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Essay

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A Reply to UN Special
Rapporteur Emmerson

Michael N. Schmitt

ESSAY

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INTRODUCTION

In January 2013, Ben Emmerson, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, began examining the use of remotely piloted aircraft (RPA or “drones”) in extraterritorial lethal targeting, commonly labeled “targeted killing.” The following October, he released an interim report surveying the legal framework for the operations.¹ It came on the heels of a report on the same topic by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Christof Heyns.² The two documents marked a sea-change in the ongoing debate over RPAs. Sophisticated yet accessible, the reports surgically dissected *jus ad bellum* (law governing the resort to force by States), *jus in bello* (international humanitarian law or IHL), and human rights norms. Together, they helped disentangle the often emotive, counter-factual and counter-normative dialogue that had obfuscated objective analysis.³

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1. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson).

2. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).

3. For a discussion of the reports, as well as reports released by Human Rights Watch and Amnesty International, see Michael N. Schmitt, *Narrowing the International Law Divide: The Drone Debate Matures*, 39 YALE J. INT'L L. ONLINE 1 (2014), <http://www.yjil.org/docs/pub/o-39-schmitt-narrowing-the-international-law-divide.pdf>. For a comprehensive survey of the legal issues, see Michael N. Schmitt, *Extraterritorial Lethal Targeting*:

This March, Emmerson released his 2013 annual report.⁴ It analyzes thirty-seven RPA strikes involving civilian casualties, proffers a sample strike analysis, and includes recommendations. In the report, Emmerson invites States to answer various legal questions regarding which “there is currently no clear international consensus, or where current practices and interpretations appear to challenge established legal norms.”⁵ States are to do so in advance of the 27th Session of the Human Rights Council in September.⁶ For Emmerson, “[l]egal uncertainty in relation to the interpretation and application of the core principles of international law governing the use of deadly force in counter-terrorism operations leaves dangerous latitude for differences of practice by States. . . . [I]t has an urgent and imperative need to reach a consensus” exists.⁷ I agree.

This essay examines Emmerson’s queries — replicated verbatim below — in an effort to assist States that answer his call. For States that do not, the analysis can serve as a useful tool in evaluating the responses of other States, as well as refining their own legal policy positions regarding RPA operations. Although I offer my own views, I make every effort to highlight competing positions.

THE EMMERSON QUERIES

A. Does the international law principle of self-defence entitle a State to engage in non-consensual lethal counter-terrorism operations on the territory of another State against a non-State armed group that poses a direct and immediate threat of attack, even when the armed group concerned has no operational connection to its host State? If so, under what conditions does such a right of self-defence arise? Does such a right arise where the territorial State is judged to be unable or unwilling to prevent the threat from materializing? If so, what are the criteria for determining “unwillingness” or “inability” to act?

These questions have frequently been mischaracterized as bearing on whether members of non-State armed groups, such as Al Qaeda, qualify as lawful RPA targets. However, that issue is answered by resort to international humanitarian law. Instead, the questions posed by Emmerson relate to the legality of RPAs reaching their targets in light of the territorial

Deconstructing the Logic of International Law, 52 COLUM. J. TRANSNAT’L L. 77 (2013).

4. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/HRC/25/59 (Mar. 11, 2014) (by Ben Emmerson).

5. *Id.* ¶¶ 70, 72.

6. *Id.* ¶ 72.

7. *Id.* ¶ 70, 71.

sovereignty enjoyed by the States in which the targets are located. They derive from *jus ad bellum* and the law of sovereignty.

