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Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations

An article from the symposium, “State Ethics: Controlling the Behavior of
Governments and Their Partners”

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In law and policy discussions of the targeted killing of suspected terrorists, the focus is typically on the international legal rights and obligations of a state engaging in targeted killing, the “attacking state.” Little to no attention has been paid to the international obligations of the state in which a violent non-state actor is located and targeted, referred to as the “territorial state.”¹ Such myopia reduces the territorial

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¹ NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 36 (2010).

state's legal considerations to the infringement of sovereignty occasioned by an attacking state's actions within its territory.

This brief commentary considers the potential effect of a territorial state's international human rights obligations on the law governing targeted killings. It posits that these obligations should limit permissible attacks by an attacking state when the territorial state is not party to an armed conflict with the relevant non-state actor, particularly when a territorial state consents to the attacking state's actions. It also argues that a territorial state's extraterritorial human rights obligations provides support for an attacking state's right to resort to force in the territorial state when it fails to suppress a resident threat. It concludes by briefly suggesting that recognizing the necessity of effective governance to the preservation of human rights could prompt the development of an international law of ungoverned spaces, perhaps best thought of as "international martial law."

I. THE TARGETED KILLING DEBATE

In this discussion, "targeted killing" refers to the premeditated, extraterritorial use of lethal force by a state against a non-state actor with which it is engaged in armed conflict or that presents a present and ongoing threat of harm while located within the ineffectively- or substantially un-governed territory of another state. This definition is a much narrower subset of targeted killing analyzed in other commentaries, which includes all lethal action by states against individuals not in their custody.² It does, however, encompass widely reported but vaguely acknowledged U.S. operations targeting members of al-Qaeda and associated groups outside of Afghanistan.³

² See, e.g., NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 3–5 (2009) (defining targeted killing as the intentional use of lethal force against specific individuals not in the custody of the entity to which the act is attributable under international law); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, p. 3, U.N. Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 26, 2010) (by Philip Alston) ("A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator."). These definitions are far too broad for this discussion.

³ See, e.g., Joe Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> (citing unnamed officials describing how the President selects targets for drone attacks); David Nakamura, *Obama on 'Tonight Show' with Jay Leno: Full Video and Transcript*, WASH. POST, Oct. 26, 2011, http://www.washingtonpost.com/blogs/44/post/obama-on-tonight-show-with-jay-leno-full-video-and-transcript/2011/10/26/gIQAHXJjIM_blog.html (during interview the President discusses drone program and its

The basic lines of the legal debate surrounding this subset of targeted killing have been drawn. There are several contested issues, but three are most prominent.⁴ The first and most fundamental is whether or under what circumstances a state has and may exercise its inherent right of self-defense against an extraterritorial non-state actor that has harmed and/or poses an imminent or ongoing threat of harm to its citizens. Next is whether or under what circumstances any such right of self-defense permits a state to intrude into another state's territory to exercise it. The final significant issue is whether the "attack," the act effecting a targeted killing, is regulated by international human rights law or by international humanitarian law,⁵ the latter of which many insist should be applied in complementary fashion with international human rights law.⁶

II. THE RELEVANCE OF TERRITORIAL STATE HUMAN RIGHTS OBLIGATIONS

Of what import are a territorial state's international human rights obligations to these three issues? The International Covenant on Civil and Political Rights (ICCPR) requires a state party "to respect and to ensure to all individuals within its territory

effectiveness); Peter Finn & Joby Warrick, *CIA Director Says Secret Attacks in Pakistan Have Hobbled al-Qaeda*, WASH. POST, Mar. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702558.html>.

⁴ For a more detailed explication of the myriad international legal issues involved, see LUBELL, *supra* note 1, at 36.

⁵ International humanitarian law regulates the conduct of parties to an armed conflict, whether state or non-state. It prescribes (and in some circumstances, removes) protections for individuals and property based upon their status in relation to the conflict and regulates the permissible means and methods of warfare. International human rights law regulates the relationship between states and individuals more generally and delineates permissible derogation(s) from accepted base principles under certain circumstances.

