Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law

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INTRODUCTION

In May 2013, President Barack Obama, addressing graduates at the National Defense University, offered the most comprehensive outline of U.S. policy on extraterritorial lethal targeting to date.1 It followed on the heels of a leak several months earlier of a Department of Justice “White Paper” regarding the targeting of United States citizens.2 Although the latter document was nothing more than a draft briefing paper, its publication ignited a firestorm of controversy. For instance, the director of the American Civil Liberties Union’s National Security Project labeled it “a profoundly disturbing document.”3

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Caustic debates over extraterritorial targeting, which is usually conducted by remotely piloted aircraft (so called "drones"), have plagued the international law community for a number of years. Although that topic merits attention, the discourse has been marked by an unusually high degree of counter-normative and counter-factual assertions. In particular, pundits often ask the wrong questions or answer the right ones by reference to the wrong body of law. The result is growing confusion, as analytical errors persist and multiply.

Despite public perceptions, the issue is not the drones themselves, for the relevant legal rules and principles apply equally to any method or means of warfare (drone, manned aircraft, artillery, cruise missile, special forces team, etc.). Instead, two factors common to all such operations lie at the heart of their legality, or lack thereof: 1) extraterritoriality, and 2) lethality. The goal of this Essay is to deconstruct the logic of international law relating to so-called “targeted killings” by sharply delineating the legal questions they raise and offering a coherent analytical framework for examining them. No attempt is made to definitively resolve the questions themselves; the framework is methodological, not substantive.

Nor does the proposed framework extend to domestic legal issues. That law has little bearing on whether an extraterritorial operation comports with international legal norms. For instance, the fact that combat operations may (or may not) be justified on the basis of the Authorization to Use Military Force is irrelevant with respect to their lawfulness as acts of self-defense under Article 51 of the


5. In international humanitarian law, the term “means” of warfare refers to weapons and the systems that support them. “Methods” of warfare are the tactics used when employing those weapon systems.

6. For sophisticated in-depth treatment of the issues discussed in this Essay, see NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010); NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW (2008).

United Nations Charter and customary international law. Similarly, while the targeting of a United States citizen may have constitutional implications, citizenship has no bearing on whether he or she is a lawful target under international humanitarian law.

I. EXTRATERRITORIALITY

Absent an applicable exception to the general principle, the mere passage of the military or civilian organs of one State into the territory of another State violates the latter's sovereignty, as does any other entry attributable to the former pursuant to the law of State responsibility. Accordingly, sovereignty is the key principle governing the legality of the extraterritorial aspect of these operations. That said, a State that unlawfully crosses into another State's territory and employs armed force there (or is otherwise legally responsible for such employment) might also violate international law's prohibition of the use of force, set forth in Article 2(4) of the United Nations Charter and customary international law.

The law surrounding the penetration of one State's border by another State's forces must not be confused with the law dealing with the specific acts in which those forces engage. Although penetration may be lawful, the acts themselves may amount to violations of...
international law, and vice versa. This Part examines the four recognized exceptions to the legal impenetrability of foreign borders: authorization by the United Nations Security Council, breach of neutrality, consent, and self-defense. Part II addresses the legality of any acts undertaken once the border has been crossed, whether lawfully or not.

A. U.N. Security Council Authorization

The United Nations Charter authorizes the Security Council to determine, pursuant to Article 39, whether a particular situation amounts to a "threat to the peace, breach of the peace, or act of aggression." In response to such a finding, the Council may offer recommendations on how to resolve the matter. It may also authorize or mandate non-forceful or forceful measures, known as "Chapter VII operations," to "maintain or restore international peace and security." Authorization would be based on Article 42, which permits the Security Council to "take such action by air, sea, or land forces" as may be necessary to achieve that end.

Security Council power in this regard is unfettered. The Council may determine that any situation represents a threat to the

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14. For instance, under international humanitarian law it is unlawful to attack civilians or those who are hors de combat. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 41(1), 50(1), 51(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Although the United States is not party to Additional Protocol I, it is bound by the same rules as a matter of customary international law. See, e.g., U.S. NAVY/U.S. MARINE CORPS/U.S. COAST GUARD, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, ¶¶ 8.2.1, 8.2.3 (NWP 1-14M, MCWP 5-12.1, COMDT PUB P5800.7A eds., 2007) [hereinafter COMMANDER’S HANDBOOK]. Even if a border is lawfully crossed, it would be unlawful to attack civilians.


16. Note that the Security Council has characterized serious acts of terrorism as a threat to international peace and security. See, e.g., S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001). The Security Council authorizes an action when, for instance, it grants states the authority to perform certain functions, such as counter-weapons of mass destruction operations. It mandates operations when it forms a particular entity, such as the U.N. peacekeeping force MONUSCO, and grants it the authority to perform a specific mission. Chapter VII refers to the chapter in the United Nations Charter in which the relevant articles appear.

17. U.N. Charter art. 42.

18. Although it is generally accepted that a Security Council Resolution may not authorize action contrary to a jus cogens norm. See Yoram Dinstein, WAR, AGGRESSION AND SELF-DEFENCE 348–50 (5th ed. 2011).
peace, breach of the peace, or act of aggression and authorize any remedial action it deems appropriate. It is undeniable that the Council could turn to Article 42 to authorize extraterritorial uses of military force against either a state or a non-state actor. It is likewise clear that the consent of the State in which the ensuing operations take place is not a condition precedent to taking such action.

Unlike the other three legal justifications for piercing the veil of state sovereignty, the existence of an "armed conflict," or lack thereof, has no bearing on the applicability and scope of Security Council authorization to cross a border to conduct extraterritorial lethal operations. However, it should be cautioned that were the ensuing hostilities to qualify as an armed conflict (either international or non-international), international humanitarian law would apply as discussed in Part II of this Essay.

B. Breach of Neutrality

International armed conflict (armed conflict between states) affords states an exceptional legal basis for conducting extraterritorial lethal operations. The law of neutrality has long imposed a duty on Neutral States to ensure that Belligerent States do not use neutral territory for purposes related to the conflict. This duty is the quid pro quo of neutrality law's recognition that neutral territory is inviolable.

If a Belligerent's troops enter neutral territory, the Neutral

19. As noted, it could not authorize violations of certain *jus cogens* norms, such as torture.


State is obligated to expel those troops, by force if necessary. Any such force is not to be construed as a hostile act against the offending Belligerent; i.e., it does not initiate an armed conflict between the Neutral and the Belligerent.24 Failure to comply with the obligation to police its territory opens the door for another Belligerent State's forces to cross into the Neutral State for the express and limited purpose of putting an end to its enemy's breach of neutrality,25 although the Belligerent may do so after it has afforded the Neutral a reasonable opportunity to remedy the situation. Note that it is irrelevant whether the Neutral State fails to fulfill its duty because it is unwilling to do so or simply incapable of taking the appropriate measures.

The structural logic underlying this long-standing neutrality law norm applies by analogy, as will be discussed, in the law of self-defense to situations not qualifying as an international armed conflict. In both cases, competing rights and interests are balanced in order to determine the best accommodation of their respective objects and purposes.

C. Consent

A state's valid consent to the presence of foreign forces on its territory precludes any claim that its territorial sovereignty has been violated.26 Consent may be granted for carrying out self-defense operations, conducting operations in association with a non-international armed conflict (described below), or assisting the territorial state in its own non-international armed conflict.

