations are not considered to be independent actors but part of a single networked actor. This regionalization has also contributed to a second qualitative shift within the organization, which increasingly seeks to control and administer territory. In Mali, al Qaeda in the Islamic Maghreb (AQIM), together with other actors, sought to establish an independent state in the *Azawad*, an area in the North of the country. In Yemen, the instability caused by the country's civil war enabled al Qaeda in the Arabian Peninsula (AQAP) to take control over infrastructure and build strategic alliances.[4] Finally, both in Syria and in Somalia the local al Qaeda franchises, Jabhat al-Nusra and al-Shabaab respectively, are among the strongest contenders for governmental control. All of these developments, however, have largely been overshadowed by the rise of the Islamic State, which similarly grew out of the al Qaeda universe. IS is the clearest manifestation of this qualitative shift from terrorist organization to insurgent group that has taken place in parts of the jihadist world.

Yet, it would be premature to argue that these groups no longer constitute international security threats. First, as Pollack and Walter point out, the management of regional civil wars is vital to the security interests of the United States and Europe because, *inter alia* and most important for the purpose of this study, a country descending into chaos might create safe havens for terrorist organizations.[5] Safe havens can be characterized as geographical areas subject to little or no governmental authority, which in turn might make it difficult for states to pre-

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[4] Helene Cooper and Eric Schmitt, 'Al Qaeda Is Capitalizing on Yemen's Disorder, U.S. Warns' *The New York Times* (Tokyo, 8 April 2015); Saeed Al-Batati and Kareem Fahim, 'War in Yemen Is Allowing Qaeda Group to Expand' *The New York Times* (Dowaan, Yemen, 16 April 2015) Middle East <http://www.nytimes.com/2015/04/17/world/middleeast/khaled-bahah-houthi-rebel-yemen-fighting.html> accessed 20 April 2015

[5] Kenneth M. Pollack and Barbara F Walter, 'Escaping the Civil War Trap in the Middle East' (2015) 38 The Washington Quarterly 29, p 31f

vent their territory from being used to plan, facilitate, and conduct the use of force against other states by non-state actors. This can best be illustrated by the areas now under the control of the Islamic State, where the non-state actor became, for a while, the *de facto* government even though the area it occupied remained *de jure* part of not one but two sovereign states. Second, as the IS example also illustrates, the regionalization of the conflict does not indicate that it the jihadists will contain their efforts to the political boundaries of existing states. IS tried to expand from its bases in Syria and Iraq into Libya and other areas.[6] What stands out in all current cases is the distinct lack of an operational link to any sovereign state, which is particularly problematic if VNSAs enter the international sphere. It is generally recognized that the use of force by VNSAs, if sent by or acting on behalf of a state, may constitute aggression[7] and may justify the use of force in self-defence if, by its scale and effects, it may be comparable to the use of force by the state's armed forces.[8] Even though non-international armed conflicts—those between a state and a non-state actor—have become the most prominent form of armed conflicts[9], the rules governing the use of force against VNSAs extraterritorially are far from clear.

From a policy perspective, governments, especially the United States, have incorporated these developments. US President Obama, in 2013, argued that the US must 'define [its] effort not as a boundless "global war on terror," but rather as a

[6] See Jessica Lewis McFate, 'ISIS's Future Global Footprint: A Historical Perspective from the Sinjar Records' (*Institute for the Study of War*, 2015) <http://iswiraq.blogspot.co.uk/2014/12/isiss-future-global-footprint_31.html>
[7] Resolution 3314 (XXIX), Definition of Aggression, General Assembly, Twenty-ninth session
[8] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment ICJ Reports 1986, p 14, para 195
[9] See e.g. Heidelberg Institute for International Conflict Research (HIIK), *Conflict Barometer 2012* (HIIK 2013)

series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America'.[10] These networks, the 2015 National Security strategy informs us, are 'not confined to a distinct country or region. Instead, they range from South Asia through the Middle East and into Africa' and 'include globally oriented groups like al-Qa'ida and its affiliates, as well as a growing number of regionally focused and globally connected groups—many with an al-Qa'ida pedigree like ISIL'.[11] The geographical diversification has furthermore drawn more states into this conflict. This includes France in Mali, an international coalition as well as Russia in Syria, and regional African states, notably Kenya, in Somalia. For the purposes of this study, an interpretation of the 2001 AUMF to include affiliate organizations creates the opportunity under domestic law to use force against VNSAS on the territories of various states against the same non-state actor.

The question to be addressed in this chapter is therefore to what extent and under which circumstances can global counter-insurgents use force against such networks on the territory of other states. It is the first of three to address the second part of the overarching research question detailed in the introduction, referring to the legal constraints placed on states when using force against jihadist networks extraterritorially. After some additional preliminary remarks, it will proceed in two parts. First, it will look at the ability of states to use force in self-defence against VNSAs. It will first establish that VNSAS, under certain circumstances, should be seen capable of mounting armed attacks, thus bringing them within the purview of Article 51 of the Charter of the United Nations. It will then consider under what circumstances armed countermeasures are

[10] Obama, 'Remarks by the President at the National Defense University'
[11] Government of the United States, *National Security Strategy* (The White House 2015), p 9

necessary and it will argue that force should be permitted if it is necessary and proportional, provided that the host state is unable and unwilling to act. Some authors directly question the extent to which the *jus ad* bellum applies to VNSAs. For some, like Yoram Dinstein, the answer is simple. According to Dinstein, there is no *jus ad bellum* with regards to violence on the sub-state level.[12] While *methods* and *targets* may of course be restricted by the relevant norms of international humanitarian and human rights law, there is neither a general prohibition on using force *against* VNSAs nor on using force *by* a VNSA.[13] Similarly, Olivier Corten argues that the *jus ad bellum* has no bearing in conflicts occurring within the confines of a single state.[14] The right to self-defence, for example, does not apply to cases where non-state political entities have a justified claim to self-determination, even though an extension of the right had been strongly favoured by some states during the Cold War.[15] In short, VNSAs are neither covered by the prohibition to the use of force, nor does the use of force against them grant them a right of self-defence.[16] This argument is misguided, however, since VNSAs are not located in *terra nullis,* but on the territory of other states and at times even in an armed conflict with those host states. If the post-9/11 period has shown one thing, it is that especially conflicts with jihadist organizations do not always restrict themselves to a single state. Conflicts with host states may spill over or host state governments may provide safe havens. As jihadist VNSAs increasingly internationalize themselves, states will need guidance on when they can use force against VNSAs extraterritorially. The chapter will also put

[12] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), p 4
[13] A Randelzhofer and O Dörr, 'Article 2(4)' cited in ibid, p 5
[14] Olivier Corten, *The Law Against War* (Hart Publishing 2010), p 128
[15] Most importantly the Socialist and non-aligned states during the Cold War, see ibid, p 140
[16] Ibid, pp 136-147; see also Ruth Wedgwood, 'The Use of Force in Civil Disputes' (1996) 26 Israel Yearbook on Human Rights 239, p 247

forward the argument that, under certain circumstances, extra-territorial law-enforcement and not the use of military force should be mandatory for states as a proportional response to armed attacks, which will be extended on in more detail in chapter 5 of this thesis.

In the second part, the chapter will then turn to the question whether states can use force on the territory of a host state, with its consent, in situations where there is no external threat. It will do so by looking at the two recent examples of Mali and Yemen. These actions may form an important part of a global counterterrorism strategy, as they may deny VNSAS safe havens from which further attacks can be planned and conducted. After all, there can be no doubt that the growing regionalization of the purported global conflict with al Qaeda and the Islamic State puts the brunt of the burden on regional states and their security services, as above everything else it is their legitimacy and territorial integrity that is threatened. The major front lines of these conflicts will be in countries such as Afghanistan, Yemen, Mali and Syria, among others, and Western states have long recognized that capacity building in these states might therefore be a better way to mitigate the threat of terrorism and regional instability.[17] Due to this convergence of interest it therefore seems unsurprising that Western have employed proxy war strategies.

Proxy wars, according to Mumford, are 'indirect engagement[s] in a conflict by third parties wishing to influence its strategic outcome'.[18] Mapping the totality of these indirect engagements within the broader conflict is still an open research question, but activities have included arming local militias[19] and

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[17] See e.g. Government of the United States, *National Security Strategy*
[18] Andrew Mumford, *Proxy Warfare* (Polity 2013), p 11
[19] Spencer Ackerman, 'US to directly arm Kurdish peshmerga forces in bid to thwart Isis offensive' *The Guardian* (New York, 11 August 2014)

training the armed forces of host states.[20] The attractiveness of such an approach is easily comprehensible, given that what is often referred to as counterterrorism in the West takes place in what more accurately should be referred to as counterinsurgency. The lessons developed in counterinsurgency literature therefore hold continued relevance for the campaigns against al Qaeda affiliates and the Islamic State. One of these lessons of a particular relevance here is that one of the primary aims of insurgents is to seize political power and legitimacy from the government they are opposing. Enabling these governments to successfully fight jihadist insurgents, if they are not already in a position to do so, may as well be one of the more productive avenues towards preventing direct and kinetic international involvement in domestic situations by third states. Nevertheless, as will be seen later in this chapter, the frequency with which host states invoke self-defence in the general context of the war with jihadist organizations, even if they are not technically required to do so by law, suggests that above all these indirect engagements can be seen as what Mumford, albeit in a different context, describes as 'proxy war[s] of self-preservation, designed to serve the interests of the homeland well above the interests of [the] allies'.[21] This does not mean, however, that it is not in the vital interest of the host states to forge such coalitions.

There are of course limitations to the effectiveness of such proxy strategies. For one, building military capacity by itself might not be enough if it is not accompanied by political, economic, and social reforms, an argument with a long history in

<http://www.theguardian.com/world/2014/aug/11/us-arm-peshmerga-iraq-kurdistan-isis> accessed 21 October 2015

[20] See e.g. European Council, 'Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali)' (2013) L14 Official Journal of the European Union 19

[21] Mumford, *Proxy Warfare*, p 34

the counterinsurgency literature and selected state counterinsurgency strategies.[22] This argument of course is a strong one, but the counterinsurgency literature also shows that military force, preferably by the contested state, is an important enabler for social, economic, and political programs.[23] Furthermore, there are limits to the feasibility of capacity building. The disbandment of the armed forces of Iraq by the Coalition Provincial Authority (CPA) in 2003[24] and the collapse of the new Iraqi Army, which was trained under American auspices, should act as a cautionary tale. Building a capable army usually takes longer than losing one and VNSAs may fill the power vacuum in ungoverned spaces. As William McCants argues in his book on the Islamic State[25], the fact that IS had mostly been left alone because Iraq was incapable, and Syria unwilling to act for strategic reasons, created opportunities that were swiftly exploited by IS.[26]

The focus of this chapter, in any case, begins at the moment when individual states eclipse proxy engagement and start to actively interfere with their own military forces on the territory of another state. There is ample evidence for such direct engagements within the relatively short period since September 11, 2001. Of course, the United States has often been characterized as the most active user of military force. Nevertheless, other states have shown similar willingness to resort to force in order to tackle terrorist networks. Examples include the

[22] See e.g. United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (United States Deparmtent of State 2009)
[23] See David Kilcullen, *Counterinsurgency* (Oxford University Press 2010), David Galula, *Counter-Insurgency Warfare: Theory and Practice* (Frederick A. Praeger 1964), Department of the Army, *FM 3-24 Counterinsurgency* (2006)
[24] Coalition Provisional Authority Order Number 2: Dissolution Of Entities, 23 May 2003, CPA/ORD/23 May 2003/02
[25] William McCants, *The Isis Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State* (Kindle edn, St. Martin's Press 2015)
[26] William McCants, 2015, 'How ISIL Out-Terrorized Bin Laden: Brutality and doomsday visions have made ISIL the world's most feared terrorist group. 19 August 2015' Politico <http://www.politico.com/magazine/story/2015/08/isis-jihad-121525.html> accessed 20 August 2015

2012 French intervention in Mali[27] and the international coalition against the Islamic State in Syria and Iraq.[28]

1. Self-Defence Against Non-State Actors

The starting point, as for every discussion of extraterritorial use of force, is by outlining that international law only clearly permits such force in two instances: following an authorization by the Security Council[29] or in self-defence.[30] The latter, which the Charter of the United Nations calls an 'inherent right'[31], is a cornerstone of the *jus ad bellum* and the basic premise is straightforward: Article 51 of the Charter gives the victim state has the right to respond with force to repel an armed attack 'if an armed attack occurs'[32], even if the determination of whether such an attack has occurred is sometimes difficult to make in practice. An armed attack, opposed to other uses of force[33], requires the use of armed, i.e. military, force and does not encompass the use of other means available to states, such as economic policy.[34] It is uncontroversial that states are capable of mounting an armed attack.

The *Caroline* incident of 1837, in which British armed forces destroyed the steamboat Caroline, which was purportedly used by Canadian insurgents, on US territory, is often used to illus-

[27] See e.g. Jon Lunn, *Mali in crisis: a political and security overview* (Standard Note SN06457, House of Commons 2012); Alexis Arieff, *Crisis in Mali* (R42664, Congressional Research Service 2013)
[28] Louise Arimatsu and Michael N Schmitt, 'Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape' (2014) 53 Columbia Journal of Transnational Law Bulletin 1
[29] Charter of the United Nations and Statute of the International Court of Justice (1945), arts 39 and 42
[30] Ibid, art 51
[31] Ibid
[32] Ibid, art. 51
[33] See *Nicaragua*, para 210; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010), p 55
[34] Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 International & Comparative Law Quarterly 963, p 965

trate basic rules of self-defence: *immediacy, necessity,* and *proportionality*. In his letter to the British ambassador after the destruction of the *Caroline*, US Secretary of State Daniel Webster outlined that the British would need to show that the 'necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation' and that 'the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it'.[35] the International Court of Justice (ICJ), in the *Oil Platforms* case, furthermore considered *intent* as a determining factor for whether to qualify an act as an armed attack.[36] This position, however, has come under criticism by scholars as being unfounded in international law.[37] Given the general self-defence requires a close temporal nexus between action and counteraction, it seems unsound to require states to be aware of malign intent before they may have a legal right to defend themselves.

1.1. Armed Attacks by Non-State Actors

There is, however, no consensus in the literature whether self-defence against VNSAs is permissible because it is not clear whether VNSAs are capable of mounting an armed attack unless they are controlled by a state.[38] It has long been recognized that 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts

[35] Letter of Secretary of State Daniel Webster to the British ambassador, reproduced in 29 (1841) British and Foreign State Papers 1137-1130 and 30 (1842) British and Foreign State Papers 195-196

[36] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgement, ICJ Reports 2003, p 161, para 64

[37] Lindsay Moir, *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror* (Hart Publishing 2010), pp 121f; see also Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', p 965

[38] See e.g. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', p 965

listed above, or its substantial involvement therein' qualifies as an act of aggression.[39] The ICJ in *Nicaragua* clarified that such a sending of armed bands would constitute an armed attack if it, by its 'scale and effects', would have been classified as an armed attack if carried out by the state's regular troops.[40] This has led some commentators to argue that self-defence against VNSASs is only permissible in the narrow instance of sufficient control by a state, a position usually backed up by the Court's decision in the *Wall*[41] and *Congo v Uganda* cases.[42]

For the current inquiry, this would mean that a state (victim state) which suffered an attack by a jihadist organization, affiliate or otherwise, would most likely only be able to use force in the case of a Security Council authorization or with the consent of the state from which the group operates (host state), as states do not usually have control over jihadist organizations. In the case of al Qaeda and the Islamic State, both of which diametrically oppose their host states, self-defence would be impossible.

However, as Trapp has pointed out, most ICJ judgments dealt with the use of force *against state institutions* and thus it is not the least surprising that the Court would require 'that the armed attack by VNSAs be attributable to the State in whose territory defensive force was being used when one considers that the territorial State [host state] was itself the subject of defensive measures.'[43] In *Congo v Uganda* the Court pointed out that since

[39] Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations 1970, General Assembly Twelfth Session, Art. 3(g)
[40] *Nicaragua*, para 195
[41] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p 136, para 139
[42] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment,* ICJ Reports 2005, p 168, para 146
[43] Kimberley N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 International & Comparative Law Quarterly 141, p 142

> the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC [Democratic Republic of the Congo] were not present [,…] the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.[44]

This is far from an outright rejection of self-defence against VNSAs and recent state practice, especially after 9/11, seems to support the existence such a right. Following the attacks on the United States, the Security Council passed resolution 1368, recognizing 'the inherent right of individual or collective self-defence in accordance with the Charter'.[45] NATO, for the first time in history, invoked Article 5 of the Washington Treaty, which holds that 'an armed attack against one or more of them […] shall be considered an attack against them all.[46] Similarly, while the 1985 strike by Israel against the PLO headquarters in Tunisia, after three Israelis were murdered in Cyprus, drew widespread criticism[47], responses to the 2006 Israeli incursion into Lebanon focused mostly on the perceived disproportionality of Israeli action while recognizing Israel's right of self-defence.[48]

Finally, the response to the Islamic State, which had established itself as a regional proto-state—including a government and political organization[49]—and married irregular tactics with conventional military capabilities[50], further supports an existing right of self-defence against VNSAs. Following large incursions of IS troops into Iraq in 2014, the Iraqi government 'requested the United States of America to lead international

[44] *Congo v Uganda*, para 147
[45] S/RES/1368 (2001)
[46] The North Atlantic Treaty (1949); NATO, 'Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001)' (2001) 40 International Legal Materials 1268; see also Edgar Buckley, 2006, 'Invoking Article 5' NATO Review Summer 2006 <http://www.nato.int/docu/review/2006/issue2/english/art2.html> accessed 16 April 2012
[47] Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors', p 142
[48] Ibid, p 154; Moir, *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror*; see also Corten, *The Law Against War*
[49] Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State* (The Brookings Project on U.S. Relations with the Islamic World Analysis Paper No. 19, Brookings Institution 2014); Brian Fishman, *Fourth Generation Governance* (Combating Terrorism Center at West Point 2007)
[50] Alex Bilger, *ISIS Annual Reports Reveal a Metrics-Driven Military Command* (2014); Michael Knights, 'ISIL's Political-Military Power in Iraq' (2014) [7] 8 CTC Sentinel, p 3

efforts to strike [IS] sites and military strongholds, with our express consent' on 20 September 2014.[51] In response, the United States, the United Kingdom, and several other regional allies began coordinated air strikes against the Islamic State in Syria and Iraq in September 2014, a coalition later joined by Canada, France, Australia, and others.[52] Similarly, Turkey invoked its right of individual and collective self-defence after the 20 July 2015 terrorist attack in Suruç, killing 32 Turkish citizens, and a border incident in Elbeyli, killing one Turkish soldier.[53] Indeed, claims of self-defence have been made repeatedly in the context of the Islamic State and very rarely, if at all, been contested. Not surprisingly, Syria has voiced sharp discontent with the use of force on its territory. In a letter dated 17 September 2015 to the Secretary General and the Security Council, it argued that the coalition states were 'violating international law' and 'distorting the meaning of [self-defence]'.[54] It furthermore clarified that '[i]f any State invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government […] its actions shall be considered a violation of Syrian sovereignty.'[55] Even before combat operations had begun, National Reconciliation Minister Ali Haidar warned that 'any action of any kind without the consent of

[51] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/2014/691, 22 September 2014

[52] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/2014/695, 23 September 2014; Letter of the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2014/851, 26 November 2014; Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, S/2015/221, 31 March 2015; Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, S/2015/693, 9 September 2015; Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/745, 9 September 2015

[53] Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, S/2015/563, 24 July 2015

[54] Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/719, 21 September 2015

[55] Ibid

the Syrian government would be an attack on Syria.'[56] Previously, there had been quite an amount of speculation about whether the Syrian government had, due to its long silence on the matter, implied consent with the coalition airstrikes. The above quoted letter undermines any such claims, which never had been strong to begin with. As Russia has pointed out, 'a formal, one-sided "notification" of airstrikes' does not suffice to prove consent, only 'the presence of explicit consent from the government of Syria'.[57] Hence, unless the Security Council was to authorize the use of force, the coalition combat operations in Syria entirely rest on individual and collective self-defence. Russia, in turn, has based its intervention in Syria on the invitation of Syrian President Assad.[58]

Generally, it would seem counterproductive to deny states the right to respond forcefully to armed attacks by VNSAs, given that the *Caroline* incident, usually cited as the baseline for the modern *jus ad bellum* and ignoring the merits in this particular case, constituted just that: self-defence against a non-state actor. Secretary Webster reminded the British that their response needs to be kept within the principles of necessity and proportionality, but he did not reject using force against VNSAs extraterritorially. The incident, obviously, occurred before the advent of the UN Charter and it is therefore possible that the Charter altered or abolished a right held previously by states. However, this seems unlikely. First, Article 2(4) of the Charter, setting out the prohibition of the use of force, specifically refers to states in

[56] Ian Black and Dan Roberts, 'Isis air strikes: Obama's plan condemned by Syria, Russia and Iran' *The Guardian* (12 September 2014) <http://www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan>

[57] Reuters, 'Russia: airstrikes must be agreed with Syria or will fuel tension' *Reuters* (23 September 2014) <http://www.reuters.com/article/2014/09/23/us-syria-crisis-airstrikes-russia-idUSKCN0HI0OU20140923>

[58] BBC, 2015, 'Russia joins war in Syria: Five key points' BBC News <http://www.bbc.co.uk/news/world-middle-east-34416519> accessed 20 July 2016; TASS, 2015, 'Lawmakers authorize use of Russian military force for anti-IS airstrikes in Syria' Russian News Agency TASS <http://tass.com/politics/824795> accessed 20 July 2016

their '*international* relations'.[59] The best interpretation of 'international' seems to be that it refers to the relations between sovereign states, which seems plausible given that the Charter is a state-centric instrument. Corten, for example, flatly denies VNSAs any role in the *jus ad bellum* altogether. According to him, it is only relevant as far as operations against the states, on whose territory those groups operate are concerned, but not with regards to the groups themselves.[60] This argument finds further support in recent interpretations of the *jus in bello*, even though this should not be seen as an attempt to conflate both frameworks. The US Supreme Court, in *Hamdan*[61], was faced with the question of whether the "war" with al Qaeda constituted an international or a non-international armed conflict and therefore whether Common Article 3 to the Geneva Conventions, applying to 'conflicts not of an international character'[62], had any bearing for al Qaeda detainees. The Bush administration had argued that the conflict was 'international in scope' and therefore outside of the Article's purview.[63] The Court took the opposite view, as, in its opinion, the phrase 'international' should receive a literal interpretation as a conflict occurring between sovereign states. Second, Article 51 of the Charter, setting out the exemption to the general prohibition found in Article 2(4), does not contain any specific reference to states. Given that the ICJ has already recognized the possibility that irregular forces may be capable of mounting an armed attack in *Nicaragua*, albeit acting on behalf of a state, it seems sensible to follow the rationale rather than the exact wording of the Court in *Nic-*

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[59] UN Charter, art. 2(4), emphasis added
[60] Corten, *The Law Against War*, ch 2
[61] *Hamdan v Rumsfeld* 548 U S ____ (2006), p 67
[62] See Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949., art. 3
[63] *Hamdan v Rumsfeld*, p 67

aragua. It seems logical that attacks by VNSAs should also qualify as armed attacks if the answer to the scale and effects test is positive even in the absence of state involvement, given that safeguarding territorial integrity is the primary goal of self-defence. Provided that jihadist organizations do not operate in *terra nullis*, international law must carefully balance the victim state's self-defence rights with the sovereignty of the host state, which will be further elaborated below.

Accepting a right of self-defence against VNSAs, however, is not unproblematic given the particularities of how VNSAs conduct warfare. VNSAs will often lack the capabilities to mount large-scale operations akin to those states may be capable of. VNSAs will therefore seek to capitalize on their strategic advantages of flexibility and adaptability to target the enemy's political decision-making process instead of aiming for a military victory.[64] Hammes, who termed this type of warfare 'fourth-generation warfare (4GW)'[65], reminds us that 4GW

> uses all available networks—political, economic, social and military—to convince the enemy's political decision maker that their strategic goals are either unachievable or too costly for the perceived benefit. It is an evolved form of insurgency.[66]

Jihadist organizations have been prone to borrow from classic guerrilla war doctrine. Al-Muqrin, an al Qaeda veteran and trainer in terrorist training camps in Pakistan[67], prescribes for the *mujahedeen* to fight in the way of the 'flea and the dog'[68], resorting to pinpoint attacks and moving constantly. These sorts of tactics are of course not foreign to any student of insurgency and counterinsurgency and it is therefore not entirely surprising that jihadist organizations would seek to learn

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[64] Kimbra L. Fishel, 'Challenging the Hegemon: Al Qaeda's Elevation of Asymmetric Insurgent Warfare Onto the Global Arena' (2002) 11 Low Intensity Conflict & Law Enforcement 285
[65] Thomas X Hammes, *The Sling and the Stone: On War in the 21st Century* (Zenith Press 2006), p 2
[66] Ibid
[67] Norman Cigar and 'Abd Al-Aziz Al-Muqurin, *Al-Qa'ida's Doctrine for Insurgency: 'Abd Al-Aziz Al-Mqurin's 'A Practical Course for Guerilla War'* (Norman Cigar tr, 2009), p 12
[68] Ibid, p 111

from history. However, the most interesting insight gained from Al-Muqrin's manual, for the purposes of this study, is that he does not only seek to capitalize on the advantages provided by topography, but also by political geography. He urges that while guerrilla forces should not have a fixed base within the country where the conflict is taking place, he takes a more relaxed view towards fixed installations in neighbouring countries. Al-Muqrin explicitly refers to bases in Pakistan by the Afghan *mujahedeen* and Georgian bases of Chechen rebels.[69] While he does not further elaborate on this point, the rationale is clear: the sovereignty of a third state would offer reasonable protection to guerrilla forces. This is certainly not an isolated tendency and similar effects can be observed locally, with IS forces operating out of Syria to mount attacks against Iraq, and globally, with franchise organizations going after the far enemy.

This combination of low-intensity attacks combined with geographical dispersion leads us back to the question of when states can use force in self-defence against such actors, which has to consider both factors. On the one hand, the determination of whether an armed attack has occurred will have to take into account the low-intensity nature of the attacks states are likely to suffer. This, it will be argued below, should not only affect the overall determination of whether states can operate extraterritorially, but also which measures should be permissible. On the other hand, the *jus ad bellum* will have to balance the legitimate desire of states to defend themselves, with the equally legitimate desire of host states not to have their sovereign territory be subject to (military) operations by foreign states. This debate will be embedded into the guiding principles of self-defence: necessity and proportionality.

[69] Ibid

1.2. Necessity

Despite its centrality for the concept of self-defence, necessity has received relatively little scholarly attention according to Ruys.[70] Even though it is questionable whether the *Caroline* incident is the source for the principle, it is often used to illustrate how the basic principle operates. According to the *Caroline* formula, the 'necessity of self-defense [has to be] instant, overwhelming, leaving no choice of means, and no moment of deliberation'.[71] From this, Ruys sets out a further subdivision of the principle; in as far as the use of force in self-defence has to be as a last resort and temporarily close to the event (immediacy).[72] However, despite the fact that the need for actions in self-defence needs to be 'imminent,'[73] states do not necessarily need to react immediately, which may not even be possible for logistical reasons or because the link between the act and the aggressor needs to be established first.[74] Furthermore, scholars largely agree that any case of preventive self-defence, based on a vague threat instead of a tangible and immediate threat, is prohibited.[75] Dinstein maintains that the '"if" condition [of Article 51] is met once an armed attack is under way, even if the attack is not yet fully matured'.[76] In short, states do not need to await the impact of a blow, but a blow must be forthcoming and observable. In any case, the more time passes the more likely it becomes that the factual circumstances demanding

[70] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 94
[71] Caroline
[72] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, pp 95-98
[73] United Nations General Assembly, *A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change, A/59/565* (2004), para 188
[74] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, pp 100f; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010), pp 44f
[75] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004), p 154; Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 322
[76] Yoram Dinstein, *War, Aggression and Self-Defence* (Fifth edn, Cambridge University Press 2011), p 206

force as a last resort change and therefore states are expected to pursue peaceful dispute resolution if possible, even though there is little consensus on which peaceful measures a state is expected to take.[77]

In the case of VNSAs, however, imminence has sometimes been taken beyond its breaking point.[78] It is not always entirely clear, as in the case of Reyaad Khan, who was killed by a Royal Air Force (RAF) drone in Syria on 21 August 2015[79], to what extent the alleged imminent acts posed real and credible threats to the United Kingdom. In its letter to the Security Council, the UK argued that Khan was 'actively engaged in planning and directing imminent armed attacks against the United Kingdom' and the 'air strike was [therefore] a necessary and proportionate exercise of the individual right of self-defence of the United Kingdom'.[80] This strike, as has been pointed out by Chesney, should be seen independently from the ongoing operations in the collective self-defence of Iraq, but rather as individual self-defence of the UK.[81] This, however, raises the question of how imminent the threat actually was, which cannot be fully determined without access to classified information. Former Prime Minister David Cameron claimed that Khan was 'involved in actively recruiting [IS] sympathisers and seeking to orchestrate specific and barbaric attacks against the west, including directing a number of planned terrorist attacks right here in Britain'.[82]

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[77] Gardam, *Necessity, Proportionality and the Use of Force by States*, p 152; Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 96; See also *Nicaragua*, Dissenting Opinion of Judge Schwebel, pp 362-7
[78] Noura S Erakat, 'The New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-Defense' (2014) 56 Arizona Law Review 195
[79] BBC, 2015, 'Islamic State conflict: Two Britons killed in RAF Syria strike, 7 September 2015' BBC News <http://www.bbc.co.uk/news/uk-34178998> accessed 10 September 2015
[80] Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2015/688, 8 September 2015
[81] Robert M Chesney, 2015, 'A British Anwar al-Awlaki Scenario? UK Targets British ISIL Member, in Syria, on an Imminent/Continuous Threat Theory, 7 September 2015' Lawfare <https://www.lawfareblog.com/british-anwar-al-awlaki-scenario-uk-targets-british-isil-member-syria-imminentcontinuous-threat> accessed 10 September 2015
[82] HC Deb, *Syria: Refugees and Counter-terrorism, vol 599, col 23* (7 September 2015), col 25

Cameron further claimed that there was 'no alternative', since the UK could not rely on the Syrian government and had no forces in the area to detain Khan[83], and therefore 'the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed'.[84] However, one is left wondering how imminent such a threat might have been, especially since Cameron did not elaborate in more detail on the nature of the threat when asked by MP Harriet Harman.[85] After all, Khan was unlikely to leave Syria, as even Cameron admits[86], and therefore the only imminent threat in this scenario would emanate from those persons that Khan was recruiting. At best, Khan was in strategic but not operational control of any ongoing IS operations in the UK and while this might turn him into a legitimate target under the *jus in bello*[87], it does not explain why it was necessary under the *jus ad bellum* to use lethal force. After all, the planned acts in question would have to arise to an armed attack and the only way to stop these specific acts would have to be armed force directed against Reyaad Khan. The mere fact that Khan was planning terrorist activities errs too much on the side of preventive self-defence. This does not mean, as will be explained below, that in cases of counterterrorism other non-lethal uses of force might not be justified extraterritorially.

Nevertheless, the interpretation of the necessity requirement against individual members of jihadist organizations cannot be interpreted in isolation from the wider campaign against such organizations. As will be set out in more detail in the following chapter on the laws of armed conflict (LOAC) [88], individuals who are functionally integrated into the military wing of an

[83] Ibid, col 25
[84] Ibid, col 26
[85] Ibid, cols 27-31
[86] Ibid, col 25
[87] See ch 4 below
[88] ch 4, sec 3.2

insurgent armed group that 'meets the standard of continuous combat function'[89] may be considered legitimate targets under the *jus in bello* if the group in question is engaged in an armed conflict with the state that wishes to use armed force. It would thus be counterintuitive to argue that the acts of such individuals, even if they only amount to exercise overall and not operational control over acts that would in themselves meet the necessity requirement, should never suffice to enable states to take necessary counteractions. The determining factor under the *jus ad bellum* therefore is how advanced the planning activities of such acts are and whether the use of lethal force is the only way to prevent such acts from materializing. The tension between the *jus ad bellum* and the *jus in bello* for counterterrorism operations is acknowledged, but ultimately cannot be resolved here for the simple reason that this determination, of course, can only be made on a case-by-case basis.

1.2.1. Gravity

The more pertinent issue in the case of self-defence against jihadist VNSAs, however, is the issue of gravity. Both in *Nicaragua* as well as in *Oil Platforms*, the Court observed that 'it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms"'.[90] This position was strongly disputed by the United States, which reserved the right to respond forcefully to *any* attack.[91] However, a minimum threshold seems nevertheless helpful to balance the desire of states to defend themselves with the preservation of international peace and stability. In the case

[89] Charles J Dunlap, 2016, 'Yes, We Can Lawfully Target Islamic State Trainees Preparing to Conduct Terrorist Attacks in Europe and Elsewhere' Just Security <https://www.justsecurity.org/30228/lawfully-target-isil-trainees-preparing-terrorist-attacks-europe/> accessed 25 March 2016, italics in original
[90] *Oil Platforms*, para 51; citing *Nicaragua*, para 101
[91] Moir, *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror*, p 120

of some specific attacks, such as the combined attacks on 9/11, or the large-scale invasion of Iraq by the Islamic State, it seems uncontroversial to argue that the threshold was crossed. Nevertheless, such events are unhelpful indicators given the generally more small-scale effects of terrorist attacks. More frequent are acts of armed force directed at a state's civilian population or infrastructure, or its diplomatic or military personnel or installations. While such attacks often result in the loss of life and property, they do not have the same effects as large-scale attacks.

This raises three questions. First, can these events be seen cumulatively, and if so, to what extent? This approach is often called the 'accumulation of events' doctrine and its attractiveness in the context of sub-state violence is obvious, given that individual acts would often barely reach the threshold of an armed attack.[92]. Second, what is the role of the host state in the case of an armed attack? It has to be remembered that acts of violence directed against the state on which a non-state actor operates do not fall within the purview of the *jus ad bellum*. The current analysis therefore solely looks at acts that emanate from the territory or occur on the territory of a host state but are aimed at a third state. Therefore, the sovereignty of the host state has to be taken into account. More specifically, if the host state is willing and able to suppress the threat posed by a non-state actor, acts in self-defence are by definition not necessary. Third, how does the lower level of violence typical of VNSAs affect what can be considered a proportional response? Arguably, it seems more plausible, as Moir and others have argued[93], that the comparably lower intensity of non-state actor

[92] C. J. Tams, 'The Use of Force against Terrorists' (2009) 20 European Journal of International Law 359, p 370
[93] Moir, *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror*, p 120; see also Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence'

attacks should influence what constitutes a proportional response and not generally influence the determination of whether an armed attack has occurred.[94]

1.2.2. Accumulation of Events

The 'accumulation of events' doctrine has been put forward as one possibility of reconciling a state's desire for security with the unique particularities of 4GW. In its basic form, it argues that while single instances may not reach the threshold of an armed attack, a series of attacks might nevertheless create a pattern of violence that may present a threat to a state, even if not an existential one, and therefore accumulate to an armed attack[95] provided that they form part of a general strategy.[96] In such cases, arguably, it is likely that further attacks will follow and self-defence thereby serves a preventive function. However, Ruys has argued that it is customary practice that self-defence is not denied if more attacks are imminent. This, to him, is 'rather logical, since the opposite position would imply that States would have little defence against consecutive pin-prick attacks'.[97] In the same vein, Roberto Ago, in his report to the International Law Commission on state responsibility, stressed that 'if the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole'.[98]

[94] See sec 1.3 below
[95] Lubell, *Extraterritorial Use of Force Against Non-State Actors*, pp 51-53; Moir, *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror*, pp 123, 140; *Oil Platforms*, para 64; *Congo v Uganda*, para 146
[96] Tams, 'The Use of Force against Terrorists', p 370; This is at least the position of the State of Israel
[97] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 106
[98] Roberto Ago, 'Addendum - Eighth report on State responsibility' (1980) II Yearbook of the International Law Commission 13, para 122

Nevertheless, while the doctrine is frequently invoked by a variety of states[99], it is far from accepted and its status under international law is unclear. Israel, as one of the strongest proponents of the doctrine, frequently raised it in the Security Council, where it repeatedly received a cold reception.[100] However, Ruys cautions that members in the Council, in the case of Israel and others, did not reject the doctrine *per se* but its disproportionate application in specific cases.[101] Furthermore, in *Oil Platforms*, the ICJ seemed to accept that a series of events taken together could theoretically constitute an armed attack[102], a position that was again taken in *Congo v Uganda.*[103] Ruys concludes that 'there is considerable support for the view that the "accumulation of events" does affect the possibility of exercising the right of self-defence'.[104]

Accumulation of events in the case of jihadist terrorist actors, as opposed to more traditional insurgent forces, nevertheless poses some distinct challenges. First, accumulating several temporarily close actions into a single armed attack is less problematic as long as 'consecutive attacks take place that are linked in time, source and cause'.[105] But the concept should not be stretched too far. Events that are separated by months or even years would stretch the concept too far, as this would fundamentally undermine the prohibition on the use of force. In such cases the focus should lie on the gravity of the individual event and the likelihood of temporally close further attacks to determine whether military action in self-defence is necessary.