It is indisputable that RPA operations may be conducted on another State's territory in two circumstances. First, a territorial State's consent precludes the wrongfulness of the "internationally wrongful act," i.e., the violation of territorial sovereignty and unlawful use of force by the State conducting the RPA strike.⁸ Consent has this effect whether the operation is carried out at the territorial State's request in its own non-international armed conflict (e.g., Yemen), as part of another State's non-international armed conflict (NIAC) that has spilled over into a neighboring State (e.g., Afghanistan-Pakistan), or pursuant to the attacking State's right of self-defense (e.g., U.S. counterterrorist operations against Al Qaeda). Second, the UN Security Council may authorize strikes in a Chapter VII resolution, which it typically does by sanctioning "all necessary means" to accomplish a specified objective.⁹ To date, the Council has never authorized RPA strikes as such, although there is no legal obstacle preventing it from doing so.

The controversial issue is whether RPA strikes may be launched pursuant to the attacking State's right of self-defense in the absence of the territorial State's consent, or even over its objection. Article 51 of the UN Charter provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations" This provision serves as an exception to Article 2(4)'s (and customary law's) prohibition on the threat or use of force against other States, which would otherwise prohibit combat operations on their territory.

In the RPA context, the threshold question is whether the right of self-defense extends to attacks committed by non-State actors. By a restrictive view, first articulated in the International Court of Justice's *Nicaragua* judgment, hostilities at the armed attack level conducted by groups sent "by or on behalf of a State," or a State's "substantial involvement therein," justify treating the attacking State's reaction as one of self-defense.¹⁰ The Court reiterated this position in two subsequent cases,¹¹ although both decisions proved controversial.¹² Absent an "operational nexus" to the

8. See G.A. Res. 56/83, Annex, art. 20, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

9. U.N. Charter art. 42. The phrase "all necessary means" is the terminology the Council typically employs in a resolution to authorize or mandate a use of force to accomplish its objective.

10. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27).

11. See *Armed Activities on Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 146–47 (Dec. 19); *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9).

12. See, e.g., *Congo*, 2005 I.C.J. at 337, ¶ 11 (separate opinion of Judge Simma); *Palestinian Territory*, 2004 I.C.J. at 215, ¶ 33 (July 9) (separate opinion of Judge Higgins); *id.* at 229–30, ¶ 35 (separate

host State, the restrictive view would preclude an extraterritorial RPA strike, not because the individuals are unlawful targets, but rather because it is unlawful for the attacking State to cross the border in self-defense.

The better position is that these pronouncements are normatively obsolescent. State practice and expressions of *opinio juris* in the aftermath of the 9/11 attacks demonstrate that many (arguably most) States now interpret Article 51 and customary international law as including the right to forcefully defend against armed attacks conducted autonomously by non-State armed groups. In addition to the many operations mounted on this basis since then, the evidence includes multiple Security Council resolutions citing self-defense adopted in the aftermath of 9/11,¹³ NATO action pursuant to the North Atlantic Treaty's collective defense article,¹⁴ and military support by other States for U.S. operations on the basis of collective defense.¹⁵ Broad acknowledgement of Israel's right to self-defense against Hezbollah during Operation Change Direction in 2006 strengthened the case measurably — although Israel faced criticism over the proportionality of its response.¹⁶ Moreover, recent U.S. statements on the matter, constituting *opinio juris*, have asserted a right of self-defense against non-State actors.¹⁷

opinion of Judge Kooijmans); *id.* at 242–43, ¶ 6 (declaration of Judge Buergenthal).

13. *See, e.g.*, Press Release, Security Council, Security Council Condemns, 'in Strongest Terms', Terrorist Attacks on United States, U.N. Press Release SC/7143 (Sept. 12, 2001); S.C. Res. 1372, U.N. Doc. S/RES/1372 (Sept. 28, 2001); S.C. Res. 1378, U.N. Doc S/RES/1378 (Nov. 14, 2001); S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

14. North Atlantic Treaty art. 5, Apr. 4, 1959, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. *See, e.g.*, Press Release, North Atl. Treaty Org. [NATO], Statement by the North Atlantic Council 124 (Sept. 12, 2001). NATO deployed AWACS aircraft to patrol U.S. skies. *NATO's Operations 1949 – Present*, NATO, <http://www.aco.nato.int/resources/21/NATO%20Operations,%201949-Present.pdf> (last visited Aug. 7, 2014).