Since the legal basis of the state's presence is consent, the activities of its forces are limited to the scope of that consent.27 Terri-

24. Hague V, supra note 22, art. 10; Hague Air Warfare Rules, supra note 22, art. 48.

25. COMMANDER’S HANDBOOK, supra note 14, ¶ 7.3; MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, 2004, JSP 383, ¶ 1.43(a) (U.K.); TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, r.92 (Michael Schmitt et al. eds., 2013) [hereinafter TALLINN MANUAL]; HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, r.168(b) (2010) [hereinafter AMW MANUAL]; INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, r.22 (Louise Doswald-Beck ed., 1995).


27. See Terry D. Gill, Military Intervention at the Invitation of a Government, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 229 (Terry D. Gill & Dieter Fleck eds., 2010). Analogously, actions pursuant to a Security Council Resolution are limited to those set forth in the respective mandate or authorization. Actions exceeding the mandate or authorization are unlawful absent a separate legal basis, such as self-defense.
torial states typically place restrictions such as nature, location, and
duration on the operations of other states in their territory. As an
example, a territorial state may permit surveillance flights in its air-
space, but prohibit lethal strikes by aircraft or drones. In this case,
engaging in the latter would violate the territorial state's sovereignty.
Indeed, since force is being used, the action could amount to an un-
lawful use of force against that state.

When evaluating consent-based operations, care must be taken
before concluding consent was lacking. In some cases, the terri-
torial state may, for domestic or international political reasons, wish
to publicly distance itself from operations to which it has in fact con-
sented. For instance, while the Pakistani and Afghan governments
often publicly object to U.S. drone strikes, they consented to the es-
tablishment of the military bases on their soil from which those oper-
ations are sometimes launched. If the strikes truly exceeded the
scope of consent, the governments would have grounds for com-
plaint. But much of the criticism seemingly was, and remains, or-
chestrated for domestic public consumption.

D. Self-Defense

In the absence of a Security Council Resolution or consent,
and in a situation that does not involve an international armed con-
{}flict such that the law of neutrality applies, the law of self-defense
may provide a basis for extraterritorial operations. The U.N. Charter
sets forth the principle in Article 51, which reflects customary inter-
national law: "Nothing in the present Charter shall impair the inher-
ent right of individual or collective self-defence if an armed attack
occurs against a Member of the United Nations . . . ." The phrase
"nothing in the present Charter text" refers, in particular, to the Arti-
cle 2(4) prohibition on the use of force. In other words, a state's

28. For instance, during the conduct of Operations Provide Comfort and Northern
Watch, the Turkish government limited Coalition operations to a set number of days per
month and did not allow night operations. Based on the author's personal experience as
legal adviser to the operations.

29. Using force inconsistent with the terms of any consent by the territorial state
would amount to an "act of aggression" against that state. G.A. Res. 3314 (XXIX), Annex

30. And, by the same token, that consent was validly granted. On the issue of consent,
see Ashley S. Deeks, Consent to the Use of Force and International Law Supremacy, 54


32. U.N. Charter art. 2, para. 4.
use of force is not unlawful when conducted to defend itself or another state (collective defense) against an armed attack.

Self-evidently, the law of self-defense permits engaging in defensive actions in the attacker's territory, in one's own territory, on the high seas, and in international airspace. Moreover, as noted by the International Court of Justice in the Nicaragua case, "the 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' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'" is an armed attack by the state sending them. In such situations, the victim State may use defensive force on the sponsor State's territory as if the sponsor State's own armed forces had conducted the attack.

An exchange of hostilities between States usually initiates an "international armed conflict" to which the law of neutrality, as discussed above, applies. If it does, that body of law governs Belligerent State intrusions into neutral territory. However, controversy surrounds cases of intrusion into other states in self-defense outside the context of an international armed conflict. The stereotypical scenario involves an extraterritorial defensive operation against a non-state actor located beyond the target State's territory. Of course, the paradigmatic cases are the U.S. drone strikes directed against al Qaeda operatives abroad.

The crux of the border crossing issue is whether the law of self-defense extends to attacks by non-state groups that are not under a state's control. Only if it does can non-consensual operations against them launched into "sanctuary States" be justified under international law. Two schools of thought exist on the subject. The first suggests that defensive actions are only permissible when the

34. Hague V, supra note 22, arts. 2, 3.
36. See discussion in Randelzhofer & Nolte, supra note 33, at 1416–19.
37. The term "sanctuary State" need not necessarily imply that the state where the group is located acquiesces to that group's presence.
non-state group operates under a state’s direction as envisaged in _Nicaragua_. Support for this position is found in two very controversial International Court of Justice cases in which the Court seemed unwilling to consider claims of self-defense in the absence of a definitive tether between a state and the non-state group in question.\textsuperscript{38} By this interpretation, an extraterritorial use of force against non-state actors in another state would be unlawful without the consent of that state or authorization of the Security Council.

A number of the judges emphatically contested the majority’s approach, arguing that it ignored both the plain text of the Charter, which does not limit self-defense to armed attacks by states, and state practice, where in the aftermath of the 9/11 attacks states appeared comfortable with the application of the norm to non-state actors.\textsuperscript{39} The United States agrees, arguing that self-defense is an available remedy in the face of an armed attack by a non-state organized armed group.\textsuperscript{40} For proponents of this position, including the author, the question is not whether self-defense is permissible against non-state actors; rather, the questions are when, how, and where a state may take action. It should be cautioned that even advocates of this view hesitate to extend the notion of self-defense to actions engaged in by individuals or by groups that are poorly organized.\textsuperscript{41}

Assuming for the sake of analysis that the law of self-defense applies to armed attacks conducted by non-state actors who are unaffiliated with any state, the question remains of whether another state’s territory may be penetrated to strike them. The law of self-defense itself imposes no limits based on the location of the defensive action. However, with regard to non-state actors in another state, the state defending itself must take into account the territorial state’s sovereignty and its right to be free from uses of force on its territory. Unlike a state that has conducted an armed attack, or is


\textsuperscript{39} See, e.g., Wall Advisory Opinion, 2004 I.C.J. at 215, ¶ 33 (separate opinion of Judge Higgins); id. at 229–30, ¶ 35 (separate opinion of Judge Kooijmans); id. at 242–43, ¶ 6 (declaration of Judge Buergenthal); Congo, 2005 I.C.J. at 337, ¶ 11 (separate opinion of Judge Simma).

\textsuperscript{40} White Paper, supra note 2, at 2. See also Harold Hongju Koh, Legal Adviser, Dep’t of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm [hereinafter Address by Harold Koh].

\textsuperscript{41} See, e.g., TALLINN MANUAL, supra note 25, at 54–61.
otherwise responsible for one engaged in by non-state actors, it has not forfeited those rights.

It has been suggested that the principle of sovereignty does not yield to the right of other states to defend themselves.\(^{42}\) There is a degree of merit in the notion of sovereignty's supremacy given the fact that assertions of a right to use force in self-defense are often made fallaciously, occasionally as "cover" for aggression. For those who have adopted this view, borders are legally impermeable; the remedies for states suffering attacks by individuals or non-state groups based in other states are to resort to the Security Council under Chapter VII of the U.N. Charter (discussed above) or to convince the territorial state through non-forceful means, such as diplomacy and countermeasures, to take those steps necessary to put an end to the offending actions.\(^{43}\)

A different, and in the author's estimation normatively sounder, approach balances competing rights. Recall that an analogous balancing undergirds the right of Belligerent States to pass into neutral territory in certain circumstances. This approach contends that when the rights of states conflict in international law, the appropriate methodology is to seek the accommodation that best balances the object and purposes of those rights. The starting point for such an analysis is the duty of the sanctuary State to ensure that its territory not be used to the detriment of other states.\(^{44}\) In light of both this duty and its right of sovereignty, the sanctuary State must be afforded a reasonable opportunity to put an end to harmful actions emanating from its territory. The duration of such an opportunity depends on how pressing the need to conduct defensive operations is for the victim State.\(^{45}\)

The United States and the author take the position that if the sanctuary State fails to remedy the situation because it is either unwilling to do so (perhaps out of sympathy for the attackers) or unable to do so (for instance, due to a lack of the necessary military equipment), the victim State, in realization of its right of self-defense, may cross into the sanctuary State's territory for the sole purpose of de-

\(^{42}\) IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 309–16 (1963).