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[99] See Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 170ff citing Israel, the United States, Russia, Lebanon, Iran, Liberia, and Sudan.
[100] Tams, 'The Use of Force against Terrorists', p 370; D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24 European Journal of International Law 235, p 244; Lubell, *Extraterritorial Use of Force Against Non-State Actors*, p 51
[101] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 169-172
[102] *Oil Platforms*, para 64
[103] *Congo v Uganda*, para 146
[104] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 174; see also Dinstein, *War, Aggression and Self-Defence*, p 206
[105] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 168

Second, the geographical dispersion of jihadist actors and the seemingly disconnectedness between the individual network members complicates the determination of the accumulation of events. While a large-scale attack by one of the affiliate organizations, as argued above, as well as the accumulation of events by a single actor engaged in repeated acts of terrorism over a short period of time might satisfy the armed attack requirements, especially al Qaeda but increasingly also the Islamic State is not a unitary actor, but a network of groups. Thus, it is likely that the pattern will be less clear, involving attacks by various subentities of the larger group against different states. Al Qaeda in the Arabian Peninsula (AQAP) is a good example in this regard. While the majority of the 473 incidents between 2001 and 2013, as recorded in the Global Terrorism Database (GTD)[106], did not transcend Yemeni territory, the group nevertheless attacked targets in the US and the UK.[107] Similarly, both al Qaeda in the Islamic Maghreb (AQIM) and al Shabaab have repeatedly attacked targets in countries in which they were not located[108] and at least one member of al Shabaab, Ahmed Abdulkadir Warsame, has been taken into custody by the United States for an attempted attack on a US airliner.[109] As questions of attribution among VNSAs have already been dealt with in more detail in chapter 2, there is therefore no need to go into extensive detail here. The discussion here will therefore be more focused on the question of how wide or narrow the net should be cast for the accumulation of events doctrine.

It was argued in chapter 2 that jihadist groups that swear an oath of allegiance to al Qaeda or the Islamic State become

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[106] National Consortium for the Study of Terrorism and Responses to Terrorism (START), *Global Terrorism Database [Data file]* (2014)
[107] Ibid
[108] Ibid
[109] See Robert M Chesney, 'Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism' (2013) 112 Michigan Law Review 163

affiliate organizations and, for the reasons laid out in chapter 1, should be considered to functionally become part of those organizations. In contrast, associate organizations may align themselves with either organization, but retain their organizational independence. On this basis, the rationale for accumulation proposed here, then, is as follows: Actions by al Qaeda or the Islamic State, either directly or through its affiliate organizations or by associate groups if al Qaeda or the Islamic State exercise overall control, shall be taken cumulatively for the determination of whether an armed attack has occurred as long as these actions are directed against a single victim state. This undermines any strategic advantage VNSAs might have in creating a pattern of violence as part of an overall strategy while preserving the fundamental rationale of self-defence in as far as a victim state must have suffered an actual attack before it might potentially have a valid claim to self-defence. Including acts by associate organizations over which al Qaeda or the Islamic State had no control, or acts towards third states, on the other hand, would stretch the very concept of self-defence beyond its breaking point.

This approach evidently creates uncertainty if a series of attacks not reaching the threshold of an armed attack individually is not directed against a particular state, but a variety of different states. This situation can arise in the case of an organization, such as the Islamic State, which seeks to establish itself as a regional proto-state pursuing an expansionist strategy using terrorist tactics. In these cases, it would be the responsibility of the Security Council, pursuant to its powers under Article 39 of the UN Charter, to determine whether there is a threat to

international peace and security and authorize appropriate countermeasures.[110]

The final inquiry for the satisfaction of the necessity requirement is whether the host state, rather than the victim state, is able and willing to suppress the threat emanating from its territory. After all, the necessity of actions in self-defence against affiliate or associate groups, on the territory of a third sovereign state, presupposes that no alternative means of threat suppression are available.

1.2.3. Unable and Unwilling

Western states engaged in a conflict with jihadist organizations may face the dilemma that even if an attack meets the gravity requirement, the core group responsible for it is located on the territory of a state to which the attack is not attributable. The reason for this is that international law places a high burden on making a state directly responsible for an attack unless it was in 'effective control' not only over the group but also over the specific conduct in question.[111] This threshold will be difficult to meet in many if not all instances. Even though such groups may potentially receive material support, jihadist organizations are not typically agents of states even if there might be interaction between state officials and members of such groups.[112] Nevertheless, interaction does not equal control. In such cases, it is sometimes argued, that states may nevertheless use force

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[110] UN Charter, art 39

[111] *Nicaragua*, paras 109 and 115; *The Wall*, para 139; *Congo v Uganda*; *Bosnia and Herzegovina v. Serbia and Montenegro* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgement, ICJ Reports 2007, p 43, paras 400-402; Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001); art 8

[112] Identical letters dated 24 December 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, 30 December 2014, S/2014/952; Such claims are obviously difficult to verify, but at least one Western intelligence official quoted by the Observer seems to suggest that there is compelling evidence for direct interactions between Turkish and IS officials; See Martin Chulov, 'Turkey sends in jets as Syria's agony spills over every border' *The Observer* (26 July 2015)

on the territory of the host state if the latter is 'unable or unwilling' to act.[113] The unable or unwilling test would reconcile the dilemma of how to safeguard the host state's sovereignty with the security of the victim state. However, the validity of the unable and unwilling test is contentious. Especially in Europe some scholars reject the unable and unwilling doctrine as having no foundation in international law.[114]

Hence, while not all scholars agree that 'indirect support', as Corten has labelled it[115], provides the victim state with the right to use force on the territory of the host state, the doctrine is nevertheless frequently invoked in international relations. Ruys has shown that prior to 9/11, invoking the 'unable or unwilling' doctrine was generally met with disapproval by the international community, even though a shift was seemingly occurring during the 1990s. While Israel's action against the PLO headquarters in Tunisia in 1985 and the United States' raid on Tripoli in 1986 were mostly considered as unlawful by most states[116], the response to US strikes in Sudan and Afghanistan, following the 1998 embassy bombings in Kenya and Tanzania, received mixed responses. As Ruys points out, in these cases the US did not hold the host states directly responsible but justified its actions strictly on the basis of both states' cooperation with al Qaeda. Although condemned by some states, including Iran, Libya, and Russia, a number of Western states approved of the strikes. The Arab states, in turn, offered no commentary on the legality of actions in Afghanistan but questioned whether

[113] Ashley S Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 Virginia Journal of International Law 483; see also Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philipp Alston, 28 May 2010, A/HRC/14/24/Add.6, para 35, arguing that 'A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if […] the second State is unwilling or unable to stop armed attacks against the first State launched from its territory'

[114] See e.g. Olivier Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' [2016] Leiden Journal of International Law

[115] Corten, *The Law Against War*

[116] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, pp 423-425

the targets in Sudan actually did serve the purpose as an al Qaeda chemical weapons plant, as the US claimed.[117] In any case, it is frequently invoked by states facing a threat emanating from outside their territory. In 1991, Turkey justified its incursion into Iraq along the lines of its inability to ask the Iraqi government to stop threats to its territorial integrity by the PKK operating out of Iraq.[118] Similarly even Russia, which in September 2014 maintained that any 'international anti-terrorist operation should be conducted either with the consent of the sovereign Governments or sanctioned by the Security Council' and that 'other options [are considered] unlawful and detrimental to international and regional stability'[119], justified its 2002 incursion into Georgia to fight Chechen rebels on the basis that the Georgian government was unable or unwilling to suppress the threat[120], which was fiercely disputed by Georgia.[121]

In the Syrian context, the United States, Canada, Australia, and Turkey have explicitly invoked the 'unable and unwilling' doctrine.[122] Some commentators have interpreted the United Kingdom's 2014 unilateral restriction to operations in Iraq as a sign that the UK does not see operations in Syria not on a firm legal footing.[123] Upon closer reading, however, this position

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[117] Ibid, pp 426

[118] Letter Dated 24 July 1995 from the Charge D'affaires A.I. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, S/1995/605, 24 July 1995

[119] The situation concerning Iraq, 7271st Meeting of the Security Council, 19 September 2014, S/PV.7271, p 19

[120] Letter dated 31 July 2002 from the Chargé d'affaires a.i. of the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, Annex, 31 July 2002, A/57/269–S/2002/854

[121] Letter dated 13 September 2002 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General, Annex, 16 September 2002, A/57/409–S/2002/1035

[122] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/2014/695, 23 September 2014; Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, S/2015/221, 31 March 2015; Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, S/2015/693, 9 September 2015; Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, S/2015/563, 24 July 2015

[123] Arimatsu and Schmitt, 'Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape', p 9

must be challenged on various grounds. First, the United Kingdom kept open the possibility of striking 'ISIL sites and military strongholds in Syria, as necessary and proportionate measures'.[124] The debate in the House of Commons, furthermore, suggests that the government of the United Kingdom did not see itself confined to Iraqi territory by international law. In his statement, Prime Minister David Cameron assured that there is a legal basis for actions in Syria and that the UK government considered American operations in Syria as lawful.[125] The reason why the motion by the UK government was restricted to Iraqi territory was a lack of consensus in the Commons on the matter, according to Cameron.[126] It needs to be remembered that the British government had only recently lost a vote in the Commons to authorize strikes against the Syrian government in response to the alleged use of chemical weapons.[127] It therefore stands to reason that the UK government wanted to ensure approval in the Commons and therefore did not put the more contentious issue of operations in Syria, which apart from legal questions also carried with it added operational risks[128], on the table. Thus, the summary of the legal position of UK government[129] has to be read in this context. The UK decided to restrict itself to operations in Iraq for *political* rather than *legal* reasons. The necessity to justify operations in Syria therefore did not arise in the first place. In fact, several Labour as well as Conservative MPs questioned this decision by the government. Pat McFadden (MP Wolverhampton/Labour), for example, was

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[124] Letter of the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2014/851, 26 November 2014
[125] HC Deb, *Iraq: Coalition Against ISIL, vol 585, col 1255* (26 September 2014), col 1259
[126] Ibid
[127] HC Deb, *Syria and the Use of Chemical Weapons, vol 566, col 1425* (29 August 2013)
[128] HC Deb, *Iraq: Coalition Against ISIL, vol 585, col 1255*, Dai Havard (Merthyr Tydfil and Rhymney/Labour), col 1287-88
[129] HM Government, *Summary of the Government Legal Position on Military Action in Iraq Against ISIL* (House of Commons Library, DEP2014-1289, 2014)

astonished that the government welcomed US-led operations in Syria and asked '[i]f it is welcome and right for others to do so, why is it not welcome and right for us?'[130] France, on the other hand, did not put forward an explicit invocation of the 'unable and unwilling' doctrine, but simply argued that it is acting 'response to attacks carried out by ISIL from the territory of the Syrian Arab Republic' in accordance with Article 51 of the Charter.[131]

The current status of the 'unable and unwilling' doctrine under international law, however, is unclear despite the abovementioned state practice. According to Henriksen the 'test is widely supported in the literature'[132] and the parliamentary research service of the German Bundestag notes that an 'evolution in customary law is emerging' in the context of the reaction of the international community to counteraction against the Islamic State in Syria and Iraq.[133] Similarly, Wettberg has compiled an impressive list of state practice to generally support the validity of the claim that while the host state itself must not become the target of self-defence action if it merely tolerates a VNSAS on its territory, 'all installations [...] used by the terrorists [...] become targets.'[134] In either case, neither completely neglecting sovereignty and host state responses nor leaving the victim state completely helpless in a situation that might qualify as an armed attack is satisfying. At the time of writing, the most

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[130] HC Deb, *Iraq: Coalition Against ISIL, vol 585, col 1255*, col 1296-97; see also Kenneth Clarke, col 1297

[131] Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/745, 9 September 2015

[132] Anders Henriksen, 'Jus ad bellum and American Targeted Use of Force to Fight Terrorism Around the World' (2014) 19 Journal of Conflict and Security Law 211, p 239, fn 101

[133] Wissenschaftlicher Dienst des Bundestags, *Staatliche Selbstverteidigung gegen Terroristen: Völkerrechtliche Bewertung der Terroranschläge von Paris vom 13. November 2015* (WD 2 - 3000 - 203/15, Deutscher Bundestag 2015), author's translation

[134] Gregor Wettberg, *The International Legality of Self-Defense Against Non-State Actors* (Peter Lang 2007)

plausible interpretation seems to be that the unable and unwilling test is generally accepted, but more research and state practice is needed to fully define the contours of the doctrine.

Deeks situates the 'unable and unwilling' test in the law of neutrality, which, according to her, puts states under an obligation to use all means at their disposal to prevent their territory from being used for acts that injure third states[135] and that this obligation extends to VNSAs as well.[136] Heller has shown that the law of neutrality does not apply to VNSAs, unless in cases of recognized belligerency, and that its application would indeed seriously undermine global counterterrorism measures by preventing states from providing assistance to either belligerent.[137] Whether or not the law of neutrality applies to terrorist organizations is, for the purposes of this study, largely inconsequential because Resolution 1373 (2001), adopted under Chapter VII of the UN Charter in the wake of 9/11, requires all states to deny terrorist organizations safe havens and prevent them from using the state's territory for the planning, financing, facilitating or committing of terrorist acts.[138] Primary responsibility for preventing and reacting to armed attacks by terrorist VNSAs therefore lies with the host state.

This, however, does not fully answer what consequences states should incur for failing to meet their obligations. Tams and several others have argued that there exists a lower threshold for attributing conduct of terrorist organizations to the host state 'where it is responsible for complicity in the activities of

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[135] Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', p 497f; However, see Kevin Jon Heller, 'The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It Is a Good Thing, Too: A Response to Chang' (2011) 47 Texas International Law Journal 115 for a discussion whether the law of neutrality applies to non-state actors.
[136] Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', p 501
[137] Heller, 'The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It Is a Good Thing, Too: A Response to Chang'
[138] S/RES/1373 (2001), para 2(a-g)

terrorists based on its territory—either because of its support below the level of direction and control or because it has provided a safe haven for terrorists'.[139] This approach, however, is not unproblematic because it could potentially dissuade victim states from any attempt to engage with the host state before a counterattack is launched, because the use of force would already be possible. It also would not necessarily provide any guidance on how to differentiate between those states that willingly provide safe havens, and those that are simply unable suppress the threat.

Rather, it is argued here, a host state's capability and willingness to counter an imminent threat should be seen as part of the necessity determination without attributing the conduct of a non-state actor, over which it may have had no control, to it. This position can be easily reconciled with the approach outlined in detail by Deeks. She identified six factors that should be taken into consideration before using force extraterritorially. These are

> (1) Prioritization of Consent or Cooperation
> (2) Nature of the Threat Posed by the Nonstate Actor
> (3) Request to Address the Threat and Time to Respond
> (4) Reasonable Assessment of Territorial State Control and Capacity
> (5) Proposed Means to Suppress the Threat
> (6) Prior Interactions With the Territorial State[140]

Generally, action by the host state or in cooperation with the host state is always preferable in counterinsurgency situations because it potentially strengthens its legitimacy. In this case, actions in self-defence are simply not necessary as either the threat will be suppressed by the host state or its consent

[139] Tams, 'The Use of Force against Terrorists', p 385; See also Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors', p 150; Derek Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4 Chicago Journal of International Law 83; Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443, pp 501f

[140] Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', pp 519-533

can provide an alternative legal basis.[141] Following from that, only in cases where the host state cannot address a threat and does not consent to action on its territory, or will not confront an imminent threat should states have a right to act in self-defence using armed force. In all other cases, it would simply not be necessary.[142] The difficulty of this determination, however, can be illustrated in the case of Syria. The United States and Turkey have explicitly justified their actions in Syria on the basis that Syria is either unable or unwilling to suppress the threat posed by the Islamic State[143], despite the fact that Syria is involved in an armed conflict with the group and even a cursory reading of the country's correspondence with the Security Council would make it very difficult to argue that the country is *officially* unwilling to act against the Islamic State.[144] Rather, what can be called into question is i) whether the Syrian armed forces are in any position to effectively prevent the organization from using Syrian territory for planning, facilitating, and conducting armed attacks on third states, or ii) whether Syria may have had strategic reasons to focus on other threats within its territory. However, in either case victim states cannot be expected to suffer further attacks.

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[141] See sec 2 below
[142] Lubell, *Extraterritorial Use of Force Against Non-State Actors*, p 46
[143] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/2014/695, 23 September 2014; Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, S/2015/563, 24 July 2015
[144] Letter dated 2 May 2014 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the President of the General Assembly, 19 May 2014, A/68/882; Identical letters dated 28 April 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/294, 1 May 2015; Identical letters dated 5 June 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/410, 9 June 2015; Identical letters dated 28 May 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/388, 11 June 2015; Identical letters dated 16 June 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/442, 17 June 2015; Identical letters dated 9 July 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/524, 13 July 2015

The Iraqi government, in asking for outside intervention, made it clear that the threat to Iraq emanated from safe havens outside its territory.[145] Similarly, the Secretary General, in response to US airstrikes, argued that 'Syrian regime has shown that it cannot and will not confront these safe havens effectively'.[146] In the Syrian case, these arguments cannot easily be discarded. During the 2015 and 2016 period, the Sykes-Picot line had been degraded to a 'theoretical line on a map' from an Iraqi point of view, as one member in the House of Commons debate on the British authorization to use force put it.[147] The strength of the Islamic State within Syria had put the areas it occupied effectively outside of the reach of the Syrian government, which in turn pushed more states into contemplating military action. France's former President Hollande, claiming that Syrian territory had been used to plan terrorist attacks against France, authorized the use of the French armed forces for intelligence gathering in preparation of kinetic operations.[148] On the other hand, Syria argued in a letter to the Security Council that the international coalition 'has yet to achieve anything tangible in its war on the terrorist organizations' and claimed that its actions in Syria had helped IS to spread both in Syria and into neighbouring states.[149] Whether there is any merit to both allegations can of course be debated. What is clear, however, is that, unless a state refuses to act completely, disagreements as

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[145] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/2014/691, 22 September 2014
[146] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/2014/695, 23 September 2014
[147] HC Deb, *Iraq: Coalition Against ISIL, vol 585, col 1255*, Kenneth Clarke (Ruthcliffe/Conservative), col 1279
[148] John Irish and Elizabeth Pineau, 'France to begin Syria reconnaissance flights, mulls air strikes' *Reuters* (7 September 2015) <http://uk.reuters.com/article/2015/09/07/uk-mideast-crisis-france-idUKKCN0R70XG20150907>
[149] Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/719, 21 September 2015

to what constitutes a reasonable response will arise and cannot be easily reconciled.

With these considerations in mind, it is now time to turn to the third question outlined above. As stated there, the generally lower level of force by non-state actor should also inform the level of violence and even the means which states can use in self-defence.

1.3. Proportionality

In the *Caroline* incident, US Secretary of State Webster demanded not only that an act taken in self-defence complies with the principle of necessity, but also that 'the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it'.[150] Lubell explains that in the context of self-defence the proportionality of the undertaken action must be measured 'in relation to the achievement of ending an ongoing danger'.[151] This was also recognized by Ago, who argued that

> It would be mistaken […] to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in his respect is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself.[152]

Arguably, by this logic, the force necessary to prevent further threats by groups such as al Qaeda can either be disproportionally higher *or* lower than the initial armed attack. Actions that fall in the first category will, in all likeliness, be more controversial. Regime change as a means of self-defence certainly

[150] Caroline
[151] Lubell, *Extraterritorial Use of Force Against Non-State Actors*, p 65; see also C. J. Tams and James G Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' (2012) 45 Israel Law Review 91
[152] Ago, 'Addendum - Eighth report on State responsibility', para 121

is on the extreme end of the spectrum and the wars in Afghanistan and Iraq should be seen in this light. Despite the fact that such cases, by their very nature, polarize world opinion, the focus here will be on the opposite end of the spectrum. The guiding question here is to what extent states can use measures short of war in their counterterrorism efforts. Provided that states do not pursue a hidden agenda in the run up to large-scale operations, giving them the means necessary to counter threats early might in fact defuse tension and prevent an escalation into all-out war. Particularly, extraterritorial law-enforcement could be a valuable tool in the counterterrorism toolkit.[153]

In *Nicaragua*, the Court touched but dismissed the question whether a state may lawfully take countermeasures that are 'analogous' to but less grave than self-defence, since they are in response to acts that involve the use of force but do not amount to an armed attack.[154] In the view of the Court 'States do not have a right of […] armed response to acts which do not constitute an "armed attack"'.[155] In the context of self-defence this is a sensible approach considering the 'armed attack' requirement in Article 51 of the Charter. However, given the nature of the adversary, the kind of permissible counterforce to be used should be seen as broadly as possible and could range from robust military force to extraterritorial law enforcement operations against individuals.[156] This recognizes both the fact that such conflicts are not per se similar to conflicts among states, as well as that an escalation of force can sometimes be avoided if a state may lawfully use law enforcement tools against VNSAs extraterritorially. Evidence suggest that especially the US, despite its track record of an overreliance on

[153] See also ch 5 of this thesis
[154] *Nicaragua*, para 210
[155] Ibid, para 211
[156] Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', p 483

armed drones, does in fact use its law enforcement agencies extraterritorially to counter terrorist organizations.[157]

It is argued here, then, that in cases were extraterritorial law-enforcement produces a result that neutralizes an imminent threat from materializing, such measures not only can but *must* be used. This of course raises several issues, not all of which can be addressed here in full detail. First, law-enforcement operations on foreign territory must of course comply with all the requirements laid out above. They should only be permissible if they are intended to prevent an armed attack from occurring or taking those responsible into custody in cases where the host state is either unable or unwilling to act *and* further attacks are imminent.[158] Second, they should be intended to bring those responsible for or suspected of such imminent activities to justice rather than indefinitely detain them. Thus, states will need to be able to prosecute those captured in such a manner.[159] It is of course acknowledged that this argument might stoke fears of a return to a widespread policy of extraordinary rendition, which is prohibited under international law.[160] It needs to be remembered, though, that such operations should only occur in cases where states have a legitimate claim of self-defence. Denying states the possibility of extraterritorial apprehension would therefore potentially create the scenario where the use of lethal force would be permitted but a lesser form of force would not. Second, in cases where the host state is able and willing to suppress an imminent threat, no action in self-defence is necessary. Third, even though military personnel will, in all

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[157] See ch 5 of this thesis; see also Chesney, 'Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism'; see also David S Kris, 'Law Enforcement as a Counterterrorism Tool' (2011) 5 Journal Of National Security Law & Policy 1
[158] Henriksen, 'Jus ad bellum and American Targeted Use of Force to Fight Terrorism Around the World', p 248
[159] For the US see *US v Alvarez-Machain*, 504 US 655 (1992)
[160] Henriksen, 'Jus ad bellum and American Targeted Use of Force to Fight Terrorism Around the World', p 246

likeliness, carry out such operations, they should be carried out under different rules of engagement, recognizing a different aim—capture instead of kill—and a different overarching legal framework—human rights law instead of the laws of war—in which they operate. The determination of whether specific conduct meets the proportionality requirement can of course only be made on a case-by-case basis. The proportionality test will be picked up again in chapter 5, section 3.1.

2. Extraterritorial Use of Force in Defence of a Host State

The cases above dealt with instances where third states used force on the territory of another state in either individual or collective self-defence. These approaches are appropriate where an armed attack by jihadist groups has already occurred. However, Western states will often try to take a proactive approach to jihadist groups establishing themselves in contested territories, which in turn may serve as safe havens for such groups. These instances often lack an international dimension, especially if jihadist groups are in conflict with their host states exclusively on their territory.

Given that most jihadist organizations do not have a friendly relationship with their 'apostate' governments it seems likely that such states, at times, will be willing to cooperate with Western forces. If they are capable of suppressing an imminent threat by themselves, Western states can and should adopt proxy strategies as alluded to in the introduction. However, in some instances a direct intervention will be required, either to counter a direct threat or in defence of the host state. These cases are furthermore different to the example of Iraq mentioned above, as they are directed against internal enemies.

Two recent and relevant examples for such a situation are Mali and Yemen, even though in Yemen the intervention was not primarily focused on al Qaeda in the Arabian Peninsula (AQAP).

Generally, the use of force is permitted with the consent of the state on whose territory force is being used.[161] International law, especially the laws of neutrality, would nevertheless prohibit the intervention into an ongoing civil war if belligerency was recognized[162], unless in response to an outside intervention by another state, an authorization by the Security Council, or if the hostilities could be described as mere domestic unrest as opposed to an outright civil war.[163] One indicator to differentiate between both types of conflict is control of territory, even though states have sometimes been unwilling to identify a conflict as a civil war.[164] Commentators have furthermore alleged that the legitimacy of a particular government should determine whether it is entitled to invite outside intervention[165], even though state practice on the matter is inconclusive.[166] The final part of this chapter will examine the cases of Mali and Yemen to tease out the opportunity to intervene on behalf of a foreign government. Another case, which could not be considered within the constraints of this thesis but should be studied in more detail is the Russian intervention on behalf of the acting Syrian government.

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[161] Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001), art 20

[162] Heller, 'The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It Is a Good Thing, Too: A Response to Chang'

[163] Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008), p 81

[164] Ibid, p 82-84

[165] Ibid, p 98-99

[166] See Brad R Roth, *Governmental Illegitimacy in International Law* (Clarendon Press 1999)

2.1. The Conflict in Mali

In Mali, continued fighting in the north of the country by nationalist and Islamist movements lead to a "strategic retreat" of the Malian army from the north, enabling the *de-facto* partition of the Malian state, including the declaration of the independent state of Azawad on 6 April 2012.[167] Even during the crisis, fighting between the nationalist *Mouvement National pour la Libération de l'Azawad* (MNLA) and the jihadist groups Ansar Dine, the *Mouvement pour l'Unicité et le Jihad en Afrique de l'Ouest* (MUJAO), and al Qaeda in the Islamic Maghreb (AQIM) ensued, driving the MNLA from the major cities.[168] Even though the jihadist groups started to implement *shari'ah* law throughout the areas under their control, they 'failed to join forces or harmonise their agendas in order to establish an "Islamic State of Azawad" in northern Mali'.[169]

The crisis in the north was strongly enabled by political weakness in the capital. On 22 March 2012, a week before scheduled presidential elections, the Malian army had overthrown the sitting government of President Touré[170], which was initially welcomed by the population.[171] Nevertheless, particularly the African Union (AU) and the Economic Community of West African States (ECOWAS) met the coup with widespread international condemnation[172] and subsequently an interim government was established on 6 April 2012.[173] The Security Council on 5 July 2012, acting under Chapter VII, expressed its support for Interim President Traoré and called for a restoration of

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[167] Isaline Bergamaschi, 'French Military Intervention in Mali: Inevitable, Consensual yet Insufficient' (2013) 2 Stability: International Journal of Security and Development 1, p 1-2
[168] Ibid, p 1-2
[169] Ibid, p 3
[170] International Criminal Court, *Situation in Mali. Article 53(1) Report* (2013), para 35
[171] Bergamaschi, 'French Military Intervention in Mali: Inevitable, Consensual yet Insufficient', p 1
[172] International Criminal Court, *Situation in Mali. Article 53(1) Report*, para 36
[173] Bergamaschi, 'French Military Intervention in Mali: Inevitable, Consensual yet Insufficient', p 2

constitutional order.[174] Furthermore, the Security Council called on all groups in the north to stop hostilities[175] and expressed its support for actions by all partied 'aimed at seeking a peaceful solution to the situation in the North of Mali mindful of the sovereignty, unity and territorial integrity of Mali'.[176] Resolution 2056 contained strong language concerning groups affiliated with al Qaeda, reminding all states of their obligations under international law to act against al Qaeda and all entities associated with it.[177] Resolution 2056, however, did not authorize the AU, ECOWAS or other states to militarily intervene in Mali.

Following a continuing deterioration of the situation in the north, posing severe problems for the territorial integrity of Mali, the transitional authorities requested military assistance by ECOWAS on 1 September 2012 and called on the Security Council, on 18 September 2012, to provide authorization for such a force.[178] This authorization was forthcoming on 20 December 2012 in resolution 2085, which authorized the

> 'deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall take all necessary measures, in compliance with applicable international humanitarian law and human rights law and in full respect of the sovereignty, territorial integrity and unity of Mali'[179]

It soon became apparent, however, that AFISMA would not be able to deploy before September 2013 and that NATO would not intervene in Mali, Traoré travelled to Paris to request bilateral assistance from France on 9 January 2013. The French Operation Serval began on 11 January 2013 based on the consent of the Malian interim authorities, even though Paris similarly

[174] S/RES/2056 (2012), paras 2-8
[175] Ibid, para 9
[176] Ibid, para 11
[177] Ibid, paras 19-24
[178] S/RES/2071 (2012)
[179] S/RES/2085 (2012), para 9

made references to Article 51 of the Charter according to Le Monde.[180]

In assessing the legality of the operation, one must look at the various possibilities available to the French government. First, the French intervention was certainly not authorized by resolution 2085, which did not include provisions for member states to act outside of AFISMA.[181] Similarly, relying on Article 51 seems nonsensical since there was no direct attack by any of the groups in the north on France and the Malian government could not rely on Article 51 to use force against domestic insurgents in collective self-defence.[182] It shows however an interesting tendency, which will also become apparent in the case of Yemen below, that states feel the need to frame their actions as self-defence when intervening or requesting outside assistance, even in situations where this justification is not necessary. One possible factor for this might be that the French government, at the time, was not sure to what extent the interim authorities were authorized, under international law, to consent to the use of force on its territory.

However, no state seriously questioned the legality of the operation and Resolution 2100, while only directly authorizing French support to the rehatted AFISMA mission under the banner of the UN[183], nevertheless welcomed 'the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali'.[184]

Nevertheless, the legality of the intervention would be tainted, at least, if one were to consider the Malian conflict as a

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[180] Delphine Roucaute, 2013, 'Mali: l'opération "Serval" est-elle légale?, 1 April 2013' Le Monde <http://www.lemonde.fr/afrique/article/2013/01/14/mali-l-operation-serval-est-elle-legale_1816877_3212.html> accessed 13 April 2015
[181] See e.g. S/RES/2085 (2012), para 9-12,13-16
[182] Corten, *The Law Against War*, p 130f
[183] S/RES/2100 (2013), para 18
[184] Ibid

civil war, for which there are very good reasons. First, as noted above, control of territory is one possible indicator for the existence of a civil war, and the existence of the unrecognized state of Azawad, declared and defended by various armed groups, is hard to ignore. Furthermore, the fact that it needed an outside intervention by France *and* regional organizations, alongside the UN, should be taken as a strong sign that the situation in Mali had plainly risen above the threshold of domestic disturbances. Nevertheless, both the Secretary General, who 'applauded France for its courageous decision to deploy forces'[185], as well as the Security Council[186] did not question the legality of the intervention. In the Council, the representative from Côte d'Ivoire, on behalf of ECOWAS, 'express[ed] [its] sincere gratitude to France for its leadership in handling the crisis in Mali'[187], and the European Union similarly 'welcomed the rapid response of France, with the support of other members of the European Union and a number of African countries, to the request from the President of Mali for military assistance against terrorist and criminal groups'.[188] Nevertheless, it would go too far to argue that the Malian case has severely undermined the prohibition to intervene in civil wars at the request of a government. It has to be remembered that the Council had already authorized *an* intervention in the country, even though it did not cover the specific form of the French intervention.[189] Still, the fact that the international community had already decided to put troops on the ground should be a factor in determining whether an outside state may legally intervene. A second line of argument, particularly attractive in the context of jihadism

[185] The Situation in Mali, 6905th Meeting Security Council Meeting, 22 January 2013, S/PV.6905, p 2
[186] S/RES/2100 (2013)
[187] The Situation in Mali, 6905th Meeting Security Council Meeting, 22 January 2013, S/PV.6905, p 9
[188] Ibid, p 18
[189] S/RES/2085 (2012)

and the increased focus on 'foreign fighters'[190], could be that a conflict with an armed group with a significant foreign element cannot qualify as a 'civil war'. It is questionable, however, to what extent jihadist groups active in the Malian theatre were composed of foreigners as opposed to local Arab tribes.[191] The MNLA, even though only representing around 10 percent of the population in the north[192], nevertheless is a local/regional organization.

2.2. The Conflict in Yemen

The situation in Yemen following the Houthi takeover, even though not directly aimed at jihadist groups, is nevertheless an interesting case to study. Following advances by the Shia Houthi militias, President Hadi resigned, yet rescinded his resignation in February 2015. In a letter dated 24 March to the heads of state of Saudi Arabia, the United Arab Emirates, Oman, Kuwait and Qatar, he asked these countries to support the Yemeni effort to drive back both the Houthi rebels, as well as al Qaeda and the Islamic State.[193] The relevant paragraph from Hadi's letter reads as follows:

> I therefore appeal to you, and to the allied States that you represent, to stand by the Yemeni people as you have always done and come to the country's aid. I urge you, in accordance with the right of self-defence set forth in Article 51 of the Charter of the United Nations, and with the Charter of the League of Arab States and the Treaty on Joint Defence, to provide immediate support in every form and take the necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression, repel the attack that is expected at any moment on Aden and the other cities of the South, and help Yemen to confront Al-Qaida and Islamic State in Iraq and the Levant.[194]

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[190] See e.g. Daniel L Byman and Jeremy Shapiro, *Be Afraid. Be A Little Afraid: The Threat of Terrorism from Western Foreign Fighters in Syria and Iraq* (Brookings 2014); see also S/RES/2178 (2014)
[191] Wolfram Lacher and Denis M Tull, 'Mali: Jenseits von Terrorismusbekämpfung' (2013) 9 SWP-Aktuell 1, p 3
[192] Arieff, *Crisis in Mali*
[193] See n 194 below
[194] Letter dated 24 March 2015 from Abraduh Mansour Hadi to the heads of state of Saudi Arabia, United Arab Emirates, Oman, Kuwait and Qatar, cited in Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to

On 27 March, the Qatari ambassador to the United Nations, representing the above-mentioned countries, informed the Security Council of their imminent military response to the situation.[195]

The Saudi-led intervention appears to be a clear example of an intervention by invitation, based on the consent of the host state. What complicates this instance is President Hadi's resignation[196], which he retracted following his escape from house arrest.[197] Hadi's resignation, according to Al Arabiya, had never been formally accepted by the Yemeni parliament as demanded by the Constitution.[198] Domestically, this situation was furthermore complicated by the fact that Hadi's term was about to expire. However, if the country is in a state of war, suffering from a natural disaster or another emergency situation, the outgoing President may stay in office for a maximum of another 90 days.[199] While it is for Yemeni lawyers to discuss whether Hadi was still the president of Yemen when he invited foreign states to intervene, it is certainly worth noting that at least in the eyes of the above-mentioned coalition this was still the case. Similarly, the Security Council, on 22 March 2015, issued a presidential statement

> support[ing] the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi, and call[ing] upon all parties and Member States to refrain from taking any actions that undermine the unity, sovereignty, independence and territorial integrity of Yemen, and the legitimacy of the President of Yemen.[200]

Certainly, Hadi saw himself as the acting head of state, making it even more surprising that he would find it necessary

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the Secretary-General and the President of the Security Council, S/2015/217, 27 March 2015, p 4-5

[195] Ibid, p 4-5

[196] Al Arabiya, 2015, 'Yemeni President Hadi resigns from office, 23 January 2015' Al Arabiya News <http://english.alarabiya.net/en/News/middle-east/2015/01/22/Yemen-government-offers-resignation.html> accessed 7 April 2015

[197] Ibid

[198] Constitution of the Republic of Yemen as ammeded by Parliament, September 29, 1994, art 114

[199] Ibid, art 113

[200] United Nations Security Council, *Statement by the President of the Security Council, On the Situation in Yemen, 22 March 2015, S/PRST/2015/8* (2015)

to appeal to the coalition of Arab countries to act under, *inter alia*, Article 51 of the Charter. As Corten has pointed out, there is no need to justify action against domestic insurgents within a self-defence paradigm, since these cases fall within the monopoly of violence of the territorial state[201] and the Houthis had not crossed any international boundaries.