15. *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 248 (Sean D. Murphy ed., 2002).

16. *See, e.g.*, Provisional Record of the U.N. Security Council, 61st Sess., 5492d mtg. at 3, U.N. Doc. S/PV.5492 (July 20, 2006); *see also* Michael N. Schmitt, "Change Direction" 2006: Israeli Operations in Lebanon and the International Law of Self-Defense, 29 MICH. J. INT'L L. 127, 154 (2008).

17. *See* U.S. DEP'T OF JUSTICE, DEP'T OF JUSTICE WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 2, *available at* http://users.polisci.wisc.edu/kmayer/408/020413_DOJ_White_Paper.pdf [hereinafter White Paper] (last visited Aug. 12, 2014); Harold Hongju Koh, Legal Adviser, U.S. 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), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>. For substantiation of the White Paper, see David Kaye, *International Law Issues in the Department of Justice White Paper on Targeted Killing*, 17 *ASIL Insights* 8, at n.1 (Feb. 15, 2013), http://www.asil.org/insights/volume/17/issue/8/international-law-issues-department-justice-white-paper-targeted-killing#_edn1.

Two conditions precedent exist as to the exercise of the right of self-defense.¹⁸ First, forceful defensive action must be necessary, in the sense that non-forceful options have either been exhausted or will not suffice. Thus, for instance, if cooperative law enforcement would put an end to the harmful activities, the law of self-defense will provide no basis for conducting an RPA attack. Second, forceful defensive operations must be proportionate. That is, only the amount of force required to block the imminent attack, stop the on-going attack, or end the campaign is allowed. Since RPA operations are precise, employ relatively small weapons, and involve no human penetration of territory, they generally comply with this requirement.¹⁹

Assuming for the sake of analysis that the right of self-defense extends to attacks by armed groups, may RPA strikes be mounted non-consensually across a border in response to those attacks? The issue arises when the territorial State refuses consent, when insufficient time to secure consent and still mount the strike exists, or when seeking consent will alert the targets. There are two schools of thought.

By the first, sovereignty reigns supreme.²⁰ Despite maturation of the right of self-defense against armed attack by a non-State armed group, the veil of territorial sovereignty may not be pierced by the RPA operation. The remedy for attacks by armed groups in such cases is cooperative law enforcement. It is only when the territorial State itself has conducted the armed attack — or the armed group's attack is attributable to the territorial State as a matter of law — that the sovereignty rights of the territorial State yield to the self-defense rights of the attacking State, thereby permitting an RPA strike against the territorial State.

A more compelling school of thought, adopted by the United States, balances the territorial State's sovereignty interests against the victim State's right of self-defense in what is known as the "unwilling or unable" test.²¹

18. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶¶ 43, 73–74, 76 (Nov. 6); *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 176, 194 (June 27). These preconditions to the exercise of the right of self-defense in the *jus ad bellum* are completely different than the *jus in bello* (IHL) principle and rule of the same name.

19. *Jus ad bellum* proportionality must be distinguished from the IHL rule of proportionality, which prohibits attacks that are expected to cause collateral damage that is excessive to the anticipated military advantage. *Jus ad bellum* proportionality deals with the amount of force used to accomplish the defensive aim, not the collateral impact on the civilian population. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 51, 57, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

20. *E.g.*, *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) ("Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.")

21. See, e.g., Barack Obama, President of the United States, Remarks by the President at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press->

This test allows penetration of the territorial State in order to conduct RPA operations against the group responsible for the underlying armed attack if the territorial State either fails to put an end to the group's activities on its territory or is incapable of doing so, as in the case of a State that lacks adequate means of responding quickly.

Since the approach represents a balancing of rights, the State conducting the RPA strikes must limit operations to those strictly required to terminate armed attacks by the group. The attacking State must first insist that the territorial State comply with its obligation to police its territory. Of course, this requirement is subject to the condition of feasibility. In some cases, for instance, hesitation to act may allow the non-State actors involved to escape.