\(^{43}\) On countermeasures, see Articles of State Responsibility, supra note 10, arts. 45–54.

\(^{44}\) See Corfu Channel, 1949 I.C.J. at 22.

Extraterritorial Lethal Targeting

fending itself. Indeed, any resistance by the sanctuary State may itself violate the prohibition on the use of force and, depending on the severity of said resistance, constitute an armed attack of its own against the victim State.

In addition to the preconditions discussed, forceful extraterritorial defensive operations must comport with the two principles that apply to every exercise of the right of self-defense—necessity and proportionality. The principle of necessity requires that there be no alternative to the use of force to effectively defeat an attack that is either imminent or underway. For instance, defensive uses of force against terrorists in another state would be impermissible if cooperative law enforcement measures were highly likely to suffice. An unnecessary defensive use of force into that state would violate its sovereignty, as well as the use of force prohibition. U.S. policy acknowledges the necessity requirement in that it permits lethal force only in defense of citizens when “no other reasonable alternatives


47. Nicaragua, 1986 I.C.J. ¶ 176, 194; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 41 (July 8); Oil Platforms (Iran v U.S.), 2003 I.C.J. 161 ¶¶ 43, 73–74, 76 (Nov. 6). Care must be taken not to confuse these jus ad bellum principles with the completely different notions of military necessity and proportionality that appear in the jus in bello.
exist to address the threat effectively." 48

Even if necessary, defensive operations, including those mounted across borders, must comply with the principle of proportionality. 49 Proportionality requires that the state engaging in self-defense use no more force than required in terms of scale, scope, duration, and intensity to end the situation justifying defensive action. A disproportionate incursion into another state violates its sovereignty and may constitute an unlawful use of force against it. As an example, if a single targeted strike against the leader of the non-state group operating from an ungoverned region in a neighboring state would so disorganize the group that it would become ineffective, it would not be proportionate to launch a major ground incursion into the country.

Since terrorists and other non-state groups often seek refuge in operationally or politically hospitable states as they plan and prepare for operations, the question arises as to when it is appropriate to cross into those states and strike. Specifically, can a state strike before being attacked? Some scholars and practitioners point to the fact that Article 51 makes no mention of anticipatory self-defense to argue that such a right does not exist. 50 Others agree, but interpret the notion of attack broadly to encompass certain periods prior to an attack's execution. 51

The majority of scholars and states accept the notion of anticipatory self-defense when armed attack is "imminent." As noted by President Obama, "we act against terrorists who pose a continuing and imminent threat to the American people." 52 However, the views of experts vary as to when that right matures. 53 Traditionalists argue for a temporal threshold based on the classic Caroline incident formula, which holds that a state may act defensively when the "necessity of self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation." 54 Contextualists, including

48. White House Fact Sheet, supra note 1.
49. As noted supra note 47, it is essential to distinguish this jus ad bellum principle from the jus in bello (international humanitarian law) rule of proportionality discussed below that deals with civilian casualties.
50. See, e.g., BROWNLIE, supra note 42, at 275–78.
51. Dinstein, for instance, proposes a standard known as interceptive self-defense. DINSTEIN, supra note 18, 203–04.
52. Remarks by President Obama, supra note 1.
53. See, e.g., TALLINN MANUAL, supra note 25, at 63–66 (discussing conclusions drawn by the International Group of Experts).
54. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), reprinted in 2 A
the author, point out that in an era when a catastrophic armed attack may fall without warning, as with a terrorist attack using a weapon of mass destruction, a strict temporal interpretation no longer makes sense. They interpret the Caroline standard as allowing for the exercise of the right of self-defense once the last feasible “window of opportunity” to forestall an armed attack is about to close.55

For those accepting the premise of anticipatory self-defense, two subsidiary issues present themselves. First, disagreement persists as to the requisite degree of knowledge. A restrictive approach holds that a state acting in anticipatory self-defense must know of a particular pending attack. This approach is sensitive to the fact that the anticipatory nature of the operation already infuses the situation with a degree of uncertainty. The United States’ position, expressed in the White Paper and supported by many in the academic community, is that there is no requirement “to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”56 The position is based on the reality that reliable and actionable intelligence that an attack will occur often exists even when the precise means, timing, and location of such an attack remain unknown. For proponents, it would be incongruent with the object and purpose of the right of self-defense to interpret the norm as disallowing action in such cases.


56. White Paper, supra note 2, at 7–8. The United Kingdom has taken the same approach. See Testimony of Attorney-General Lord Goldsmith, 660 Hansard. H.L. 370 (Apr. 21, 2004) (U.K.), http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_spmin0. The point was made by de Vattel three and a half centuries earlier in his classic work, The Law of Nations:

Since it is the lot of men to be guided in most cases by probabilities, these probabilities deserve their attention in proportion to the importance of the subject-matter; and, if I may borrow a geometrical expression, one is justified in forestalling a danger in direct ratio to the degree of probability attending it, and to the seriousness of the evil with which one is threatened. If the evil in question be endurable, if the loss be of small account, prompt action need not be taken; there is no great danger in delaying measures of self-protection until we are certain that there is actual danger of evil. But suppose the safety of the State is endangered; our foresight cannot extend too far. Are we to delay averting our destruction until it has become inevitable?

A second question involving anticipatory self-defense is whether each pending attack must be addressed individually. Several approaches exist. The restrictive approach requires that the imminence criterion (as well as necessity and proportionality) be met for each pending attack. For instance, the fact that a terrorist group has mounted attacks in the past may bear on the reasonableness of a later determination that an attack by the group is imminent, but the imminence determination must nevertheless be performed for each possible attack before forceful defensive action across a border is permitted. The more permissive approach holds that at a certain point it becomes clear that a group is mounting a campaign of attacks. For proponents of this approach, once it is reasonable to conclude that a campaign is underway, forceful extraterritorial defensive actions are permitted throughout the relevant period until such time as it would be reasonable to conclude that the campaign is over or that the criterion of necessity is no longer satisfied. A number of states have adopted a middle position. They acknowledge the notion of a campaign, but limit defensive operations in that context to the “hot battlefield.” Beyond locations where active hostilities are underway, these states would perform a case-by-case analysis, only acting in self-defense when the particular threat is imminent.

Finally, as is clear from the plain text of Article 51, one state may come to the aid of another in “collective defense.” The state coming to another’s aid may do so once the right of the defending state to engage in defensive actions has matured and the defending state has requested such assistance. An assisting state’s right to

57. Similarly, the military forces of a state conduct campaigns that consist of related but separate operations at the tactical and operational levels, punctuated by pauses to allow for regrouping, resupply, etc.

58. See Schmitt, supra note 46, at 535–36. This position has been adopted by the United States. See Brennan Remarks, supra note 46.