A competing possibility would be that Hadi saw it necessary to justify any potential intervention as self-defence, since, in his and the Arab allies' view, it not only involved local militias but also 'regional powers', i.e. Iran.[202] This would transform the situation from one of a domestic civil war to the use of force by one state against another in violation of Article 2(4) of the Charter. The intervention, then, could be seen as an act of collective self-defence against Iran. This interpretation, however, seems unsatisfying on multiple levels. First, it seems unlikely that Iran exercised effective control over the Houthis. The appropriate test is found in *Nicaragua*[203], and in as far as it seems unlikely that Iran provides support exceeding that of the provision of weapons and materiel, which the ICJ has found not to amount to an armed attack within the meaning of Article 51[204], there is no credible evidence to support a position that would see the Houthis as agents of Iran.

Second, despite the strong rhetoric deployed in the alliance's letter, the justification brought forward does not actually support the assumption that the regional forces, 'which are seeking to extend their hegemony over Yemen and use the country as a base from which to influence the region'[205], are the

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[201] Corten, *The Law Against War*, p 130f
[202] Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/217, 27 March 2015
[203] *Nicaragua*
[204] Ibid, paras 191-195
[205] Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/217, 27 March 2015, p 5

primary reason for the alliance's intervention, even though the Houthis 'have always been a tool of outside forces that have constantly sought to undermine the safety and stability of Yemen'[206]. Rather, it is characterized as a threat to the territorial integrity of Yemen, as well as a direct threat to Saudi Arabia posed by the Houthis, given the 'presence of heavy weapons and short and long-range missiles beyond the control of the legitimate [Yemeni] authorities', their failure 'to respond to repeated warnings from the States members of the Gulf Cooperation Council and the Security Council', their continued violation of international law as well as building up 'a military presence, including heavy weapons and missiles, on the border of Saudi Arabia'.[207]

Finally, it has to be noted that it is ultimately not clear whether the alliance is relying on Article 51 to justify the intervention in Yemen. While Hadi specifically relies on self-defence in his appeal, the alliance leaves the legal base for its intervention open. While the letter by the respective ambassadors to the Secretary General and the President of the Security Council might be seen as being in fulfilment of the reporting requirements of Article 51, nowhere does their letter make any reference to either self-defence or the Article 51. One can therefore only guess whether the alliance relies on consent or self-defence.

While both the intervention in Mali and Yemen are hard to reconcile with the prohibition to intervene in civil wars *sensu stricto*, the Yemeni example sits particularly uneasy with the prohibition. In Mali, it has been shown above, the Security Council had broadly authorized force in the country. The French intervention, therefore, has to be evaluated in the context of a

[206] Ibid, p 5
[207] Ibid, p 5

situation where the already authorized intervention force could not readily deploy and bilateral actors worked generally within the framework of the resolution, even though it was not addressed to them. In Yemen, on the other hand, no such resolution exists. Even though the Security Council, in Resolution 2140, determined that the situation in Yemen constituted a threat to international peace and security and, acting under Chapter VII, green-lighted a broad set of political and punitive measures, it did not authorize the use of force.[208] Resolution 2201 reminded all parties to find a peaceful solution, but again stopped short of an authorization of force.[209] Nevertheless, the outside intervention by the Gulf Cooperation Council (GCC) has drawn little criticism and thus would provide a stronger basis for an argument that the prohibition of intervention in civil wars is weakening or obsolete. What the Yemeni example illuminates, however, is how intervention might even be detrimental to counterterrorism efforts. Media reports suggest that one of the biggest benefactors of the outside intervention was in fact not the Yemeni state, but al Qaeda in the Arabian Peninsula.[210] This feeds into a more general tendency to underestimate the affiliates' possibility to capitalize on state weakness and tighten their grip on territory, while simultaneously use this territory to stage attacks both on regional states as well as the West.[211] In many such cases the territorial state will be in a weak position to act against those groups, simply because these groups would

[208] S/RES/2140 (2014)
[209] S/RES/2201 (2015)
[210] Cooper and Schmitt, 'Al Qaeda Is Capitalizing on Yemen's Disorder, U.S. Warns'
[211] See e.g. Daveed Gartenstein-Ross, 'Al Qaeda's Big Year: How the terrorist group made a comeback in 2013' *Politico Magazine* (29 December 2013) <www.politico.com/magazine/story/2013/12/al-qaeda-2013-101477_full.html?print> accessed 15 February 2014; Daveed Gartenstein-Ross and Bridget Moreng, 2015, 'Al Qaeda Is Beating the Islamic State, April 14, 2015' Politico <http://www.politico.com/magazine/story/2015/04/al-qaeda-is-beating-the-islamic-state-116954_full.html> accessed 15 April 2015

not be in a position to make gains in the first place if state authorities had more control over their territory. Consent is one way to allow outside states to support the territorial state's fight against these groups and if the above cases are any indication the threshold for governmental legitimacy required to invite intervention is not particularly high.

3. Conclusion

From the outset it has to be restated that indirect action, i.e. engagement through the host state, is the preferable option to respond to threats by insurgent jihadist VNSAs, as it is not only the sounder option under international law, but also confers various policy advantages in a counterinsurgency situation. Most importantly, it provides the opportunity to strengthen the legitimacy of the host state government and protects its territory from the use of force by an outside actor. To this end, more research is needed to delineate the range of possible action in a proxy war, especially with regards to human rights law. The limits to which victim states may be able to share intelligence with a host state, in order to enable the state to take preventive countermeasures, are an open question, especially in situations where it is possible that such intelligence sharing arrangements may lead to human rights violations.

Nevertheless, there may and will be situations where states will have to resort to the use of extraterritorial use of force in self-defence in response to or in prevention of an armed attack materializing. It was argued here that such a use of force against a VNSA is permissible within the current structure of international law, as long as it is necessary and proportionate, if the host state is unable *and* unwilling to act. The latter limitation is necessary to strike a balance between the victim state's

security and the host state's sovereignty. Whether the host state is willing and able should therefore be seen as an integral part of the necessity assessment. It is argued that states should be able to "accumulate" several low-intensity attacks in their determination whether an armed attack by a violent jihadist non-state actor has occurred, but this accumulation should be limited to a single actor, which includes affiliate organizations in the case of al Qaeda and the Islamic State, and these attacks should be directed against the same state. If an actor directs various attacks against several states, and these attacks by themselves do not amount to an armed attack against one of these states, it would be the responsibility of the Security Council to determine whether armed force is warranted.

Second, proportionality, in the case of VNSAs, should be understood to require a disproportionately lower response in many cases, requiring states to employ extraterritorial law-enforcement measures wherever feasible. Again, these actions should be restricted to those in self-defence and a widespread return to extraordinary rendition should be resisted. This would serve a dual function of i) safeguarding a state's sovereignty and the human rights of its citizens while ii) also limiting potential backlash from an overreliance on lethal force.

Third, as conflicts with jihadist organizations will rarely rise to the level of a civil war, states can consent to the use of force by outside actors on their territory. The cases of Mali and Yemen suggest that the threshold for regime legitimacy as reasonably low and, as the case of Mali further shows, the Security Council can play an important role in authorizing such operations.

Having thus established that states may use force against jihadist VNSAs extraterritorially, it is now time to turn to the *jus in bello* to determine when such organizations become legitimate targets.

4 | GLOBAL WAR AND THE LAWS OF ARMED CONFLICT

The United States has continuously[1] and controversially[2] claimed that, after the attacks of September 11, 2001, it has been engaged in a global armed conflict with al Qaeda and groups linked to it.[3] What stands out is that both belligerent sides seem to be in agreement that this is indeed a military confrontation that crosses the threshold of, for the lack of a better word, "war". This denominator seems equally appropriate since, even though the label "war on terror" has been officially dropped, senior US policymakers continue to refer to the '*war* with al Qaeda'.[4] Al Qaeda, through statements made by Osama bin Laden on behalf of the organization, initially declared war on the United States in 1996 and 1998 respectively.[5] A similar position was advanced by self-appointed Islamic State (IS) caliph Abu Bakr al-Baghdadi in his 2014 message to believers

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[1] See e.g. Harold Hongju Koh, *Statement by Harold Hongju Koh before the Senate Foreign Relations Committee Regarding Authorization for Use of Military Force After Iraq and Afghanistan, May 21, 2014* (2014)
[2] See e.g. Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position* (European Council on Foreign Relations 2013), p 7
[3] See e.g. United States Senate Committee on Armed Services, *The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force, Hearing Before the Committee on Armed Services, United States Senate, One Hundred Thirteenth Congress, First Session, S. HRG. 113–282, 16 May 2013* (United States Senate Committee on Armed Services 2013)
[4] See e.g. Ibid, Statement by Robert S. Taylor, then Acting General Counsel Department of Defense, pp 6-30, emphasis added
[5] 1996 Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Mosques; Expel the Heretics From the Arabian Peninsula; 1998 World Islamic Front's Statement Urging Jihad Against Jews and Crusaders, in Osama Bin Laden, *Compilation of Usama bin Laden Statements 1994 - January 2004* (FBIS Report 2004), pp 13-28; pp 56-58

worldwide, calling upon the 'soldiers of the Islamic State' to 'fight, fight!' until the 'day […] when the Muslim will walk everywhere as a master'.[6]

It is important to remember that the United States—or any other state—initially did not agree with the characterization of war. Former President Clinton, in reporting to Congress after the USS Cole bombing in 2000 by al Qaeda, did not frame the attack as an act of war[7], even though the United States used military force in response to terrorist attacks.[8] This position was only fundamentally altered after 9/11. Following terrorist attacks in Europe, it is possible to observe tendencies of militarization of both the rhetoric and policy of counterterrorism efforts, similar to American responses after 9/11, elsewhere. While George W. Bush, in an address to a joint session of Congress on 20 September 2001, claimed that al Qaeda had 'committed an act of war against our country'[9], former French President Hollande called the terrorist attacks in Paris on 13 November 2015 'an act of war perpetrated by a terrorist army'[10] and promised his country a 'merciless' war against the Islamic State.[11]

The question then, as it is now, circles around the perceived tension between what is required to safeguard the national security of the state and the limits of what is permissible

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[6] Abu Bakr Al-Husayni Al-Qurashi Al-Baghdadi, 2014, 'A Message to the Mujahidin and the Muslim Ummah in the Month of Ramadan' <https://ia902501.us.archive.org/2/items/hym3_22aw/english.pdf> accessed 9 July 2014

[7] William Clinton, 'Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the U.S.S. Cole, 14 October 2000' in *Public Papers of the Presidents of the United States, Book 3* (Office of the Federal Register National Archives and Records Administration 2000)

[8] See e.g. *El–Shifa Pharmaceutical Industries Co. v. U.S.*, 607 F3d 836 (DC Cir 2010)

[9] George W Bush, *Selected Speeches of President George W. Bush* (White House Archives 2001-2008), p 65

[10] BFMTV, 'Attentats à Paris: Hollande accuse Daesh "d'acte de guerre"' *BFMTV* <http://www.bfmtv.com/politique/attentats-a-paris-francois-hollande-accuse-daesh-d-acte-de-guerre-930121.html#> accessed 4 December 2015, author's translation

[11] John Lichfield, 'Paris attacks: How Francois Hollande's pledge of 'merciless' war on Isis scattered his right-wing critics' *The Independent* (18 November 2015) <http://www.independent.co.uk/news/world/europe/paris-terror-how-francois-hollandes-hard-line-speech-scattered-his-right-wing-critics-a6738476.html> accessed 4 December 2015

for the state to achieve this aim. The question 'what do we *have* to do?' cannot be seen separately from 'what are we *allowed* to do?'. In the words of Judge Walton, writing in the *Gherebi* case before the United States District Court of Columbia in 2009, 'Common Article 3 [of the Geneva Conventions] is not a suicide pact'.[12] The answer, of course, can neither be that everything that one might perceive necessary must be legal, nor that everything that is perceived illegal could not be necessary. It is the unfortunate reality that violent non-state actors (VNSAs) have a relatively short history as threats to international peace and security despite their long and violent record at the domestic level.

Therefore, there is comparably little guidance for states that has stood the test of time to be found in international law in how to confront these threats. It is of course true that the law regarding non-international armed conflicts has expanded considerable between the drafting of the Geneva Conventions (GC) in 1949, where Article 3 common to all four GC (CA 3) first attempted to provide minimum protections for cases 'of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'[13], and the present. The Second Additional Protocol to the GC in 1977 for the first time not only included protections for the civilian population but also rules for the conduct of hostilities.[14] The jurisprudence of the International Criminal Court for the Former Yugoslavia[15] and the study of the International Committee of the Red Cross

[12] *Gherebi v. Obama*, 609 FSupp2d 43 (DDC 2009), p 67
[13] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949., Common Article 3 (CA 3)
[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
[15] See e.g. *Prosecutor v. Dusko Tadic*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995

(ICRC)[16] accepted many of the more developed rules of international armed conflicts (IACs)—that is armed conflicts between sovereign states—as customary international law.

The development of the law of NIACs, however, has been driven by a security environment faced by states in the past. It is acknowledged that prior conflicts ranged from high-intensity clashes between highly organized armies, such as the American Civil War[17], to insurgencies that followed the Maoist conception of relatively small rural insurgencies that would eventually result in the build up of a competent army.[18] It is furthermore acknowledged that even the seemingly 'global' insurgents of al Qaeda more often than not try to follow the Maoist blueprint.[19] Where the history of LOAC departs from current practice, in the context of jihadist groups, is that prior insurgencies used to be, more or less, strictly national. They occurred on the territory of a single state, the government of which the insurgency tried to overthrow. Even in the process of decolonization, which aimed at expelling foreign governments, the end goal was never reversing the situation by invading the colonial power in a fashion described in chapter 1. It is therefore not surprising that the law of NIACs follows the general structure of international relations as perceived by realist theorists, with states being the only legitimate actors in the international arena.[20]

While not all jihadists are internationalists, the two groups used as a case study in this thesis certainly are. Through their global insurgent project, as described in more detail in chapters

[16] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press 2009)
[17] Francis Lieber, *Guerilla Parties Consideres with Reference to the Laws and Usages of War* (D Van Nostrand 1862)
[18] Tse-tung Mao, *Fleet Marine Force Publication 12-18, Mao Tse-tung on Guerilla Warfare* (U.S. Marine Corps 1989)
[19] Norman Cigar and 'Abd Al-Aziz Al-Muqurin, *Al-Qa'ida's Doctrine for Insurgency: 'Abd Al-Aziz Al-Mqurin's 'A Practical Course for Guerilla War'* (Norman Cigar tr, 2009), See Introduction
[20] Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (1st edn, Alfred A Knopf 1948); Kenneth N Waltz, *Theory of International Politics* (Addison-Wesley Publishing Company 1979)

1 and 2, al Qaeda and the Islamic State have directly challenged Western security. They may have done so because they perceive Western power and interests as a threat to their cause[21] or out of a genuine, although unrealistic, aspiration to rule the world.[22] While transnationalism is ingrained in both al Qaeda and the Islamic State, two issues must be distinguished. The first is situated on the tactical level and may be called tactical internationalism. Tactical internationalism can be found in the decision by Osama bin Laden to target the far enemy—primarily the United States and some European countries—instead of the near enemy of regimes in the Middle East.[23] In Bin Laden's rationale, the biggest obstacle to the overthrow of 'apostate' regimes and the establishment of the Caliphate was the support given by the far enemy to the near enemy, and thus going after the near enemy would be pointless as long as the far enemy was in a position of power.[24] This type of internationalism is not driven by the desire to contest western territory, but rather represents a tactical decision for the realization of a strategic goal.

The second issue relates to the establishment of the global Caliphate itself and can be observed in the expansionist policies of the Islamic State[25] but also in the expansion of Boko Haram into neighbouring states.[26] In this type of internationalism, even if the West completely withdraws from the areas they now claim and control, the restoration of the Caliphate would still bring them into conflict with states currently existing in the region.

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[21] Fawaz A Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge University Press 2009)
[22] Aaron Y Zelin, 2014, 'The Clairvoyant: Colonial Caliphate: The Ambitions of the "Islamic State", 8 July 2014' Jihadology <http://jihadology.net/2014/07/08/the-clairvoyant-colonial-caliphate-the-ambitions-of-the-islamic-state/> accessed 22 July 2015
[23] Gerges, *The Far Enemy: Why Jihad Went Global*
[24] Martin Rudner, 'Al Qaeda's Twenty-Year Strategic Plan: The Current Phase of Global Terror' (2013) 36 Studies in Conflict & Terrorism 953, p 961; See also Gerges, *The Far Enemy: Why Jihad Went Global*
[25] Zelin, 'The Clairvoyant: Colonial Caliphate: The Ambitions of the "Islamic State", 8 July 2014'
[26] Virginia Comolli, *Boko Haram: Nigeria's Islamist Insurgency* (Hurst 2015)

The third, yet generally unrelated, issue is the crossover of personnel and collaboration between different affiliate organizations, which can exist in either scenario.

The overall question asked in this chapter is then reasonably straightforward and tries to straddle the line between law and policy: Is the law of armed conflict (LOAC) adequately equipped to accommodate necessary countermeasures against a networked transnational actor as described in chapters 1 and 2? In order to answer it, it will of course first be necessary to briefly establish which measures are necessary to counter such groups in light of their tactics and geographic distribution.

In a second step, it will then be possible to revisit the question of the global armed conflict, in light of the framework of affiliated and associated groups developed in chapter 2, with a particular focus on the policy issues developed in the preceding part. It will be argued that while, due to the unitary understanding of al Qaeda and the Islamic State that incorporates affiliate organizations, there may be a general conflict with either of them, this does not mean that this conflict is truly global and that therefore the use of military force is possible always and everywhere. In this respect, the restraining force of the *jus ad bellum* outlined in the previous chapter must also be kept in mind. Rather it is limited to those areas where either organization is sufficiently organized and operates above the required threshold of violence. The argument put forward accommodates both the fact that al Qaeda increasingly relies on its affiliate organizations to do its bidding[27], as well as putting restraints on an overinclusive understanding of armed conflict. A special consideration will be given to the issue of terrorist attacks in the

[27] See e.g. Barak Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences* (Oxford University Press 2016); see also National Consortium for the Study of Terrorism and Responses to Terrorism (START), 2015, 'Annex of Statistical Information, Country Reports on Terrorism 2014' <http://www.state.gov/documents/organization/239628.pdf> accessed 3 December 2015

West, which are the preferred weapon of choice of these groups to strike against Western targets.

1. Fighting a Transnational Insurgency

In order to assess the role LOAC needs to serve in fighting a transnational insurgency, one must look at how they are fought and which factors enable them. Insurgency can be defined as 'an organized, protracted politico-military struggle designed to undermine the legitimacy of an established government, occupying power or other political authority while increasing insurgent control'.[28] In transnational insurgencies, this includes the governments of the states in which these groups operate, in as far as they are the direct targets from which political legitimacy should be removed, and the territories which should become part of the territory of the Caliphate, while weakening other actors, such as the United States, which might work to strengthen those governments. Chapters 1 and 2 have shown the extent of the claimed territory as well as the political and religious ideology that drives this expansion. For al Qaeda, this insurgency is fought almost exclusively by affiliate organizations, which are nevertheless an integral part of al Qaeda.[29] The Islamic State, on the other hand, had managed to establish a heartland from which it was trying to expand, while simultaneously trying to extend its territory by accepting pledges of allegiance from affiliate organizations.[30] At the time of writing, these heartlands are increasingly contested and the Islamic State suffers loss of control. Even these in-theatre operations,

[28] Department of the Army, *FM 3-24 Counterinsurgency* (2006), p 2
[29] Mendelsohn, *The al-Qaeda Franchise: The Expansion of al-Qaeda and Its Consequences*; see also ch 2 of this thesis
[30] Aaron Y Zelin, *The Islamic State's Archipelago of Provinces* (The Washington Institute for Near East Policy 2014); Zelin, 'The Clairvoyant: Colonial Caliphate: The Ambitions of the "Islamic State", 8 July 2014'

however, are not purely national but include an element of transnationalism, in as far as insurgents not only use neighbouring territories as areas to retreat and regroup, but actively claim territory for the Caliphate.

At the same time, while the era of predominantly targeting the far enemy seems to be over[31], both the Islamic State and al Qaeda continue to see the United States and various European states as direct threats to their political goals. After the terrorist attacks in Paris in 2015, a spokesman of the Islamic State warned

> Let France and all nations following its path know that they will continue to be at the top of the target list for the Islamic State […] as long as they partake in the crusader campaign, […], and as long as they boast about their war against Islam in France and their strikes against Muslims in the lands of the Caliphate with their jets, which were of no avail to them in the filthy streets and alleys of Paris.[32]

Increasingly, this pledge seems to be taken on by radicalized individuals, which claim to act in the name of the Islamic State. Such attacks usually strike civilian targets and are later claimed by the Islamic State. Examples include but are not limited to an attack on a Christmas market in Berlin, Germany in December 2016 [33], an axe attack on train passengers in Wuerzburg, Germany, in July 2016[34], an attack using a truck in Nice, France, on Bastille Day in July 2016[35], a vehicle-based attack on 22 March 2017 on Westminster Bridge[36] and on 3 June on London Bridge[37] in London, a suicide bombing in Manchester

[31] See ch 2 of this thesis
[32] Thomas Joscelyn, 2015, 'The Islamic State Claims Responsibility for Paris Attacks' The Long War Journal <http://www.longwarjournal.org/archives/2015/11/the-islamic-state-clams-responsibility-for-paris-attacks.php> accessed 22 April 2016
[33] Heil, 2017 #3427}
[34] Hans Leyendecker and Georg Mascolo, 'Die Chats der Attentäter von Würzburg und Ansbach mit dem IS' *Süddeutsche Zeitung* (14 September 2016) <http://www.sueddeutsche.de/politik/2.220/terror-die-chats-der-attentaeter-von-wuerzburg-und-ansbach-mit-dem-is-1.3161419> accessed 20 September 2016
[35] Alissa J Rubin and Aurelien Breeden, 'ISIS Claims Responsibility for Attack in Nice, France' *The New York Times* (16 July 2016) <http://nyti.ms/29Xz5AD> accessed 16 July 2016
[36] Jason Burke, 'Crude nature of Westminster attack suggests limited Isis network in Britain' *The Guardian* (23 March 2017) <https://www.theguardian.com/uk-news/2017/mar/23/crude-nature-of-attack-suggests-lack-of-isis-network-in-britain> accessed 7 October 2017
[37] Lizzie Dearden and May Bulman, 'London terror attack: Isis claims responsibility amid group's 'call for increased attacks'' *The Independent* (4 June 2017) <http://www.independent.co.uk/news/uk/home-news/london-terror-attack-isis-claims-responsibility-borough-market-bridge-a7772776.html> accessed 7 October 2017

on 22 May 2017[38], and a shooting in San Bernardino, United States, in December 2015.[39] The impact of this with regards to LOAC will be analysed in more detail below.

Far from being able to pose a significant military threat to the West, this exemplary statement shows many of the features of what Thomas Hammes has described as fourth generation warfare (4GW), which 'uses all available networks—political, economic, social, and military—to convince the enemy's political decision makers that their strategic goals are either unachievable or too costly for the perceived benefit.'[40]

Terrorist tactics usually form an integral part of such an overall strategy. The US Department of State, relying on the definition contained in Title 22 of the United States Code (U.S.C.), Section 2656f(d), sees terrorism as 'premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience'.[41] Contrary to the conventional meaning of 'noncombatant', the State Department definition also includes military personnel if they are unarmed or not on duty at the time of the attack, as well as military installations and armed military personnel if they are outside of a theatre where an armed conflict is taking place.[42]

For the Federal Bureau of Investigation (FBI), terrorism are activities that

> involve violent acts or acts dangerous to human life that violate federal or state law; appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation

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[38] Rukmini Callimachi and Eric Schmitt, 'Manchester Bomber Met With ISIS Unit in Libya, Officials Say' *The New York Times* (3 June 2017) <https://www.nytimes.com/2017/06/03/world/middleeast/manchester-bombing-salman-abedi-islamic-state-libya.html> accessed 7 October 2017

[39] Thomas Joscelyn, 2015, 'Islamic State issues first official statement on San Bernardino terrorist attack' The Long War Journal <(http://www.longwarjournal.org/archives/2015/12/islamic-state-issues-first-official-statement-on-san-bernardino-terrorist-attack.php> accessed 7 December 2015

[40] Thomas X Hammes, *The Sling and the Stone: On War in the 21st Century* (Zenith Press 2006), p 2

[41] 22 U.S.C. § 2656f(d)(2)

[42] United States Department of State, *Patterns of Global Terrorism* (US Department of State 2003), p xii, footnote 1

> or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping;

and either

> occur primarily outside the territorial jurisdiction of the U.S., or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum

to constitute international terrorism, or

> occur primarily within the territorial jurisdiction of the U.S.

to constitute domestic terrorism.[43] This definition is mirrored in the Foreign Intelligence Surveillance Act (FISA), which replaces 'primarily' with 'totally' outside of the United States.[44]

The Department of Defense defines terrorism as

> [t]he unlawful use of violence or threat of violence, often motivated by religious, political, or other ideological beliefs, to instill fear and coerce governments or societies in pursuit of goals that are usually political.[45]

Striking at the heart of European cities, or attempting to bring down an airliner as al Qaeda in the Arabian Peninsula (AQAP) tried in 2009[46], are aimed at convincing policy makers and the Western public not to engage these groups. While it may of course be argued that the appropriate response would be to cease interventionism, in its entirety this argument is unconvincing. While some interventions, especially the US invasion of Iraq in 2003 are difficult to justify under international law[47], the French intervention in Mali[48], which was, *inter alia*, directed against al Qaeda in the Islamic Maghreb (AQIM), was in response to the loss of governmental control of some areas of the country.[49] The following training mission by the European Union, which sought to build up local capacity[50], fell victim to a

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[43] 18 U.S.C. § 2331
[44] 50 U.S.C. § 1801(c)(3)
[45] United States Department of Defense, *Joint Publication 1-02, Dictionary of Military and Associated Terms 8 November 2010 (As Amended Through 15 March 2014)* (2014), p265
[46] Gregory D Johnsen, 'AQAP in Yemen and the Christmas Day Terrorist Attack' [2010] CTC Sentinel 1
[47] Nigel D. White, 'The Will and Authority of the Security Council after Iraq' 17 Leiden Journal of International Law 645
[48] See ch 3, sec 2.1 of this thesis
[49] Claire Mills, Arabella Lang and Jon Lunn, *The crisis in Mali: current military action and upholding humanitarian law* (Standard Note SN06531, House of Commons 2013)
[50] European Council, 'Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali)' (2013) L14 Official Journal of the European Union 19

terrorist attack.[51] Similarly, Security Council Resolution 2249 (2015), in response to the continued threat to international peace and security by IS, called upon

> Member States that have the capacity to do so to take all necessary measures, in compliance with international law, […], on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda[52]

While the resolution's ambiguity does not help to resolve the legality of intervention under the *jus ad bellum*[53], what is of particular interest here are the policy implications. If states follow the Security Council's appeal—and there certainly are indications that the safe havens established constituted a threat to regional peace and security[54]—they might inadvertently become targets of terrorist violence themselves. Terrorism, in this case, is used as a deterrent by these organizations against foreign involvement. While Hepworth found no increase in terrorist violence in a two-month period following the killing of al Qaeda leaders[55], the short time period of the study, combined with the unpredictability of when such killings occur, and the time required to plan and execute a counterattack, may rather show that terrorist organizations have no readily deployable agents to carry out immediate retaliation. The quote by the Islamic State presented above, at least in theory, details how deterrence is used as a rhetorical device. While the focus of the following legal analysis will be on the situation of Western states, one must not forget that the brunt of the armed conflict usually

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[51] Tiemoko Diallo and Adama Diarra, 2016, 'Gunmen Attack EU Military Mission HQ in Mali; One Attacker Killed' Reuters accessed 22 March 2016

[52] S/RES/2249 (2015), para 5

[53] See Dapo Akande and Marko Milanovic, 2015, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' EJIL! Talk <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 21 November 2015

[54] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/2014/691, 22 September 2014

[55] Daniel P Hepworth, 'Terrorist retaliation? An analysis of terrorist attacks following the targeted killing of top-tier al Qaeda leadership' (2014) 9 Journal of Policing, Intelligence and Counter Terrorism 1

lies on the local state, which faces an often very serious threat to its territorial integrity.

While Western states may certainly face a danger from radicalization and terrorism from within[56], what is of interest here is confronting these groups extraterritorially or, in the context of detention, for actions that occur beyond the borders of the state. The insurgent nature of both al Qaeda and the Islamic State, including the fact that both hold and control territory from which they can plan and facilitate further attacks, has strong implications for what is necessary to counter them. The criminalization of individuals, which is the preferred method of European counterterrorism approaches[57], is not enough to dismantle or at least weaken these groups in the areas in which they are the strongest and thereby also relieve the pressure on local states. While it is impossible to generalize on the appropriate measures to counter an insurgency, which can only be seen in relation to the underlying causes[58], scholars usually agree that countering insurgencies requires a mix of political, economic, social, and military tools.[59] While a detailed analysis of the driving causes in all the various theatres in which al Qaeda and the Islamic State are active is impossible within the

[56] Joscelyn, 'Islamic State issues first official statement on San Bernardino terrorist attack'
[57] Council of the European Union, *Outline of the Counter-Terrorism Strategy for Syria and Iraq, with Particular Focus on Foreign Fighters* (5369/15, General Secretariat of the Council 2015)
[58] Scholars have long argued over the driving causes of non-state violence; see P. Collier, 'Greed and grievance in civil war' (2004) 56 Oxford Economic Papers 563 and P. Collier, A. Hoeffler and D. Rohner, 'Beyond greed and grievance: feasibility and civil war' (2008) 61 Oxford Economic Papers 1 for a discussion of economic motives; James D. Fearon and David D. Laitin, 'Ethnicity, Insurgency, and Civil War' (2003) 97 American Political Science Review 75 on ethnicity; Guilain Denoeux and Lynn Carter, *Guide to the Drivers of Violent Extremism* (USAID 2009) for reasons on why individuals may resort to terrorism; Stathis N. Kalyvas, 'The Ontology of "Political Violence": Action and Identity in Civil Wars' (2003) 1 Perspectives on Politics 475 for ideology vs local grievances; World Bank, *Conflict, Security, and Development. World Developmet Report 2011* (The World Bank 2011), p 79f for inequalities between groups; and Havard Hegre and others, 'Toward a Democratic Civil Peace? Democracy, Political Change, and Civil War, 1816–1992' (2001) 95 American Political Science Review 33 for the role of democratization on sub-state violence
[59] David Kilcullen, 'Counter-insurgencyRedux' 48 Survival 111, p 123; United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (United States Deparmtent of State 2009)

confines of this chapter, there can be no doubt that a combination of local grievances[60] and a transnational or expansionist ideology motivates these organizations, but not necessarily every individual member. Nigeria's Boko Haram, for example, was initially solely focused on Nigeria, yet increasingly embraces at least a regional outlook[61] and, through its affiliation with the Islamic State, now forms part of the self-proclaimed Caliphate.[62] While most foreign fighters who flocked to the Islamic State showed little interest in returning to the West in order to conduct terrorist attacks[63], the leadership continues to appeal to globalism.[64] In July 2017, Interpol circulated a list of 173 members of an international 'suicide brigade' compiled by US security services to Western security services.[65]

From a general policy perspective, it cannot be denied that military force alone is not enough to defeat these insurgencies. This requires a broad political strategy taking into account local particularities. On a more general level, however, it equally cannot be denied that military force has an important role as an enabler for political and social programmes. The imperative for security is blatantly obvious when one looks at the rise of the Taliban, which after years of infighting following Soviet invasion

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[60] The rise of the Islamic State in Iraq, *inter alia*, has been attributed to the disenfranchisement of the *Sunni* population by the *Shi'a* government, see Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (Regan Arts 2015); The al Qaeda insurgency is increasingly tapping into local grievances, see Shiraz Maher, 'Bin Laden's Final Triumph. From Riyadh via London to Damascus, Baghdad and ISIS – the Jihadist Surge' *New Statesman* (29 August 2014) 22; Al Shabaab, the Somali al Qaeda affiliate, always pursued a more local strategy relying on economic and political grievances to which it later added globalism, see S.J. Hansen, *Al Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005-2012* (Oxford University Press 2013), ch 1

[61] Comolli, *Boko Haram: Nigeria's Islamist Insurgency*

[62] Thomas Joscelyn, 2015, 'Islamic State spokesman publicly accepts Boko Haram's allegiance (13 March 2015)' The Long War Journal accessed 13 March 2015

[63] Brian Dodwell, Daniel Milton and Don Rassler, *The Caliphate's Global Workforce: An Inside Look at the Islamic State's Foreign Fighter Paper Trail* (Combating Terrorism Center at West Point 2016), p 29

[64] Zelin, 'The Clairvoyant: Colonial Caliphate: The Ambitions of the "Islamic State", 8 July 2014'; see also William McCants, *The Isis Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State* (Kindle edn, St. Martin's Press 2015)

[65] Lorenzo Tondo, Patrick Wintour and Piero Messina, 'Interpol circulates list of 173 suspected members of Isis suicide brigade' *The Guardian* (21 July 2016) <https://www.theguardian.com/world/2017/jul/21/isis-islamic-state-suicide-brigade-interpol-list> accessed 6 August 2017

of Afghanistan, managed to provide security[66] and some form of justice, through *Shari'ah* courts[67], to the population. Boots on the ground do therefore matter.[68] However, since what is at stake is primarily the legitimacy of the local government, it is preferable to employ local forces or, if these are not properly equipped, trained, and available, regional forces.[69]

From a Western policy perspective, two areas can be identified which are of particular importance within this chapter and those are i) the application of LOAC to safe havens of terrorist organizations and ii) the legality and limits of the use of lethal force against al Qaeda and the Islamic State, including its affiliate organizations, and its individual members. The crucial issue of the permissibility of extraterritorial apprehension of suspected terrorists through a state's own security forces with the intention of putting individuals responsible for planning and inciting terrorist attacks on trial will be addressed in chapter 5. Following this general introduction of policy issues, these two specific issues will be briefly introduced in more detail, before evaluating them with regards to the particular problems that arise within regards to LOAC. In fact, armed force has been increasingly used as an external measure to confront jihadist organizations extraterritorially. According to the journalist Jeremy Scahill, American Special Forces have been deployed to roughly 135 countries over the course of this conflict.[70] Yet, the majority if not all uses of kinetic force are restricted to areas where these organizations are already engaged in an armed conflict with the

[66] Amin Saikal, 'The Role of Sub-National Actors in Afghanistan' in Klejda Mulaj (ed), *Violent Non-State Actors in World Politics* (Hurst 2010), p 246
[67] David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One* (Oxford University Press 2009), p 47
[68] David Betz and Anthony Cormack, 'Iraq, Afghanistan and British Strategy' (2009) 53 Orbis 319, p 328
[69] See e.g. Matt Freear and Cedric De Coning, 'Lessons from the African Union Mission for Somalia (AMISOM) for Peace Operations in Mali' 2 Stability: International Journal of Security and Development
[70] See Jeremy Scahill, *Dirty Wars: The World is a Battlefield* (Kindle edn, Serpent's Tail 2013)

respective local governments and have managed to establish some sort of safe haven. So far, US drone strikes, often the weapon of choice, have been carried out in Afghanistan and Pakistan[71], Yemen[72], Somalia[73], Syria[74], and Iraq.[75] Other Western countries have similarly been active in areas where the actions of jihadist insurgents threatened the territorial integrity of local or regional states.[76] The United Kingdom has used drones in Afghanistan[77], Syria[78], and Iraq.[79]

2. Safe Havens and LOAC

Safe havens, as understood by the United States' counter-terrorism strategy, provide 'physical sanctuary of ungoverned or poorly governed territories, where the absence of state control permits terrorists to travel, train, and engage in plotting'.[80] Examples of such areas are parts of Libya, Mali, and Niger,

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[71] Patrick B Johnston and Anoop K Sarbahi, 'The Impact of U.S. Drone Strikes on Terrorism in Pakistan and Afghanistan'
[72] Michael S Schmidt, 'U.S. Strike in Yemen Kills Dozens in Qaeda Affiliate, Officials Say' *The New York Times* (22 March 2016) <http://nyti.ms/1q1dIUK> accessed 22 March 2016
[73] Phil Stewart, 'U.S. air strike in Somalia targets al Shabaab senior leader - Pentagon' *Reuters* (2 April 2016) <http://uk.reuters.com/article/uk-usa-somalia-airstrike-idUKKCN0WY5K6> accessed 3 April 2016
[74] Martin Chulov and Tom McCarthy, 'US drone strike in Syria kills top al-Qaida leader, jihadis say' *The Guardian* (27 February 2017) <https://www.theguardian.com/world/2017/feb/27/us-drone-strike-in-syria-kills-top-al-qaida-leader-jihadis-say> accessed 7 October 2017
[75] W.J. Hennigan, 'The U.S. is now routinely launching 'danger-close' drone strikes so risky they require Syrian militia approval' *Los Angeles Times* (15 August 2017) <http://www.latimes.com/world/la-fg-raqqah-drones-20170808-story.html> accessed 7 October 2017
[76] Examples are the French intervention in Mali, see International Criminal Court, *Situation in Mali. Article 53(1) Report* (2013), as well as the multilateral coalition against the Islamic State in Syria and Iraq, see Kenneth Watkin, 'Targeting "Islamic State" Oil Facilities' (2015) 90 International Law Studies 499
[77] Alice Ross, 2013, 'UK Drones Three Times More Likely Than US To Fire in Afghanistan' The Bureau of Investigative Journalism <https://www.thebureauinvestigates.com/stories/2013-09-06/uk-drones-three-times-more-likely-than-us-to-fire-in-afghanistan> accessed 7 October 2017
[78] Josie Ensor, 'RAF drone footage shows the moment a missile stops Isil carrying out a public execution' *The Telegraph* (20 September 2017) <http://www.telegraph.co.uk/news/2017/09/20/raf-drone-footage-shows-moment-missile-stops-public-execution/> accessed 7 October 2017
[79] Adam Lusher, 'UK drone pilots to get medals for killing from 2,000 miles outside the combat zone' *The Independent* (20 September 2017) <http://www.independent.co.uk/news/uk/home-news/uk-drone-pilots-get-medals-isis-iraq-syria-reaper-drone-strikes-killing-kill-terrorists-fighters-a7957356.html> accessed 7 October 2017
[80] Government of the United States, *National Strategy for Counterterrorism* (The White House 2011), p 9

which enable militants to retreat and regroup[81], as well as parts of Syria and Iraq[82], and other areas under the control of jihadist insurgents. Safe havens may be used for military training[83], religious studies[84], or other support activity. Safe havens can also be used to plan and facilitate terrorist attacks, for which there are strong indications in the case of both the attacks on the Charlie Hebdo newspaper in Paris in January 2015[85] and the coordinated attacks in Paris in November 2015.[86] Williams has argued that continued pressure by Western counterterrorism efforts have made it more difficult for al Qaeda to strike targets in the West by denying the group safe havens to plan and facilitate such attacks.[87] Conversely, Islamic State attacks in Paris in November 2015[88] and in Brussels in March 2016[89] were allegedly planned and directed in part from the IS sanctuary in Syria.[90] The importance of safe havens therefore has been consistent and can be observed through the history of al Qaeda and the Islamic State.