No precise criteria for application of the test exist. Rather, each case must be evaluated on its own merits taking into consideration such factors as the window of opportunity to effectively conduct the operation, operational capabilities of the territorial State, the relationship between the armed group and the territorial State, the relationship between the State wishing to conduct RPA operations and the territorial State, the prior history of RPA operations into the territorial State, the effectiveness of previous territorial State efforts to police its territory, the significance of the target, the availability of assets to conduct the operation, and so on. Ultimately, the test is that which always applies to the use of force in international law — reasonableness. Therefore, the question is whether a reasonable State in same or similar circumstances would conclude that the territorial State is either unwilling or unable to address the situation in a manner that obviates the need for a defensive RPA attack.

office/2013/05/23/remarks-president-national-defense-university (“[W]e act . . . when there are no other governments capable of effectively addressing the threat.”) [hereinafter NDU Remarks]; THE WHITE HOUSE, OFFICE OF THE PRESS SEC’Y, FACT SHEET: U.S. POLICY STANDARDS AND PROCEDURES FOR THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> (requiring “[a]n 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”); John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Program on Law and Security at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“[W]e reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.”). For academic treatment of the subject, see Ashley S. Deeks, *“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483 (2012). For post-9/11 analysis, see Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 540–43 (2003).

B. *Is the international law principle of self-defence confined to situations in which an armed attack has already taken place, or does it entitle a State to carry out pre-emptive military operations against a non-State armed group on the territory of another State, without the territorial State's consent, where it judges that there is an imminent risk of attack to its own interests? If so, how is imminence to be defined?*

Assuming, *arguendo*, that the law of self-defense extends to attacks by non-State armed groups, the question arises as to when that right matures. Self-evidently, it attaches once an armed attack is underway. The prevailing view is that self-defense is also available against attacks that are imminent.²² Such anticipatory self-defense was traditionally viewed as temporal in character, reflecting the State-based nature of armed attacks. The attacks typically were preceded by such indications and warnings as heightened tension, mobilization of the reserves, and movement of forces towards the border. The time and visibility involved generally afforded the target State an opportunity to prepare itself and for diplomacy to deescalate the situation.

This approach is ill-suited to twenty-first century armed attacks by non-State armed groups.²³ Their modus operandi is typically to act without warning; indeed, in light of their comparative disadvantage in capability, most pending attacks by armed groups can be foiled if uncovered. Moreover, in an era in which weapons of mass destruction are increasingly available, an attack can be catastrophic. In light of this contemporary reality, the sensible interpretation of the norm is one that allows defensive uses of force, including RPA strikes, when the group in question possesses the means and intent to conduct an attack, and waiting to act defensively may sacrifice the opportunity to mount an effective defense.²⁴ The U.S. government has now embraced this “last window of opportunity” test.²⁵ To the extent a State has a right to act anticipatorily against a non-State

22. The criterion is drawn from the exchange of letters following the *Caroline incident*. See Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton (Aug. 6, 1842), reprinted in 2 A DIGEST OF INTERNATIONAL LAW 412 (John Bassett Moore ed., 1906) (permitting action where the “necessity of self-defence [is] instant, overwhelming, and leaving no choice of means, and no moment for deliberation” (internal quotation marks omitted)).

23. The first public indication of a shift in interpretation of the law of self-defense in light of this new reality was the 2002 National Security Strategy. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 17, 2002), <http://www.state.gov/documents/organization/63562.pdf>.

24. See Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 18–19 (2008).

25. See White Paper, *supra* note 17, at 7. The author first proposed the interpretation in 2002. Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 32 ISR. Y.B. HUM. RTS. 53, 110 (2002), reprinted in MICHAEL N. SCHMITT, COUNTER-TERRORISM AND THE USE OF FORCE IN INTERNATIONAL LAW 65 (MARSHALL CTR. PAPER NO. 5, 2002).

armed group, it may do so without the consent of the territorial State in the “unwilling/unable” circumstances described above.