59. Brennan, supra note 46. General agreement exists as to the unlawfulness of preventive self-defense. See, e.g., TALLINN MANUAL, supra note 25 at 63–66 (discussing the consensus of the International Group of Experts). Preventive self-defense is forceful defensive action taken against a group or state that lacks either the clear intention to conduct attacks or the imminent capability to do so. Whether the action is preventive in nature or fails to meet the criteria described, what is clear is that a premature defensive action into another state’s territory violates their sovereignty and likely constitutes an unlawful use of force.

60. “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs . . . .” U.N. Charter art. 51 (emphasis added).

61. DINSTEIN, supra note 18, at 294. On collective self-defense, see id. ch. 9.
conduct extraterritorial lethal targeting on behalf of another state derives solely from the right of the latter to defend itself in the face of an armed attack. As a result, it may engage in extraterritorial operations only to the same extent as the state seeking assistance.

II. LETHALITY

Part I of this Essay examined when one state may lawfully act extraterritorially in violating the sovereignty of another state. Such extraterritorial action requires both that one of the exceptions to the principle of extraterritoriality applies and that the state claiming the exception acts within the scope of that exception. The issue of sovereignty must not be confused with the legality of any action under either international humanitarian law or international human rights law, the subject of this Part.

These bodies of law are separate and distinct from, and unaffected by, the extraterritoriality analysis. For instance, a state may have a right to be in another state pursuant to the law of self-defense or neutrality, but due to the presence of a large number of civilians, be prohibited from conducting a lethal strike against the target based on the principle of proportionality (discussed below). Conversely, the forces may have no right to be in another state, but the attack itself may be otherwise lawful under the applicable law because it is sufficiently discriminate. Non-expert commentators, who tend to conflate the various legal regimes applicable to extraterritorial lethal operations, often miss this legal distinction.

Although it is sometimes urged that human rights law governs lethal attacks during an armed conflict, the International Court of Justice appears to have settled the point in its Nuclear Weapons advisory opinion. There it held that although human rights law applied to armed conflict, international humanitarian law, as lex specialis, determines the lawfulness of lethal attacks.

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis,

62. For instance, when State A violates State B's sovereignty using the rationale of self-defense, State A must still act within the scope of the self-defense exception by only using force that is both necessary and proportional. Similarly, when one state violates another's sovereignty because it is given consent to do so, the state may only act within the scope of that consent.
namely, the law applicable in armed conflict which is
designed to regulate the conduct of hostilities. Thus
whether a particular loss of life, through the use of a
certain weapon in warfare, is to be considered an arbi-
trary deprivation of life contrary to Article 6 of the
[International Covenant on Civil and Political Rights],
can only be decided by reference to the law applicable
in armed conflict and not deduced from the terms of
the Covenant itself.63

A. International Humanitarian Law

To assess whether a lethal operation is legally permissible, it
is first necessary to determine if an “armed conflict” is underway. If
it is not, international human rights law and any applicable domestic
legal norms will govern the strike. During an armed conflict, by con-
trast, the legality of a strike depends on international humanitarian
law.

The United States considers itself to be involved in an armed
conflict with al Qaeda and its associated forces.64 There are two
forms of armed conflict—international and non-international—a bi-
furcated structure set forth in Common Articles 2 and 3 respectively
of the four 1949 Geneva Conventions.65 With regard to international
armed conflict, Article 2 provides that “the present Convention shall
apply to all cases of declared war or of any other armed conflict
which may arise between two or more of the High Contracting Par-
ties, even if the state of war is not recognized by one of them.” This
provision is generally interpreted as containing two criteria. First, the
conflict must be between two or more states. Second, the conflict
must be armed. A minor controversy exists with respect to the inten-

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63. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶25 (July 8).

64. Remarks by President Obama, supra note 1 (“the United States is at war with al Qaeda, the Taliban, and their associated forces”); White Paper, supra note 2, at 2 (citing Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006)).

E X T R A T E R R I T O R I A L L E T H A L T A R G E T I N G

sity of the hostilities that qualify as "armed." However, the disagree- 
ment is of little import to the issue at hand since it is unlikely that 
one state would conduct lethal operations within another state over an 
incident so minor that the existence of an international armed conflict 
was questionable.66 Suffice it to say that if the organs of one state, 
such as the military or intelligence agencies, are using armed force 
against another state, an international armed conflict is almost cer-
tainly underway and international humanitarian law applies.

In some circumstances, a conflict may be international with- 
out the direct involvement of a state’s organs. For instance, “private 
individuals acting within the framework of, or in connection with, 
ammo forces, or in collusion with State authorities may be regarded 
as de facto State organs.”67 A conflict may also be international 
when a state endorses and encourages the acts of individuals or non-
state groups.68 More likely is a situation in which the non-state group 
and state forces are not acting in concert, but the state nevertheless 
exercises “overall control” of the group’s actions by providing direc-
tion and support in operations against another state.69 In all of these 
cases, international humanitarian law applicable in international 
armed conflict would govern any extraterritorial lethal strikes con-
ducted against the individuals or groups concerned.

A minority view asserts that a conflict between a state and an 
organized armed group that transcends borders is international in 
character. To an extent, this was the approach taken by the Israeli

66. The official International Committee of the Red Cross (ICRC) Commentary to the 
article suggests 

any difference arising between two States and leading to the intervention of 
members of the armed forces is an armed conflict within the meaning of Article 
2, even if one of the Parties denies the existence of a state of war. It makes no 
difference how long the conflict lasts, how much slaughter takes place, or how 
numerous are the participating forces.

INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE 
TREATMENT OF PRISONERS OF WAR 23 (Jean Pictet ed. 1960). See also INT’L COMM. OF THE 
RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA 
CONVENTIONS OF AUGUST 12 1949 ¶ 62 (Yves Sandoz et al. eds., 1988) [hereinafter 
ADDITIONAL PROTOCOLS COMMENTARY]. A narrower view is that isolated instances of 
hostilities between the armed forces of states do not constitute an armed conflict. 
Christopher Greenwood, Scope of Application of Humanitarian Law, in THE HANDBOOK OF 
INTERNATIONAL HUMANITARIAN LAW 37, 48 (Dieter Fleck ed., 2d ed. 2009).

67. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 144 (Int’l 

68. Id. ¶¶ 133–37.

69. Id. ¶ 145. See also Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trial 
In assessing the Israel Defense Force’s targeted killings operations, it held that “[t]his law [international humanitarian law] applies in any case of an armed conflict of international character—in other words, one that crosses the borders of the state—whether or not the place in which the armed conflict occurs is subject to belligerent occupation.” A number of prominent scholars have also adopted this stance.

Non-international armed conflicts are more difficult to identify, although doing so is essential in order to determine whether international humanitarian law or international human rights norms govern a state’s extraterritorial lethal targeting. Common Article 3 of the 1949 Geneva Conventions defines non-international armed conflicts in the negative as those that are “not of an international character.” In a widely accepted formulation, the International Criminal Tribunal for the Former Yugoslavia has described such conflicts as comprising “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” The United States takes the position that its armed conflict with al Qaeda and its associated forces is non-international in character.

There are two well-accepted criteria in order for a non-international armed conflict to be present. First, the group involved must exhibit a degree of organization. It need not be organized to

70. See discussion in 46 INT’L LEGAL MATERIALS 375, 382 ¶ 18 (translating HCJ 769/02 Pub. Comm. against Torture in Isr. v. Gov’t of Isr. 62(1) PD 507 [2006] (Isr.)).