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[81] Wolfram Lacher, *Organised Crime and the Conflict in the Sahel-Sahara Region* (Carnegie Papers 2012); Wolfram Lacher, 'The Malian Crisis and the Challenge of Regional Cooperation' 2 Stability: International Journal of Security and Development
[82] S/RES/2249 (2015), para 5
[83] *Al-Adahi v. Obama*, 613 F3d 1102 (DC Cir 2010), p 1108
[84] Dodwell, Milton and Rassler, *The Caliphate's Global Workforce: An Inside Look at the Islamic State's Foreign Fighter Paper Trail*
[85] Pamela Brown and Patrick Paton Walsh, 2015, 'France tells U.S. Paris suspect trained with al Qaeda in Yemen' CNN <http://edition.cnn.com/2015/01/08/politics/paris-suspects-al-qaeda-yemen/index.html> accessed 10 January 2015
[86] Anthony Falola and Souad Mekhennet, 'Paris Attacks Were Carried Out by Three Groups Tied to Islamic State, Offical Says' *The Washington Post* (15 November 2015) <https://www.washingtonpost.com/world/string-of-paris-terrorist-attacks-leaves-over-120-dead/2015/11/14/066df55c-8a73-11e5-bd91-d385b244482f_story.html> accessed 15 November 2015
[87] Jennifer Williams, 2015, 'The Bureaucracy of Terror' Foreign Affairs <https://www.foreignaffairs.com/articles/2015-03-25/bureaucracy-terror> accessed 2 March 2016
[88] Falola and Mekhennet, 'Paris Attacks Were Carried Out by Three Groups Tied to Islamic State, Offical Says'
[89] Alissa J Rubin, Aurelien Breeden and Anita Raghavan, 'Strikes Claimed by ISIS Shut Brussels and Shake European Security' *The New York Times* (22 March 2016) <http://www.nytimes.com/2016/03/23/world/europe/brussels-airport-explosions.html> accessed 30 March 2016
[90] Rukmini Callimachi, 'How ISIS Built the Machinery of Terror Under Europe's Gaze' *The New York Times* (29 March 2016) <http://nyti.ms/1SsSAQn>

However, unlike al Qaeda in Afghanistan and Somalia during the 1990s and early 2000s, where it was actively being sheltered by local governments[91], al Qaeda affiliates and the Islamic State are currently often actively engaged in an armed conflict with the states on the territory of which they operate. As already described in more detail in chapter 2, after directing most efforts against the 'far enemy' in the early 2000s, many jihadist organizations increasingly direct their attention inwards to the 'near enemy'[92], which brings them into conflict with local governments. According to the Global Terrorism Database (GTD), even al Qaeda in the Arabian Peninsula (AQAP), one of the more outward-oriented al Qaeda affiliates, overwhelmingly operated within its own sphere of influence with only two attacks outside of the Arabian Peninsula between 2004 and 2014.[93] This does not mean that the strategic goals of these organizations are being abandoned. Rather, it suggests that at least al Qaeda is turning away from tactical internationalism. The Islamic State, if the November 2015 Paris attack and the March 2016 Brussels attack—as well as several other recent attacks in Europe inspired by the Islamic State—are any indication, on the other hand, seems to embrace it.

Ungoverned areas are thus vital to terrorist organizations, while their existence dictates which policy responses are available. If a state has no access to some of its territory, neither the state itself nor Western forces can rely on law enforcement measures to arrest suspected terrorists. This of course raises the question how these developments should affect continued claims by the United States of being engaged in a global armed

[91] See e.g. Jason Burke, *Al-Qaeda: The True Story of Radical Islam* (Penguin Books Limited 2007)
[92] Maher, 'Bin Laden's Final Triumph. From Riyadh via London to Damascus, Baghdad and ISIS – the Jihadist Surge'
[93] National Consortium for the Study of Terrorism and Responses to Terrorism (START), *Global Terrorism Database [Data file]* (2014), author's own calculations

conflict, and therefore the ability to strike against such targets, which will be addressed below.

2.1. Application of LOAC to the Conflict with AQ and IS

The problem of ungoverned areas is obvious: While they provide insurgents freedom of action with regards to planning military operations, restricted access makes it impossible for the local state or international allies, such as the United States, to arrest potential terrorists. Thus, military force may often be the only feasible way to address these treats, both for the benefit of the local state and the West. Military force, however, can only be used within an armed conflict. Continuous claims by the United States of being engaged in an armed conflict with al Qaeda that is not limited to a specific territory but is global in nature need to be carefully evaluated.[94]

Non-international armed conflicts (NIACs), i.e. those between a state and a non-state group or between such groups[95], are regulated by treaty[96] and customary international law.[97] It is furthermore largely uncontested that international human rights law (IHRL) continues to apply during armed conflicts[98], even though uncertainties remain whether all states, and especially the United States, are bound by them in extraterritorial operations.[99] The United States has historically and consistently

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[94] Harold Hongju Koh, *The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010* (2010)
[95] *Prosecutor v. Dusko Tadic*, para 70
[96] art 3 common to all Geneva Conventions, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949., hereinafter Common Article 3 (CA 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, hereinafter AP II
[97] See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*
[98] *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, ICJ Report 1996, p 226, para 25
[99] See Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011); see also ch 5 of this thesis

rejected the extraterritorial application of human rights law.[100] The application of LOAC in NIACs hinges on 'protracted armed violence'[101] between organized[102] parties to the conflict.[103] Additional Protocol II (AP II) furthermore introduced a specific territorial requirement that is absent from CA 3.[104] Since neither al Qaeda nor the Islamic State, despite calling itself a state, can be considered a state under international law, the following analyses in more detail whether the conflict with both of these organizations can be considered a NIAC and, thus, whether military conduct against these organizations is permissible under LOAC.

It has already been established in chapter 2 of this thesis that jihadist networks, or at least certain parts thereof, should be seen as armed groups for the purposes of LOAC and the analysis therefore does not need to be repeated here.[105] Suffice to say at this point that chapter 2 argued that affiliated organizations, i.e. those that have sworn an oath of allegiance and thereby incorporated themselves into the *de jure* command structure of the parent organization, should be seen as being a sub-group of said organization, while those merely associated, i.e. those who may cooperate on a tactical or operational level, but are not officially part of the command structure, should be excluded. This understanding will provide the baseline for the analysis here

[100] See ch 5, sec 3.3 below
[101] *Prosecutor v. Dusko Tadic*, para 70
[102] *Commentary on the First Geneva Convention of 12 August 1949*, (Jean S Pictet ed, International Committee of the Red Cross 1952), pp 49f
[103] CA 3 refers to 'each party to the conflict'
[104] art 1(1) AP II restricts its application to conflicts not of an international character that 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol', while art 1(2) excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as being not armed conflicts'
[105] See ch 2, sec 3

2.2. Global Armed Conflict vs Regional Armed Conflicts

The particular problem that arises in the context of global jihadism is the fact that it is neither limited to a particular territory, as we would expect in other non-international armed conflicts, nor, logically following from the preceding, is it limited to a core group that is active throughout the entire territory—that is the entire globe or all relevant theatres in which affiliate organizations are active—in which hostilities occur. On the side of al Qaeda, the list of current affiliates and the area in which they are active includes al Qaeda in the Islamic Maghreb (AQIM) in Mali and parts of Algeria and Tunisia[106], al Qaeda in the Arabian Peninsula (AQAP) in Yemen[107], al Shabaab in Somalia[108], the al Nusrah Front in Syria[109], al Qaeda in the Indian Subcontinent (AQIS)[110] and Islamic Emirate of the Caucasus in Chechnya.[111] The Islamic State is active in Iraq and Syria[112] as well as in Nigeria through Boko Haram[113] and in, *inter alia*, Libya.[114] Both groups have collected numerous other pledges of allegiance from other jihadist groups.[115] It is largely uncontested that the situation within these countries often amounts to an armed conflict. The al Qaeda affiliates in Yemen and Syria are

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[106] Security Council Committee Pursuant to Resolution 1267/1989, 'Narrative Summaries of Reasons for Listing' <http://www.un.org/sc/committees/1267/entities_other_groups_undertakings_associated_with_Al-Qaida.shtml> accessed 29 September 2014, entity QE.B.138.14., year of affiliation 2006
[107] Ibid, entity QE.A.129.10., year of affiliation 2009
[108] Not listed, Year of affiliation 2010, see also Rick Nelson and Thomas Sanderson, *A Threat Transformed: Al Qaeda and Associated Movements in 2011* (Center for Strategic and International Studies 2011), p 8
[109] Security Council Committee Pursuant to Resolution 1267/1989, 'Narrative Summaries of Reasons for Listing', entity QE.A.137.14.
[110] Jason Burke, 'Al-Qaida leader announces formation of Indian branch' *The Guardian* (Delhi, 4 September 2014)
[111] Security Council Committee Pursuant to Resolution 1267/1989, 'Narrative Summaries of Reasons for Listing', entity QE.E.131.11.
[112] S/RES/2249 (2015)
[113] Thomas Joscelyn, 2015, 'Boko Haram leader pledges allegiance to the Islamic State, 8 March 2015' The Long War Journal <http://www.longwarjournal.org/archives/2015/03/boko-haram-leader-pledges-allegiance-to-the-islamic-state.php> accessed 9 March 2015
[114] David D Kirkpatrick, Ben Hubbard and Eric Schmitt, 'ISIS' Grip on Libyan City Gives It a Fallback Option' *The New York Times* (28 November 2015) <http://nyti.ms/1HwyPG4> accessed 22 February 2016
[115] Aaron Y Zelin, *The Islamic State's Archipelago of Provinces* (The Washington Institute for Near East Policy 2014)

engaged in armed conflicts with their respective states[116], as is the al Shabaab militia in Somalia.[117] However, in light of the vast geographic spread of both al Qaeda and the Islamic State, it must of course be asked whether there can be a global armed conflict with them—a position held by at least two US governments and accepted by US courts[118]—and, as a matter of policy, whether this argument is necessary for US policy?

As Figure 1 shows, the majority of all AQ and IS attacks between 2001 and 2013, as recorded in the Global Terrorism Database (GTD), are clustered in the immediate area in which specific affiliate organizations are active. While both organizations have not abandoned their internationalist and global rhetoric, their actions speak a different language.

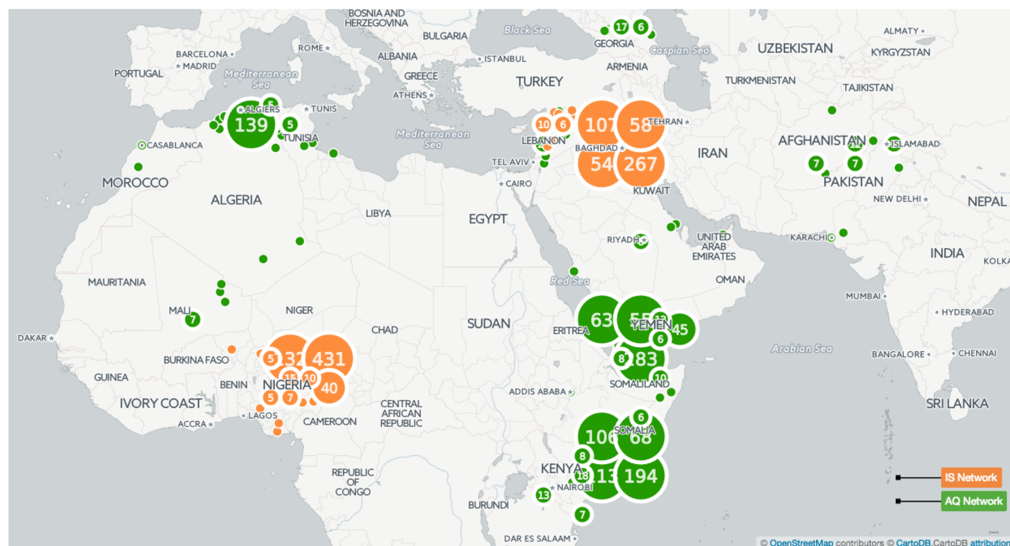

Figure 3: AQ and IS Attacks 2001-2013, GTD Data[119]

Attacks in Europe and the US, in comparison, were few and far in between during this period. There are of course, in some instances, high-profile attacks with high casualty numbers. But

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[116] Louise Arimatsu and Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (Chatham House 2014)
[117] The GTD shows over 500 attacks, distributed throughout the year, against military targets alone in 2014, the last year for which data is available; National Consortium for the Study of Terrorism and Responses to Terrorism (START), *Global Terrorism Database [Data file]*, author's own calculations
[118] *Al-Aulaqi v. Panetta*, 35 FSupp3d 56 (DDC 2014), p 80; *Al Warafi v. Obama*, No 09-CV-2368, 2015 WL 4600420 (DDC July 30, 2015), p 41
[119] National Consortium for the Study of Terrorism and Responses to Terrorism (START), *Global Terrorism Database [Data file]*

that should not hide the fact that far from a truly global conflict, the 'war' with al Qaeda and the Islamic State is isolated to several specific geographic regions. The connection between both theatres, as outlined above, is that freedom of action afforded to those organizations by virtue of being active in ungoverned and chaotic areas may enable them to stage attacks in the West. This, in turn, creates policy pressures to counter them in these areas.

The right question to ask, therefore, is not whether there is a global armed conflict, but whether the law allows for several conflicts with a single organization in various locations. The latter is necessary, in line with the overall argument of this thesis, because the affiliate organizations are not seen as independent actors, but rather part of the overall al Qaeda or Islamic State networks. It is worth, at this point, to reproduce the relevant paragraph from *Tadić* in full. According to *Tadić,*

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, *in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.*[120]

Thus, in order for LOAC to apply, there needs to be protracted violence between parties to the conflict, but the ensuing armed conflict would not be global in nature but limited to the areas actually under the control of one of the parties. The downside to accepting or advancing the armed conflict argument, of course, is that this conflict would also include the territory of the state parties if one is to read 'internal' in the quote given above to mean 'non-international'. In this transnational conflict, this would imply the territory of the United States. This would

[120] *Prosecutor v. Dusko Tadic*, para 70, italics added

mean that military installations in the United States may be considered legitimate targets under international law, but attacks against these could still be criminalized under US domestic law.

Nevertheless, on the whole such a reading of a transnational conflict can be more easily reconciled with traditional LOAC than the expansionist understanding used by successive US administrations. It is argued that this argument holds even when such an armed conflict is not limited to the territory of a single country but spills over into neighbouring countries. Common Article 3 applies to an 'armed conflict not of an international character occurring in territory of one of the High Contracting Parties'.[121] One reading of CA 3 might of course be that the conflict must be limited to exactly one territory. But as Pejic has developed, the alternative reading that CA 3 applies even if the conflict occurs on the territory of a High Contracting Party, although the conflict is not with the state on whose territory fighting takes place, is also possible.[122] Since virtually all states are parties to the Geneva Conventions and the International Court of Justice (ICJ) has identified CA 3 as customary international law and minimum yardstick for all armed conflicts[123], the transnationality of particular conflicts with jihadist organizations can be easily reconciled with LOAC.[124] As the ICRC has pointed out, 'any armed conflict between governmental armed forces

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[121] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949., CA 3

[122] Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye' 93 International Review of the Red Cross 189

[123] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment ICJ Reports 1986, p 14, para 218

[124] See e.g. Lindsey Cameron and others, 'Article 3: Conflicts not of an International Character' in Jean-Marie Henckaerts (ed), *Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Geneva, 12 August 1949* (International Committee of the Red Cross 2016) <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC> accessed 11 April 2016, paras 117-120

and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention'.[125]

Coincidentally, the strategic shift by al Qaeda and the Islamic State to conquer and hold territory could contribute to putting the "war" on a more solid legal foundation in two ways. First, transforming from terrorist organizations, which are not merely sporadically striking against various targets, to full-fledged insurgent organizations increases the likelihood of 'protracted' violence as demanded by LOAC. Second, in all cases where AQ affiliate organizations are active as well as in the case of the Islamic State and its provinces, the political landscape is very different to the 1990s and early 2000s, where the jihadist organizations often had organic relationships and cooperation with the states on whose territory they were located. Due to the reversal of the policy of predominantly targeting the far enemy, these organizations are now in a situation of active conflict with these states. The overwhelming majority of attacks seen in Figure 1 are directed against host states. This creates the policy option of tapping into those regional conflicts provided the local state consents. By engaging with local regimes, the United States no longer needs to rely on the global armed conflict argument as far as international law is concerned. The interests of the US and local states can potentially align in pursuing an overall counterinsurgency strategy against these groups. That being said, if governments go down this route they need to make clear that they are acting in cooperation with the territorial state. In its latest review on the UK government's use of drones for targeted killings, the joint parliamentary committee stated, in the case of IS, that the organization is

> involved in protracted armed violence with governmental authorities in Iraq and Syria. It seems clear to us that, as a matter of international law, the UK is therefore involved in a non-international armed conflict

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[125] International Committee of the Red Cross (ICRC), *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* (2008), p 3

> with ISIL/Da'esh in Iraq and Syria, and that the Law of War applies to that armed conflict.[126]

However, the existence of an armed conflict between the Iraqi and Syrian authorities and IS does not naturally imply the state of an armed conflict between the UK and IS. The argument is stronger in Iraq, where the authorities have explicitly invited foreign intervention[127], but fails to convince in Syria, where the authorities have very vocally rejected Western intervention.[128]

From a policy perspective, this creates a certain degree of uncertainty. Are there separate conflicts with the same organization in both theatres? Does the conflict in Iraq spill over into Syria or is it confined to Iraqi territory? The same issue arises in the case of Afghanistan and Pakistan, in which the German Federal Prosecutor, halting the proceedings after a lethal drone strike on a German national by a US drone, argued that 'the Afghan Taliban's use of the [Federally Administered Tribal Area (FATA)] region [of Pakistan] as a haven and staging area has evidently caused the Afghan conflict to "spill over" onto this particular part of Pakistan's national territory'.[129] At the same time, the federal prosecutor argued that Pakistan's efforts to combat insurgent Taliban groups in the FATA areas created a separate armed conflict between Pakistan and the insurgent groups.[130] While it is acknowledged that this reading represents the current state of LOAC, it is argued that the better solution, at least in the case of IS, is to view both theatres as one non-international armed conflict with multiple participants. After all, insurgents on both sides of the border may use the Iraq or Syrian

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[126] Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing* (House of Lords, House of Commons, Second Report of Session 2015–16, 2016), para 3.46
[127] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/2014/691, 22 September 2014; see also ch 3 of this thesis
[128] See ch 3 of this thesis
[129] *Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan (Targeted Killing in Pakistan Case)* Case No 3 BJs 7/12-4, Decision to Terminate Proceedings, Germany, Federal Prosecutor General 23 July 2013, (2013) 157 ILR 722, p 742
[130] Ibid

territory as a sanctuary and, in the words of *Tadić*, 'the whole territory [is] under the control of a party'.[131]

The approach proposed here seeks to strike a middle ground between the very expansionist reading of LOAC by US administrations of a borderless armed conflict, which is even criticised by the United Kingdom as the US's strongest ally[132], and minimalist approaches that would only allow the existence of separate armed conflict with specific affiliate organizations on the territory of a single state. In line with the overall argument of this thesis, protracted armed violence between a subset of the al Qaeda or Islamic State organization would create a state of armed conflict with the organization as a whole, but this armed conflict would be limited to the areas under the control or actively contested by the organization. This, in turn, would allow for status-based targeting of members of these organizations in these areas.[133]

It is important to clarify, however, that the application of LOAC in these theatres does not resolve *jus ad bellum*[134] issues which have to be addressed separately. Thus, while it is argued that the law should act restraining on extraterritorial state policy, this restraint does not stem from LOAC, but states would have to evaluate on a continuing basis whether they can—absent a Chapter VII authorization by the Security Council or consent by the territorial state—use force in self-defence. If LOAC seeks to make a factual determination of the existence of an armed conflict—and therefore whether the use of military force is permitted out of necessity—it must not be restricted by sov-

[131] *Prosecutor v. Dusko Tadic*, para 70
[132] See Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing*, para 3.52
[133] see sec 3 below
[134] See Kinga Tibori-Szabó, 'Self-Defence and the United States Policy on Drone Strikes' (2015) 20 Journal of Conflict and Security Law 381, p 387

ereignty issues for which it was not designed. Rather this question—whether the use of force on the territory of another state is permissible—should be left to the relevant *lex specialis*.

In light of the above it is explicitly welcomed that the Obama administration has published the Presidential Policy Guidance on 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities'.[135] According to a report by the New York Times, the Trump administration considers dropping some of the limitations of the PPG.[136] While the policy standards will be addressed in chapter 5, they create a higher threshold for the use of lethal force outside 'areas of active hostilities', but it does not provide any specification on what constitutes an area of active hostilities. Given that targeting practices differ based on this qualification, this is a serious shortcoming.

2.3. Intensity Requirement and Temporal Scope

Two final issues to consider before turning to the use of force against individuals associated with either organization is the temporal scope of the application of LOAC to these conflicts as well as the intensity requirement they have to meet. For matters of clarity, the temporal scope will be discussed in conjunction with the intensity requirement, as these are intrinsically linked. In the case of insurgencies, this requires a careful balancing act between a restrictive application of LOAC, as is should not be an open-ended framework that allows states to

[135] Government of the United States, 2013, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013' The White House <https://info.publicintelligence.net/DoJ-DroneStrikeProcedures.pdf> accessed 9 August 2016, p 1

[136] Charlie Savage and Eric Schmitt, 'Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids' *The New York Times* (21 September 2017) <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html> accessed 21 September 2017

target terrorists based on their status whenever it seems feasible. On the other hand, what sets insurgencies apart from more traditional inter-state conflict is their extended duration. Conflict may flare up following a terrorist attack or through a push by one of these organizations to control territory, but defeating insurgencies may take years or decades compared to months and thereby considerably longer than inter-state conflicts. International law therefore needs to balance a state's security imperative—allowing it to use force when it is absolutely necessary—with the danger of extensive use of force on the basis of an open-ended application of LOAC. The latter becomes increasingly more urgent if groups operate in areas in where they are beyond the reach of law-enforcement agencies and military force seems the only possible policy response.

2.3.1. Protracted Armed Violence and Terrorist Networks

The intensity requirement shall be discussed first. As a general principle, LOAC applies, whenever there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'[137], provided it is of sufficient intensity.[138] Despite universal agreement on the intensity requirement—thereby setting armed conflict apart from 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'[139]—there is little clarity on its substance. The ICRC argues that the intensity requirement may be met 'when hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead

[137] *Prosecutor v. Dusko Tadic*, para 70
[138] International Law Association, *Final Report on the Meaning of Armed Conflict* in International Law, The Hague Conference (2010), p 15
[139] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, art 1

of mere police forces'.[140] In the current context, this definition is entirely unhelpful. If insurgents operate out of safe havens, a government may see itself required to use military forces not because police operations may not suffice to suppress the threat, but because it is the only available policy option. Additionally, this definition introduces a significant subjective element into a determination that is supposed to be objective.[141] For example, the International Criminal Tribunal for Rwanda (ICTR) in *Akayesu*, after having held that an objective determination is required to establish the existence of an armed conflict[142], solely relied on statements by the United Nations and other officials to arrive at the conclusion that a state of armed conflict existed.[143]

The ICRC Commentary to Common Article 3, relying on case law by the ICTY and the International Criminal Court (ICC), lists a number of criteria that may be used in this determination, such as, *inter alia,*

> the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed.[144]

While these criteria provide for a clearer and more objective determination, their helpfulness in the current context can be doubted. On the one hand, as in the case of organization[145], they have been developed in the context of large-scale clashes between governmental forces and VNSAs. While they may help

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[140] International Committee of the Red Cross (ICRC), *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, p 3
[141] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998, para 603
[142] Ibid, para 603
[143] Ibid, para 621
[144] Cameron and others, ‘Article 3: Conflicts not of an International Character’, para 82; see also *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Judgement, 10 July 2008, para 177; *Prosecutor v. Haradinaj, Balaj and Brahmaj*, IT-04-84-T, Judgement, 3 April 2008, paras 49 and 90-99; *Prosecutor v. Limaj, Bala and Musliu*, IT-03-66-T, Judgement, 30 November 2005, paras 90 and 135-170; *Prosecutor v. Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06, Judgement, ICC, 14 March 2012, para 538
[145] See ch 2, sec 3

to resolve the question of whether al Qaeda or the Islamic State, through their affiliates, are in an armed conflict with the state on whose territory they operate, the operational reality from which they stem differs from the operational reality in which Western states find themselves in, unless an invasion has taken place. One way to resolve this question would of course be to answer the question of whether the United States, or any of its allies, is in an armed conflict with al Qaeda or the Islamic State in the negative. However, on the other hand, this answer does not match the reality these states find themselves in.

Given that it is largely unlikely that US conduct in this regard will ever be argued in front of an international court, it is worth looking at how US courts have resolved the matter. The United States Supreme Court, in *Hamdan*, found that a state of armed conflict exists between the United States and al Qaeda.[146] However, the Court did not discuss at length its rationale for why Common Article 3 was applicable to the conflict. Rather, the Court was more concerned with whether the conflict was international or non-international. On the other hand, in *Al-Bahlul*, the United States Court of Military Commission Review, which reviews decisions of the military commission in Guantanamo Bay, instructed its members that

> In determining whether an armed conflict existed between the United States and al Qaeda and when it began, you should consider the length, duration, and intensity of the hostilities between the parties; whether there was protracted armed violence between the governmental authorities and organized armed groups; whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of either side indicating their perceptions regarding the existence of an armed conflict including the presence or absence of a declaration to that effect; and any other facts and circumstances you consider relevant to the existence of armed conflict.[147]

However, the precise application of these criteria, which seem to be in line with LOAC, remains unclear. The *Al-Bahlul*

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[146] *Hamdan v Rumsfeld* 548 U S ____ (2006), pp 65-70
[147] *US vs. Al-Bahlul*, 820 FSupp2d 1141 (USCMCR 2011), p 1190

Court concluded that it is 'convinced, beyond a reasonable doubt, that the United States was engaged in an armed conflict with al Qaeda during the charged timeframe in ''various locations in Afghanistan, Pakistan, and elsewhere.''' [148] While the existence of a state of armed conflict in Afghanistan and parts of Pakistan are mostly uncontroversial, 'elsewhere' raises serious concerns.

In general, US courts have generally deferred to the executive for the determination of whether an armed conflict existed, in as far as in none of the cases regarding detention the existence of an armed conflict was seriously doubted.[149] One of the strongest statements to the contrary can be found in the 2015 decision in *Al-Warafi*, in which Judge Lamberth vocally rejects the government's argument that war exists if the government says it does. In his words, which are worth quoting in full, the government

> argues that the President has a peculiar strain of King Midas's curse: Everything he says turns to law. By this blinkered logic, so long as he maintained that active hostilities were ongoing in Afghanistan, the President could preserve his AUMF detention power even if he withdrew all U.S. military presence from Afghanistan, stopped any military aid to the Afghan government, and brokered a lasting peace treaty between the U.S., the Taliban, al Qaeda, and the Afghan government. But war is not a game of "Simon Says," and the President's position, while relevant, is not the only evidence that matters to this issue. […] Petitioner's obsession with Presidential speeches recalls the tale of the man who lost his keys: A police officer sees a man looking for something under a streetlamp and asks the man what it is he's looking for. The man responds that he's looking for his keys, so the officer decides to help. After several minutes the officer asks the man if he's quite sure this is where he lost his keys. The man says no; he lost them over in the park. The officer, befuddled, asks why they've been looking under the streetlamp, to which the man replies "the light's better over here." A court cannot look to political speeches alone to determine factual and legal realities merely because doing so would be easier than looking at all the relevant evidence.[150]

The problem with relying on these cases for the period ahead, in which the conflict with al Qaeda and the Islamic State will take place less in one specific theatre, but rather in a series

[148] Ibid, p 1190
[149] See e.g. *Al-Bihani v. Obama et al*, 590 F3d 866 (DC Cir 2010), p 874; *Al-Aulaqi v. Panetta*, p 80; *Al-Warafi v. Obama*, 704 FSupp2d 32 (DDC 2010), p 38; *Gherebi v. Obama*, pp 60-65
[150] *Al Warafi v. Obama*, pp 4-5

of theatres, stems from the fact that most of these cases concern individuals that were detained in the context of the war in Afghanistan, for which there is little doubt that armed conflict existed during the respective time period. Nevertheless, it is argued that for the satisfaction of the intensity requirement with a particular group as a whole, be it al Qaeda or the Islamic State, intensive conflict in one theatre under the control of an affiliate organization shall suffice. However, two arguments to mitigate the danger of an escalation of violence are put forward. First, it needs to be made clear which affiliates are part of an organization against which military force is authorized, and only armed violence by these organizations shall be included in the intensity determination. Not every group that shares an ideology with al Qaeda or the Islamic State is destined to use force against the West and, even if it does, this should be considered separately. The framework proposed in chapter 2 is reasonably restrictive to draw the line between al Qaeda and the Islamic State and other jihadist groups and relies on their actions and administrative statements rather than their general rhetoric. Second, as already discussed above, the *jus ad bellum* provides an important safeguard against unrestricted violence in multiple countries.

2.3.2. Temporal Scope of Such Conflicts

This leads to the second issue that needs to be addressed: when does the application of LOAC begin and end? The answer to the first question was important in the case of *Al-Nashiri*, who was detained because of his involvement in the bombing of the USS Cole in 2000 by United Arab Emirate authorities in 2002 and transferred to US military detention in 2003.[151] Al-Nashiri

[151] *Al -Nashiri v. Obama et al*, 76 F Supp 3d 218 (2014), p 220

was detained by the United States on the basis of the 2001 AUMF[152] and in 2011 was charged with 11 charges under the 2009 Military Commissions Act (MCA 2009) 'based on conduct that occurred between 1996 and 2002'.[153] Offenses triable under the MCA 2009 are limited to acts 'committed in the context of and associated with hostilities'.[154] The government's argument in this case is that the United States has been in an armed conflict with al Qaeda since 1998, following the declaration of war by Osama bin Laden in 1996 and 1998[155], leading to the attacks on the US embassies in Kenya and Tanzania in 1998, the USS Cole in Yemen in 2000 and the terrorist attacks on September 11, 2001.[156] In its brief, the government explicitly invokes the *Tadić* test of protracted armed violence[157] and contends that '[t]he scale, organized nature, and warlike purpose of al Qaeda's armed attacks on the United States before September 11, 2001, went far beyond the isolated and sporadic violence that is typical of internal disturbances and riots.'[158] Furthermore, al Qaeda's attacks 'were part of a concerted plan to further the group's explicit purpose of carrying out ever more destructive attacks, including using weapons of mass destruction if they could be obtained, fully expecting a military response by the United States'.[159] Al-Nashiri contends, convincingly, that a series of opinions by the Office of Legal Counsel, the rhetoric by the Clinton administration in the aftermath of the Embassy Bombings as well as the USS Cole attack as well as a series of federal statues, which all put the start of hostilities

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[152] Authorization for Use of Military Force. 50 USC 1541 note. Public Law 1070-40, 2001
[153] *Al -Nashiri v. Obama et al*, p 221; See also Military Commissions Act 2009, H.R. 2647
[154] MCA 2009, sec 950p(c)
[155] 1996 Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Mosques; Expel the Heretics From the Arabian Peninsula; 1998 World Islamic Front's Statement Urging Jihad Against Jews and Crusaders, in Bin Laden, *Compilation of Usama bin Laden Statements 1994 - January 2004*, pp 13-28; pp 56-58
[156] *Al-Nashiri v. Obama*, On Petition for a Writ of Mandamus to the Military Commission, Brief for the United States, Nos 15-1023, 15-5020 (DC Cir 2015), pp 5-7
[157] Ibid, pp 27 -30
[158] Ibid, p 31
[159] Ibid, p 32

at September 11, 2001, fail to lend credibility to the government's arguments.[160] This adds to Al-Nashiri's previous arguments that his conduct, notwithstanding the question of whether there is an active and ongoing conflict with al Qaeda after 9/11, occurred before this particular conflict came into existence.[161] The US District Court for the District of Columbia, however, ultimately did not answer the question. It concluded that the beginning of the hostilities remains an 'open question' that it did not need to address because it was immaterial for the relief sought by Al-Nashiri.[162]

In any case, the policy implications of a different decision in the *Al-Nashiri* case would have been relatively minor, as it only relates to the detention of individuals for conduct prior to 9/11, although it could have provided more clarity to the question of whether 9/11 was indeed the beginning of an armed conflict with al Qaeda. According to the ICRC, Common Article 3 comes into force 'as soon as the criteria of intensity and organization are fulfilled in a situation of violence between a State and a non-State armed group or between two or more non-State armed groups'.[163]

On a relatively minor note, Blank and Farley have questioned whether the existence of an armed conflict depends on the response by the attacked party.[164] Under this view, the start of the conflict would not be 9/11, but rather 10 October 2001, the start of combat operations in Afghanistan.[165] The point is minor since it would not necessarily limit a state's policy options following a terrorist attack. A state may choose not to respond

[160] *Al-Nashiri v. Obama*, On Petition for a Writ of Mandamus to the Military Commission, Petitioner's Reply Brief, Nos 15-1023, 15-5020 (DC Cir 2016), pp 2-5
[161] *Al -Nashiri v. Obama et al*
[162] *In re Al-Nashiri*, 835 F3d 110 (DC Cir 2016), p 137
[163] Cameron and others, 'Article 3: Conflicts not of an International Character', para 134
[164] Laurie Blank, 'Identifying The Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World' (2015) 36 Michigan Journal of International Law 467, p 494
[165] Ibid, p 494

or rely on law enforcement tools in its response, but it would have the theoretical option to do so. Thus, while the exact start of hostilities may play a role in whether certain individuals can be subject to military detention and tried according to LOAC, it is immaterial overall going forward.