⁶ Some argue that international human rights law, including any permissible derogation, applies during armed conflict unless displaced by a relevant rule of international humanitarian law. See, e.g., Gabor Rona, *A Response to Ohlin About IHL and IHRL*, OPINIO JURIS (Jan. 17, 2012, 5:10 AM), <http://opiniojuris.org/2012/01/17/a-response-to-ohlin-about-ihl-and-ihrl/>. Others argue that international humanitarian law is *lex specialis* between the parties to an armed conflict and applies anywhere acts of hostilities (broadly defined) are undertaken. See, e.g., Jens David Ohlin, *IHL and IHRL*, LIEBER CODE (Jan. 14, 2012, 2:58 PM), <http://www.liebercode.org/2012/01/ihl-and-ihrl.html>. I confess that my views on this topic are nuanced. For a more nuanced view of this complementary relationship in non-international armed conflict, see Marco Sassóli & Laura M. Olson, *The Relationship of International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 616–27 (2008).

and subject to its jurisdiction their international human rights.”⁷ These obligations would seem relevant to any armed attack within a state’s territory, where it clearly must both respect and ensure the human rights of its population.

It has been argued that human rights law alone governs an attacking state’s use of defensive or preventive force beyond active battlefields and that any killing in such circumstances is therefore strictly limited to that which is necessary to counter an immediate threat or actual attack.⁸ But there are indications that the governments of both Pakistan and Yemen may (secretly) consent to targeted killing within their borders.⁹ May a territorial state consent to a targeted killing consistently with its obligation to ensure the human rights of its population? Some might readily say, “certainly not,” but the situation is more complex than it seems.

At first glance, it would seem that a state’s “responsibility to protect” its population¹⁰ would prohibit a territorial state from allowing another state to attack individuals within its territory. After all, a state’s responsibility to protect its population should apply equally to harm emanating from within or without its borders. A territorial state may therefore violate its human rights obligations by consenting to an attacking state’s targeted killing operation.

⁷ International Covenant on Civil and Political Rights art. 2, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); *id.* at S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967).

⁸ See Mary Ellen O’Connell, *Unlawful Killing with Combat Drones*, in *SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT* (Simon Bronitt ed., forthcoming), available at <http://ssrn.com/abstract=1501144>.

⁹ Regarding Pakistan, see Adam Entous, Siobhan Gorman & Evan Perez, *U.S. Unease over Drone Strikes*, WALL ST. J., Sept. 26, 2012, at 1 (citing unnamed officials describing the U.S. method of obtaining what it deems Pakistan’s tacit approval of drone strikes). Regarding Yemen, see Greg Miller, *Yemen Leader Says He Approves All Drone Strikes*, WASH. POST, Sept. 30, 2012, at 3 (quoting Yemen’s President, Abed Rabbo Monsour Hadi, “[e]very operation, before taking place, they take permission from the president”).

¹⁰ INT’L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 13 (2001) [hereinafter ICISS REPORT] (“Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.”). The United Nations General Assembly eventually legitimized the central conclusions of this report. See G.A. Res. 60/1, ¶¶ 120–122, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). For a concise discussion, see Daniel Rice & John Dehn, *Armed Humanitarian Intervention: A Primer for Military Professionals*, 87 Mil. Rev. 38, 42–43 (2007).