71. Id.

72. See, e.g., Yoram Dinstein, Concluding Remarks on Non-International Armed Conflict, 88 INT’L L. STUD. 395, 400 (2012). See also the discussion of the matter in Dapo Akande, Classification of Armed Conflicts Relevant Legal Concepts, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 73–78 (Elizabeth Wilmshurst ed., 2012). But see Lubanga, Case No. ICC-01/04-01/06, Trial Chamber Judgment, in which the International Criminal Court explicitly states that extraterritorial conflicts are not international unless the armed group is acting under the control of the state. This is also the ICRC position. Int’l Comm. of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 89 INT’L REV RED CROSS 719, 725 (2007).

73. Geneva Conventions I–IV, supra note 65, art. 3.


75. White Paper, supra note 2, at 3 (citing Hamdan v. Rumsfeld, 548 U.S. 557, 628–31 (2006)).

the same extent as a state’s armed forces, but it must exhibit enough organization to reasonably style its actions as those of a group and not of individuals.\textsuperscript{77} Organization may be evidenced by such factors as the existence of a command structure, intelligence sharing, the conduct of joint mission planning and execution, operational deconfliction, and cooperation in the acquisition of weaponry.\textsuperscript{78} Absent sufficient organization on the part of a non-state group engaging in hostilities against a state, there is no non-international armed conflict and, therefore, international humanitarian law would not govern extraterritorial lethal targeting of its members.

The mere fact that individuals or groups share a common ideology or aim is not sufficient to satisfy the organization criterion. Thus, it would be incorrect to refer to terrorists generally as a party to a non-international armed conflict. Former Department of Defense General Counsel Jeh Johnson has defined al Qaeda’s “associated forces” in a manner consistent with this understanding of organized armed groups:

An “associated force,” as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an “associated force” is not any terrorist group in the world that merely embraces the al Qaeda ideology.\textsuperscript{79}

The second criterion necessary to establish a non-international armed conflict is intensity. Article 1(2) of the 1977 Additional Protocol II to the Geneva Conventions excludes from the ambit of non-international armed conflict “situations of internal dis-
turbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."\(^8\) This threshold treaty requirement is generally accepted as reflecting customary law, evidenced, for example, by its inclusion in the Statute of the International Criminal Court.\(^{81}\) Although the threshold lacks exactitude, it is clear that extraterritorial operations directed against groups that engage in only a single (and last) act of violence, no matter how destructive, or that engage in violence on an infrequent basis, are not subject to international humanitarian law norms. Interestingly, President Obama's remarks at National Defense University raise the prospect of the battle with al Qaeda slipping below the threshold of intensity necessary to qualify as a non-international armed conflict.\(^{82}\) Should that occur, U.S. operations would be governed by the human rights norms discussed below rather than international humanitarian law.

As are the cases in Afghanistan and Iraq, the forces of one state may assist the forces of another in its own non-international armed conflict.\(^{83}\) When a state provides such assistance, it becomes a party to the non-international armed conflict. Accordingly any extraterritorial lethal operations it conducts are subject to the targeting norms applicable in such conflicts. Only if an external state enters the fray on the side of the non-State forces is the conflict internationalized.\(^{84}\)

A contentious issue that has drawn significant attention recently is the geographical scope of a conflict. Traditionally, international humanitarian law applied wherever hostilities occurred. In in-


\(^{81}\) Rome Statute of the International Criminal Court, supra note 74, art. 8(2)(d).

\(^{82}\) The President noted that the core of al Qaeda "is on the path of defeat" and that the remaining operatives "spend more time thinking about their own safety than plotting against us." Remarks of President Obama, supra note 1. Hostilities involving affiliated groups would have to thus be assessed on a case-by-case basis to determine whether they met the organizational and intensity criteria.

\(^{83}\) For instance, this was the case, at least in part, with U.S. lethal operations in Yemen and Somalia and their non-international armed conflicts with al Qaeda in the Arabian Peninsula and al-Shabaab respectively.

\(^{84}\) See TALLINN MANUAL, supra note 25, commentary accompanying r.92; Jelena Pejic, Status of Armed Conflicts, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW [hereinafter CUSTOMARY INT’L HUMANITARIAN LAW] 77, 82 (Elizabeth Wilmshurst & Susan Breau eds., 2007); Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 137.
international armed conflict, that law was understood to apply anywhere in belligerent territory (irrespective of whether hostilities were underway in the relevant area), international waters and airspace, and occasionally in neutral territory (under the circumstances described in the section discussing the law of neutrality). Non-international armed conflicts were generally rebellions and, therefore, limited by nature to the territory of the State concerned.

The geography of conflict has evolved. For instance, the United States was a party to the international armed conflict in Iraq, but the prospect of hostilities occurring in the United States, thousands of miles from the “hot battlefield,” was remote. Additionally, non-international conflicts have spilled over into neighboring countries, as demonstrated by the spill-over of the conflict in Afghanistan into Pakistan’s tribal areas. And to the extent hostilities between states and transnational terrorists qualify as armed conflicts, there is no traditional battlefield. While extraterritoriality in such cases was addressed in the preceding section, the question remains as to whether international humanitarian law governs the lethal targeting of individuals beyond the “hot battlefield.”

By classic principles, once the criteria for either international or non-international armed conflict were met, international humanitarian law governed any hostilities wherever located, with a direct nexus to the conflict in question. The author is of the view that this approach remains valid; after all, there is no contemporary treaty provision or accepted customary norm to the contrary. Accordingly, the international humanitarian law targeting norms discussed below apply both to extraterritorial operations conducted in neutral territory during an international armed conflict and to those executed extraterritorially during a non-international armed conflict. Indeed, even if the forces of the attacking state are present in another state’s territory unlawfully (i.e., in violation of neutrality law during an international armed conflict or without justification under the law of self-defense during a non-international armed conflict), an individual’s targetability depends on his or her status under international humanitarian law, not his or her location. This is the U.S. legal position. Despite this


86. Brennan Remarks, supra note 46. However, the White Paper crafts a slightly
stance, the Obama administration has placed certain policy restrictions on operations conducted outside the zone of "active hostilities." 87

More recently, this approach has been drawn into question on the basis that it widens an armed conflict by permitting strikes in areas far from the battlefield. Opponents suggest that the applicability of international humanitarian law should fade with distance from the "hot battlefield." 88 For them, the object and purpose of international humanitarian law is to set forth norms for classic "war zones." Otherwise, for example, the law would render lawful attacks that result in "proportionate" civilian injuries in areas that are otherwise hostilities-free, including in the territory of states that are not party to the conflict in question. 89

This is not an unreasonable position. Such operations do in fact at times appear to challenge the underlying object and purpose of international humanitarian law. However, in the author's view, insufficient state practice and opinio juris exist to support an assertion that the traditional understanding of the geographical scope of inter-

narrower scheme:
If an operation of the kind discussed in this paper were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against U.S. persons and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida that the Supreme Court recognized in Hamdan. White Paper, supra note 2, at 5. Presumably, this narrowing reflects policy concerns.

87. On the restrictions, see White House Fact Sheet, supra note 1. Unfortunately, the administration has offered no clear articulation of the rationale for these restrictions. While they do not derive from international humanitarian law, some of them are related to the legal requirements for conducting operations in another state's territory, i.e., the law of self-defense and neutrality law, discussed supra. Others are based on policy concerns.


The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location. That does not appear to be the rule of the historical practice, for instance, even in a traditional international conflict.


national humanitarian law has so evolved. At the moment, the approach represents *lex ferenda*, not *lex lata*.