The more important question here, and this links back to the issue of intensity above, is whether terrorist attacks in themselves are sufficient to trigger the application of LOAC. The aftermath of 9/11, as well as the more current French response to the 2015 Paris attacks, indicates that this question can be answered in the affirmative. After 9/11, NATO invoked Article 5 of the North Atlantic Treaty[166] and the Security Council passed resolution 1368, recognizing 'the inherent right of individual or collective self-defence in accordance with the Charter'.[167] While the invocation of the right of self-defence does not, in itself, signal the existence of an armed conflict, it is a strong indication that the Council foresaw and implicitly sanctified the use of military force—one of the characteristics of armed conflict. Furthermore, academic literature supports the thesis that a state of armed conflict existed in Afghanistan following the 9/11 attacks.[168]

Similarly, after the Paris attacks in 2015, France invoked the mutual defence clause of the European treaties[169] and significantly stepped up its military efforts in Syria. The Security Council passed resolution 2249, which called upon all

> Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the

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[166] Edgar Buckley, 2006, 'Invoking Article 5' NATO Review Summer 2006 <http://www.nato.int/docu/review/2006/issue2/english/art2.html> accessed 16 April 2012

[167] S/RES/1368 (2001)

[168] See e.g. M. E. O'Connell, 'Defining Armed Conflict' (2008) 13 Journal of Conflict and Security Law 393, p 399; Marja Lehto, 'War on Terror – Armed Conflict with Al-Qaida?' (2010) 78 Nordic Journal of International Law 499, p 506; Jelena Pejic, 'Armed Conflict and Terrorism: There is a (Big) Difference' in Ana María Salinas de Frías, Katja LH Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012), pp 201f; Noam Lubell, 'The War (?) against Al-Qaeda' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012)

[169] Claire Mills, *France and Article 42(7) of the Treaty on the European Union* (CPB No 7390, House of Commons 2015)

> United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL […].[170]

While the existence of an armed conflict can again not be directly deducted from this resolution, it lends strong credibility to the argument that it does and furthermore supports the argument advanced above that this conflict would only extend to the territory the Islamic State actually controls.

The second, and for policy reasons arguably more important question, is when LOAC ceases to apply. The *Tadić* definition states that '[LOAC] applies from the initiation of [a non-international armed conflict] and extends beyond the cessation of hostilities until […] in the case of internal conflicts, a peaceful settlement is achieved'.[171] According to the ICRC, whether a peaceful settlement has been achieved is a factual determination[172], taking into account whether i) one of the parties has seized to exist, ii) an official ceasefire has been agreed upon, or iii) the end of hostilities without the risk of resumption.[173] However, the ICRC warns that such conflicts may 'oscillate' and that therefore temporary lulls between hostilities may not be taken to mean that the conflict has ended.[174] The ICRC, however, does not define how much time have to pass before a state may not rely on LOAC for targeting purposes anymore. The answer to this question needs a delicate balance between allowing for open-ended war and putting states at a tactical disadvantage. After all, the use of terrorism as a tactic would make it possible that members of non-state groups may stage a devastating attack, retreat into safe havens and strike again when the moment of possible counteraction has passed. In *Haradinaj*, the

[170] S/RES/2249 (2015)
[171] *Prosecutor v. Dusko Tadic*, para 70
[172] Cameron and others, 'Article 3: Conflicts not of an International Character', para 137
[173] Ibid, paras 139-141
[174] Ibid, paras 142-144

ICTY considered interruptions of several weeks as preventing a chain of events.[175] This period seems too short for the current conflict. However, extending the period to several years, as the US argues in the current conflict, equally seems unsatisfyingly long.[176] There is no easy way to resolve this dilemma. As Klein has pointed out, it is unlikely that both sides will ever reach a 'peaceful settlement' per se and the combination of top-down and bottom-up violence makes it unlikely that a complete cessation of hostilities will be achieved in the near future.[177]

While it is beyond this thesis to propose an exact time period after which LOAC should cease to apply, it is argued that the law should aim towards restricting rather than encouraging violence and therefore, after long periods without hostilities, status-based targeting should not be permissible. After all, in the case of an impending armed attack states would still have the option to use force in self-defence and, in the absence of such a threat, law enforcement responses are more appropriate both as a matter of law and of policy. The likelihood of continuing armed conflict within the theatres in which affiliate organizations are active could also push towards diplomatic cooperation between the West and the states in the region, thus making the existence of armed conflict between al Qaeda or the Islamic State and Western countries less relevant. US courts have thus far not addressed the issue in a lot of detail. While the *Al-Bihani* court stressed that prisoners in Guantanamo Bay must be released at the end of hostilities[178] and the *Al-Warafi* court decided that it is permissible for the courts to assess whether there

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[175] *Prosecutor v. Haradinaj, Balaj and Brahmaj*, IT-04-84bis-T, Retrial Judgement, 29 November 2012, para 92-99

[176] See n 156 above; see also Blank, 'Identifying The Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World', pp 499f

[177] Adam Klein, 2016, 'Part II: Terrorist Groups and the Law of How Wars End' Lawfare <https://www.lawfareblog.com/part-ii-terrorist-groups-and-law-how-wars-end> accessed 19 April 2016

[178] *Al-Bihani v. Obama et al*, p 874

are on-going hostilities[179], it also established that hostilities persist in Afghanistan.[180] It thus mirrors the limited guiding scope, for the purposes of this thesis, of the judicial review within the United States so far, as a majority of these cases are concerned with actions tied to the Afghan theatre.

3. Membership in al Qaeda or the Islamic State and the Use of Force Against its Members

The question of individual membership in terrorist networks arose in the case of Hedges and the detention authority inherent in the AUMF, where the Court acknowledged that 'one obviously cannot "detain" an organization'.[181] However, VNSAs rarely have degrees of membership that formally integrates individuals into the organization akin to the armed forces of states and both the rules for targeting and detention must clarify how they relate to the individuals making up these organizations. While the discussion in chapter 2 was concerned with how affiliate organizations relate to the central leadership, and each other, the question here becomes how individuals relate to these organizations. As David Kilcullen has pointed out,

> counterinsurgency is war, and war is inherently violent. Killing the enemy is, and always will be, a key part of guerrilla warfare. Some insurgents […] must be hunted down, killed, or captured, and this is necessarily a ruthless process conducted with the utmost energy that the laws of war permit.[182]

What exactly the laws of war permit, and more importantly against whom, shall be the subject of this final section.

The breadth of the issue requires limiting the scope of enquiry for this section. Fighting an insurgency raises a variety of

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[179] *Al Warafi v. Obama*, pp 3-5
[180] Ibid, p 6
[181] *Hedges v. Obama*, 724 F3d 170 (2nd Cir 2013), p 190
[182] David Kilcullen, *Counterinsurgency* (Oxford University Press 2010), p 4

questions, for example whether civilian objects such as oil facilities, from which the Islamic State derived a lot of its income[183], are legitimate military targets?[184] Despite the obvious policy relevance of such this question, the focus here shall be on two interrelated questions regarding individual member of such organizations. First, this section will address the issue of status-based targeting for members of al Qaeda and the Islamic State. It will do so in the basis of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law[185], which establishes that certain members in non-state armed groups may serve in a continuous combat function and may therefore be targeted based on their membership in an armed group rather than because of their specific conduct.[186] It will explore this notion based on selected jurisprudence of the US District of Columbia courts in their *habeas corpus* review of detainees at Guantanamo Bay, as they are of most relevance for this thesis and have explored in detail whether individuals are part of non-state armed groups. Second, it will then apply this concept to individuals traveling to territory held by al Qaeda or Islamic State with the purpose of receiving training to conduct terrorist attacks in the West.

3.1. Individual Membership in Jihadist Organizations

In the case of non-state armed groups engaged in an armed conflict, questions of when an individual becomes a member of said organizations are not easy to answer but carry

[183] Nour Malas and Maria Abi-Habib, 'Islamic State Economy Runs on Extortion, Oil Piracy in Syria, Iraq' *The Wall Street Journal* (28 August 2014)
[184] Kenneth Watkin, 'Targeting "Islamic State" Oil Facilities' (2015) 90 International Law Studies 499
[185] International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (prepared by Nils Melzer)' (2008) 90 International Review of the Red Cross 991
[186] Ibid, pp 1002-1008

tremendous weight. In traditional IACs, membership in a state's armed forces is established through a state's domestic law.[187] Those members of the armed forces who are combatants[188] have the right to 'adopt means of injuring the enemy' even though this right 'is not unlimited'.[189] In the law of non-international armed conflicts, no such status exists. Common Article 3 applies to '[p]ersons taking no active part in the hostilities'[190], which is mirrored in AP II. Art 13(3) of AP II defines that '[c]ivilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.'[191] Thus, under treaty law, members of organized armed groups remain part of the civilian population and therefore protected according to their civilian status 'unless and for such time as they take a direct part in hostilities'. The Supreme Court of Israel described this asymmetry between a state's armed forces and VNSAs as the "revolving door" phenomenon,[192] whereby individuals could blend into the civilian population and be immune from attack between individual attacks.

For obvious reasons, this approach drew heavy criticism and various attempts have been made to reconcile this dilemma. The San Remo Manual relating to Non-International Armed Conflicts, prepared by Professors Schmitt, Garraway, and Dinstein, introduced the category of 'fighters'[193] to substi-

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[187] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907., art 1; International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (prepared by Nils Melzer)', p 998
[188] Hague Regulations of 1907, art 1
[189] Ibid, art 23
[190] GC III, CA 3(1)
[191] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
[192] *Public Committee against Torture in Israel v. Government of Israel*, Supreme Court of Israel, Case No HCJ 769/02, 13 December 2006, para 40
[193] Michael N Schmitt, Charles HB Garraway and Yoram Dinstein, *The Manual on the Law of Non- International Armed Conflict. With Commentary* (International Institute of Humanitarian Law 2006), art 4

tute for the combatant category non-existent in NIACs. Fighters, like combatants, would be legitimate targets for the duration of the conflict. The ICRC, in its commentary on direct participation, clarified that members having a continuous combat function within a non-state armed group cease to be civilians and therefore lose protection for the entire period in which they hold such a position.[194]

> Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.[195]

Difficulty arises with regards to the determination whether an individual is a member of such an organization. As the ICRC clarifies, membership in such organizations has to be understood 'in a strictly functional sense'[196]. Sivakumaran contends, however, that there is no reason that integration could not also be achieved through a formal act.[197] Similarly, Schmitt argues that a continuous combat function may be established through either open expression, such as wearing uniforms and weapons, but also through conclusive behaviour confirmed through either reliable intelligence or location (e.g. attending a training camp).[198]

In effect, US courts have largely employed a similar approach, even though they have not directly engaged with the ICRC document. In *Hamlily*, which was concerned with the detention of five individuals detained on the basis of the AUMF, the government argued that the Court should not only consider

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[194] International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (prepared by Nils Melzer)', pp 1003f
[195] Ibid, p 1007
[196] Ibid, p 1007
[197] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Paperback edn, Oxford University Press 2014), pp 360f
[198] Michael N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 Harvard National Security Journal 5, p 22

formal criteria, such as swearing an oath of allegiance, but also functional criteria such as staying in al Qaeda guest houses, attending training camps or taking up a position within the group to determine whether an individual was part of a covered organization.[199] The petitioners rejected this argument, since it would provide for status-based detention, which according to the petitioners does not exist under the law of NIAC.[200] In *Hamlily*, the Court construed membership largely on a functional basis, although it did not rule out formalism.[201] However, the key enquiry in *Hamlily* was not whether an individual self-identified with a terrorist organization covered by the AUMF, but whether such an individual works within the command and control structure of al Qaeda by 'receiving and executing orders'.[202] In a similar vein, the *Gherebi* Court argued that CA 3 suggests and supports that members of such organizations are taking a direct part in hostilities by virtue of their membership.[203] In *Al-Warafi*, the Court clarified that 'some level of knowledge or intent is required'.[204] The Court in *Gherebi* further explained that the existence of an armed group is necessary in order to be subject to attack and detention.[205] In *Al-Adahi*, the Court introduced a conditional probability test to determine membership retrospectively.[206] Al-Adahi travelled to Afghanistan and stayed with his brother-in-law, who was a close associate of Osama bin Laden. After training at the Al Farouq training camp, which had been attended by the 9/11 hijackers previously, he moved to an al

[199] *Hamlily v. Obama*, 616 FSupp2d 63 (DDC 2009), p 70
[200] Ibid, p 71; In this specific case, the Court did not engage with this issue in detail, since the President's detention authority stems from domestic rather than international law, pp 73f; In *Gherebi*, the Court rejected this claim, see *Gherebi v. Obama*, p 60; See also *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB) for a recent UK case coming to the opposite conclusion.
[201] *Hamlily v. Obama*, p 75
[202] Ibid, p 75; see also *Al-Warafi v. Obama*, p 38
[203] *Gherebi v. Obama*, p 65; See also Jens David Ohlin, 'Targeting Co-Belligerents' in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford Universtity Press 2011), pp 72-74
[204] *Al-Warafi v. Obama*, p 38
[205] *Gherebi v. Obama*, p 69
[206] *Al-Adahi v. Obama*, p 1106

Qaeda guest house and, at the beginning of US combat operations in Afghanistan, travelled between Kabul, Khost, and Kandahar. Before being detained, he boarded a bus with wounded Taliban fighters. Al-Adahi claims he was not a member of al Qaeda.[207] In the Court's view, in his case the determination should rest on how likely each of the individual steps would have been without the former and therefore without membership in the al Qaeda organization.[208] The Court found it not credible that he, for example, would have met Osama bin Laden, who had gone into hiding by this point due to security concerns, without being a member of al Qaeda despite Al-Adahi's claims that such visits were common during this period. While this test is appropriate for *ex-post* considerations, its role in the decision-making process before a potential strike depends on the credibility of intelligence sources.

A special consideration in this case was also given to the question of disassociation from al Qaeda. While attending the Al Farouq training camp, Al-Adahi was caught smoking and thereby violated a direct order. *Gherebi* had established that following orders was the crucial question for membership[209], but the Court in *Al-Adahi* maintained that violating single orders was not enough to break the bond between and individual and the organization.[210] Since *Al-Adahi* did not disassociate himself actively and his conduct seemed to show conclusively that he continued to function as a member of the organization, the Court rejected his claims.

US courts have construed membership wider than the ICRC. In the view of the ICRC, only members who serve a combat function may be seen as members of an armed group within

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[207] Ibid, pp 1102f
[208] Ibid, pp 1106f
[209] *Gherebi v. Obama*, p 69
[210] *Al-Adahi v. Obama*, p 1109

the meaning of LOAC. 'Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.'[211] Schmitt, who was involved in drafting the ICRC document but later withdrew from the committee, criticised this approach because it would create an imbalance between the armed forces of a state and non-state groups.[212] In practical terms, according to Schmitt, it would be impossible to differentiate between those who have a continuous combat function and those directly participating in hostilities.[213]

However, the question is whether a differentiation must be made between those individuals encountered on the battlefield and those, like propagandists, who are not likely to serve in an active combat function. The case of Anwar al-Awlaki, who was killed by a US drone strike in Yemen in 2011[214], is illustrative. Despite his prominent role in the al Qaeda in the Arabian Peninsula (AQAP) organization, al-Awlaki did not serve in a front-line role. In a case brought by his father, the government argued that his role as an AQAP leader rested both on his oath of allegiance, as well as his instrumental role in directing and planning the attempted airline attack by Umar Farouk Abdulmutallab, also known as the underwear bomber, in 2009.[215] Abdulmutallab was convicted in 2011 and tried to challenge his sentence—unsuccessfully—twice.[216] What is of interest here,

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[211] International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (prepared by Nils Melzer)', p 1008
[212] Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', p 22
[213] Ibid, p 22
[214] BBC, 2011, 'Islamist cleric Anwar al-Awlaki killed in Yemen' BBC News <http://www.bbc.co.uk/news/world-middle-east-15121879> accessed 30 September 2013
[215] *Al-Aulaqi v. Panetta*, pp 61f
[216] *US vs. Abdulmutallab*, 2011 WL 4345243 (ED Mich 2011); *US vs. Abdulmutallab*, 739 F3d 891 (6th Cir 2014)

however, is whether al-Awlaki's involvement in the plot should mean that he was holding a continuous combat function. The government argued that Abdulmutallab stated his intention to go on a suicide mission to al-Awlaki, who discussed the specifics of the attack with both Abdulmutallab as well as with AQAP bomb maker Al-Asiri. Ultimately, al-Awlaki gave the final order to green-light the attack, which should occur over US soil.[217] The Court, which dismissed the case for lack of standing on behalf of al-Awlaki's father, concluded that the 'United States is in a congressionally-declared military conflict'[218] and that al-Awlaki therefore constituted a legitimate military target. The validity of this claim shall be evaluated below.

Before turning to this question, a final inquiry regarding whether individual potential terrorists in the West belong to al Qaeda or the Islamic State is necessary. Considering the recent focus on foreign fighters—and they danger they may pose through returning to their home countries with the purpose of conducting terrorist attacks[219]—as well as lone-wolf terrorists inspired by propagandists like al-Awlaki or others[220], this issue is a timely one. After all, if membership in an armed group requires geographic proximity, states would not have the possibility to target the command and control structures of the groups inciting violence after a terrorist attack in the West on the basis of LOAC.

It is argued that the analysis in these cases shall rest on the same rationale as laid out above. What is important is that

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[217] *Al-Aulaqi v. Panetta*, pp 62f
[218] Ibid, p 80
[219] See e.g. Daniel L Byman and Jeremy Shapiro, *Be Afraid. Be A Little Afraid: The Threat of Terrorism from Western Foreign Fighters in Syria and Iraq* (Brookings 2014); See also United Nations Security Council, *Analysis and recommendations with regard to the global threat from foreign terrorist fighters, S/2015/358* (2015)
[220] See e.g. Thomas Joscelyn, 2015, 'Why the Islamic State tells supporters to swear allegiance before dying' The Long War Journal <http://www.longwarjournal.org/archives/2015/12/why-the-islamic-state-tells-supporters-to-swear-allegiance-before-dying.php> accessed 7 December 2015

individuals 'receive and execute' orders from the central leadership without considering the geographical location of an individual. The key inquiry, as in the cases above, is therefore formal and functional membership rather than self-identification. The November 2015 Paris attacks, carried out by members of the Islamic State, are illustrative. On the one hand, the New York Times (NYT), relying on information obtained from French security officials as well as sealed court documents, reported that the attacks were directed by one of 21 individuals trained by the Islamic State in Syria and dispatched to Europe in order to plan, organize, and carry out terrorist attacks.[221] They are part, according to European and American intelligence officials mentioned by the NYT, of an external operations unit within the Islamic State. 'The unit identifies recruits, provides training, hands out cash and arranges for the delivery of weapons once fighters are in position.'[222] The Islamic State, in an article published in its French online magazine Dar al-Islam, explained that the unit mirrors a 19th century German military doctrine called 'Auftragstaktik' (instruction tactic), in which 'commanders […] give subordinates a goal and a time frame in which to accomplish it, but otherwise […] give them the freedom to execute it' with complete tactical autonomy.[223] It is argued that a loose organizational structure should not prevent the determination that a hierarchical relationship exists.[224] Thus, the issue of an order and the execution of the same, even if it is stated in general rather than very specific terms, should suffice to bring individuals within the fold of an armed group. The attacks in Paris, if they were so ordered by the rank and file of the Islamic State, which is difficult to verify independently and relies on classified

[221] Callimachi, 'How ISIS Built the Machinery of Terror Under Europe's Gaze'
[222] Ibid
[223] Ibid, also citing the Islamic State
[224] See Sivakumaran, *The Law of Non-International Armed Conflict*, pp 170-176

intelligence not available to the author, should be seen as having been conducted by 'soldiers'[225] of the Islamic State.

3.2. Strikes Against Potential Terrorists

This brings us to the final stage of the inquiry and the question of how the above determination affects the ability of states to target potential terrorists. From the outset, it has to be stated that the analysis here is limited to areas actually under the control or contested by either al Qaeda or the Islamic State. As stated in the analysis above, outside of these areas it is questionable at best whether an armed conflict exists and therefore LOAC would not apply.

From a Western perspective, two groups of people stand out: First, there is the leadership of these organizations, who not only direct hostilities within a specific theatre, but also, as in the case of al-Awlaki, have the authority to order terrorist attacks in the West. The second group are those traveling to safe havens in order to receive training and carry out the instructions of the first group. Before continuing the analysis, it has to be asked whether such individuals hold a continuous combat function or whether they are civilians who must directly participate in hostilities in order to be targetable. The policy implications are considerable. If potential terrorists fall in the former category they can be lawfully targeted at any time, subject to other *in bello* as well as *ad bellum* considerations. If they fall into the latter, the window of opportunity to target them would

[225] A terminology used deliberately because it is employed by the Islamic State itself; See ch 2, sec 2.2

be limited 'for such time' as they directly participate in hostilities.[226] This requires both temporal and geographical proximity to a specific attack. While the deployment to an attack, in the case of terrorism e.g. the use of public transportation to get to the chosen attack site, already counts as direct participation[227], general preparatory measures, as opposed to measures aiming to carry out a specific act, would not.[228]

What is uncontested, it is argued, is that al-Awlaki—and by extension similar leadership members—was undoubtedly a member of al Qaeda at the time he was killed.[229] Similarly, individuals attending training camps, based on the analysis above, should be seen as members of the organization in which they are being trained. Whether they are holding a continuous combat function, however, is a different issue. It is argued here that the best answer to this question is finding a balance between the minimalist approach of the ICRC and the maximalist approach of Dunlap and Schmitt. The ICRC, on the one hand, restricts the continuous combat function to those whose exclusive role it is to participate in hostilities. This excludes, *inter alia*, propagandists and financiers, but also trainers and others who continuously contribute to the overall war effort of a non-state group.[230] Dunlap, on the other hand, argues that the determination should be 'whether the armed *group* meets the

[226] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, art 13(3); This provision is part of customary international law, see Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87 International Review of the Red Cross 175, rule 6

[227] International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (prepared by Nils Melzer)', p 1033

[228] Ibid, p 1032

[229] See David J Barron, *Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (Office of Legal Counsel, US Department of Justice 2010), p 21

[230] International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (prepared by Nils Melzer)', p 1008

standard of continuous combat function'.[231] While the practical implications of these different approaches may be negligible as long as an insurgent group exclusively consists of an armed wing, this does not meet the operational realities of many al Qaeda affiliates and especially not of the Islamic State. As soon as a group starts to govern, it will have administrators and other civilian personnel, which should not be the subject of attack. On the other hand, the ICRC approach would mean that in a potential airstrike on a training camp in Syria an attacker would have to distinguish between those attending the camp because they seek to join the fight in Syria and those joining the external operations unit in Europe.[232] This, it seems, would be practically impossible. Rather, it is argued, all those who are lastingly integrated into an armed group to perform a role comparable to similar roles in a state's armed forces, which includes commanders, trainers, and soldiers including recruits, whether they are going to serve domestically or extraterritorially, should be seen as having a continuous combat function. Conversely, in cases where insurgent groups start to develop governing structures that can be characterized as purely civilian, the members of these structures should not be seen as holding a continuous combat function.

A similar approach was taken in a recent case in which the German Federal Prosecutor decided not to bring charges after an American drone strike on a German national in the FATA.[233] The targeted individual was not a member of a frontline unit, but rather in the—although admittedly advanced—planning

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[231] Charles J Dunlap, 2016, 'Yes, We Can Lawfully Target Islamic State Trainees Preparing to Conduct Terrorist Attacks in Europe and Elsewhere' Just Security <https://www.justsecurity.org/30228/lawfully-target-isil-trainees-preparing-terrorist-attacks-europe/> accessed 25 March 2016, italics in original
[232] Ibid
[233] *Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan (Targeted Killing in Pakistan Case)*

phase of a suicide attack.[234] The prosecutor specifically relied upon the continuous combat function and argued, echoing language from the ICRC, that such a role can be assumed even before a hostile act is carried out.[235] To be even more precise, the prosecutor declared that 'none of the persons killed *was a civilian*.'[236]

The ICRC argues that the continuous combat function must be 'distinguished from persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life. Such "reservists" are civilians until and for such time as they are called back to active duty.'[237] While this raises interesting questions regarding those who are not actively planning an attack but instead are 'sleepers', there is no need to engage with this question here. As discussed above, such individuals are leaving areas in which an armed conflict could theoretically exist and thus LOAC is no longer applicable to them. Furthermore, as sleepers operate typically in the West they are within reach of law enforcement agencies and thus, even if they could be lawfully targeted, policy considerations make this discussion immaterial.

Yet, some court decisions and policy documents seem to suggest that if persons holding a continuous combat function operate in areas in which an armed conflict exists they may nevertheless not be generally targeted if other options exist. Relying heavily on international human rights law, the Israeli Supreme Court in the *Targeted Killings* case, set out stringent criteria for targeting decisions. Most importantly, it declared that 'one must choose the means whose harm to the human

[234] Ibid, p 723
[235] Ibid, p 747
[236] Ibid, p 745, italics added
[237] International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (prepared by Nils Melzer)', pp 1007f

rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed'. [238] However, the Israeli court classified all those subject to targeted killings as civilians taking part in hostilities, which would be at odds with the analysis above.

While under LOAC the analysis must of course take into account the principle of proportionality and therefore outlaw attacks that cause excessive amounts of collateral damage[239], it seems undesirable that a party to a NIAC would consist of individuals who are immune from attack unless they directly participate in hostilities. As Milanovic has pointed out, under LOAC there is no necessity to capture members of the opponent's armed forces, even if they can be captured, unless they are *hors de combat* or if they have laid down their arms.[240]

4. Conclusion

Several terrorist attacks in Western cities, most notably the coordinated attacks in Paris in 13 November 2015 and in Brussels in March 2016, which were allegedly planned and coordinated from safe havens in Syria, are indicators of tactical interventionism adopted by terrorist networks in their conflict with Western states. Similarly, while the Islamic State appears to be in retreat at the time of writing, there is no certainty that either al Qaeda or the Islamic State will not return to a position where they would pursue a strategy of expansionist internationalism. This shows the importance of not putting safe havens out of

[238] *Public Committee against Torture in Israel v. Government of Israel*, para 40
[239] Ibid, para 26
[240] Marko Milanovic, 'Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case' (2007) 89 International Review of the Red Cross 373, p 390

reach of states' security services. Given the apparent shift of no longer predominantly targeting the far enemy, this also opens up the policy option for the United States to tap into regional conflicts between such organizations and the host states—provided these states consent to the use of force on their territory or invite the United States to join their conflict.

The law must strike a careful balance between accepting an overly expansionist understanding that transforms the entire globe into a battlefield, and an overly restrictive understanding that constrains countermeasures too much. This chapter followed the framework of chapter 2 of defining both al Qaeda and its affiliates, as well as the Islamic State and its provinces, as unitary armed groups despite their network structure. However, the chapter stopped short of embracing the global armed conflict argument most strongly supported by the United States. In contrast, it is argued that where such conflicts exist, it is restricted to the areas under the control of either party. At the time of writing this would, for example, include parts of Syria and Iraq, to the extent that they remain under the control of the Islamic State. Nevertheless, such a conflict would not be understood as separate conflicts with various organizations, but a single conflict occurring in various geographic locations. Under domestic law, it would nevertheless be captured by the AUMF and be subject to all instruments that depend on it. It is furthermore argued that all parts of the network may contribute to meeting the intensity requirement. What remains an open research question is the temporal scope of such a conflict. While no definitive answer can be provided, it is nevertheless argued that a gap of several years in between attacks would certainly not qualify in establishing that an armed conflict existed throughout the period.

It was furthermore argued that a balance has to be struck between the expansive notion that only a group as a whole would have to meet the continuous combat function, and thereby transform all its members into permanent legitimate targets under LOAC, as the overly restrictive understanding of the ICRC. It was argued that all members serving functions similar to those in a state's armed forces should be legitimate targets, even if they do not regularly directly participate in hostilities. Individual membership, in turn, is determined both along functional and formal lines. Their membership hinges on 'receiving and executing' orders, as the *Hamlily* Court put it, and they directly participate in hostilities through their membership, as developed in *Gheribi*.

5 | EXTRATERRITORIAL LAW ENFORCEMENT

Crelinsten has argued that the attacks of September 11, 2001, heralded a massive transformation in how states do counter-terrorism.[1] Prior to 9/11, the international community approached counter-terrorism as a matter of law enforcement and criminal justice and enacted a total of 18 international legal instruments[2] criminalizing various acts including, but not limited to, aircraft hijacking[3], terrorist bombings[4], and terrorist financing.[5] At their heart, these conventions are state-centric and respect the territorial sovereignty of the signatory states. They are based on the formula of 'prosecute or extradite', which means that 'states holding the suspects can decide whether to prosecute them itself or extradite to states willing to prosecute'.[6] This system often proved cumbersome and was faced with the reluctance, by some states, to carry out their obligations. After the 21 December 1988 bombing of Pan Am flight 103, also known as the Lockerbie bombing, the Security Council

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[1] See e.g. Roland Crelinsten, *Counterterrorism* (Wiley 2009)
[2] Anton du Plessis, 'A snapshot of international criminal justice cooperation against terrorism since 9/11' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press 2013), p 48f
[3] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971, United Nations, Treaty Series, Vol. 974, p 177, hereinafter the *Montreal Convention*
[4] International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, United Nations, Treaty Series , Vol. 2149, p 256
[5] International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, United Nations, Treaty Series , Vol. 2178, p 197
[6] Nigel D. White, 'The United Nations and Counter-Terrorism: Multilateral and Executive Law-Making' in Ana María Salinas de Frías, Katja LH Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012), pp 54-57

exercised its powers under Chapter VII of the UN Charter to ensure prosecution of the suspects.[7] Similarly, Johnsen describes how the United States experienced significant difficulties in bringing the perpetrators of the 12 October 2000 bombing of the USS Cole to justice in Yemen.[8] Incarcerated al Qaeda members frequently escaped prison[9] and authorities in Yemen did not see it as a high priority to capture them.[10]

After the 9/11 attacks, responses became militarized in what has been described as the 'war model'.[11] To an extent, enemy-centric counterterrorism turned to population *and* enemy-centric counterinsurgency that tried to attack the enemy in their safe havens *and* eradicate the public support such groups may enjoy. These safe havens where often located in weak or failed states and therefore required extraterritorial action. The invasions of Afghanistan and Iraq—but also the increasing number of drone strikes not only in those theatres but in places such as Yemen, Somalia and others—are evidence of this. To some degree, through its focus on the *jus ad bellum* and the *jus in bello* in the context of networked armed groups, this thesis has not challenged this assertion.

The exclusive focus on the war model, however, is problematic for two reasons: First, the dichotomy between law enforcement and war does not do justice to the reality of contemporary counterterrorism. For one, it is impossible to observe a militarization of counterterrorism across the board. Within the United States and other Western states, the focus was and re-

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[7] Ibid, p 58

[8] Gregory D Johnsen, *The Last Refuge: Yemen, Al-Qaeda, and the Battle for Arabia* (Kindle edn, Oneworld Publications 2013)

[9] Susan Sachs, 'Suspects in U.S.S. Cole Bombing Escape Prison' *The New York Times* (11 April 2003) <http://www.nytimes.com/2003/04/11/international/middleeast/suspects-in-uss-cole-bombing-escape-prison.html> accessed 8 October 2017

[10] Johnsen, *The Last Refuge: Yemen, Al-Qaeda, and the Battle for Arabia*, pp 129ff

[11] Crelinsten, *Counterterrorism*

mains on law enforcement agencies and the civilian court system to target and dismantle terrorist networks. Of course, at times, the lines between the law enforcement and war paradigms may be blurred even domestically as in the case of José Padilla[12], who after first being arrested by the FBI on the suspicion of planning to carry out terrorist attacks in the United States upon entering the United States[13], was later designated an enemy combatant by the White House, and therefore transferred from the Justice Department to the Defense Department for further processing in 2002.[14] Nevertheless, while extraterritorial action saw increasing militarization, especially after attacks in Western cities such as New York, Paris, Nice, or London, their domestic results have usually been criminal investigations and charges in civilian courts. This point is easy enough to make and, while it is acknowledged that there remain open questions regarding the implications of a stronger focus on counterterrorism on various aspects of domestic policy, civil liberties being a prime example, it does not warrant further inspection within the confines of this thesis. The larger point and area of interest here lies elsewhere.