A related requirement of self-defense is immediacy, which limits the period following an armed attack during which defensive uses of force can be mounted. As to the scope of the requirement, the critical point is that the operation in question must not constitute punishment or retribution.²⁶ Once the armed attack is definitively over, any right to cross into another State’s territory to conduct RPA strikes, whether consensual or not, is extinguished.

It is necessary to distinguish individual acts from campaigns. If the armed group concerned is engaged in a series of attacks against a State, that State need not treat every one of the group’s operations as separate for the purpose of self-defense, such that the imminency and immediacy criteria apply to each.²⁷ Rather, it may conduct RPA strikes against the group until its campaign is over.

C. Does the international humanitarian law test of intensity of hostilities (which is one of the criteria determining whether a non-international armed conflict exists) require an assessment of the severity and frequency of armed attacks occurring within defined geographical boundaries? In applying the intensity test to a non-State armed group operating transnationally, is it legitimate to aggregate armed attacks occurring in geographically diverse locations in order to determine whether, taken as a whole, they cross the intensity threshold so as to amount to a non-international armed conflict? If it is possible for a State to be engaged in a non-international armed conflict with a non-State armed group operating transnationally, does this imply that a non-international armed conflict can exist which has no finite territorial boundaries?

To fully understand these questions, it is necessary to differentiate *jus ad bellum* and *jus in bello* terminology. “Armed attack” is a term of art in the former that represents the point at which a victim State may use force to defend itself. Emmerson’s questions, despite mention of armed attack, refer instead to the *jus in bello* issue of when does an “armed conflict” exist such that IHL governs how the operation is executed. The determining factors are the frequency and intensity of the “hostilities,” not aggregation of “armed attacks.”

This issue is normatively critical because, absent an armed conflict, human rights and domestic law, rather than IHL, set the legal parameters

26. For discussion and application of the immediacy concept in the context of cyber conflict, see TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 66 (Michael N. Schmitt ed., 2013). The principle of immediacy was acknowledged by all members of the International Group of Experts who participated in the cyber warfare project.

27. See Schmitt, *supra* note 25, at 75–76; SCHMITT, *supra* note 25, at 23–25.

for RPA strikes. The practical difference is that IHL allows for attacks based solely on the status of the target (e.g., a member of an organized armed group that is party to the conflict), whereas human rights law only allows attacks when necessary for the defense of oneself or others; it does not contemplate status-based targeting.²⁸

Unlike international armed conflict, which is armed conflict between two or more States, a NIAC — armed conflict between an organized armed group and a State or between two or more organized armed groups — only commences once an intensity threshold has been crossed. It is generally accepted that “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are insufficiently intense.²⁹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) has further indicated that the “armed violence between governmental authorities and organized armed groups” must be “protracted” in order to satisfy the requirement.³⁰

All acts of violence occurring within a single State may be aggregated to meet the intensity threshold. This is the logical result of the ICTY’s conclusion that there is no zone of hostilities within a State during a NIAC beyond which IHL ceases to apply.³¹ In other words, even if sections of a country are peaceful, IHL applies throughout the country once a NIAC is underway. IHL experts also generally agree that in the physical locations to which IHL applies, all acts related to the conflict in question may be aggregated. The question, therefore, is where IHL applies.

Consensus as to the geographical scope of IHL, and therefore a NIAC, is lacking. There are three views.³² Common Article 3 of the 1949 Geneva Conventions’ “in the territory of one of the High Contracting Parties” text provides the basis for the traditional view,³³ which limits IHL

28. See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 112–13, U.N. Doc. A/CONF.144/28/Rev.1 (1991).

29. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. This treaty requirement is generally acknowledged as a correct articulation of the customary norm. See also Rome Statute of the International Criminal Court art. 8(2)(d), July 17, 1998, 2187 U.N.T.S. 90.

30. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

31. See *id.* ¶¶ 69–70; see also, e.g., Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 56–57 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

32. See Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT’L L. STUD. 1, 9–18 (2014).

33. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135;

applicability to the confines of the State. By this approach, an RPA strike justified solely on the identity of the target would be unlawful beyond the State's borders.

The advent of transnational terrorism and the propensity of modern NIACs to spill over into neighboring States have rendered this view dubious. Today, the international legal community is broadly receptive to an interpretation of IHL that extends its applicability to territory in neighboring States into which a conflict has spilled. The ICRC has adopted this position,³⁴ and the jurisdictional provisions of the International Criminal Tribunal for Rwanda Statute support it.³⁵ Beyond the spillover territory, RPA strikes just based on target identity would be impermissible.

A third view, which I support, focuses not on the location of hostilities, but rather on the parties to a conflict. IHL has historically classified conflicts based on the parties thereto and, for NIACs, the existence of a level of hostilities justifying attachment of international legal constraints.³⁶ So long as the armed group in question is sufficiently "organized" and the attendant hostilities cross the requisite intensity threshold, a NIAC exists, and status-based targeting is permissible. The question of whether military operations related to that conflict may lawfully be conducted in a particular location is determined by the *jus ad bellum* (consent, unwilling/unable), instead of IHL.

D. Does international humanitarian law permit the targeting of persons directly participating in hostilities who are located in a non-belligerent State and, if so, in what circumstances?

In both international and non-international armed conflicts, civilians are protected from attack, but only, as discussed below in Question G, for such time as they do not directly participate in the hostilities.³⁷ As an aspect of IHL, the rule's operation is limited to locations where that body of law applies. Therefore, the three schools of thought presented in response to the previous set of questions determine whether direct participants may be attacked using RPAs beyond the borders of a State

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

34. Int'l Comm. of the Red Cross [ICRC], *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 9–10, Doc. No. 31IC/11/5.1.2 (2011), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

35. See Statute of the International Tribunal for Rwanda art. 1, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994).

36. See, e.g., MINISTRY OF DEFENCE, *THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT*, 2004, JOINT SERV. PUBL'N 383, ¶¶ 3.2, 3.5, 15.2 (U.K.).

37. Additional Protocol I, *supra* note 19, art. 51(3); Additional Protocol II, *supra* note 29, art. 13(3).

involved in a NIAC. By the first, they may not be, absent a justification consistent with human rights law (i.e., immediate defense of self or others); by the second, they may be attacked only while in the spillover area; and by the third approach, direct participants are targetable so long as the RPA strike may be conducted in the location consistent with the *jus ad bellum*.

It should be noted that the legal basis for determining that a particular individual is targetable using an RPA is typically that the individual qualifies as a member of an “organized armed group,” a notion discussed in Question F, not that he is a civilian directly participating in the hostilities. However, the geographical limitations pertaining to direct participants and members of organized armed groups are identical.

E. Do the pattern and frequency of the armed attacks currently being perpetrated by Al-Qaida, and the various affiliate organizations in different parts of the world that claim allegiance to Al-Qaida, satisfy (or continue to satisfy) the criteria of organization and intensity required under international humanitarian law to qualify as a state of armed conflict?

The answer to this question is, of course, fact dependent. As confirmed by President Obama, RPAs and other counterterrorist operations have significantly disrupted Al Qaeda as a centralized terrorist organization.³⁸ The primary threat today is instead from the “emergence of various al Qaeda affiliates.”³⁹ This begs the question of whether the United States continues to be engaged in a NIAC with the organization.

As discussed, acts may be aggregated to reach the intensity threshold so long as they occur in an area in which an armed conflict exists. The existence of an armed conflict depends not only on intensity, but also on whether the armed group is sufficiently “organized.”⁴⁰ Although the requisite level of organization is not that of regular armed forces, it is generally understood as requiring some sort of “chain of command.” It is insufficient, for example, that the groups concerned share a common cause or even proclaim allegiance to a purported leader. Rather, the organization, albeit perhaps decentralized in structure, must act as a related entity that engages in operations that are to an extent cooperative and collaborative. Reduced to basics, it must be sensible to characterize the group as a single party to the conflict.