There are also practical challenges with the position. It would afford otherwise targetable individuals immunity from attack whenever they left the battlefield. This would encourage them to base themselves in neutral territory during an armed conflict or in other States during a non-international armed conflict. Doing so would be highly destabilizing, as has been demonstrated by, *inter alia*, the presence of Hezbollah in Lebanon. It would also be especially difficult to apply this restrictive standard to situations in which there is no clear battlefield, such as a non-international armed conflict with a group that acts transnationally. The lack of a clear standard is likewise problematic. For instance, the majority view is that international humanitarian law applies to conflicts that spillover into neighboring states. However, no cogent explanation has been offered for how far from the core fighting the concept of spillover extends.

Once it is established that some form of armed conflict exists, the prescriptive norms of international humanitarian law apply. It is important to note that its rules as to attacks do not vary significantly between international and non-international armed conflicts. If the situation does not constitute an armed conflict, international human rights law (discussed in the next section) and domestic law would control any lethal targeting.

Before turning to the core issues, it is necessary to dispel one common misperception regarding targeted killings. During an armed conflict, there is no prohibition in international humanitarian law on operations being conducted by intelligence or security agencies. However, when individuals other than lawful combatants participate directly in the hostilities, they do not enjoy belligerent immunity from prosecution for actions in which they engage. In other words, they could be prosecuted by a State enjoying jurisdiction for the act of killing a person who is lawfully targetable by the armed forces. Moreover, as discussed below, such individuals lose the protection from attack that they would otherwise enjoy as civilians.

When considering the lawfulness of a lethal attack under international humanitarian law, the threshold question is whether the


Target of the operation is subject to attack at all. Targeting norms are framed as prohibitions. Neither civilians who are not directly participating in the hostilities, nor individuals who are hors de combat may be attacked. Curiously, critics of extraterritorial lethal operations label the operations as "targeted killings," implying that the propriety of such "killings" are somehow impugned simply because a specified individual is the object of attack. In reality, possessing sufficient intelligence to know the identity of a target is a positive factor in that it diminishes the likelihood of a mistaken attack.

There are two categories of targets for extraterritorial lethal strikes conducted by the United States. The first are "high value" targets. This classification requires that identity, function, and importance be established in advance. Important individuals who qualify as lawful targets are added to a list of approved targets. Despite their presence on the list, any actual strike against them must receive a further legal review and must be approved at especially high levels in the chain of command, important safeguards designed to ensure a strike is lawful in the attendant circumstances.

A second category consists of what are publicly labeled "signature strikes." These operations are directed against individuals who are determined to be lawful targets due to their activities. For instance, communications intercepts, human intelligence, and imagery may be used to monitor a group of individuals. Based on that monitoring, it may be concluded either that they are members of an organized armed group subject to attack or civilians who are directly participating in hostilities. Whether the individuals are selected as high value targets or assessed as targetable as a result of their activities, the international humanitarian law rules set forth below apply without exception.

Members of the armed forces of a party to a conflict are targetable at all times, subject to the rule of proportionality and the requirement to take precautions in attack (described below). In an in-

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93. Additional Protocol I, supra note 14, arts. 41(1), 51(2); Additional Protocol II, supra note 80, arts. 7, 13(2); Int’l Comm. of the Red Cross, Customary International Humanitarian Law, r.1, 6, 47 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

94. Recall that one of the key requirements for lawful exercise of the right of self-defense in the jus ad bellum is also labeled proportionality. There is no relationship between such proportionality and the international humanitarian law (jus in bello) rule of proportionality. The former limits the amount of force used to conduct defensive operations to that required to defeat an armed attack (as that term is used in Article 51 of the U.N. Charter). It is a constraint designed to limit inter-state violence. By contrast, the
international armed conflict, those forces comprise a State's regular armed forces, including militia or volunteer corps that form part of the armed forces (such as reserve forces) and members of other militia or volunteer corps belonging to a Party that comply with four conditions: 1) being under responsible command; 2) carrying weapons openly; 3) wearing a uniform or other attire that distinguishes them from civilians; and 4) conducting operations in accordance with humanitarian law. In a non-international armed conflict, the category includes the security forces of the state involved and dissident armed forces that are fighting that state.

There is general consensus that members of organized armed groups are also targetable at any time, although states and international law experts disagree over who qualifies as a member of these groups. Organized armed groups have been described as those that "recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity, and level of sophistication as state armed forces." To be "armed," a primary purpose of the group must be to engage in hostilities. For instance, members of the purely political wing of Hamas are not members of an organized armed group, whereas those who are in its military wing qualify as such.

Two schools of thought exist regarding the targetability of members of an organized armed group. The first, to which the author adheres, takes the position that all members of organized armed groups (except for medical and religious personnel) are targetable at all times. Function in the group is irrelevant. This approach em-
phasizes the importance of a normative balance between the parties to a conflict. Since all members of the armed forces are targetable, so too should be all members of organized armed groups that they face. This congruency appears to be reflected in the Additional Protocol II Commentary, which provides with respect to non-international armed conflict that “[t]hose who belong to armed forces or armed groups may be attacked at any time.” 100

The International Committee of the Red Cross (ICRC) adopted a somewhat different approach in its Interpretive Guidance on the Notion of Direct Participation in Hostilities. It treats as targetable only those members of an organized armed group who have a “continuous combat function” within the group.101 A continuous combat function is a role within the group involving activities that would qualify as direct participation (described below) if the individual were not a group member. The Interpretive Guidance then treats all individuals affiliated with the group who do not have a continuous combat function as civilians who may only be attacked if and when they directly participate in hostilities.102 The White Paper seems to embrace this approach as a matter of policy, since the referenced “senior operational leaders” who may be targeted represent a paradigmatic example of group members who by definition have a continuous combat function.103 However, there is no indication in the White Paper or any pronouncement by the U.S. government or its officials that this policy choice is viewed as a requirement of law.

The difference in approaches has significant implications vis-à-vis extraterritorial lethal attacks. By the first approach, group members may be attacked irrespective of their role in the group. There need only be a reasonable belief that the individual is a member of a qualifying group. By the second approach, an attacker must also have a reliable indication that the individual has a combat role in the group. Although it can be difficult to develop sufficient intelligence (or determine from the attendant circumstances) that particular individuals are members of an organized armed group, it is usually even more challenging to ascribe a specific function to them.

If a targeted individual is not a member of the armed forces or an organized armed group—or by the second approach, if the indi-

100. Additional Protocols Commentary, supra note 66, ¶ 4789.
102. Id. at 34.
103. White Paper, supra note 2, at 1.
EXTRATERRITORIAL LETHAL TARGETING

vidual is a member but does not have a continuous combat function—a lethal strike is nevertheless permissible if he or she is taking part in the conflict. This rule of treaty and customary law applies in both international and non-international armed conflict.104 Its classic formulation is set forth in Article 51(3) of Additional Protocol I: “Civilians shall enjoy the protection afforded by this Section [which governs attacks], unless and for such time as they take a direct part in hostilities.”105

The direct participation rule poses two interpretive concerns. Both were explored during the expert meetings that led to promulgation of the Interpretive Guidance. First, it is necessary to define what is meant by “direct participation,” that is, those activities that render a person susceptible to attack. During the course of the expert meetings, a set of three cumulative criteria emerged which, despite slight differences of opinion over specific application, have been generally accepted:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).106

It must be emphasized that these criteria apply to “persons who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis.”107 They do not apply to members of the armed forces or organized armed groups, although the continuous combat function disagreement must be borne in mind as to the latter.