Second, in the international relations and security studies literature, the tendency to analyse global counterterrorism dichotomously has led to an increased focus on the military aspect—often in the context of the wars in Afghanistan and Iraq.[15]

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[12] *Padilla v. Hanft*, 423 F3d 386 (4th Cir 2005)
[13] Garrett M Graff, *The Threat Matrix: The FBI at War* (Paperback edn, Back Bay Books 2012), pp 366ff
[14] Ibid, p 368; Padilla was later transferred to civilian custody pending review by the Supreme Court.
[15] See e.g. Stuart Griffin, 'Iraq, Afghanistan and the future of British military doctrine: from counterinsurgency to Stabilization' (2011) 87 International Affairs 317; David Betz and Anthony Cormack, 'Iraq, Afghanistan and British Strategy' (2009) 53 Orbis 319; Bruce Hoffman, *Insurgency and Counterinsurgency in Iraq* (RAND Corporation 2004); Michael J Boyle, 'Do counterterrorism and counterinsurgency go together?' (2010) 86 International Affairs 333; John Mackinlay and Alison Al-Baddawy, *Rethinking Counterinsurgency* (RAND Corporation 2008); David H Ucko, 'Critics gone wild: Counterinsurgency as the root of all evil' (2014) 25 Small Wars & Insurgencies 161

The legal literature, similarly, has devoted a lot of time and energy on the *jus ad bellum* and the *jus in bello*[16] and has often harshly criticized the application of the former and drawn a sharp distinction between the war model and the criminal justice model governed by human rights law.[17]

The reality, however, is a different one. First, the counterinsurgency literature, both from governmental[18] as well as academic sources[19], has recognized that defeating groups such as al Qaeda or the Islamic State requires "all-of-government" responses. The debate so far has largely focused on the contribution of social and economic development, and all agencies, governmental and non-governmental alike, engaged in such activities.[20] What has been largely absent from the debate is the extraterritorial, as opposed to the domestic, contribution of a state's own law enforcement agencies to a global counterinsurgency campaign. The reasons for this may be a combination between the prevalence of military action and the fact that law

[16] It is acknowledged that this thesis falls into this category as well.
[17] See e.g. Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008); Jelena Pejic, 'Armed Conflict and Terrorism: There is a (Big) Difference' in Ana María Salinas de Frías, Katja LH Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012); Ana María Salinas de Frías, Katja LH Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012)
[18] Government of the United States, *National Strategy for Counterterrorism* (The White House 2011); United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide* (United States Deparmtent of State 2009)
[19] See e.g. Curtis A Bradley and Jack L Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 Harvard Law Review 2047
[20] Sultan Barakat, 'Introduction: Post-war Reconstruction and Development - Coming of Age' in Sultan Barakat (ed), *After the Conflict, Reconstruction and Development in the Aftermath of War* (I.B. Tauris 2010); E. Berman and others, 'Do Working Men Rebel? Insurgency and Unemployment in Afghanistan, Iraq, and the Philippines' (2011) 55 Journal of Conflict Resolution 496; Eli Berman, Jacob N Shapiro and Joseph H Felter, 'Can Hearts and Minds Be Bought? The Economics of Counterinsurgency in Iraq' (2011) 119 Journal of Political Economy 766; Daniel L Byman, 'Uncertain Partners: NGOs and the Military' (2001) 43 Survival 97; Mark Duffield, *Global Governance and the New Wars* (Zed Books 2001); James D. Fearon, Macartan Humphreys and Jeremy M. Weinstein, 'Can Development Aid Contribute to Social Cohesion after Civil War? Evidence from a Field Experiment in Post-Conflict Liberia' 99 American Economic Review 287; Sarah Kenyon Lischer, 'Military Intervention and the Humanitarian "Force Multiplier' (2007) 13 Global Governance 99

enforcement counterterrorism is usually achieved through police cooperation rather than direct extraterritorial action.[21] Additionally, jihadist groups are often located in states where human rights violations are widespread, which, as Efrat has shown in the case of the FBI, often prevents the foreign deployment of law enforcement agencies.[22]

Second, non-international armed conflicts (NIAC) have always differed from international armed conflicts (IAC) in one crucial aspect. In IACs, combatants on both sides have the legal right to use deadly force against one another[23], and only certain conduct is criminalized.[24] If captured, combatants become prisoners of war and must be returned to their states at the end of hostilities.[25] In NIACs, on the other hand, every violent act by the non-state party may in theory be criminalized and prosecuted by the criminal justice system of the state party. In fact, in the present conflict with al Qaeda, the United States has used its military justice and criminal justice systems to pursue members of these organizations.[26] While Additional Protocol II calls for the 'broadest possible amnesty' for those who have participated in the conflict[27], there certainly is no obligation to do so. What sets the conflict between the United States and al Qaeda and the Islamic State apart, however, is the fact that this NIAC occurs entirely extraterritorially. The contribution of law enforcement to this conflict is therefore, while not unexplored, at least understudied.

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[21] See e.g. Mathieu Deflem, *The Policing of Terrorism: Organizational and Global Perspectives* (Routledge 2009); Mathieu Deflem, 'Global Rule of Law or Global Rule of Law Enforcement? International Police Cooperation and Counter-terrorism' (2006) 603 The ANNALS of the American Academy of Political and Social Science 240
[22] Asi Efrat, 'Do human rights violations hinder counterterrorism cooperation? Evidence from the FBI's deployment abroad' (2015) 10 The Review of International Organizations 329
[23] See ch 4 of this thesis
[24] See Rome Statute of the International Criminal Court 1998
[25] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949., art 118
[26] See below sec 1.2 and sec 2.3 below
[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, art 6(5)

The final chapter of this thesis seeks to partly fill this gap, even though it is impossible to cover it entirely. The fundamental argument here is that extraterritorial conflicts with non-state actors require responses that are more in line with how these actors operate and how they are organized, rather than treating all such conflicts analogously to inter-state conflicts. This will often require the prioritization of extraterritorial use of law enforcement agencies—or rather law enforcement tactics and practices—over kinetic action by military forces.

Before proceeding, two qualifications must be made. First, it is of course recognized that there is a large body of literature dealing with issues of law enforcement in counterterrorism. These writings are usually concerned with questions of cooperation between law enforcement agencies[28] and prosecution and extradition of terrorism suspects under the relevant counterterrorism conventions.[29] While these criminal justice approaches at the international level are obviously important, what is of importance here are the political and legal implications of outward actions short of war, taken in the context of a global counterinsurgency campaign. In line with the general scope of the thesis the focus here will be on the United States and its agencies. Second, while the term law enforcement is necessarily associated with the police, the net must be cast wider here to capture all agents who might reasonably conduct operations that could also be described as law enforcement. Extraterritorial law enforcement (ELE) may of course be carried out by traditional law

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[28] See e.g. Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press 2006); Deflem, *The Policing of Terrorism: Organizational and Global Perspectives*; John Mueller and Mark G Stewart, *Chasing Ghosts: The Policing of Terrorism* (Oxford University Press 2016); Wyn Rees, *Transatlantic Counter-Terrorism Cooperation* (Routledge 2006)

[29] See e.g. Larissa van den Herik and Nico Schrijver, 'The fragmented international legal response to terrorism' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Order* (Cambridge University Press 2013), p 18; Anton du Plessis, 'A snapshot of international criminal justice cooperation against terrorism since 9/11' in Larissa van den Herik and Nico Schrijver (eds), Counter-Terrorism Strategies in a Fragmented International Legal Order (Cambridge University Press 2013)

enforcement agencies, such as the Federal Bureau of Investigation (FBI) on the federal level or local police departments such as the New York City Police Department (NYPD)[30], it may be similarly carried out by military forces. It is therefore prudent to adopt a functional rather than an institutional definition for law enforcement. For the purposes of this chapter, law enforcement operations shall therefore be operations that have the primary aim of apprehending individuals suspected of unlawful activity, or contribute to such operations, for the purpose of criminal prosecution. This definition sufficiently separates such operations from lethal operations, carried out either by unmanned aerial vehicles (UAVs) or Special Forces, or intelligence gathering missions. Critics may argue that such an approach should more adequately described as abduction or extraterritorial rendition. The Intelligence and Security Committee (ISC) of the United Kingdom's House of Commons generally defines 'rendition' as 'any extra-judicial transfer of persons from one jurisdiction or State to another' and 'extraordinary rendition' as the

> 'extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment (CIDT).'[31]

Duffy and Kostas similarly warn that extraordinary rendition may seriously affect the human rights of those so apprehended.[32] Most importantly, it would violate the right to liberty because 'any detention must be on grounds and in accordance with procedures established by law, and subject to procedural guarantees, including the right to counsel.'[33] Nevertheless, according to the ISC, extraordinary rendition is not the only possible type of rendition. Its report further lists 'military rendition',

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[30] See Graff, *The Threat Matrix: The FBI at War*; Christopher Dickey, *Securing the City: Inside America's Best Counterterror Force - the NYPD* (Simon & Schuster 2009)
[31] Intelligence and Security Committee, *Rendition* (Cm 7171, The Stationary Office 2007), p 6
[32] Helen Duffy and Stephen A Kostas, ''Extraordinary Rendition': A Challenge for the Rule of Law' in Ana María Salinas de Frías, Katja LH Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012)
[33] Ibid, p 549

'rendition to detention', and 'rendition to justice'. It defines the latter as the 'extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of standing trial within an established and recognised legal and judicial system'.[34] It is this type of rendition that is described in this chapter, which should alleviate most concerns raised by critics of extraordinary rendition.

This chapter will proceed in three parts: First, section 1 will map which roles law enforcement agencies can perform in transnational counterinsurgency operations against jihadist actors. The word transnational instead of extraterritorial has been used consciously here, since the theatres of such conflicts may include domestic ones. It will be argued that while the protection of the homeland will of course remain at the forefront of the responsibilities of the law enforcement community, arresting and prosecuting individuals apprehended abroad can also make an invaluable contribution by gathering crucial intelligence. It will further be argued that ELE is a multi-agency endeavour that extends beyond those organizations most traditionally associated with law enforcement.

Second, section 2 will turn towards US domestic law and its role in the prosecution of individuals apprehended abroad. After all, an ELE approach is only possible if those apprehended can actually be prosecuted before domestic courts. It will be argued that US domestic law does not pose any significant obstacles.

Third, section 3 will then look at the constraints of international law in employing ELE tactics. It will first establish that ELE operations can be reconciled with the right of self-defence under

[34] Intelligence and Security Committee, *Rendition*, p 6

Article 51 of the UN Charter. It will be argued that the international legal framework, in certain circumstances, would actually require an ELE approach. The focus will then turn to the permissibility of employing lethal force during such operations. It will establish that, while the use of lethal force would be permissible in certain circumstances, such operations could not have the primary aim of killing terrorist suspects, which would have to be reflected in the rules of engagement.

1. Law Enforcement as a Counterinsurgency Tool

It was argued in the opening chapter—and subsequently throughout this thesis—that the jihadist threat represents a form of transnational insurgency with the aim of establishing a new polity: The Caliphate. This aim is pursued to varying degrees by organizations such as al Qaeda and the Islamic State and the individual members of these organizations. These organizations, furthermore, are often organized in transnational networks held together through varying levels of organizational integration and a shared ideology. Being insurgent in nature, these organizations use violence—including terrorism—as part of 'an interlocking system of actions—political, economic, psychological, military—that aims at the overthrow of the established authority in a country and its replacement by another regime'.[35] Through the use of violence against combatant and non-combatant targets in various theatres, including the near and the far enemy, such organizations aim to create an atmosphere of fear that casts doubt on the government's ability to protect the civilian population and thereby drives them into the arms of the insurgent organization or erodes their loyalty to

[35] Roger Trinquier, *Modern Warfare: A French View of Counterinsurgency* (Bernard B Fall tr, Pall Mall Press 1964), p 6, italics removed

their home country through alienation.[36] Strategically, both al Qaeda and the Islamic State are attempting to destabilize various geographical regions in order to create governmental structures and consolidate their hold on a specific region.[37]

Counterinsurgency doctrine defines counterinsurgency as a 'complex effort that integrates the full range of civilian and military agencies. It is often more population-centric (focused on securing and controlling a given population or populations) than enemy-centric (focused on defeating a particular enemy group)'.[38] The requirement of unity of effort[39] and the primarily political nature of counterinsurgency[40] have long been recognized in the literature. Following the invasion of Iraq and Afghanistan and the need for extraterritorial counterinsurgency, emphasis was put on the role of the military, with military doctrine interested in the contribution the armed forces can make to counterinsurgency efforts.[41] Equally, the possible contribution of civilian actors, especially in the area of economic development, received a considerable amount of attention.[42] Finally, due attention has of course been given to the role of the diplomatic corps in campaigns beyond the borders of the counterinsurgent state.[43]

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[36] Ibid, pp 16f
[37] Mara Revkin, *The Legal Foundations of the Islamic State* (2016)
[38] United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide*, p 12, highlights removed
[39] Frank Kitson, *Low Intensity Operations: Subversion, Insurgency and Peacekeeping* (Kindle edn, Faber & Faber 2013 [1971]); David Kilcullen, *Counterinsurgency* (Oxford University Press 2010); Trinquier, *Modern Warfare: A French View of Counterinsurgency*; United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide*
[40] David Galula, *Counter-Insurgency Warfare: Theory and Practice* (Frederick A. Praeger 1964), p 7
[41] Department of the Army, *FM 3-24 Counterinsurgency* (2006); Ministry of Defence of the United Kingdom, *Security and Stabilisation: The Military Contribution. Joint Doctrine Publication 3-40* (2009)
[42] Lischer, 'Military Intervention and the Humanitarian "Force Multiplier'; Organization for Economic Co-Operation and Development (OECD), *A Development Co-operation Lens on Terrorism, Key Entry Points for Action* (OECD 2003); Hugo Slim, 'With or Against? Humanitarian Agencies and Coalition Counter-Insurgency' (2004) 23 Refugee Survey Quarterly 34
[43] United States Government Interagency Counterinsurgency Initiative, *U.S. Government Counterinsurgency Guide*; Sherard Cowper-Coles, *Cables From Kabul: The Inside Story of the West's Afghanistan Campaign* (Harper Press 2011)

Due to the fact that large-scale counterinsurgency efforts occurred extraterritorially, considerably less attention has been paid to the role law enforcement can play in counterinsurgency campaigns abroad. This stands in contrast to the domestic role of the police in counterterrorism, where law enforcement has naturally remained at the forefront.[44] From an American or indeed generally Western perspective, this is unsurprising since the traditional role of the police in counterinsurgency—the provision of security—is often difficult if not impossible to perform in an extraterritorial setting. After all, even if it was possible for US law enforcement officials to permanently assume police responsibilities in an overseas territory[45], this would still be undesirable given that it would further undermine the authority of the local government. For this reason, US military doctrine convincingly argues that the development of host-state police capabilities, rather than the deployment of US police forces, is tantamount in extraterritorial counterinsurgency campaigns.[46] However, as these conflicts play out both domestically and abroad, mapping the role of law enforcement agencies will necessarily require looking at full spectrum of contributions—including domestic ones—that can be performed by law enforcement agencies in such conflicts.

1.1. Securing the Homeland

Despite the overall focus on extraterritorial action in this chapter, it would nevertheless be incomplete without mentioning the most obvious role of law enforcement in a transnational

[44] See e.g. David Benjamin Green, 'The Role of Local Law Enforcement In Counterterrorism' (MA thesis, Georgetown University 2010); Bruce Hoffman, Edwin III Meese and Timothy J Roemer, *The FBI: Protecting the Homeland in the 21st Century, Report of the Congressionally-directed 9/11 Review Commission* (Federal Bureau of Investigation 2015)
[45] During the conflict in Iraq, the FBI indeed assumed police functions in Baghdad for a short period; see sec 1.4 below
[46] Department of the Army, *FM 3-24 Counterinsurgency*, paras 6-90

counterinsurgency—the protection of the homeland. Whether through coordinated large-scale attacks that are attributable to a specific organization[47], attacks which are claimed but where attribution remains in doubt[48], or attacks that inspired but not directly linked to a specific organization[49], jihadist insurgents may try to fight a war of attrition not only within the areas they control or claim, but also in the West.[50] At this point, the warning that 'all nations following [the path of action against the Islamic State] know that they will continue to be at the top of the target list' by a spokesman of the Islamic State is worth remembering.[51] Through terrorist attacks in the West, such organizations pursue goals that are recognizable and do not necessarily differ from those found in domestic conflicts. These are, among others, spreading fear, provoking a disproportionate response, and undermining the will of the public to commit to counteractions.[52] While this threat should not be overstated—so as not to exaggerate fear and play right into the hands of these organizations—it must nevertheless be taken seriously. The primary responsibility of the police, which is traditionally in charge of domestic security, is therefore exactly that.

While police action needs to be incorporated into a wider strategy of deradicalization and other flanking measures[53], the threat of terrorism also requires organizational transformation

[47] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (W. W. Norton & Company 2004)
[48] Alissa J Rubin and Aurelien Breeden, 'ISIS Claims Responsibility for Attack in Nice, France' *The New York Times* (16 July 2016) <http://nyti.ms/29Xz5AD> accessed 16 July 2016
[49] Pete Williams and Halimah Abdullah, 2015, 'FBI: San Bernardino Shooters Radicalized Before They Met' NBC News <http://www.nbcnews.com/storyline/san-bernardino-shooting/fbi-san-bernardino-shooters-radicalized-they-met-n476971> accessed 25 May 2016; see also ch 2 of this thesis
[50] Michael W. S. Ryan, *Decoding Al-Qaeda's Strategy: The Deep Battle Against America* (Columbia University Press 2013)
[51] Thomas Joscelyn, 2015, 'The Islamic State Claims Responsibility for Paris Attacks' The Long War Journal <http://www.longwarjournal.org/archives/2015/11/the-islamic-state-clams-responsibility-for-paris-attacks.php> accessed 22 April 2016
[52] See e.g. Andrew Kydd and Barbara F Walter, 'The Strategies of Terrorism' (2006) 31 International Security 49
[53] See e.g. Magnus Ranstorp (ed) *Understanding Violent Radicalisation: Terrorist and Jihadist Movements in Europe* (Routledge 2010) for a general overview of radicalization processes

of law enforcement agencies. Generally, the 9/11 Review Commission, in line with general developments since 9/11, argued that law enforcement must be an integral part of the national security apparatus.[54] The 9/11 Review Commission held that especially the FBI needs to be a 'threat based, intelligence driven' organization.[55] Similarly, Europol stressed the need for intelligence in order to be better able to predict and prevent future attacks.[56] Gathering and distributing intelligence necessitates a different approach to law enforcement than simply handling individual cases. Cooperation and intelligence sharing will be crucial to implement countermeasures against networked jihadist actors who operate across multiple jurisdictions.

The need for intelligence will have to be carefully balanced against the rights of individuals and especially privacy will be at the forefront in the coming years. While these issues raise interesting questions, they are beyond the ambit of this chapter. Rather, here the focus will be on an area that already is squarely within the responsibility of the police, and that is the arrest of potential terrorists with the aim of prosecution. The reason this area is singled out is simple and twofold. First, as has been convincingly argued by Kris[57], arrest and interrogation for the purposes of criminal prosecution simultaneously offers an avenue for intelligence gathering as well as threat neutralization. Second, the United States already recognizes that capture rather than kill missions should be the preferred approach in counterterrorism operations, not only domestically but also extraterritorially for the same reasons as above.[58] Nevertheless, ELE—

[54] Hoffman, Meese and Roemer, *The FBI: Protecting the Homeland in the 21st Century, Report of the Congressionally-directed 9/11 Review Commission*, p 9
[55] Ibid, p 15
[56] Europol, *Changes in Modus Operandi of Islamic State Terrorist Attacks* (Europol Public Information 2016), p 8
[57] David S Kris, 'Law Enforcement as a Counterterrorism Tool' (2011) 5 Journal Of National Security Law & Policy 1
[58] Government of the United States, 2013, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22,

whether conducted by civilian agencies or by the military—raises distinct questions under international and domestic law that must be addressed below.

1.2. Threat Neutralization and Intelligence Gathering

Law enforcement can provide an added value to the overall protection of national security in three areas. First, arrests are a useful way to disrupt terrorist plots.[59] In the US, there are currently several cases before the courts involving suspects of the Islamic State[60], and prosecutions have also involved individuals acting on behalf of or supporting al Qaeda[61], and al Shabaab.[62]

Second, whether an attack has been planned or has already been carried out, the criminal justice system can also contribute to the long-term neutralization of potential or actual terrorists through incarceration.[63] While military detention has been used to the same effect over the past decade, as Kris has pointed out, military detention can realistically only serve this purpose until the end of hostilities, whenever that may be.[64] On top of this, the criminal justice system has a wider potential scope than military detention. While detention based on the 2001 AUMF[65] is only available for those who are part of or substantially support al Qaeda or, in an expansive interpretation,

2013' The White House <https://info.publicintelligence.net/DoJ-DroneStrikeProcedures.pdf> accessed 9 August 2016, p 1

[59] Kris, 'Law Enforcement as a Counterterrorism Tool', p 13

[60] See Center on National Security at Fordham Law, *Case by Case: ISIS Prosecutions in the United States, March 1, 2014 - June 30, 2016* (Center on National Security at Fordham Law 2016)

[61] Department of Justice, 2010, 'Faisal Shahzad Pleads Guilty in Manhattan Federal Court to 10 Federal Crimes Arising from Attempted Car Bombing in Times Square' Office of Public Affiars <https://www.justice.gov/opa/pr/faisal-shahzad-pleads-guilty-manhattan-federal-court-10-federal-crimes-arising-attempted-car> accessed 26 August 2016; *U.S. v. Najibullah Zazi*, 2010 WL 2710605 (SDNY 2010)

[62] Department of Justice, 2010, 'Fourteen Charged with Providing Material Support to Somalia-Based Terrorist Organization Al-Shabaab' Office of Public Affiars <https://www.justice.gov/opa/pr/fourteen-charged-providing-material-support-somalia-based-terrorist-organization-al-shabaab> accessed 26 August 2016

[63] Kris, 'Law Enforcement as a Counterterrorism Tool', p 13

[64] Ibid, pp 50-60

[65] Authorization for Use of Military Force. 50 USC 1541 note. Public Law 1070-40, 2001

the Islamic State[66], a successful prosecution can theoretically be brought against any individual who violates US laws. Out of the 417 terrorism indictments in the United States between September 2001 and 2006, only 143 were actually prosecuted on specific terrorism charges. The rest were indicted on other charges such as marriage fraud, driver's license fraud and others.[67] Kris also gives the example of prosecuting an individual travelling abroad to receive military training, which is a violation of US law[68], even in cases where it cannot be established whether a specific camp is administered by al Qaeda or the Islamic State.[69] Furthermore, as Chesney points out, US law not only criminalizes support given to those organizations recognized as foreign terrorist organizations by the Secretary of State[70] or by executive order[71], but more generally material support to anyone, as long as the defendant was aware that his or her support would be used to carry out terrorist attacks.[72] The criminal justice system thus sidesteps some of the limitations of the military justice system.

Third, the criminal justice system offers a unique avenue to gather intelligence 'from terrorists through interrogation, and through recruiting them as cooperating assets'.[73] The criminal justice system has established procedures and other tools, such as plea bargains and proffer agreements, to incentivise cooperation.[74] Relying on the criminal justice system, rather than military commissions or military detention, also has a higher degree of success to secure cooperation from allies. As Kris points

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[66] See ch 2 of this thesis; see also Kris, 'Law Enforcement as a Counterterrorism Tool', pp 50-60
[67] Graff, *The Threat Matrix: The FBI at War*, p 420
[68] 18 U.S.C. §2339D
[69] Kris, 'Law Enforcement as a Counterterrorism Tool', p 59
[70] 18 USC §2339B
[71] 50 USC §1705
[72] 18 USC §2339A; see also Robert M Chesney, 'Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism' (2007) 80 Southern California Law Review 425, pp 428-436
[73] Kris, 'Law Enforcement as a Counterterrorism Tool', p 13
[74] Ibid, pp 50-60

out, several extradition treaties contain provisions explicitly prohibiting the use of military commissions.[75]

Taken together, these three benefits are likely to make a positive contribution to a transnational counterinsurgency campaign. Indeed, the Presidential Policy Guidance (PPG) implicitly and explicitly recognizes that capturing rather than killing members of al Qaeda and the Islamic State should be prioritized.[76] According to the PPG, '[l]ethal action should be taken in an effort to prevent terrorist attacks against US persons only when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat.'[77] Capture operations have two distinct advantages: First, apprehension instead of elimination opens up the possibility of interrogation for intelligence gathering purposes. Post-9/11, the FBI proved incredibly successful in extracting valuable intelligence from detainees through the use of traditional interrogation techniques.[78] Second, law enforcement operations, by design, require agents to be physically present and therefore have the additional opportunity to gather intelligence and establish a chain of evidence.[79] More generally, the value of al Qaeda and Islamic State documents captured in the field cannot be overstated.[80]

However, due to the extraterritorial nature of such a campaign, there are limits, within the general scope of counterinsurgency doctrine, to what role law enforcement can play in a transnational counterinsurgency campaign. It is prudent to re-

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[75] Ibid, pp 50-60
[76] Government of the United States, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013', p 1
[77] Ibid
[78] Graff, *The Threat Matrix: The FBI at War*, pp 361-370
[79] Ibid, p 442
[80] See e.g. Nelly Lahoud and others, *Letters from Abbottabad: Bin Ladin Sidelined?* (Harmony Program at the Combating Terrorism Center at West Point 2012)

call that counterinsurgency is primarily population-centric rather than enemy-centric. In an extraterritorial setting, this role is reversed as far as US law enforcement agencies are concerned. After all, it is neither desirable nor likely that US law enforcement officers would patrol the streets of a city that is disputed by jihadist insurgents. Rather, law enforcement, in the widest sense of the term, can help to bring individual members of such organizations to justice. It is of course the police forces of the host state which have to protect the citizens of foreign countries.

1.3. ELE as a Multiagency Endeavour

It therefore has to be noted that ELE, within the context of the current conflict, has a narrower scope than law enforcement in general, but that its responsibilities are spread over a variety of actors. What law enforcement can realistically achieve is bringing individuals, whether they already have committed acts of terrorism or are in the preparatory stages thereof, to the United States for interrogation and prosecution. What is less clear, however, is the means by which to achieve this goal and therefore which parts of the law enforcement community—or the criminal justice system in general—bears the primary responsibility. There are several possible ways to bring a potential terrorist physically to the US.

First, the United States has 110 bilateral extradition treaties[81], as well as multilateral treaties with entities such as the European Union[82], providing for extradition of criminal suspects. Similarly, as was mentioned above, all multilateral terrorism suppression conventions carry the obligation to 'prosecute or

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[81] 18 U.S.C. § 3181

[82] Council Decision of on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America, 7746/09, Brussels, 7 April 2009

extradite' suspects.[83] Extradition requests were traditionally handled on the diplomatic level[84], but beginning in the 1970s, through the internationalization of law enforcement and mutual legal assistance (MLA) treaties, the Department of Justice and various other agencies developed closer links that ultimately work alongside the State Department. Unfortunately, in the jihadist context, many countries that are on the frontline of the conflict, such as Yemen, Syria, Mali, Somalia and others, are not amongst those covered by an extradition treaty. While an extradition can of course always be secured on a bilateral level, the absence of a treaty complicates procedures. But even in instances where a treaty exists, requests for extradition have often proven difficult in terrorism cases. As Martin describes, political and foreign policy considerations play a far greater role in these cases then with more ordinary forms of crime, as the governments of the host states have a reasonable fear of retaliation by terrorist organizations.[85]

The case of Hamadei illustrates how the fear of retaliation can work even against states not on the front line. Mohammed Ali Hamadei was involved in the hijacking of TWA Flight 847 on 14 June 1985 and killed a US Navy diver on board.[86] The United States tracked his movements and alerted the West German authorities about a planned trip to West Germany, where he was subsequently detained at Frankfurt airport.[87] The US requested extradition of Hamadei to the United States and, fearing the success of this request, supporters of Hamadei abducted

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[83] White, 'The United Nations and Counter-Terrorism: Multilateral and Executive Law-Making', p 57; du Plessis, 'A snapshot of international criminal justice cooperation against terrorism since 9/11', pp 48f

[84] Ethan Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (Pennsylvania State University Press 1993), pp 19-22

[85] Richard A Martin, 'Problems in International Law Enforcement' (1990/1991) 14 Fordham International Law Review 519, p 24f

[86] Federal Bureau of Investigation, 'Hijacking of TWA Flight 847' <https://www.fbi.gov/history/famous-cases/hijacking-of-twa-flight-847> accessed 31 August 2016

[87] Martin, 'Problems in International Law Enforcement', p 34

West German citizens in Beirut demanding that he not be extradited. The West German authorities decided to try Hamadei in West Germany and, even though he was convicted and given a life sentence with the support of the United States, this proved to be a costly and difficult process for US authorities. On the other hand, in the case of Ramzi Yousef, who was wanted for his involvement in the 1993 World Trade Center bombing and a plot to place bombs on airliners bound for the United States, the extradition request was ultimately successful, after Yousef was apprehended by Pakistani security forces in Islamabad.[88]

Second, ELE and subsequent arrest can take the form of official or unofficial cooperation with the police forces of a host state.[89] In the Latin American context, US law enforcement agents, primarily the Drug Enforcement Agency (DEA) and the FBI, have been directly operating on foreign soil with or without the consent of the host state.[90] In some cases, these agents coordinated and cooperated with local police in the apprehension and transport of suspects to the United States without the tacit approval of the local authorities. One such case is Humberto Alvarez-Machain, who was wanted in connection with the murder of a DEA agent in Mexico.[91] Alvarez-Machain was apprehended by Mexican police officers on behalf of the DEA, who received USD 50,000 as well as relocation to the United States in return.[92] Neither the actions by the Mexican police officers, nor their American counterparts, were sanctioned by the Mexican government, which protested the violation of its territory.[93] In a similar case, Francisco Toscanino, an Italian citizen charged

[88] *U.S. v. Yousef*, 927 FSupp 673 (SDNY 1996), pp 675f
[89] Gregory S McNeal and Brian J Field, 'Snatch-and-Grab Ops: Justifying Extraterritorial Abduction' (2007) 16 Transnational Law & Contemporary Problems 491, p 155
[90] Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement*, ch 1
[91] *U.S. v. Caro-Quintero*, 745 FSupp 599 (CDCal 1990), p 599
[92] Ibid, p 609
[93] Ibid, p 609

with narcotics charges and living in Uruguay at the time, was taken from his home in Montevideo by Uruguayan police. As in Alvarez-Machain, this occurred without the knowledge or consent by the host state.[94] The United States also made no formal request for extradition.[95] He was subsequently driven to the Brazilian border and handed over to a group of Brazilians, who, in the account of Toscanino, were cooperating with American authorities. Toscanino was then detained for 17 days in Brasilia for interrogation, before being drugged and put on a plane bound for the United States, where he was finally arrested.[96] While the exact status of the Brazilians is unclear from the court documents, they nevertheless suggest that US officials, including the US Attorney for the Easter District of New York, the Department of Justice, and the Bureau of Narcotics and Dangerous Drugs (BNDD), a predecessor organization of the DEA[97], either received regular progress reports of the interrogation or, as in the case of the DOJ and the BNDD, were present and participated in the interrogation.[98]

Third, the potentially most attractive but arguably also most contentious option within the context of a global campaign against jihadist networks is the abduction of suspects by US forces on foreign soil. Part of its attractiveness stems from the fact that cooperation with those states on the frontline of this conflict has not always been successful. After the USS Cole bombing, for example, Yemeni authorities complicated efforts by the FBI to investigate the bombing and could not prevent repeated prison breaks by the suspects.[99]

[94] *United States v. Toscanino*, 500 F2d 267 (1974), pp 268f
[95] Ibid, p 270
[96] Ibid, p 269
[97] A predecessor agency of the DEA
[98] *United States v. Toscanino*, p 270
[99] Johnsen, *The Last Refuge: Yemen, Al-Qaeda, and the Battle for Arabia*

The US has a long but infrequent history of resorting to this tactic. While an opinion by the Office of Legal Counsel (OLC) in the 1980s declared this to be illegal[100], the opinion was overturned in 1989[101] and thereby the OLC cleared the way for a variety of operations. Already in 1987, in the case of Fawaz Yunis, who was later convicted for his involvement for the hijacking of Jordanian Air flight 402 on 11 June 1985, the FBI obtained an arrest warrant and subsequently lured Yunis onto a yacht in the Mediterranean under false pretences. Upon reaching international waters, he was arrested by FBI agents and transferred to a US Navy vessel before being flown to the United States for trial.[102] In the Achille Lauro affair, following the hijacking of the Italian ship MS Achille Lauro by the Palestine Liberation Front (PLO), the United States used F-14 Tomcats to force an Egyptian airliner carrying the hijackers to land at a NATO base in Italy. The Italian authorities arrested most of the hijackers.[103] On the extreme end of the spectrum end of the spectrum is the case of Manuel Noriega, the former head of state of Panama, where the US launched a military invasion in 1989 in order to, among other things, arrest Noriega on narcotics charges and put him on trial in the United States.[104] More recently, US military forces apprehended Abu Anas al-Liby in Libya for his involvement in the 1998 Embassy Bombings[105] and Ahmed Abu Khatallah for his involvement in the attack on the US diplomatic compound in Benghazi.[106] Similarly, US forces

[100] Office of Legal Counsel, 'Extraterritorial Apprehension by the Federal Bureau of Investigation' (1980) 4B Op OLC 543
[101] Office of Legal Counsel, 'Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities' (1989) 13 Op OLC 163
[102] *U.S. v. Yunis*, 924 F2d 1086 (DCCir 1991), p 1089
[103] Mark D Larsen, 'The Achille Lauro Incident and the Permissible Use of Force' (1987) 9 Loyola of Los Angeles International and Comparative Law Review 481
[104] *U.S. v. Noriega*, 746 FSupp 1506 (SDFla 1990)
[105] *U.S. v. Al Liby*, 23 FSupp3d 194 (SDNY 2014), p 196
[106] *U.S. v. Khatallah*, 2016 WL 410987, F3d (2016), p 1

captured Ahmed Warsame in the Gulf of Aden for providing material support to the Somalia-based Al Shabaab organization and al Qaeda in the Arabian Peninsula (AQAP).[107] He was interrogated for two months on board a US Navy vessel before being read his Miranda rights and brought to the US for trial.[108]

Three things stand out from the above: First, ELE refers to a wide spectrum of activities encompassing a broad range of actors. It incorporates the State Department, the Justice Department, various law enforcement agencies such as the DEA and the FBI, and US military forces. The latter may play a supportive role by transporting individuals to the United States or a more active role by directly apprehending individuals. Second, and following from that, the actors involved in ELE need to be understood more broadly than in domestic law enforcement. Third, the United States has indeed a historical record of unilaterally bringing individuals within the jurisdiction of the United States for the purpose of putting them on trial. This stands in contrast to the large-scale detention policies that post-dated 9/11.

1.4. The FBI in Iraq and Afghanistan

The value law enforcement in general and the expertise of domestic law enforcement agencies in particular can add to extraterritorial operations can be briefly described on the basis of Graff's account of the role the FBI played during the conflicts in Afghanistan in Iraq.[109] According to Graff, the FBI had three

[107] The United States Attorney's Office for the Southern District of New York, 2013, 'Manhattan U.S. Attorney Announces Guilty Plea Of Ahmed Warsame, A Senior Terrorist Leader And Liaison Between Al Shabaab And Al Qaeda In The Arabian Peninsula For Providing Material Support To Both Terrorist Organizations' <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-guilty-plea-ahmed-warsame-senior-terrorist-leader-and> accessed 15 March 2016
[108] Ibid
[109] Graff, *The Threat Matrix: The FBI at War*

main objectives while deployed: First, applying its expertise in 'old-fashioned police work' to countering networks of non-state actors.[110] When the FBI first deployed to Iraq it had mainly sent Hostage Rescue Team (HRT) operators to be embedded with Special Forces. But as then Joint Special Operations Command Commander General McChrystal put it: 'I got shooters. I appreciate that. […] I need investigators.'[111] The FBI adjusted its mission and the second wave of deployments included case agents, analysts, evidence collection teams, and other agents aimed at gathering actionable intelligence.[112] Over the years, the FBI assisted in analysing insurgent networks by charting relationships between individuals just as it had investigated organized crime back in the United States.[113] It conducted investigations into kidnapping, money laundering, and terrorism financing cases. At the height of the reconstruction mission in Iraq, the FBI had a dedicated agent working cases on government corruption as money poured into the country.[114] In return, the FBI itself gained intelligence that could lead to prosecutions back in the United States.[115] As an added benefit, the intense relationship between the military and the FBI reconfigured how the military would approach missions. The military began treating raids more than crime zones, enabling HRT operators to establish a chain of custody for evidence that could be exploited both to obtain actionable intelligence as well as being usable in a court of law.[116]

[110] Ibid, p 442
[111] Ibid, p 442
[112] Ibid, p 442
[113] Ibid, p 449
[114] Ibid, p 443
[115] Ibid, p 434
[116] Ibid, p 449

Second, the FBI massively assisted in the training of Iraqi police forces, establishing relationships that led to mutual operations against insurgents.[117] Just as the FBI maintained that its law enforcement role back in the US gave it a unique ability to gather intelligence on clandestine adversaries[118], the same held true in a war zone. This is another reminder that non-international armed conflicts often require a fundamentally different approach than international armed conflicts.