However, the specific circumstances clearly matter. A state is justified in consenting to such attacks if it is also engaged in an internal armed conflict with the relevant non-state actor.¹¹ But may it also do so if, due to other internal conflict or general weakness in the de jure government, it is unable to arrest or otherwise suppress activities within its borders that inflict or seek to inflict harm outside its borders? Either of these scenarios may accurately describe the situations, in whole or in part, in Pakistan and Yemen. Pushing the assumption one step further, if a territorial state is not engaged in an armed conflict with the target of another state's attack, may it consent to a use of force that conforms to international humanitarian law but not human rights standards? If not, what should be the consequences of its doing so, for either the attacking or territorial state? Particularly in cases of consent, where a territorial state has ceded a part of its sovereignty to an attacking state, an attacking state's targeted killing operations should be limited to some uncertain extent by the territorial state's internal human rights obligations. Precisely how has been under-analyzed. Lack of clarity in this area may be one reason, among others, why Pakistan (reportedly) does not expressly consent to U.S. drone attacks within its borders.¹²

A territorial state's human rights obligations should also be relevant to an attacking state's right to resort to armed force against a violent non-state actor within its territory. It is often argued that states have extraterritorial, one might say, external, human rights obligations. Applying a disjunctive reading to the ICCPR provision quoted above, many argue that states must respect the human rights of all persons, wherever located, and must also ensure (or secure) the human rights of those within its territory or jurisdiction.¹³ Some adopt elastic definitions of "jurisdiction" (encompassing virtually all governmental acts) to extend human rights obligations extraterritorially.¹⁴

If we ascribe to a territorial state the same extraterritorial human rights obligations that many would apply to an attacking state, then a territorial state should be responsible for suppressing any threat within its territory that would deprive those outside its territory of their human rights. This is not an issue of attributing the conduct of a resident non-state actor to its territorial state, but rather of recognizing the responsibility of a territorial state to prevent extraterritorial harm in order to respect the human rights of those outside its borders.

¹¹ States may generally seek the aid of other states in dealing with internal threats without affecting the nature of the armed conflict or the permissible forms of attack. *See, e.g.,* Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. OF THE RED CROSS 69, 80 (2009).

¹² *See* Entous, et al., *supra* note 9.

¹³ *See* LUBELL, *supra* note 1, at 195–207 (surveying a range of opinions on the topic).

¹⁴ *See id.* at 207–13 (surveying several of these claims).

Recognizing that states must prevent injuries to other states and their nationals comports with generally accepted first principles of international law. An important and fundamental principle of international law is formal sovereign equality.¹⁵ All states may pursue their interests as long as they do not infringe upon, or allow the infringement of, the rights of other states and their nationals.¹⁶ Any such infringement was traditionally understood to create a remedial right in the injured state, including a right of reprisal or war.¹⁷ Commentators have posited that this fundamental aspect of the international legal system is why the First Congress enacted the Alien Tort Statute (ATS)—to provide an individual remedy for injured aliens and thereby obviate the need for a state-to-state remedy.¹⁸ It is also why the neutrality acts of the United States have long made it a crime for any person who “within the United States, knowingly begins,” aids, funds, or “takes part in, any military or naval expedition or enterprise . . . against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace.”¹⁹ Both the ATS and the neutrality acts implement what should be properly understood as a state’s international obligation to prevent infringements of the individual (or collective) rights of foreign nationals by its citizens or by the illicit use of its territory.

Viewing the targeted killing debate through the lens of a territorial state’s extraterritorial human rights obligations therefore strengthens the claims of some commentators that international law permits an attacking state to resort to armed force against a violent non-state actor within the territory of another state when that state is unwilling or unable to suppress the threat.²⁰ If a state is unable or unwilling to

¹⁵ See, e.g., R.P. ANAND, SOVEREIGN EQUALITY OF STATES IN INTERNATIONAL LAW (2008).

¹⁶ INTERNATIONAL GROUP OF EXPERTS, THE TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 33 (Michael N. Schmitt, ed., forthcoming 2013), *available at* <http://www.ccdcoe.org/249.html> (citing *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) and, at n. 53, the *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905, 1963 (1941)).

¹⁷ See *The Three Friends*, 166 U.S. 1, 52 (1897).

¹⁸ See, e.g., Anthony J. Bellia & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 471–77 (2011); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 873 (2006).