There is wide agreement that anyone who actually engages in

104. Additional Protocol I, supra note 14, art. 51(3); Additional Protocol II, supra note 80, art. 13(3); INT’L COMM. OF THE RED CROSS, supra note 93, r.6 and accompanying commentary.
105. Additional Protocol I, supra note 14, art. 51(3).
106. INT’L COMM. OF THE RED CROSS, supra note 97, at 46.
107. Id. at 6, 34.
an attack, or who directly supports one, is a direct participant. For instance, an individual implanting improvised explosive devices on a “for pay” basis or someone serving as a lookout for an ambush out of sympathy for the group conducting it is directly participating. However, the more remote from hostilities the act in question, the more consensus over its characterization will dissipate. Most significantly, the *Interpretive Guidance* took the position that voluntary human shields and those who assemble and store improvised explosive devises are not direct participants; a fair number of the experts involved in the meetings, especially those with military experience or specialized knowledge, took the opposite position. 108 Similarly, controversy exists in the wider debate over whether the financing of an organized armed group constitutes direct participation and, if so, under what circumstances. 109 Whatever one’s view, it is apparent that controversy over an extraterritorial lethal operation will grow the more attenuated the relationship between the individual’s activities and the ongoing hostilities.

Disagreement has long existed over the “for such time” temporal factor. The *Interpretive Guidance* suggests that “[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.” 110 Critics claim this standard creates an unacceptable “revolving door” of targetability in that an individual need only temporarily desist from direct participation to regain the immunity from attack that civilians enjoy. 111 Such persons would only become targetable again once they resumed engaging in preparatory measures. This creates near insurmountable operational hurdles by essentially requiring the individual to be “caught in the act.” As a result, the critics are of the view that an individual who engages in multiple acts is directly participating in hostilities throughout the period; like a member of the armed forces or an organized armed group, he or she remains targetable until definitive withdrawal from participation in the conflict. Whatever the interpretive approach taken, the “for such time” issue will be determinative of when an extraterritorial lethal strike against a direct participant can be mounted.

108. *Id.* at 54, 56–57.

109. Characterization of the positions is based on author experience as a member of the expert group.


These points are relevant to the U.S. policy that individuals posing "an imminent threat of violent attack against the United States" are targetable.¹¹² Imminence is primarily a *jus ad bellum* issue bearing on the right of anticipatory self-defense. However, in the context of an ongoing armed conflict, individuals posing an imminent threat would typically qualify as having a continuous combat function. Therefore, such persons who are members of an organized armed group would be targetable under any of the approaches to attacking group members. Should such an individual not be a member of an organized armed group, he or she would qualify as a direct participant in hostilities. The imminence of the attack would satisfy the temporal ("for such time") requirement and the violence of the attack would clearly amount to an act of participation that is sufficiently direct. Indeed, the U.S. standard is actually much higher than required by the law. It is a threshold that avoids all of the current international humanitarian law controversies regarding qualification as a lawful target.

A related issue is whether a duty to capture an individual who qualifies as a lawful target (combatant, member of an organized armed group, or direct participant in hostilities) exists when doing so is feasible. In his National Defense University speech, the President asserted, "America does not take strikes when we have the ability to capture individual terrorists."¹¹³ Attacks are limited to those situations in which "capture is infeasible" and a requirement to "monitor whether capture becomes feasible" applies.¹¹⁴ In the author's view, no such requirements exist as a matter of international humanitarian law. Instead, individuals are either targetable because of their status, as with members of armed forces and organized armed groups, or may be attacked based on the specific activity in which they are engaging, as in the case of civilians who directly participate in hostilities. Once an individual qualifies as a lawful target, there is no obligation to minimize harm to that person.¹¹⁵ Rather, the limitations on

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¹¹². *White Paper*, supra note 2, at 7–8. Note that the President also asserted that the United States acts only when the threat is imminent. *Remarks by President Obama*, supra note 1.


¹¹⁴. *White Paper*, supra note 2, at 1. The position taken by the Department of Justice is based on domestic law, not international humanitarian law. *Id.* at 6.

¹¹⁵. The one exception to this premise is the prohibition on use means or methods of warfare that cause unnecessary suffering or superfluous injury to them. *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, art. 23(e), Oct. 18, 1907, 36 Stat. 2277; *Additional Protocol I*, supra note 14, art. 35(2); *Int’l Comm. of the Red Cross*, supra note 92, r.70;
execution of the operation derive from humanitarian law norms designed to protect civilians and those who are hors de combat. It is only fair to acknowledge, however, that the Interpretive Guidance suggests that the principles of military necessity and humanity may in certain circumstances require that an individual be captured rather than attacked.116

Although not mandated by international humanitarian law, capture instead of kill is usually a sensible operational and policy restriction.117 Operationally, capture can yield valuable intelligence. In terms of policy, capture avoids criticism by individuals and organizations that have adopted the ICRC’s point of view. Of course, the capture requirement is subject to a condition of feasibility, which includes such factors as risk to the capture team, likelihood of success, operations security, authorization from the territorial State, required timing, and risk of collateral damage.

Finally, both President Obama and the White Paper specifically addressed the narrow issue of lethal operations against U.S. citizens.118 In his speech, the President confirmed the lethal targeting of four U.S. citizens. It is clear that in international humanitarian law, the citizenship of a target has no relevance to the legality of an attack.119 On the contrary, in the few circumstances in which international humanitarian law acknowledges citizenship as a relevant factor, it tends to deprive the individuals concerned of certain protections. For instance, the 1949 Fourth Geneva Convention on the protection of civilians only extends to persons who “find them-

COMMANDER’S HANDBOOK, supra note 14, ¶ 9.1.1.


117. This, rather than any legal requirement, is the express justification for the U.S. policy (“The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots.”). White House Fact Sheet, supra note 1.

118. Remarks by President Obama, supra note 1; White Paper, supra note 2, at 3.

selves... in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” To the extent citizenship matters with respect to the lethality aspect of extraterritorial targeting, it does so based on domestic law, a point acknowledged by the President with respect to U.S. constitutional law.

Once it is determined that an individual may lawfully be targeted, the impact of the attack on civilians and civilian property must be assessed and minimized. International humanitarian law requires attackers to take precautions designed to limit collateral damage. This obligation includes: doing everything feasible to verify the target; choosing available weapons or tactics that will minimize collateral damage without sacrificing military advantage; and selecting targets so as to minimize collateral damage.

Of particular note is the weapon selection requirement. Assuming it is lawful to cross the border and that the individual to be attacked is a lawful target, the attacker must choose the weapon system that will best avoid collateral damage while still being effective. Despite their occasional condemnation, in many cases this will be a drone because of the ability to loiter over a target to definitively identify it and to strike it with a precision weapon at a time when collateral damage is least likely. Moreover, as noted by the President in his remarks, ground operations can run the risk of “triggering a firefight with surrounding tribal communities,” thereby placing civilians in the vicinity at greater risk.

As to verification of the target, U.S. policy is to require “near certainty that the terrorist target is present” before executing an extraterritorial strike. This standard is in excess of international humanitarian law’s requirement that a decision to attack be reasonable in the attendant circumstances after every feasible step has been taken to verify the target. In some circumstances, it may be reasonable to wait until near certainty has been achieved before striking. This would be so, for instance, if the target was relatively unim-

120. Geneva Convention IV, supra note 65, art. 4 (emphasis added).
121. Remarks by President Obama, supra note 1.
122. Additional Protocol I, supra note 14, art. 57; Customary Int’l Humanitarian Law, supra note 85, ch. 5; Commander’s Handbook, supra note 14, ¶ 8.1; AMW Manual, supra note 25, § G.
123. Additional Protocol I, supra note 14, art. 57(2)(a)(ii); Int’l Comm. of the Red Cross, supra note 93, r.17.
124. Remarks by President Obama, supra note 1.
125. White House Fact Sheet, supra note 1.
126. AMW Manual, supra note 25, r.1(q) and 32(a).
important and collateral damage was expected. However, the degree of requisite certainty would drop in the case of a very high value target because less certainty would be justified in light of the military advantage likely to accrue from the operation. The point is that the standard is one of reasonableness, with each operation assessed on a case-by-case basis.