38. NDU Remarks, *supra* note 21.

39. *Id.*

40. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); see also Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 INT’L L. STUD. 119, 126–35 (2012).

The more successful counterterrorist operations are in disrupting Al Qaeda, the less likely this will be the case. To the extent that Al Qaeda affiliates operate independently, separate NIACs could emerge from the previous single conflict. Each of the conflicts would then have to qualify by the intensity and organization criteria on its own merits. It is possible, therefore, that the U.S. is, or will soon find itself, engaged in NIACs with certain terrorist groups, and accordingly able to conduct status-based RPA strikes against its members, whereas its operations *vis-à-vis* others will be limited to law enforcement consistent with international human rights norms.

F. *Assuming that a non-international armed conflict exists, does the test of “continuous combat function”, as elaborated by the International Committee of the Red Cross for determining whether a person is a “member” of an armed group (such that that person may be targeted with lethal force at any time) reflect customary international law? If not, what is the correct test?*

Between 2003 and 2008, the International Committee of the Red Cross (ICRC) conducted an expert-driven process to examine the concept of direct participation. The result was its *Interpretive Guidance on the Notion of Direct Participation in Hostilities*.⁴¹ During the process, the experts accepted the premise that members of “organized armed groups” were assimilated to members of the regular armed forces for the purposes of targeting. In particular, group members are targetable at all times, as distinct from the “for such time” limitation *vis-à-vis* individuals. However, for the ICRC, only those members of the group who have a “continuous combat function” are subject to such targeting.⁴² Other members may not be attacked unless they are engaged in activities qualifying as direct participation.⁴³ A continuous combat function is a regular role in the group involving activities that somehow directly harm the enemy.

The ICRC’s distinction between members of the same organized armed group provoked controversy among the experts.⁴⁴ In particular, some of them, including myself, objected on the basis that IHL does not distinguish members of the regular armed forces who have a combat function from those who do not.⁴⁵ With the exception of medical and

41. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) (by Nils Melzer) [hereinafter *Interpretive Guidance*].

42. *Id.* at 27.

43. *Id.* at 34–35.

44. See, e.g., Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 655–57 (2010).

45. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NAT’L SECURITY J. 5, 23 (2010) [hereinafter Schmitt, *Interpretive Guidance*].

religious personnel, all members of the group are targetable throughout their enlistment. To afford greater protection to members of an organized armed group — who enjoy no right to participate in the conflict in the first place — than to members of the regular armed forces appeared to these experts as unacceptably incongruent and contrary to IHL's object and purposes.

For the experts who are of this view, the appropriate criterion for around-the-clock targetability is membership in a group that has an express purpose of conducting hostilities. It must be cautioned that targetability does not extend to individuals who merely support the group, as in financing its general operations or periodically offering its members sanctuary. Such individuals must be treated as civilians who may only be attacked for such time as they engage in acts qualifying as direct participation in hostilities.

Some groups, such as Hamas and Hezbollah, have both military and nonmilitary wings. The latter may provide, for example, education, medical care, and other services unrelated to the hostilities. Only those in the military wing are targetable as members of an organized armed group.⁴⁶ Individuals who have functions in both the military and nonmilitary components are targetable based on their membership in the former.

G. Does the guidance promulgated by the International Committee of the Red Cross for “direct participation in hostilities” reflect customary international law? In particular, does an individual who has participated in hostilities cease to be targetable during a pause in his or her active involvement? Does providing accommodation, food, financing, recruitment or logistical support amount to “direct participation in hostilities” for targeting purposes?