¹⁹ Neutrality Act of 1794, ch. 50, § 5, 1 Stat. 381, 384 (codified as amended at 18 U.S.C. § 960 (1994)).

²⁰ For arguments supporting an “unable or unwilling” standard for the extraterritorial exercise of self-defense, see Ashley S. Deeks, “Unwilling or Unable”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483 (2012) (reviewing state practice arguably supporting the existence of an “unable or unwilling” standard and suggesting doctrinal improvements). See also Brian Finucane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30 BERKELEY J. INT’L L. 35 (2012) (reviewing state practice arguably supporting the right to engage threats in ungoverned territory); Michael D. Banks, *Addressing State (Ir-)Responsibility: The Use of Military Force as Self-Defense in International Counter-Terrorism Operations*, 200 MIL. L. REV. 54, 57 (2009) (“If a terrorist organization operates within a host State, and that host State cannot or will not act to prevent the terrorist organization

meet its obligations to prevent harm to those outside its territory, then—for reasons similar to those that justify humanitarian intervention—injured states, regional organizations or the international community should not be required to sit idly by.²¹ A territorial state's external human rights obligations therefore support not only an attacking state's inherent right (or if we consider the attacking state's responsibility to protect its population, its obligation) to engage in self-defense against violent non-state actors, but also its ability to exercise that right when a territorial state fails in its sovereign obligations to prevent extraterritorial harm.

III. CONCLUSION: TOWARD A NEW PARADIGM?

The international human rights obligations of a territorial state should be understood to place constraints the use of force by an attacking state, particularly when the territorial state consents to the attacks but is not party to an armed conflict with the relevant non-state actor. Those obligations also support an attacking state's right to resort to armed force within a territorial state when the latter state is unwilling or unable to suppress a threat. These are the logical outgrowths of a territorial state's internal and external human rights obligations. What is less clear, given the lack of attention to these matters thus far, is precisely how they should influence our understanding of the law regulating targeted killing. To suggest that an attacking state must observe the full measure of human rights law when targeting a non-state actor with which it is engaged in armed conflict seems overly simplistic. To permit targeting pursuant to the permissive standards of international humanitarian law beyond active battlefields might allow too much.

Given these concerns, the law of targeted killing in ungoverned spaces may evolve. This analysis underscores the absolute necessity of effective governance to the preservation of international human rights. Governments must possess both *de jure* and *de facto* sovereignty in order to fulfill their territorial and extraterritorial human rights obligations. When governance fails, it threatens the human rights of not only those within such a state, but also potentially those in other states.

Recognizing the necessity of effective governance to the preservation of human rights could shift the targeted killing debate away from an international

from attacking another State, the injured State may act in self-defense against the terrorist organization, with or without the consent of the host State.”).

²¹ A similar moral and legal right to infringe upon the sovereignty of a state is made when it fails in its obligation to protect its population from harm. *See, e.g.*, ICISS Report at 16 (“The emerging principle in question is that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.”). *See also* Rice & Dehn, *supra* note 10, at 39–40 (surveying moral and legal arguments in favor of armed humanitarian intervention).

humanitarian/human rights law dichotomy and towards the development of an international law of ungoverned spaces. This might best be conceived of as an “international martial law”—a body of law more permissive than the rules that govern law enforcement but without the full targeting authorities of international humanitarian law. A martial law paradigm might be a fair characterization of some existing scholarship on the topic of transnational terrorism,²² and of Israel’s well-known targeted killing decision.²³ Such a legal regime might prove more workable than insisting on respect for the full measure of international human rights law in circumstances when such rights cannot possibly be secured or preserved. In such cases, international law should allow the efficient but cautious elimination of obstacles to the preservation of human rights in order to help establish conditions in which those rights might ultimately flourish.

²² See, e.g., Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. OF CONFLICT AND SEC. L. 245 (2010); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 Eur. J. Int’l L. 171 (2005).

²³ HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [Dec. 11, 2006] slip op.