Even if the individual is a lawful target and all feasible steps to minimize collateral damage have been considered during the mission planning process, the attack must still conform to the rule of proportionality. By the rule, an attack that would otherwise be lawful is prohibited if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."127 It is only with respect to this norm of international humanitarian law that the harm incidentally caused to civilians during an extraterritorial lethal strike is considered; it is not relevant to the issue of whether the border may lawfully be crossed.

Two aspects of proportionality are especially relevant to much of the discussion surrounding extraterritorial lethal operations. First, the proportionality assessment is *ex ante*, not *post factum*. As a matter of law, the question is whether "anticipated" collateral damage was excessive relative to the military gains the attacker "expected" to attain through attack. The actual harm or advantage that resulted bears only on the reasonableness of the *ex ante* assessment. It is an error of law to simply look at the results of an attack and draw a conclusion as to proportionality.

Second, the determinative issue in the application of the proportionality rule is excessiveness. Proportionality does not call for a formalistic "balancing" of collateral damage and military advantage. Instead the test is best described as asking whether a reasonable warfighter in the same or similar circumstances would hesitate to attack because of the extent of the likely collateral damage. Such a determination is always contextual. In some circumstances, the military value of removing a target from the conflict may merit incidentally causing substantial harm to civilians, as in the case of an elusive leader of a deadly organized armed group. On the other hand, an attack against a low-level member of a group or a direct participant who is contributing little to the hostilities may be unlawful at rela-

127. Additional Protocol I, supra note 14, art. 51(5)(b); see INT’L COMM. OF THE RED CROSS, supra note 93, r.14; COMMANDER’S HANDBOOK, supra note 14, ¶ 5.3.3; AMW MANUAL, supra note 25, r.14.
tively low levels of collateral damage.

Although President Obama has pointed to the “wide gap between U.S. assessments of [civilian] casualties and nongovernmental reports,” he acknowledges that drone strikes have caused collateral damage.\textsuperscript{128} In justification, the President cites the military advantage (saved lives) resulting from the strikes to justify such casualties.\textsuperscript{129} However, if, as he asserts, “before any strike is taken, there must be near-certainty that no civilians will be killed or injured,” the rule of proportionality will seldom be implicated because the issue is “expected” collateral damage.\textsuperscript{130} Similarly, the requirement to take precautions in attack only applies in situations in which there is a likelihood of collateral damage. Therefore, assuming strict compliance with the administration’s standard during planning and execution, the only proportionality and precautions in attack issues are likely to be the reasonableness of the conclusion that the standard had been met and the extent of expected damage to civilian objects.

B. Human Rights Law

If an armed conflict is not underway, international human rights norms and domestic law apply in lieu of international humanitarian law. This is so even in the case of self-defense, although most defensive acts, combined with the armed attack to which they respond, will comprise either an international or non-international armed conflict. For proponents of the view that self-defense is only available in the case of attacks by states, or for which states are responsible under the law of self-defense, human rights law governs the targeting of transnational armed groups or of individuals.

Human rights law is relatively unsettled. The United States takes a very restrictive view of its extraterritorial effect. For instance, it is the longstanding view of the United States that the International Covenant on Civil and Political Rights, which contains a non-derogable prohibition on the arbitrary deprivation of life in Article 6,\textsuperscript{131} applies only to individuals inside the United States.\textsuperscript{132} This

\textsuperscript{128} Remarks by President Obama, \textit{supra} note 1.

\textsuperscript{129} “But as Commander-in-Chief, I must weigh these heartbreaking tragedies against the alternatives.” \textit{Id.}

\textsuperscript{130} \textit{Id.}

is in contradistinction to United Nations Human Rights Committee Comment 31, which asserts that the rights contained in the treaty reach anyone "within the power or effective control" of a State Party.\textsuperscript{133}

Assuming, as the author does, that there is nevertheless a customary international human rights law right to life that applies extraterritorially, the use of lethal force is permitted in only very limited circumstances. The United Nations Office of the High Commissioner for Human Rights set forth a well-accepted definition of such circumstances in its Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

Law enforcement officials shall not use firearms against persons except in self-defense or defense 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.\textsuperscript{134}

This standard is typically expressed in terms of two requirements that must be met lest a killing be arbitrary—necessity and proportionality. In the context of human rights law, necessity requires that there be no alternative to the use of deadly force in protecting oneself or others from grave harm. Proportionality requires that the force used causes no more harm than justified by the good it is intended to achieve. Absent an armed conflict, any extraterritorial use of lethal force by a state would have to comport with these standards. For example, if arrest by local authorities were feasible, use of lethal

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force by a state would not be authorized because it would not comply with the necessity criterion.

CONCLUSION

Extraterritorial lethal operations must be considered in light of two legal issues. The first is whether it is lawful to conduct the operation extraterritorially. Extraterritorial action is always permitted if sanctioned by the United Nations Security Council under its Chapter VII authority. If an international armed conflict is underway, a Belligerent Party may mount such operations into neutral territory when the Neutral State has failed to comply with its obligations under the law of neutrality. During a non-international armed conflict or in the absence of armed conflict, the right to cross into another state’s territory derives from the jus ad bellum. In such circumstances, only consent by the territorial state or the territorial state’s inability or unwillingness to police its own territory permit the borders to be crossed. In the latter case, the action must conform to the strict requirements of the law of self-defense. Absent one of these four justifications, an extraterritorial operation constitutes a breach of the territorial state’s sovereignty and may amount to an unlawful use of force against that state.

Any time a state acts extraterritorially using one of the above exceptions to the principle of sovereignty, that state may act only within the scope of that exception. For instance, when a state acts pursuant to a Security Council resolution, it may only take such actions as are permitted by that resolution. In an armed conflict, a state may in certain circumstances enter neutral territory, but only for the express and limited purpose of expelling its enemies. If a state is given consent to operate in another state by that state, it may only take those measures that are within the scope of the consent given. Lastly, when a state acts in self-defense, it may only use force that is both necessary and proportional.

Even when a violation of sovereignty is lawful, a separate body of law will govern execution of any lethal operation. If the situation qualifies as an international or non-international armed conflict, international humanitarian law rules apply. The targeted individual must either be a member of the armed forces of a party to the conflict, a member of an organized armed group, or a civilian directly participating in hostilities. An attacker must seek to minimize collateral damage during the operation; an attack will be prohibited if it is nevertheless expected to cause collateral damage that is excessive in light of the military advantage the attacker reasonably envisages at-
Lethal operations conducted outside an armed conflict are subject to human rights norms. Although the scope and content of human rights law is unsettled, as a general matter, lethal force may only be used in the face of grave danger when less violent means to resolve the situation, including capture of the target, do not exist. Even in such cases, the use of force must be necessary and proportionate, as those terms are used in human rights law.

This Essay has offered an analytical framework for assessing the lawfulness of a particular extraterritorial lethal operation. There is no question but that the ongoing dialogue over such strikes would benefit from greater normative precision. It is equally clear that greater transparency as to the operations and the law justifying them is needed. The ivory tower is hardly the optimal venue for explication of a body of law that is dependent on state consent (treaty law) and practice (customary international law), and which governs the most significant activity in which states engage—the use of force.