Third, the FBI was able to contribute technical expertise and other capabilities the military lacked.[119] One area that stands out is the Terrorist Explosive Device Analytic Center (TEDAC) at Quantico. According to Graff, by 2011 almost 70 % of all lab resources at Quantico were devoted to identifying and tracing Improvised Explosive Devices (IEDs) in Afghanistan and Iraq.[120] TEDAC identified more than 206 individuals based on fingerprints and DNA traces found on pieces of evidence. By doing so, the FBI managed to trace IED supply chains by examining cell phones, computer chips, plastics, and by matching explosives across multiple devices.[121]

2. ELE and US Domestic Law

Even more than extraterritorial use of military force against non-state actors, ELE stands at the intersection of domestic and international law. That is not to say that domestic law plays no role in the former. Decisions about whether and to what extent the executive is authorized to employ force and, as in the case of Guantanamo Bay, whether and how long detainees may be

[117] Ibid, p 449
[118] Ibid, p 420
[119] Ibid, p 446
[120] Ibid, p 473
[121] Ibid, p 473

held, necessarily must be grounded in constitutional law. Nevertheless, the overarching framework and legitimacy of such action derive from international law. As this thesis has shown, while the use of force against al Qaeda and the Islamic State traces its way back to the AUMF, the legality of actions based on it have to be primarily analysed on the basis of international law. For example, the decision to strike a specific target has to be primarily consistent with international law and its legality has to be established with reference to it. Furthermore, such actions, for example an extraterritorial drone strike against a jihadist camp, are, for the lack of a better word, self-contained in as far as they usually do not have any consequential acts beyond the act in question. In other words, while such a strike may or may not achieve its goal, the target will not have to be tried on the basis of admissible evidence.

ELE, on the other hand, primarily sits within a framework of domestic law, with international law limiting but not entirely guiding any possible action. This can be illustrated on the basis of the primary inquiry of this chapter, the extraterritorial apprehension of terrorism. While international law is the deciding factor on whether a state can operate on the territory of another sovereign state, the successful prosecution of those such apprehended will rest solely on the legality of such conduct under domestic law. It requires the existence of a relevant crime a terrorism suspect can be charged with, an unbroken chain of evidence, the ability of the courts to exercise jurisdiction over such individuals, and subsequently a trial in accordance with the domestic laws of the state.

Thus, while ELE needs to be carried out in accordance with international law, the role of domestic law is significantly larger. ELE, to the extent it is currently practiced, relies on applying

domestic criminal laws extraterritorially and exerting extraterritorial jurisdiction. It is for this reason that before turning to the limiting effects of international law in Section 3 below, this chapter first needs to shed light on the domestic laws of the US.

2.1. The Presidential Policy Guidance in the Context of ELE

Outside of 'areas of active hostilities', which is the terminology used currently by the US for theatres in which the laws of armed conflict (LOAC) apply, law enforcement responses are already the preferred and proscribed policy option of the United States. The Presidential Policy Guidance (PPG), issued in 2013, lays out that

> the United States prioritizes, as a matter of policy, the capture of terrorist suspects as a preferred option over lethal action and will therefore require a feasibility assessment of capture operations as a component of any proposal for lethal action. […] Lethal action should be taken in an effort to prevent terrorist attacks against U.S. persons only when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat.[122]

While it is not entirely certain, at the time of writing, whether the Trump administration will keep the PPG in place or alter it in any other way, it has similarly not withdrawn it.[123]

What is apparent from the above is that in cases of imminent danger, the United States reserves the right to use lethal force even outside areas of active hostilities. It is not explicitly stated in the PPG what the legal basis for such strikes is, provided that—as was also pointed out in the previous chapter—these are not covered by LOAC. The most likely legal basis under international law for such strikes is self-defence or consent

[122] Government of the United States, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013', p 1
[123] Charlie Savage and Eric Schmitt, 'Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids' *The New York Times* (21 September 2017) <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html> accessed 21 September 2017

of the host state[124], provided that there is a clear and imminent threat of an action of the required scale and effects.[125] Opposed to members of armed groups within areas of active hostilities, to which the LOAC apply, individuals targeted under this regime may not be targeted based on their status.

The PPG contains several criteria that have to be included by a nominating agency (i.e. the agency that proposes that action should be taken against a specific individual) in their operational plan. Of these, four are relevant here. First, any operation must help to achieve the counterterrorism objectives of the United States.[126] Second, the international legal basis for taking action has to be given.[127] This will be discussed further on section 3 of this chapter. Third, any operational plan must contain the strike and surveillance assets that will be used to engage a target.[128] It is worth mentioning that the PPG does not apply to US law enforcement requests to foreign governments for arresting or otherwise capturing a suspect. It does also not apply to any assistance, financial or material, the US government may give to foreign governments in order to enable them to apprehend a potential terrorist.[129] However, the fact that all agencies, and not only the military or intelligence community, may nominate a person at least indicates that extraterritorial action by law enforcement agencies would be possible under the PPG. Fourth, the PPG demands a) near certainty that an identified high-value target or other lawful terrorist target is present, b) near certainty that non-combatants will not be injured or killed

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[124] Government of the United States, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (The White House 2016), pp 8f
[125] See ch 3 of this thesis
[126] Government of the United States, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013', p 3; see introduction of this thesis for US counterterrorism objectives
[127] Ibid, p 3
[128] Ibid, p 3
[129] Ibid, pp 5f

and c) it lists several criteria for the employment of lethal force, which will be explored in more detail in section 3.

Finally, every operational plan must include an evaluation of the implications for the broader regional and political interests of the US and every operation requires the President to sign-off.[130] The Trump administration, according to the New York Times, considers extending the list of possible targets under the PPG to include 'foot-soldier jihadists with no special skills or leadership roles' and drop the requirement that proposed action has to undergo high-level vetting.[131]

The PPG will be analysed in more depth in section 3.2 regarding its compatibility with international law. It was included here to demonstrate that ELE already has a role in US extraterritorial counterterrorism.

2.2. Extraterritorial Jurisdiction

The abduction of individuals necessarily raises an array of questions under international law, especially the permissibility of infringing on another state's sovereignty and potential human rights violations. While those will be dealt with in part three of this chapter, what will have to be briefly established whether individuals can be put on trial in the United States, regardless of whether or not their conduct occurred outside of the United States. In order to put an individual on trial, a court requires jurisdiction over the individual as well as the extraterritorial application of criminal law. Shaw recognizes five types of criminal jurisdiction: i) territorial jurisdiction, depending on where the offence has taken place; ii) national jurisdiction based on the

[130] Ibid, pp 4f
[131] Savage and Schmitt, 'Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids'

nationality of the offender; iii) protective jurisdiction in cases where the national interest is injured; iv) universal jurisdiction for particularly heinous crimes regardless of where the offence has occurred; and v) passive personality jurisdiction based on the nationality of the victims.[132] Abramovsky points out that especially the passive personality principle has been increasingly invoked in US courts in cases where the victims were US citizens.[133] As Shaw explains, the passive personality principle 'a state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state'.[134] It is also worth pointing out that in *Bin Laden*, the Court explicitly stated that while conduct must have a sufficient nexus to the United States in order to be tried in US courts, an action to which the protective principle applies fulfils this requirement.[135] It can be assumed that terrorism cases, especially in the political climate post-9/11 and its emphasis on national security, will easily fall within the protective principle. Courts have also not shied away from invoking universal jurisdiction for terrorism offences. In *Yunis*, the District Court held that both the universal as well as passive personality principle would provide adequate grounds for asserting jurisdiction.[136]

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[132] Malcolm N. Shaw, *International Law* (8th edn, Kindle edn, Cambridge University Press 2017), pp 488-520; see also Abraham Abramovsky, 'Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok' (1990-1991) 31 Virginia Journal of International Law 151 Shaw, *International Law*, p 178; see also *U.S. v. Bin Laden*, 92 FSupp2d 189 (SDNY 2000), p 195; see also 'Draft Convention on Jurisdiction with Respect to Crime', (1935) 29 The American Journal of International Law Supplement: Research in International Law 439
[133] Abramovsky, 'Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok', p 178; see also American Law Institute, *Restatement of the law, the foreign relations law of the United States / as adopted and promulgated by the American Law Institute, at Washington, D.C. May 14, 1986* (American Law Institute Publishers 1987); *U.S. v Layton*, 509 FSupp 212 (1881)
[134] Shaw, *International Law*, p 497; see also International Convention Against the Taking of Hostages, New York, 17 December 1979, United Nations, Treaty Series , Vol. 1316, p 205, art 5(1)(d); International Convention for the Suppression of Terrorist Bombings, art 6(2)(a) and 6(2)(b) for bombings against the state or government facilities itself, similar language is furthermore used in art 7(2)(a) and (b) of the International Convention for the Suppression of the Financing of Terrorism
[135] *U.S. v. Bin Laden*, p 220
[136] *U.S. v. Yunis*, p 109; see also *U.S. v. Yousef*, p 681

In general, however, US courts have been more preoccupied with the question of whether Congress has given particular statutes extraterritorial application, given that it is well established principle of US law that Congress has the power to enforce US laws beyond US borders.[137] It is therefore not necessary here to go into further detail of statutory interpretation in cases where Congress has made the extraterritorial application of criminal statutes not explicit.[138] Suffice to say at this point that post-9/11 Congress has expanded extraterritorial jurisdiction for various offences and terrorism-related penalties, including but not limited to the planning and committing of terrorist acts, provision of material support for such acts, and soliciting the commission of terrorist-related offences, and conspiring to commit such offenses.[139]

2.3. The Ker-Frisbie Doctrine and ELE

The second element to be investigated here relates to the ability of US courts to assert jurisdiction over individuals brought to the United States in ways that potentially violate international law. The basis under international law will be established in more detail below. However, since this is a contentious issue, it is prudent to assume at this point that such action may indeed be contrary to international law and subsequently examine whether an individual facing trial in the United States could use a potential violation of international law as an argument for a court to divest itself of jurisdiction over an offender apprehended abroad and brought to the United States.

[137] *U.S. v. Bin Laden*, p 193
[138] See ibid; See also Curtis A Bradley, *International Law in the U.S. Legal System* (second edn, Oxford University Press 2015), ch 6 for a general discussion of extraterritorial application of US law.
[139] Government of the United States, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, p 37

US courts have a long-standing tradition—commonly referred to as the Ker-Frisbie doctrine—of asserting jurisdiction over individuals regardless of how they arrived before the courts. The doctrine derives its name from the two seminal cases of *Ker v. Illinois*[140] and *Frisbie v. Collins*[141]. In *Ker*, the Supreme Court was called upon to decide whether the forceful abduction of a US citizen from Peru without reliance on the extradition treaty between the US and Peru was a violation of the defendant's due process rights[142], despite the fact that a warrant for his arrest had been issued.[143] The Court's verdict provides rather sweeping powers for ELE. First, despite the existence of a proper warrant and an extradition treaty being in place, the Court stated that the fact that the treaty was not relied upon in bringing Ker to the United States, did not deprive Ker of any rights that would have existed under the treaty.[144] It has to be acknowledged, however, that the agent responsible for Ker's abduction did so on his own accord and not on order of the US government.[145] However, this circumstance had little effect on later decisions and it can be doubted that an abduction under direct orders would render a different verdict in the present.[146] In fact, the Court stated quite plainly that 'forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and present no valid objection to his trial in such court'.[147]

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[140] *Ker v. Illinois*, 119 US 436 (1886)
[141] *Frisbie v. Collins*, 342 US 519 (1952)
[142] *Ker v. Illinois*, p 439
[143] Ibid, p 438
[144] Ibid, p 443
[145] Ibid, p 443
[146] See e.g. *U.S. v. Al Liby*; *U.S. v. Yunis*; Office of Legal Counsel, 'Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities'
[147] *Ker v. Illinois*, p 444

Frisbie, on the other hand, did not have an international element but was concerned with the forcible abduction of a US citizen resident in Illinois and brought to trial—and subsequent conviction for murder—in Michigan.[148] Reiterating its previous reasoning, the Supreme Court stated that it

> has never departed from the rule announced in [Ker] that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction".[149]

Furthermore, it clarified that 'due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with *constitutional* procedural safeguards'.[150]

Coincidentally, abducting a potential terrorist abroad and bringing him or her to the United States outside of an extradition treaty gives the executive a greater degree of flexibility with regards to which charges it wants to levy against an individual. It was pointed out in section 1.2 above that the criminal justice system offers a higher degree of flexibility than military detention, since in principle it is capable to prosecute a wider array of offences. However, this flexibility is curtailed by the doctrine of speciality as established by *US v. Rauscher*.[151] In Rauscher, decided on the same day as *Ker*, the Supreme Court had to decide whether a US court had the authority to try the defendant after he had been extradited from the United Kingdom for an offence other than the one for which extradition had been sought. The *Rauscher* Court, after establishing that self-executing treaties such as the extradition treaty between the United States and the United Kingdom are the law of the land, decided that US courts do not have the power to try offenders for any other offence than the ones stipulated in the treaty if

[148] *Frisbie v. Collins*, p 520
[149] Ibid, p 522, internal citations omitted
[150] Ibid, p 522, emphasis added
[151] *US v. Rauscher*, 119 US 407 (1886)

they are the basis for the extradition request.[152] The courts have not departed from Rauscher, even though its interpretation has not been uniform.[153] Later courts were satisfied, for example, if the prosecution relied on the same facts as those given in the extradition request.[154] Nevertheless, the majority of all current extradition treaties specifically codify the doctrine of speciality.[155] Tactically, this means that whereas the US is free to prosecute an individual for a lesser charge than terrorism offences and, should new evidence emerge subsequently, also for terrorism offences in the case of an abduction, this avenue is closed in the case of extradition. The extent to which this seriously undermines counterterrorism efforts cannot be reasonably estimated within this thesis, but it was nevertheless included to show the greater degree of freedom the executive has in the case of abductions.

Under Ker-Frisbie, the administration therefore has the utmost discretion to bring members of jihadist networks to justice by means of abduction, provided that their constitutional due process rights are upheld once they arrive in the United States. In the extreme, as in the case of *Noriega*, Ker-Frisbie authorizes prosecution even in cases where the executive orders a full-scale military intervention.[156] This, however, is not to say that there are not outer limits to the conduct permissible for the executive. One such possible limit, despite the fact that it itself has been seriously curtailed by later case law, is the *Toscanino* exemption. As already mentioned in section 1.3 above, Francisco Toscanino was an Italian citizen kidnapped by US agents

[152] Ibid, pp 421f
[153] Bradley, *International Law in the U.S. Legal System*, pp 277f
[154] Ibid, p 278
[155] Ibid
[156] See *U.S. v. Noriega*

in Uruguay. During the abduction, Toscanino was severely mistreated, deprived of sleep, and held incommunicado.[157] While the *Toscanino* Court did not necessarily depart from the understanding that due process rights are limited to constitutional rights, it construed Ker-Frisbie not to be reconcilable with the Fourth Amendment.[158] It added that it

> view[s] due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's *deliberate, unnecessary and unreasonable* invasion of the accused's constitutional rights.[159]

Within this it clarified that not using an existing extradition treaty, which had been an issue in the *Toscanino* case, should be seen as unnecessary.[160] It furthermore held that the abduction of an individual extraterritorially, in violation of the sovereignty of the other state, was not covered by Ker-Frisbie.[161] However, this relatively broad limitation of the Ker-Frisbie doctrine was never effectively applied in practice.[162] To the contrary, only one year after the decision in Toscanino had been handed down, the same court watered down the limitation of Ker-Frisbie. In the case of *Lujan v Gengler*[163], Julio Juventino Lujan challenged his verdict on the basis that his abduction from Bolivia and subsequent trial in New York violated his constitutional due process rights. However, contrary to *Toscanino*, the *Lujan* Court reformulated the outer boundaries of permissible conduct during extraterritorial abductions. While Toscanino spoke of a 'deliberate, unnecessary and unreasonable' violation of a defendant's constitutional rights, *Lujan* held that '*Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by

[157] *United States v. Toscanino*, pp 269ff
[158] Ibid, p 275
[159] Ibid, p 275, emphasis added
[160] Ibid, p 275
[161] Ibid, p 278
[162] Abramovsky, 'Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok', p 160
[163] *United States ex rel. Lujan v. Gengler*, 510 F2d 62 (1975)

use of *torture, brutality and similar outrageous conduct'*.[164] It clarified that both cases[165] it had relied upon in *Toscanino* to construe the limitation of Ker-Frisbie 'dealt with government conduct of a most shocking and outrageous character' and more generally that 'not *any* irregularity' in how a defendant arrived before the Court would require a Court to divest itself of jurisdiction.[166] However, the restrictions by *Lujan* could, in theory, provide protection against the worst excesses that have characterized American detainee policy in the aftermath of 9/11. At a minimum, they should ensure that individuals apprehended abroad will be apprehended and treated humanely while in transit to the United States.

Within the context of the campaign against al Qaeda and associates there are several cases where the Ker-Frisbie doctrine has been applied successfully in order to prosecute members of these organizations and there is no significant obstacle for its application to members of the Islamic State, should the necessity arise. The first such case is the case of Anas Al Liby, who was apprehended on 5 October 2013 in Libya and charged with conspiring with al Qaeda and Osama bin Laden to bomb the US embassies in Kenya and Tanzania.[167] Al Liby was captured by Delta Force operators outside his home in Tripoli and removed from his vehicle 'with extreme physical and brutal force'.[168] Subsequently he was blindfolded, deprived of hearing, bound, gagged and moved to a location around Tripoli before being transferred to the US naval vessel USS San Antonio, where he was interrogated by CIA and other intelligence officers until 12 October 2013. During this time, he was held incommu-

[164] Ibid, p 65, emphasis added
[165] *Rochin v. California*, 72 SCt 205 (1952); *United States v. Russell*, 93 SCt 1637 (1973)
[166] *United States ex rel. Lujan v. Gengler*, 65
[167] *U.S. v. Al Liby*, p 196
[168] Ibid, p 196

nicado and not allowed to contact his family or the Libyan government.[169] Similarly, Ahmed Abu Khatallah, a Libyan national wanted in connection with the attacks on the US diplomatic compound in Benghazi, was apprehended by US military forces and charged with the provision of material support by a grand jury while in transit to the US on board a US naval vessel.[170] Both defendants challenged their verdict on various grounds, including a violation of the Posse Comitatus Act[171], a violation of international treaties, and a violation of their constitutional rights.[172] The latter, as was already described above, has to be seen within the context of *Toscanino* in as far as certain treatment can constitute a violation of an individual's Fourth Amendment rights. Khatallah furthermore alleged a violation of his constitutional rights since he had been interrogated while in transit without being made aware of his Miranda rights and the fact that no counsel was provided despite his insistence.[173] The Court denied dismissal on these grounds because it rightly pointed out that the proper remedy for this is a motion to suppress evidence, rather than dismissing the case outright.[174] What is more pertinent here, however, is the extent to which both Courts have—or rather have not—interpreted *Toscanino* as requiring dismissal in the face of government conduct that is, as the *Yunis* Court put it, neither 'picture perfect' nor 'a model for law enforcement behavior.'[175] Al Liby alleged that the way he had been treated amounts to 'inhumane treatment', an assertion the Court did not address directly.[176] Nevertheless, the Court followed *Lujan* and concluded that

[169] Ibid
[170] *U.S. v. Khatallah*, p 1
[171] See section 2.4 below
[172] *U.S. v. Al Liby*, p 196; *U.S. v. Khatallah*, p 1
[173] *U.S. v. Khatallah*, p 8
[174] Ibid, p 8
[175] *U.S. v. Yunis*, p 969
[176] *U.S. v. Al Liby*, p 196

> Toscanino, to whatever extent it survives, does not support al Liby here. Al Liby's counsel has not alleged torture or brutality, nor has he asserted other outrageous conduct of the sort asserted in Toscanino. Al Liby's apprehension rests squarely within the well-established Ker–Frisbie rule.[177]

It furthermore flatly stated that the 'motion to dismiss the indictment based on the asserted ''inhumane treatment'' would be denied without a hearing even if there were competent evidence to support al Liby's factual assertions.'[178] Similarly, the *Khatallah* Court affirmed that *Lujan* had restricted *Toscanino* to only the most outrageous forms of mistreatment.[179]

A final aspect to consider is the influence of potential violations of international law on the Ker-Frisbie doctrine. Both Al Liby and Khatallah partly rested their motion of dismissal on the ground that their abduction violated, *inter alia*, Article 2(4) of the UN Charter.[180] While this assertion obviously deserves evaluation on its own merit[181], the question here is whether or not a violation of international norms could in theory have an impact on the prosecution of individuals suspected of terrorism. After all, if this was the case, it would seriously undermine the ability of the government to use law enforcement as a tool of extraterritorial counterinsurgency outside of situations where an extradition is possible. In theory, international agreements can have an effect on Ker-Frisbie provided that they are self-executing. In *Medellin v. Texas*, which concerned the question of whether judgements by the International Court of Justice were directly enforceable in US Courts, the Supreme Court affirmed that international treaties can only be relied upon in domestic courts if Congress has passed enabling legislation or if the treaty provisions themselves show an intention to be self-executing and is ratified on this basis.[182] It subsequently established that the

[177] Ibid, p 200
[178] Ibid, p 200
[179] *U.S. v. Khatallah*, p 8; see also *United States ex rel. Lujan v. Gengler*
[180] *U.S. v. Al Liby*, pp 201-204; *U.S. v. Khatallah*, p 4
[181] See section 3 below
[182] *Medellín v. Texas* 552 U S ____ (2008), pp 8-27

UN Charter did not fall under this category[183] and both the *Al Liby* as well as the *Khatallah* Court followed this reasoning.[184] According to Bradley, the restrictions found in the UN Charter are directed at the political and military organs of a state and are therefore not self-executing.[185] While violations of international human rights law were not raised as a defence in either case, it can be doubted the International Covenant on Civil and Political Rights (ICCPR)[186] could provide an effective remedy for defendants. The reason for this is that, in the view of the United States, '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'[187]

Thus, it can be confidently said that the extraterritorial abduction of terrorism suspects fits easily within the Ker-Frisbie doctrine and there is no serious impediment under domestic law to bring suspects to the United States for criminal prosecution. However, as was stated above and what is clearly shown in the cases of *Al Liby* and *Khatallah*, is that the military is instrumental for ELE. The military contributed either by directly apprehending suspects or, at the very least, by providing transportation and other logistical support to other law enforcement agencies.

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[183] Ibid

[184] *U.S. v. Al Liby*, p 202; *U.S. v. Khatallah*, pp 5f

[185] Bradley, *International Law in the U.S. Legal System*, p 287

[186] International Covenant on Civil and Political Rights 1966, General Assembly Resolution 2200A (XXI)

[187] American Law Institute, *Restatement of the law, the foreign relations law of the United States / as adopted and promulgated by the American Law Institute, at Washington, D.C. May 14, 1986*, p 395; see also *Medellín v. Texas*, p 9, n 3

2.4. The Posse Comitatus Act and ELE

Both Al Liby as well as Khatallah challenged their verdicts based on the Posse Comitatus Act (PCA), which generally prohibits the utilization of the Army or the Air Force—but not the Navy—in law enforcement. Specifically, it holds that

> [w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, wilfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined no more than $ 10,000 or imprisoned not more than two years, or both.[188]

The question that was explored during both cases, as well as in a previous opinion by the Office of Legal Counsel (OLC)[189], is whether the act has any extraterritorial effect. If it did it would prohibit the most direct forms of ELE for all US armed forces except the Navy.

The OLC argued that the PCA cannot be understood outside of the context in which it was drafted. The framers of the Constitution were very clear that they intended the standing army only as a defence against external foes, while the militia was directly responsible for upholding internal order, even in the case of insurrections.[190] The fear that a strong standing army could dismantle the political system is obvious in the fact that financial appropriations for the Army have to be renewed every two years while the same is not true for the Navy.[191] It is thus easily understood why the internal use of the Army, especially in cases where other agencies have the authority and capacity to fulfil a function such as law enforcement, would be heavily restricted. Furthermore, the President is the sole US organ responsible for external relations and similarly the commander-

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[188] Posse Comitatus Act of 1878, 18 U.S.C. §1385

[189] Office of Legal Counsel, 'Extraterritorial Effect of the Posse Comitatus Act' (1989) 13 Op OLC 321

[190] Ibid, p 324

[191] Constitution of the United States of America, ratified on June 21, 1788, (1789), art. 1, sec 8

in-chief of the armed forces. He has the right, and to some extent duty, to enforce US laws abroad.[192] The OLC opinion therefore concludes that the PCA does not prohibit the involvement of the US armed forces in ELE.

This line of reasoning was upheld in both *Al Liby* and *Khatallah*. Even more, both cases also affirmed that even if the PCA had extraterritorial effect, the proper remedy would not be dismissal of the case, but rather criminal prosecution of those who authorized such action.[193]

In conclusion, there is very little from a US domestic law point of view that would prevent a strategy of ELE over a strategy of using deadly force. The law is flexible enough to allow for the involvement of the armed forces in such operations, either in a supportive or direct role. The role of the military will depend and vary in each case. In some instances, the military will merely assist law enforcement officers through the provision of logistical support, primarily in transporting individuals to the United States for trial, while the arrests are carried out by law enforcement officers, as in the case of Yunis, who was apprehended by FBI agents before being taken aboard a US Navy vessel and taken to the United States by plane from a US aircraft carrier.[194] In other instances, the arrest itself will have to be carried out by military operators, although under different rules of engagement. Von der Gröben, in his account of the approach taken by the Colombian Armed Forces against guerrilla groups, describes the existence of separate operational frameworks for individual engagements of the armed forces. This, he

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[192] Office of Legal Counsel, 'Extraterritorial Effect of the Posse Comitatus Act', p 329
[193] *U.S. v. Al Liby*, p 201; *U.S. v. Khatallah*, pp 2ff; see also *U.S. v. Yunis*, pp 1093f
[194] *U.S. v. Yunis*, p 1089

shows, stems out of the fact that 'the varying conflicts in Colombia have different legal frameworks'.[195] Under so-called 'red-card-rules', armed forces conduct is governed by the rules of LOAC. Under 'blue-card-rules', engagements stay within national rules of law enforcement and human rights law.[196] A similar approach could be adopted for ELE operations, provided that military operators receive the adequate training in both law enforcement rules and procedure, because, ultimately, the goal of ELE operations is to prevent imminent attacks by apprehending suspected terrorists and subsequently putting them on trial. Nevertheless, the analysis cannot end there. After all, while domestic law might be permissive enough, international law may not.

3. International Law and ELE

What can be said so far is that under domestic law there are no significant problems for apprehending potential terrorists abroad and bringing them back for trial in the United States. While it is not uncommon for US law enforcement agencies to operate outside of the territory of the United States[197], such operations usually occur with the consent of the host state and are based on legal agreements between the United States and other states.[198]

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[195] Constantin von der Gröben, *Transnational Conflicts and International Law*, vol 3 (Claus Kreß ed, Cologne Studies on International Peace and Security Law, Kindle edn, Institute for International Peace and Security Law 2014), loc 3566

[196] Ibid

[197] See e.g. sec 1.4 above for FBI operations in Iraq and Afghanistan; see also Adam Goldman and Julie Tate, 'Inside the FBI's secret relationship with the military's special operations' *The Washington Post* (10 April 2010), Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* and Graff, *The Threat Matrix: The FBI at War* for the FBI; see also David Gomez, 'Spies Like Them: How Robert Mueller transformed -- for better and for worse -- the FBI into a counterterrorism agency.' [2013] Foreign Policy and Dickey, *Securing the City: Inside America's Best Counterterror Force - the NYPD* for the NYPD

[198] See Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement*, ch 1

The strategic landscape in the conflict with al Qaeda and the Islamic State, however, often dictates that such groups operate in countries where the government is either unable or unwilling to act on its own or consent to US operations on its territory. Thus, the narrower question here does not concern the ability of the United States to conduct operations overseas with the consent of the host state, but rather when such consent is absent. While such operations necessarily raise a multitude of questions under international law, the analysis here will be restricted to the two most pertinent areas. First, it will need to be established whether law enforcement operations can be reconciled with the law of self-defence, recognizing that self-defence is the most commonly used justification brought forward by states for extraterritorial abductions.[199] Self-defence is of course not the only legal avenue available for such operations. Arimatsu has explored in great detail the ability of states to conduct extraterritorial operations based on the principle of necessity under the law of state responsibility.[200] Nevertheless, the analysis here will be solely on self-defence, for the simple reason that it seems unlikely, at the time of writing, that the United States would turn away from the framework and main arguments it has consistently relied upon since 9/11.

Second, such operations, even if conducted by military forces, must by definition not rely on the laws of war. It will therefore need to be established to what extent the United States is bound by human rights obligations, as an alternative framework, in extraterritorial operations and how permissive this framework is. The remainder of this chapter will take these questions in turn.

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[199] Andrew J Calica, 'Self-Help is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists' (2004) 37 Cornell International Law Journal 389, p 392

[200] See Louise Arimatsu, 'The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm' (2013) 89 International Law Studies 21

3.1. The Jus Ad Bellum and ELE

Chapter 3 ended with the suggestion that, in certain situations, the self-defence proportionality test would require a response that would not qualify as a military strike. Above it has been defined that such operations, even when they are carried out by military force, would have the objective of capturing an individual and bringing him or her back to the United States for trial. This would have to be reflected in the rules of engagement (ROE) for such an operation, as shall be seen below, in as far as deadly force could only be used as a last resort. However, the fact that the ROE would prohibit deadly force, unless exercised in self-defence of the operators on the ground, does not change the fact that such an operation would infringe on the host state's sovereignty unless carried out with its consent. It will thus be necessary to analyse whether such an operation can be reconciled with international law.

It has already been shown in chapter 3 that the most commonly used defence for extraterritorial operations against members of violent non-state actor (VNSAs) networks is the law of self-defence. It will not be necessary to cover the question of whether self-defence is permissible against VNSAs again, since this has already been established in chapter 3. Suffice to say that such operations may be conducted if an armed attack[201] is imminent and the state on whose territory the VNSA is operating is either unable or unwilling to act.[202] While it cannot be ignored that states may often rely on self-defence even when it is not justified, it equally cannot be ignored that self-defence

[201] Charter of the United Nations and Statute of the International Court of Justice (1945), art 51
[202] See Ashley S Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 Virginia Journal of International Law 483

against VNSAs is permissible in principle. For this chapter, it is thus assumed that both conditions are met.

The discussion thus circles back not to *whether* a response is permissible, but rather *what kind* of response is warranted. The *Caroline* test clearly lays out that the 'necessity of self-defense [must be] instant, overwhelming, leaving no choice of means, and no moment of deliberation' and that 'the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it'.[203] The proportionality requirement contained in the final part of the *Caroline* formula clearly obliges us to take into account that the measures necessary to prevent or contain an armed attack by a network of VNSAs—often not more than a few individuals—will be qualitatively different to the measures necessary to prevent or contain a full-blown military attack by a state. Whereas it may be impossible to meet threats by other states in any other fashion than by robust military force, adversaries such as al Qaeda and the Islamic State employ a different *modus operandi* in their overseas operations.[204] Terrorist plots, as deadly as they may be, can often be disrupted by arresting very few individuals should sufficient intelligence on the identity and location of the

[203] Letter of Secretary of State Daniel Webster to the British ambassador, reproduced in 29 (1841) British and Foreign State Papers 1137-1130 and 30 (1842) British and Foreign State Papers 195-196

[204] See Brian Dodwell, Daniel Milton and Don Rassler, *The Caliphate's Global Workforce: An Inside Look at the Islamic State's Foreign Fighter Paper Trail* (Combating Terrorism Center at West Point 2016), p 37 for reasons why foreign fighters would leave IS controlled territory; Erin Miller, 'Patterns of Islamic State-Related Terrorism, 2002--2015' [2016] START Background Paper for data on how attacks are carried out; Rukmini Callimachi, 'How ISIS Built the Machinery of Terror Under Europe's Gaze' *The New York Times* (29 March 2016) <http://nyti.ms/1SsSAQn> , Karen Yourish, Derek Watkins and Tom Giratikon, 'Where ISIS Has Directed and Inspired Attacks Around the World' *The New York Times* (1 July 2015) <http://www.nytimes.com/interactive/2015/06/17/world/middleeast/100000003737925.app.html> , and Rukmini Callimachi, 'Not 'Lone Wolves' After All: How ISIS Guides World's Terror Plots From Afar' *The New York Times* (4 February 2017) <https://www.nytimes.com/2017/02/04/world/asia/isis-messaging-app-terror-plot.html> accessed 5 February 2017 on how terrorist organizations guide terrorist attacks from afar

perpetrators be available, which is also the reason why law enforcement agencies such as the FBI after 9/11 were called upon to be much more intelligence-driven than before.[205]

Kretzmer sets out that, in the context of self-defence, two tests have traditionally been employed to judge whether action meets the proportionality requirement. On the one hand, the tit-for-tat test sets out that counterforce may not exceed the force that provoked it.[206] On the other hand, under the means-ends test, 'proportionality relates to whether the force used (the means) is proportionate to the legitimate ends of using that force (self-defence)'.[207] Ruys argues that the most rigid interpretations of the tit-for-tat approach are almost universally rejected by most scholars.[208] He furthermore develops how some states were reluctant to include a reference to proportionality into the definition of aggression[209], as they feared that a purely quantitative construction of the proportionality requirement could tie the hands of victim states in their choice of response when faced with an armed attack.[210] It seems plausible, therefore, that proportionality should properly be understood as the least harmful way by which an armed attack can be prevented and, as said above, in the context of counterterrorism this may be a law enforcement operation. While it is acknowledged that it may be necessary to employ lethal force in the course of such an operation, such force could only be justified as self-defence of the individual operator and, the mission as such, must not

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[205] Hoffman, Meese and Roemer, *The FBI: Protecting the Homeland in the 21st Century, Report of the Congressionally-directed 9/11 Review Commission*, p 15; Graff, *The Threat Matrix: The FBI at War*

[206] D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24 European Journal of International Law 235, p 239

[207] Ibid, p 239

[208] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010), p 111

[209] Resolution 3314 (XXIX), Definition of Aggression, General Assembly, Twenty-ninth session

[210] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, p 113

have the primary aim of killing rather than apprehending a terrorism suspect.[211]

After 9/11, several commentators voiced strong concerns over the fact that the United States reserved for itself the right to employ lethal force outside areas of active hostilities, or in other words, in areas where the LOAC did not apply.[212] In response, Daskal has argued that

> lethal targeting outside a zone of active hostilities should be limited, not categorically prohibited. It should be focused on those threats that are clearly tied to the zone of active hostilities and other significant and ongoing threats that cannot adequately be addressed by other means. Moreover, a heightened quantum of information and other procedural requirements should apply, given the possibility and current practice of ex ante deliberation and review.[213]

However, the interpretation of the proportionality requirement offered here would in effect help reconcile the concerns of those who fear an escalation of lethal force with those who are afraid that states might be powerless to stop attacks until the moment they materialize. Besides, working from the assumption that the imminent attack, against which counteraction is directed, would warrant action in self-defence, it would be counterintuitive to argue that while extraterritorial lethal force would be permitted, extraterritorial non-lethal force would not.[214] It is also worth bearing in mind that both extraterritorial lethal and non-lethal action on another state's sovereign territory would only be permitted if the host state is either unable or unwilling to address the threat. Furthermore, bringing extraterritorial arrest within the ambit of self-defence should not be understood

[211] See Concluding Observations of the Human Rights Committee: Israel, 21/08/2003, CCPR/CO/78/ISR, declaring that 'before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted'

[212] William C Banks and Evan J Criddle, 'Customary Constraints on the Use of Force: Article 51 with an American Accent' (2016) 29 Leiden Journal of International Law 67, p 20; Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philipp Alston, 28 May 2010, A/HRC/14/24/Add.6

[213] Jennifer Daskal, 'The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone' (2013) 161 University of Pennsylvania Law Review 1165, p 1209

[214] See e.g. Jordan J Paust, 'Permissible Self-Defense Targeting and the Death of Bin Laden' (2011) 39 Denver Journal of International Law and Policy 569, p 572, suggesting that the self-defence paradigm allows killing or capturing individuals engaged in carrying out or planning imminent acts that amount to an armed attack.

as a universal endorsement of this practice. It should be particularly pointed out that an extraterritorial arrest needs to serve the function of preventing an imminent attack. Reactionary actions, especially for bringing those responsible for past attacks to justice, in the absence of credible intelligence that further attacks are imminent, would not fall within the scope of what is outlined here. A prime example for actions that could not be justified is the above-cited Achille Lauro affair in which the United States forced down a commercial airliner to arrest members of the PLO.[215] As Larsen has pointed out, while the hostage taking of American citizens might potentially be construed as an armed attack, the fact that the attack was over and no further attacks forthcoming puts the American response outside of the framework of permissible self-defence.[216]

It is questionable whether the 2 May 2011 raid in Abbottabad, Pakistan, that resulted in the death of Osama bin Laden falls within the paradigm described in this chapter. While the mission was carried out by Navy Seals, and their mission reportedly was to kill or capture Osama bin Laden, the question here hinges on whether the action was carried out inside or outside of an armed conflict.[217] Then US Legal Advisor Harold Koh, in a legal justification for the raid published in 2011, heavily relied on LOAC arguments to establish the operation's legality. Koh said that bin Laden's 'unquestioned leadership role' and 'clear continuing operational role' were sufficient to show that bin Laden was the 'leader of an enemy force' and therefore a

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[215] See p 10 above
[216] Larsen, 'The Achille Lauro Incident and the Permissible Use of Force', pp 484-487
[217] Eric Schmitt, Thom Shanker and David E. Sanger, 'U.S. Was Braced for Fight With Pakistanis in Bin Laden Raid' *The New York Times* (9 May 2011) <http://www.nytimes.com/2011/05/10/world/asia/10intel.html> accessed 9 October 2017

'legitimate target in our armed conflict with al Qaeda' and 'presented a lawful target for the use of lethal force'.[218] Koh furthermore assured that the United States acted in accordance with the principles of distinction and proportionality, which are drawn from LOAC.[219] Paust argues that, at the time of the raid against bin Laden, Pakistan, including the region where bin Laden was hiding, had become part of the armed conflict in Afghanistan and bin Laden was furthermore able to pass orders to the Afghan theatre.[220] The German Federal Prosecutor General similarly acknowledged that an armed conflict existed in Pakistan in 2010, although it is unclear whether it extended beyond the Federally Administered Tribal Areas (FATA) in Northern Waziristan.[221] Whether or not the operation against Osama bin Laden therefore falls within the type of operations described in this chapter depends on whether or not an armed conflict between the United States and al Qaeda existed in Pakistan at the time of the operation, a question which goes beyond the scope of this chapter.