In the *Interpretive Guidance*, the ICRC suggested that direct participation consists of three cumulative constitutive elements. First, 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.” Second, “there must be a direct causal link between the act and the harm likely to result.” Third, a nexus must exist between the act in question and the armed conflict.⁴⁷

The experts involved in the process generally accepted the three as reflecting customary law. However, opinions sometimes differed over their precise application to particular types of activities. For example, the ICRC opined that serving as a voluntary human shield or (perhaps) building improvised explosive devices did not qualify on the basis that the causal

46. *Interpretive Guidance*, *supra* note 41, at 32. Most experts agree on this point.

47. *Id.* at 46.

connection between these acts and the ensuing harm is indirect.⁴⁸ I was among the experts who countered that such an interpretation of direct causation is overly restrictive.

So long as the activities cited in the above question are engaged in generally, rather than to facilitate a particular operation, they would likely not qualify as direct participation. For instance, and although the experts are not unanimous in this regard, contributing financially to an organization in a general way is not direct participation, whereas specifically funding a particular operation would qualify.⁴⁹ Similarly, providing general logistics support, such as transporting material for an organized armed group, would not amount to direct participation, while transporting equipment to the group for a specific imminent attack would.⁵⁰

Disagreement also exists over the temporal aspect of direct participation. A State conducting an RPA strike against a direct participant must be sensitive to the limitation that the attack may only take place “for such time” as the individual is so participating.⁵¹ The precise meaning of the phrase remains elusive. According to the *Interpretive Guidance*, “[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.”⁵² Between individual acts of participation, the individual regains protection from attack. An alternative approach, one I support, interprets the phrase more broadly.⁵³ By it, individuals who engage in repeated acts of direct participation remain targetable throughout the period during which those acts occur.

H. In the context of non-international armed conflict, when (and under what circumstances) does international humanitarian law impose an obligation to capture rather than kill a legitimate military target where this is feasible?

The issue of capture or kill surfaced during the final year of the direct participation project. According to the ICRC, “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”⁵⁴

48. *Id.* at 56.

49. *Id.* at 34.

50. *See id.* at 56.

51. Additional Protocol I, *supra* note 19, art. 51(3); Additional Protocol II, *supra* note 29, art. 13(3).

52. *Interpretive Guidance*, *supra* note 41, at 65.

53. Schmitt, *Interpretive Guidance*, *supra* note 45, at 16–17.

54. *Interpretive Guidance*, *supra* note 41, at 77.

This comment evoked controversy among the experts and sparked a debate that continues today.⁵⁵

It is militarily illogical to kill the enemy when capture is possible because detainees often provide useful intelligence. However, I was among the experts who took the position that *as a matter of law* an individual becomes targetable once he or she qualifies as an enemy combatant, directly participates in hostilities, or is a member of an organized armed group. For these experts, IHL specifically delineates the circumstances in which such individuals may not be attacked, as when they have been captured or are wounded.⁵⁶ Military necessity serves not as a separate rule, but rather as a foundational principle of IHL that has already been factored into the specific rules. In other words, absent a specific rule of IHL prohibiting attack on an individual, such as the prohibition on attacking civilians or application of the rule of proportionality, he or she may be attacked without consideration of the extent to which the attack is militarily necessary.

CONCLUSION

Policy makers sometimes embrace normative opaqueness in the belief that it allows for political and operational flexibility. In fact, it often does. Yet, when the task at hand involves lethal activity, there is a strong moral argument for States committed to the international rule of law to set forth the legal basis for their operations. Doing so is particularly imperative in light of customary international law's reliance on State practice and expressions of *opinio juris*. Whether States will heed Special Rapporteur Emmerson's call to set forth their legal position on RPA operations remains to be seen. However, that States engaged in any lethal activity should be willing to coherently and transparently articulate a legal basis therefor would seem self-evident.

55. Compare, e.g., Geoffrey S. Corn et. al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536 (2013) (arguing against a requirement to minimize the force used against individuals that qualify as lawful targets), with Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819 (2013) (taking the contrary position).

56. See Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'*, 24 EUR. J. INT'L L. 855 (2013).