In any case, it must be admitted that there is an absence of state practice that would support the framework above, partly because prior abductions have often occurred in entirely different circumstances. While states have usually protested abductions on their territory[222], these abductions often occurred

[218] Harold Hongju Koh, 2011, 'The Lawfulness of the U.S. Operation Against Osama bin Laden' Opinio Juris <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29> accessed 20 September 2013
[219] Ibid
[220] Paust, 'Permissible Self-Defense Targeting and the Death of Bin Laden', p 579
[221] *Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan (Targeted Killing in Pakistan Case)* Case No 3 BJs 7/12-4, Decision to Terminate Proceedings, Germany, Federal Prosecutor General 23 July 2013, (2013) 157 ILR 722, p 723
[222] See the Security Council condemnation of the abduction of Adolf Eichmann by Israel from Argentina, Resolution 138 of 23 June 1960, S/4349; As was pointed out in Eichmann's trial, both countries ultimately issued a joint communique deciding that no violation of sovereignty had occurred, see *Attorney General v Adolf Eichmann*, District Court of Jerusalem, Criminal Case 40/61, Judgement, 11 December 1961, para 44; See also Mexican protests in the case of Alvarez Machain (n 93)

either in the context of organized crime, such as Alvarez Machain[223], or to bring war criminals such as Adolf Eichmann to justice.[224] While an analogy to organized crime may be tempting, it is not entirely appropriate. While organized crime may trigger severe disruptions to public safety, crime syndicates rarely engage in activities that might be construed as armed attacks against other states. A report by the Bureau for International Narcotics and Law Enforcement Affairs within the State Department, for example, notes for Mexico that drug-related crime significantly contributes to domestic insecurity in Mexico.[225] The first nine months of 2016 saw a 20% increase in the murder rate and 72% of Mexicans believe their city is unsafe.[226] Nevertheless, this insecurity rarely manifests violently externally. Conversely, in the context of VNSA networks, the opposite is true. Ultimately, the absence of state practice should not be seen as prohibitive to this approach as it can be reconciled, it is argued here, with the letter of the law. Putting ELE operations under the ambit of self-defence could indeed help to restrain an escalation of the use of lethal force.

To summarize, if, as Corten criticizes, the threshold for a violation of Article 2(4) of the Charter has been lowered[227], this could be remedied by adequately interpreting the proportionality requirement inherent in self-defence determinations, to insist on ELE operations in cases where such conduct is sufficient to address imminent threats. As such, ELE operations would not be a violation of Article 2(4), but a lawful use of force as long

[223] n 93 above
[224] *Attorney General v Adolf Eichmann*
[225] Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report, Volume 1, Drug and Chemical Control* (United States Department of State 2017), p 215
[226] Ibid
[227] Olivier Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' [2016] Leiden Journal of International Law, p 15

as the level of force does not exceed what is absolutely necessary to suppress an imminent threat. In other words, if apprehending a suspected terrorist on the sovereign territory is enough to prevent a threat of significant scale and effects to materialize, such action should be required as a response in the inherent right of self-defence.

3.2. The PPG and International Law

The PPG required a) near certainty that any identified high-value target or other lawful terrorist target is present, b) near certainty that non-combatants will not be injured or killed and c) if lethal force is being employed

> i) an assessment that capture is not feasible at the time of the operation;
>
> ii) an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
>
> iii) an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.[228]

From the above it seems clear that the PPG tries to integrate various legal requirements that have been mentioned throughout this thesis. First, it clearly tries to satisfy the *ad bellum* requirement of necessity. While an earlier and abridged version of the PPG stated that 'the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons'[229], the later version simply states that lethal force can only be taken 'in an effort to prevent terrorist attacks against U.S. persons'.[230] This standard is arguably considerably wider than the former. However, in a report on the

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[228] Government of the United States, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013', p 3
[229] Government of the United States, 2013, 'U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities' The White House <https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> accessed 1 August 2014, p 2
[230] Government of the United States, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013', p 1

legal and policy frameworks for US military operations, released by the outgoing Obama administration in December 2016, the US clearly identifies imminence as the defining characteristic for extraterritorial action in self-defence.[231] Curiously, the report lists several criteria that would more logically be part of the necessity determination, such as the 'likely scale of the attack and the injury, loss, or damage likely to result', as part of the immediacy determination.[232] Furthermore, paragraph ii above explicitly invokes the unable and unwilling test already described in chapter 3.[233] Action can therefore only be taken if the threat cannot or will not be addressed by the host state.

At the time of writing it is unclear whether the Trump administration will leave the PPG in place. Nevertheless, it is clear from the above that, at the moment, capturing rather than killing suspected terrorists is the primary policy choice of the United States according to the PPG. Furthermore, the Obama administration claimed that all terrorism suspects apprehended outside of areas of active hostilities since 2009 have been handled by the criminal justice system rather than military courts.[234] Thus, while lethal strikes do of course occur on a regular basis, it seems that the extraterritorial apprehension of terrorist suspects is an integral part of US counterterrorism strategy or, at the very least, is meant to form an integral part of it.

3.3. ELE and Rules of Engagement

It is time to turn to the question of what rules would cover the actual conduct of ELE operations. The PPG explicitly applies

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[231] Government of the United States, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, p 9
[232] Ibid
[233] ch 3 of this thesis, sec 1.2.3
[234] Government of the United States, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, p 36

only to operations outside of areas of active hostilities, i.e. areas to which the LOAC do not apply.[235] It would therefore be a stretch to argue that these operations would be covered by LOAC. As far as ELE operations by the United States are concerned, it is not immediately evident which alternative international law framework could apply in its place. Whereas the European Court of Human Rights has made it clear that the European Convention on Human Rights applies to European forces 'whenever the State through its agents exercises control and authority over an individual'[236], the US has continuously rejected any extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR).[237] Article 2 of the ICCPR sets out that each state party 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.[238] In the view of the US, '[t]hat dual requirement restricted the scope of the Covenant to persons under United States jurisdiction *and* within United States territory.'[239]

However, it has been contested that the ICCPR does not have any extraterritorial effect for the United States. Milanovic, after reviewing its drafting history, concluded that the US was mistaken in construing the jurisdiction clause of the ICCPR narrowly.[240] Similarly, former US former Legal Advisor Harold Koh, in a Memorandum Opinion, argued that the narrow interpretation 'is *not* compelled by either language or the negotiating history of the Covenant' and that it 'is in fact in significant tension

[235] See sec 2.1 above
[236] *Al-Skeini and Others v. United Kingdom*, Application no 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, para 137
[237] Human Rights Committee, Summary Record of the 1405th Meeting, 31 March 1995, CCPR/C/SR. 1405, para 20
[238] ICCPR, art 2
[239] Human Rights Committee, Summary Record of the 1405th Meeting, 31 March 1995, CCPR/C/SR. 1405, para 20, emphasis added
[240] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011), pp 222-227

with the treaty's language, context, and object and purpose'.[241] Reassuring those who would fear a serious constraint on US operations abroad, Koh reminded that

> Adopting the sounder legal interpretation need not require a dramatic change in our actual practices abroad. […] Many of the obligations recognized by the ICCPR that would apply to U.S. conduct overseas already apply in that context through the operation of other international legal obligations (such as the Geneva, Genocide and Torture Conventions, as well as customary international law).[242]

For the purposes of this chapter it would be futile to delve any deeper into the question of whether or not the ICCPR applies to US ELE operations for two reasons. First, it is unlikely that the United States will change its official legal position in the near future. Second, the United States has also made it clear that it considers the ICCPR to be not self-executing, thus making it impossible for individuals to directly rely on the Covenant as a course of action in domestic courts.[243]

Nevertheless, in the words of the Human Rights Committee, '[b]efore resorting to the use of deadly force, *all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted*'.[244] As a matter of policy, such an approach would already apply to operations guided by the PPG. As a reminder: '[l]ethal action should be taken in an effort to prevent terrorist attacks against US persons only when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat.'[245] In general, ELE operations should at least, as a matter of policy, adhere to the United Nations Code of Conduct for Law Enforcement

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[241] Harold Hongju Koh, *Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights* (United States Department of State, Office of the Legal Adviser 2010), p 4, emphasis in original

[242] Ibid, p 5

[243] Human Rights Committee, Summary Record of the 1405th Meeting, 31 March 1995, CCPR/C/SR. 1405, para 7

[244] Concluding Observations of the Human Rights Committee: Israel, 21/08/2003, CCPR/CO/78/ISR, emphasis added

[245] Government of the United States, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, May 22, 2013', p 1

Officials (CoC)[246] and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[247] They provide that

> Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.[248]

and that

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[249]

Similarly, Article 3 of the CoC sets out that 'Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.'[250] It furthermore prohibits the use of torture, inhumane or degrading treatment.[251] Pejic argues that the Basic Principles are 'a soft law instrument that arguably reflects customary law'.[252] According to Special Rapporteur Christof Heyns both the CoC and the Basic Principles are 'authoritative statements of international law that set out the principles on the use of force by the police'.[253]

This approach would be consistent with federal law enforcement standards on the use of deadly force. A 1995 memorandum by the Attorney General sets out that law enforcement officers

[246] Code of Conduct for Law Enforcement Officials, United Nations General Assembly Resolution 34/169 of 17 December 1979
[247] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF.144/28/Rev.1, 1990, pp 110-117
[248] Ibid, para 3, p 113
[249] Ibid, para 9, p 114
[250] Code of Conduct for Law Enforcement Officials, United Nations General Assembly Resolution 34/169 of 17 December 1979
[251] Ibid, art 5
[252] Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), p 110
[253] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, annexed to UN doc. A/66/330, 30 August 2011, para 36

> may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.[254]

Additionally, it holds that during an attempted escape, use of deadly force is authorized if

> (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and
>
> (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.[255]

While an in-depth analysis of the outer limits of permissible force is beyond the scope of this chapter, in either case this would mean that ELE operations could still result in the death of a suspected terrorist, but it would rule out missions with the primary objective of killing such persons.

The most pertinent issue obviously is the question of how to reconcile such operations, which effectively amount to extraordinary rendition and would therefore be prohibited by IHRL, with international law.[256] Given the constraints of this thesis this issue cannot be addressed here. As a cursory explanation, it is offered here that in cases that are covered by the law of self-defence, the latter would mitigate against human rights violations. If one is to accept that in certain exceptional circumstances the law of self-defence can mitigate against violations of the right to life, it can also mitigate against violations of other human rights norms. However, a more grounded inquiry will have to be made in further research.

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[254] Office of the Attorney General, Policy Statement: Use of Deadly Force, Memorandum on Resolution 14, October 17, 1995, United States Department of Justice; see also US Customs and Border Protection, *Use of Force Policy, Guidelines and Procedures Handbook, HB 4500-01C* (Of ce of Training and Development, US Customs and Border Protection 2014), p 3, for a similar provision

[255] AG Policy Statement Use of Deadly Force; see also *Tennessee v. Garner*, 105 SCt 1694 (1985); *Graham v. Connor*, 109 SCt 1865 (1989); and US Customs and Border Protection, *Use of Force Policy, Guidelines and Procedures Handbook, HB 4500-01C*, p 3, for a similar provision

[256] See e.g. Duffy and Kostas, ''Extraordinary Rendition': A Challenge for the Rule of Law'

4. Conclusion

This chapter has shown that while extraterritorial law enforcement will not typically assume traditional security roles in counterinsurgency operations, in as far as foreign law enforcement officials will not typically provide security in areas occupied by VNSAs, it can nevertheless make a significant contribution to such operations. Law enforcement can of course ensure the security of the "home front" by disrupting terrorist plots and neutralize threats. This role, in turn, can also be served extraterritorially. Law enforcement, and the criminal justice system in general, can also be instrumental in gathering intelligence domestically and extraterritorially and feed this intelligence to operations both inside and outside of the United States. Furthermore, ELE is a multiagency responsibility that also includes the armed forces, for these will often be the only actors capable of fulfilling it. Nevertheless, this must not always be the case. ELE can be carried out either by a cooperation between law enforcement agencies and the military, as in the case of Yunis, or by the military alone, as in the cases of Al Liby and Khatallah.

Furthermore, in many cases, especially in the context of jihadist organizations operating out of safe havens, these individuals will have to be apprehended unilaterally. It was shown that US domestic law does not pose significant obstacles to the apprehension and trial of terrorism suspects apprehended abroad. It was furthermore argued that such conduct is reconcilable with the *jus ad bellum*, provided that such an apprehension serves the purpose of preventing an imminent threat from materializing and the extraterritorial conduct is the only way to achieve this goal. It was argued that it would be counterintuitive for the *jus ad bellum* to authorize lethal operations in such sit-

uations, but not non-lethal capture missions. Indeed, it is argued that the proportionality test inherent in the *jus ad bellum* should in many cases require and not merely authorize such conduct in cases where the goal of preventing an imminent threat from materializing can be realized in such a manner. Consequently, this approach should at least limit operations by platforms that are incapable of taking such persons into custody, especially air or seaborne attacks. Operationally, this would then also limit the use of drones outside areas of active hostilities for any other purpose than reconnaissance and/or intelligence gathering. Tactically, the United States would have to rely on Special Forces on the ground more often, which would also have the benefit of enhanced intelligence gathering capabilities. Ultimately, there might still be occasions where such operations are simply not possible. However, such situations will often occur either i) in areas of active hostilities to which a different framework applies, or ii) in situations where a person is outside of reach but for that reason presents no imminent threat. Furthermore, while US law is no obstacle for prosecuting terrorism suspects apprehended abroad, the *Toscanino* exception would provide a safeguard against certain conduct that has characterized previous detention programs.

CONCLUSION

When work on this thesis began in 2013, the threat of al Qaeda appeared to have mostly subsided and the expansion of the Islamic State into a regional proto-state, encompassing large swaths of territory in Syria and Iraq, had not yet fully begun. At the end of the writing period in 2017, the Islamic State's Caliphate equally seems to be all but extinguished, but the threat of the organization seems to be far from over. As the attention of the public and policymakers slowly turns toward home-grown radicalization, spurred by attacks on the streets of Nice[1], Berlin[2], London[3], and Barcelona[4], among others, it must not be forgotten that often these groups, in one way or another, may be involved. Attackers in Europe have relied on blueprints laid out in propaganda material by al Qaeda and the Islamic State. The most recent version Al Qaeda's magazine publication, at the time of writing, calls on supporters to derail trains

[1] BBC, 'Nice attack: What we know about the Bastille Day killings' *BBC News* (19 August 2016)accessed 21 August 2016; Alissa J Rubin and Aurelien Breeden, 'ISIS Claims Responsibility for Attack in Nice, France' *The New York Times* (16 July 2016) <http://nyti.ms/29Xz5AD> accessed 16 July 2016

[2] Reuters, 'Berlin Christmas market attacker got order directly from Islamic State - report' *Reuters* (15 April 2017) <http://uk.reuters.com/article/uk-germany-security/berlin-christmas-market-attacker-got-order-directly-from-islamic-state-report-idUKKBN17H0E4> accessed 1 June 2017

[3] Lizzie Dearden and May Bulman, 'London terror attack: Isis claims responsibility amid group's 'call for increased attacks'' *The Independent* (4 June 2017)accessed 17 June 2017

[4] Elwyn Lopez, Tom Lister and James Griffiths, 'ISIS praises Barcelona terrorists, threatens more attacks in Spain' *CNN* (24 August 2017) <http://edition.cnn.com/2017/08/23/europe/barcelona-attack-isis/index.html> accessed 26 August 2017

in the United States and Europe[5], and supporters seek to answer the call. The German security services are worried that similar attacks are likely, or at least possible, in Germany.[6] In short, it is likely that the threat of jihadist terrorism will persist for the foreseeable future. According to Gilles de Kerchove, the EU's Counterterrorism Coordinator, the Islamic State seeks to establish a "virtual Caliphate" to incite terrorist attacks.[7]

For this reason, attempts to dismantle and defeat terrorist organizations "at home", that is in areas where such organizations are most likely to be able to establish safe havens from which they can plan, facilitate, coordinate, and carry out such attacks, by Western states are equally unlikely to cease. Put differently, extraterritorial counterterrorism action will in all likeliness remain a fixture of international security policy, despite growing tensions between the West and Russia[8] and sharpening of the dispute over North Korea's nuclear weapons program.[9]

This thesis sought to engage with the issue of forceful extraterritorial counterterrorism measures and specifically with the question of how to characterize and counteract networks of violent non-state actors (VNSAs) under the framework of US law, particularly the 2001 Authorization for Use of Military Force (AUMF)[10], which remains at the heart of all US action against al

[5] Thomas Joscelyn, 2017, 'AQAP publishes guide for derailing trains in the US, Europe' The Long War Journal <http://www.longwarjournal.org/archives/2017/08/aqap-publishes-guide-for-derailing-trains-in-the-us-europe.php> accessed 17 August 2017
[6] Jan Jessen and Miguel Sanches, 'Terrorgruppe Al-Qaida ruft zu Anschlägen auf die Bahn auf' *Berliner Morgenpost* (30 August 2017) <https://www.morgenpost.de/politik/article211750767/Terrorgruppe-Al-Qaida-ruft-zu-Anschlaegen-auf-die-Bahn-auf.html> accessed 30 August 2017
[7] Duyugu Oezkan, '"Der IS zielt auf ein virtuelles Kalifat ab"' *Die Presse* (30 August 2017) <http://diepresse.com/home/ausland/aussenpolitik/5276767/Der-IS-zielt-auf-ein-virtuelles-Kalifat-ab> accessed 31 August 2017
[8] Lorenz Hemicker, 'Russia Conducts Three Times More War Games than Nato' *Frankfurter Allgemeine Zeitung* (23 August 2017) <http://www.faz.net/aktuell/politik/ausland/russia-conducts-three-times-more-war-games-than-nato-15162743.html> accessed 27 August 2017;
[9] Choe Sang-Hun, '2 Days After North Korea Missile Test, a Show of U.S. Airpower' *The New York Times* (31 August 2017) <https://www.nytimes.com/2017/08/31/world/asia/north-korea-south-korea-us-joint-exercises.html> accessed 31 August 2017
[10] Authorization for Use of Military Force. 50 USC 1541 note. Public Law 1070-40, 2001

Qaeda and the Islamic State[11], on the one hand, and international law on the other. The central question at the heart of the thesis, that is the question of how to conceptualize the relationships between individual members of a terrorist network and the impact of this conceptualization on extraterritorial counter-terrorism action, will therefore remain relevant.

The framework proposed in this thesis approached this question from two different angles. First, chapter 1 tried to understand the inherently insurgent nature of jihadist organizations, in as far as trying to recast the political landscape in certain regions, and indeed the entire world, in a state-building project with the Caliphate as its end-goal. To this end, this thesis looked at historic precedents for the organization of the Caliphate during the time period most aspired to by jihadists. The reason for this is the simple fact that, in order to place the desired Caliphate within the correct historical framework, one has to accept that jihadists seek to "purify" Islam by drawing on Islam's most early period.[12] It was established, based on Mawardi's Ordinances of Government[13] and several other accounts of the historic Caliphate[14], that it was not averse to the regionalization of internal and foreign policy powers. In Mawardi's framework, regional emirs assume significant powers in the war of the *dar al-Islam* against the *dar al-harb*.[15] Similarly, it was argued, it should not be surprising that the leaders of affiliate organizations would be at the forefront of jihad.

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[11] Mary Louise Kelly, 2016, 'When The U.S. Military Strikes, White House Points To A 2001 Measure' NPR <http://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure> accessed 26 July 2017

[12] See e.g. Graeme Wood, 'What ISIS Really Wants' *The Atlantic* (March 2015) <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/> accessed 20 February 2015

[13] Abu'l Hasan 'Ali ibn Muhammad ibn Habib al-Basri al-Mawardi, *The Ordinances of Government (Al-Ahkam al-Sultaniyyah walwilayat al-Diniyyah)* (Wafaa H Wahba tr, Paperback edn, Garnet Publishing 2000 [450])

[14] See ch 2 of this thesis

[15] S. S. Ali and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10 Journal of Conflict and Security Law 321

Based on this historic account, the thesis developed the understanding of a jihadist federation with a central command and control centre that, while potentially not in control of all day to day operations, assumes the *de jure* role of the highest-ranking authority to which all other entities, through pledging *bayat*, are subordinated. Through this act of voluntary subordination, it is argued, such groups become members of a single networked actor, which can subsequently be treated as such for the purposes of the AUMF or similar pieces of legislation. This proposition was complemented by a framework rooted in international law, which argued that such groups, based on their own internal law, should be seen as agents of the overall organization and that therefore their acts should therefore be seen as acts of the organization as a whole. Responsibility is furthermore not only incurred by those who carry out attacks, but also by those who order such attacks. Nevertheless, in order to constrain an escalation of the use of force, it was furthermore argued that this special kind of arrangement only pertains to affiliate, but not to associate organizations. Associate organizations, opposed to affiliates, are not *de jure* members of al Qaeda or the Islamic State and their acts should only have implications for them in case they exercise overall control over individual operations or the group as a whole.[16]

Furthermore, with the demise of strong regional groups, at least for the time being, this thesis proposed that violent acts by individuals without formal membership or affiliation in groups such as al Qaeda or the Islamic State, shall also be considered as acts of these organizations if they are claimed by them. In the case of the San Bernardino shooting, it was argued

[16] See ch 2 of this thesis

that should the Islamic State consider those responsible as 'soldiers' of the group, thus adopting the conduct as their own, it should be treated as such. This suggestion is a timely one, considering the increasing number of "lone actor attacks", often on the basis of propaganda by either al Qaeda or the Islamic State. The argument here is simple: Such groups should not be awarded the benefit of claiming such actions as their own without incurring the corresponding responsibility.

While this thesis has attempted to give concrete examples of specific organizations that should be considered affiliate organizations of either the Islamic State, al Qaeda in the Arabian Peninsula in the case of al Qaeda or Boko Haram in the case of the Islamic State. Nevertheless, it would be futile to provide an up-to-date list of all those groups to be considered affiliates or associates, as the jihadist landscape is ever changing. While the number of formal al Qaeda affiliates has remained fairly stable over the years, and the names of those organizations were provided in chapter 2, the Islamic State had in total already collected 43 pledges of allegiance and declarations of support as of 15 December 2015, according to the private intelligence company IntelCenter.[17] The point is that while it is beyond the scope of this thesis to provide an exhaustive list of affiliates and associates, which is the responsibility of intelligence analysts, the framework proposed here can provide an adequate foundation for making such a determination and give insight into its implications. Further work should nevertheless investigate the trove of declassified battlefield documents found in the Harmony Program of the United States[18], as well as documents declassified

[17] IntelCenter, 2015, 'Islamic State's 43 Global Affiliates Interactive World Map' IntelCenter <https://intelcenter.com/maps/is-affiliates-map.html#gs.dR0TjEY> accessed 17 June 2016
[18] Combating Terrorism Center, 'Harmony Program' Combating Terrorism Center at West Point, <https://ctc.usma.edu/programs-resources/harmony-program> accessed 3 September 2017

by the Office of the Director of National Intelligence[19], to put the framework set out above on a stronger empirical footing.

The benefit of this framework for a counterinsurgent like the United States, facing a changing international jihadist landscape, is that networks of groups that have sworn to attack the United States can be more easily understood as single actors and therefore put current practice of using force against them, based on a single piece of legislation, on a firmer footing. While the current approach, based on co-belligerency[20], relies on such groups attacking the United States, it does not answer how such groups are linked to al Qaeda, which in turn is the fundamental requirement of the AUMF. It is argued that such a limitation of extraterritorial use of force is a sensible policy restriction, the approach promoted here nevertheless has the benefit of tying such groups to 9/11 because they officially become part of the group responsible for it. Concerns that the United States would not be in a position to respond to imminent attacks because an individual group has not pledged allegiance to al Qaeda can be easily dismissed, because the President has sufficient powers under Article II of the Constitution to respond to such threats.[21] At the same time, this approach would also force Congress to authorize force against organizations that fall outside of the AUMF, such as the Islamic State, and therefore prevent the Executive from stretching the powers given to it in the AUMF beyond the breaking point. That such authorizations may become necessary is furthermore evident from the discussion of jihadist international relations found in chapter 1, which detailed that Islamic international law, as understood by jihadist organizations, in effect demands the expansion of the *dar al-Islam* into

[19] Office of the Director of National Intelligence, 2015, 'Bin Laden's Bookshelf' Office of the Director of National Intelligence, <https://www.dni.gov/index.php/features/bin-laden-s-bookshelf?start=1> accessed 3 September 2017
[20] *Hamlily v. Obama*, 616 FSupp2d 63 (DDC 2009), p 75
[21] Constitution of the United States of America, ratified on June 21, 1788, (1789), art II

the *dar al-harb*. Furthermore, as also argued in chapter 1, certain interpretations of Islamic laws on the use of force may lead jihadist organizations to the belief that they are obligated to wage wars against 'apostate' regimes, thus creating instability in areas in which such organizations operate. It will remain to be seen to what extent jihadist groups will employ strategies that either rely on tactical internationalism or expansionist internationalism in the future, and further research into this question is warranted.

Despite the increase of lone actor attacks alluded to before, it is unlikely that jihadist organizations will abandon the goal of controlling territory and establishing regional proto-states. Whether or not they will seek to target the far enemy to achieve this goal will remain to be seen, at the time of writing in September 2017 it certainly seems likely. The United States and other Western states will therefore potentially find themselves in the situation of having to prevent imminent armed attacks either emanating or at least being controlled or incited from safe havens outside of their territory. At times, the use of military force will be the only way to prevent such attacks. This thesis argued that the right of self-defence applies to such attacks by non-state actors, even in situations where their conduct is not attributable to a state, as long as the 'scale and effect'[22] of such attacks rises to the level of an armed attack by a state. It was shown that jihadist strategic thinking seeks to capitalize on the protection offered by sovereignty rights.[23]

However, two qualifications were introduced in the thesis. First, the litmus test under the *jus ad bellum* is that such use of military force may only be used to prevent an armed attack from

[22] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment ICJ Reports 1986, p 14, para 195
[23] Norman Cigar and 'Abd Al-Aziz Al-Muqurin, *Al-Qa'ida's Doctrine for Insurgency: 'Abd Al-Aziz Al-Mqurin's 'A Practical Course for Guerilla War'* (Norman Cigar tr, 2009), p 12

materializing.[24] It was furthermore argued that states should be able to employ the 'accumulation of events' doctrine to determine whether an armed attack has taken place, and count attacks by affiliate organizations and associate organization, in case such acts were under the overall control of either al Qaeda or the Islamic State, provided they are directed against the same state.[25] Further empirical work is needed to set out a workable timeframe within which such attacks need to take place, but it was argued that an interim time-period of several years is certainly too long.

Furthermore, the *jus ad bellum* does not allow for punitive action or for action where an attack is not imminent. Second, such action is only permissible in cases where the host state, that is the state on whose territory these groups operate, is either unable or unwilling to act. If the host state is in a position and willing to suppress an imminent attack, there is simply no reason for extraterritorial action. However, while the unable and unwilling test is frequently invoked and some scholars, legal opinions by states, and state practice suggest that it cannot be easily dismissed[26], more work is needed to define the contours of the principle. Specifically, scholars need to investigate what exactly constitutes either prong of the unable and unwilling test and how either can be established in practice.

Furthermore, it was argued that the recalibration of jihadist strategy towards the near enemy is opening up an avenue for acting with the consent of the host states, or the adoption of proxy strategies. In this case, more work is needed to delineate

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[24] see ch 3 of this thesis
[25] See ch 3, sec 1.1.2, of this thesis
[26] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010), pp 423-425; Wissenschaftlicher Dienst des Bundestags, *Staatliche Selbstverteidigung gegen Terroristen: Völkerrechtliche Bewertung der Terroranschläge von Paris vom 13. November 2015* (WD 2 - 3000 - 203/15, Deutscher Bundestag 2015); Anders Henriksen, 'Jus ad bellum and American Targeted Use of Force to Fight Terrorism Around the World' (2014) 19 Journal of Conflict and Security Law 211, p 239, fn 101

the permissible limits of support given states on the frontline. Here it is possible to refer back to the unable and unwilling test. There might be situations where a state is willing to act, but it is likely that it is only possible if either materiel or intelligence, or in fact both, are provided to it. It is furthermore possible that such states may use force to confront threats in a way that would be contrary to international law, especially human rights law. More work is therefore needed to establish the limits for Western states to provide support in such cases. Furthermore, in cases where such support is not possible, it needs to be established whether states can use force on the basis that such a state is not able to prevent the imminent attack.[27]

Nevertheless, it was argued, that an armed conflict may nevertheless exist between either al Qaeda or the Islamic State and the United States, or other Western countries, but that such a conflict would not be "global", contrary to the current legal position of the United States. Invoking the language of *Tadić*, such a conflict would include 'whole territory under the control of a party, whether or not actual combat takes place there.'[28] This approach would, on the one hand, safeguard the ability of states to act in areas actively contested or under control by jihadist organizations, for example safe havens, while on the other shield against too expansive interpretations of the *jus in bello*. While it is beyond the scope of this thesis to provide an exhaustive list of all territories that would be currently covered, as there is a risk of such information within a short period of time, it can nevertheless be said that the territory of Iraq and Syria, and to some extent Yemen, would probably fall into this category at the time of writing. Again, it is up to state officials

[27] See ch 3 of this thesis
[28] *Prosecutor v. Dusko Tadic*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70, italics added

to convincingly establish whether the laws of armed conflict apply before launching operations. In line with the argument above, such operations may also be part of an ongoing conflict between jihadist groups and regional states, which the United States or other Western states may join based on the consent of those regional states. Furthermore, the cases of *Al-Nashiri*, *Al-Bihani*, and *Al-Warafi* were cited to illustrate the difficulty of establishing when such an armed conflict against a network of VNSAs begins or ends.[29] This question certainly will demand a lot more attention in the future.

Ultimately, it was argued, the *jus in bello* should not be seen as a tool to protect states against the use of force on their territory. While such a shield is necessary, it should be more logically found in the *jus ad bellum*. Thus, even if it were possible to establish that the laws of armed conflict apply to a given territory, the use of force is nevertheless dependent on the satisfaction of the criteria found in the *jus ad bellum* and the scope of the specific action to be launched must clearly remain within what is necessary.[30]

Finally, it was argued that the proportionality requirement of the *jus ad bellum* should be understood that in cases where an imminent attack can be prevented through the apprehension and trial of individual terrorist suspects, such an approach should indeed be mandated by international law. This argument should not be seen as a conflation of the *jus ad bellum* and the *jus in bello*, which might allow for status-based targeting in areas where the laws of armed conflict apply, but as a sensible limitation on the violation of the sovereignty of other states. Such a limitation would nevertheless serve to uphold other

[29] *Al -Nashiri v. Obama et al*, 76 F Supp 3d 218 (2014)

[30] See Letter of Secretary of State Daniel Webster to the British ambassador, reproduced in 29 (1841) British and Foreign State Papers 1137-1130 and 30 (1842) British and Foreign State Papers 195-196; *Al-Bihani v. Obama et al*, 590 F3d 866 (DC Cir 2010), p 87; *Al Warafi v. Obama*, No 09-CV-2368, 2015 WL 4600420 (DDC July 30, 2015), pp 3-5

goals of international law, especially human rights law. While critics may argue that the unilateral extradition of individuals is in itself a violation of an individual's human rights, it is contended that it is counterintuitive to authorize lethal operations in such situations, which clearly has to be reconciled with such an individual's right to life, while not authorizing operations that would have to be reconciled with other rights. Again, such an approach will have to clearly stay within what is necessary and proportional to prevent imminent attacks. It was also shown that there are little obstacles in US domestic law for the employment of such an approach, and persons so apprehended could be put on trial in the United States. Indeed, the Presidential Policy Guidance (PPG), which applies to operations outside of areas of active hostilities, already requires such an approach. Nevertheless, scholars will have to pay careful attention on whether the PPG will remain in place or whether the Trump administration will change the framework of US extraterritorial counterterrorism operations.

Such operations could nevertheless be carried out by military forces, either in cooperation with or independent of civilian law enforcement agencies, but they would have to operate under a different set of rules of engagement. The rules of engagement would have to mirror the main objectives of such operations, which could be achieved by taking guidance from federal standards on the employment of lethal force in domestic law enforcement operations. This would safeguard the primary principle of bringing individuals to justice, while acknowledging the strong objection of the United States to the extraterritorial application of international human rights law. It is suggested that the United States develops a framework comparable to the Co-

lombian Armed Forces in their domestic struggles, which operate either under 'red-card-rules' or 'blue-card-rules' depending on the situation.

Furthermore, it was argued that there are strong policy benefits of an extraterritorial law enforcement approach. The thesis pointed to the successes of the Federal Bureau of Investigation after 9/11 in the gathering and analysis of intelligence, in contrast to the limitations of other attempts by the United States in intelligence gathering.

Ultimately, due to the breadth of the scope of inquiry in this thesis, it had to leave many questions unanswered. More attention will have to be paid to the activities of the intelligence community and especially large-scale data gathering activities that have been justified on the basis of the necessities of counterterrorism operations. With regard to the activities of law enforcement agencies, a particularly interesting research question relates to the globalizing role of domestic law enforcement agencies and the present author especially points to the New York City Police Department[31], which has even developed its own intelligence unit.[32] Generally, scholars should pay attention to further developments within the jihadist sphere and interpret the issue discussed in this thesis on the basis of developments on the ground.

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