Killing Citizens: Core Legal Dilemmas in the Targeted Killing Abroad of Canadian Foreign Fighters

Tuer ses ressortissants: Dilemmes juridiques fondamentaux dans l'assassinat ciblé de Canadiens combattant à l'étranger

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Abstract

For the first time since the introduction of the *Canadian Charter of Rights and Freedoms*, Canada is in an armed conflict with an insurgency that has actively recruited Canadians and directed them to use or promote violence against Canada. In the result, the Canadian government may ask its soldiers to target and kill fellow Canadians abroad or to assist allies in doing so. This situation raises a host of novel legal issues, including the question of "targeted killing." This matter arose for the United Kingdom in 2015 when it directed the use of military force against several Britons believed to be plotting a terrorist attack against the United Kingdom from abroad. This incident sparked a report from the British Parliament highlighting legal dilemmas. This article does the same for Canada by focusing on the main legal implications surrounding a targeted killing by the Canadian government of a Canadian citizen abroad. This exercise shows that a

Résumé

Pour la première fois depuis l'avènement de la *Charte canadienne des droits et libertés*, le Canada se trouve en état de conflit armé avec des insurgés qui recrutent activement des Canadiens et Canadiennes et les incitent à réaliser ou promouvoir des actes de violence contre le Canada. Il est donc envisageable que le gouvernement du Canada demande à ses soldats de cibler et de tuer des citoyens canadiens à l'étranger, ou d'appuyer des forces alliées à cette fin. Cette situation soulève une panoplie de nouvelles questions juridiques, y compris celle de "l'assassinat ciblé" confrontée par le Royaume-Uni en 2015 lorsqu'il dirigeait l'utilisation de la force militaire contre plusieurs Britanniques soupçonnés d'un complot terroriste, conçu à l'étranger, contre le Royaume-Uni. En a résulté un rapport du Parlement britannique mettant en évidence plusieurs dilemmes juridiques. Cet article fait de même pour le Canada en identifiant les principales implications

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Canadian policy of targeted killing would oblige Canada to make choices on several weighty legal matters. First, the article discusses the Canadian public law rules that apply when the Canadian Armed Forces deploy in armed conflicts overseas. It then analyzes international law governing state uses of military force, including the regulation of the use of force (*jus ad bellum*) and the law of armed conflict (*jus in bello*). It also examines an alternative body of international law: that governing peacetime uses of lethal force by states. The article concludes by weaving together these areas of law into a single set of legal questions that would necessarily need to be addressed prior to the targeted killing of a Canadian abroad.

Keywords: Canadian military law; counterterrorism; human rights law; law of armed conflict; targeted killing; terrorism; use of force.

juridiques découlant de l'assassinat ciblé par le gouvernement canadien d'un citoyen canadien à l'étranger. Cet exercice révèle qu'une politique canadienne d'assassinats ciblés obligerait le Canada à faire des choix sur plusieurs questions juridiques épineuses. Tout d'abord, l'article identifie les règles de droit public canadien applicables lorsque les forces armées canadiennes sont déployées dans un conflit armé à l'étranger. Il analyse ensuite le droit international régissant l'utilisation par les états de la force militaire, y-compris les règles applicables au recours à la force armée (*jus ad bellum*) ainsi que le droit des conflits armés (*jus in bello*). Il examine également un domaine subsidiaire du droit international, celui qui régit l'utilisation étatique de la force meurtrière en temps de paix. L'article conclut en dégageant de ces divers domaines du droit une série de questions juridiques qui devront nécessairement être traitées avant l'assassinat ciblé d'un Canadien ou d'une Canadienne à l'étranger.

Mots-clés: Assassinat ciblé; droit militaire canadien; droits de la personne; droit des conflits armés; lutte contre le terrorisme; recours à la force armée; terrorisme.

Introduction

In 2015, a targeted attack by a British drone killed two Britons and one Belgian in Syria. The British government believed that one of these individuals was conspiring to conduct terrorist violence within the United Kingdom.[1] The government's "precision air strike" precipitated significant

[1] For a discussion of the relevant facts, see Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, Doc S/2015/688 (7 September 2015). See also Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing*, Second Report of Session 2015–16, HL Paper 141, Doc HC 574 (10 May 2016), online: <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>. Soon after, two other Britons were killed in US airstrikes. In one of these instances, the prime minister announced "that the UK intelligence and security Agencies had been working with US colleagues to track down" the target. UK Intelligence and Security Committee of Parliament, *Annual Report 2015–16* at 7, online: <http://isc.independent.gov.uk/files/2015-2016_ISC_AR.pdf>.

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consideration as to its legality, including a UK parliamentary report in April 2016 labelling the strike a "targeted killing."[2] "Targeted killing" is the term used to describe "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."[3] The United Kingdom is not the only state to confront legal issues arising out of targeted killing as a tool of counter-terrorism.[4] Famously, the United States' large-scale drone aircraft campaign, first leveraged against Al-Qaeda and now against other threats, has precipitated considerable controversy, written construals of the applicable legal standards authored by the Obama administration,[5] and a massive law review literature evaluating US conduct.[6]

In Israel, the state's policy of targeted killing resulted in an important decision from that country's high court, to date the most detailed judicial

[2] See Alice Ross & Owen Bowcott, "UK Drone Strikes 'Could Leave All Those Involved Facing Murder Charges," *The Guardian* (10 May 2016), online: <http://www.theguardian.com/politics/2016/may/10/uk-drone-strikes-murder-charges-clarify-legal-basis-targeted-kill-policy-isis>; Joint Committee on Human Rights, *supra* note 1.

[3] UN Special Rapporteur, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions — Addendum: Study on Targeted Killings*, Doc A/HRC/14/24/Add.6 (28 May 2010) at para 1 [UN Special Rapporteur, *Addendum: Study on Targeted Killings*].

[4] See UN Special Rapporteur, *Addendum: Study on Targeted Killings*, *supra* note 3, for a discussion of instances of targeted killing by Russia, the United States, Israel, and Sri Lanka, as of 2010. See also UN Special Rapporteur, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc A/HRC/25/59 (28 February 2014) (for a focus specifically on killings using drones as of 2014).

[5] *US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, online: <https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf>; US Department of Justice, Office of Legal Counsel, *Memorandum for the Attorney General re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (16 July 2010), online: <https://www.aclu.org/sites/default/files/field_document/2014-06-23_barron-memorandum.pdf>; US Department of Justice, *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*, White Paper (no date), online: <https://www.law.upenn.edu/live/files/1903-doj-white-paper> [US Department of Justice, *Lawfulness of a Lethal Operation*]; "Secret U.S. Memo Made Legal Case to Kill a Citizen," *New York Times* (9 October 2011).

[6] Some of the most recent publications on the issue include: Charlie Savage, *Power Wars* (New York: Little Brown, 2015) ch 6; Martin S Fleherty, "The Constitution Follows the Drone: Targeted Killins, Legal Constraints, and Judicial Safeguards" (2015) 38(1) Harvard JL & Public Policy 21; Catherine Lotrionte, "Targeted Killings by Drones: A Domestic and International Legal Framework" (2016) 3:1 J Intl & Comp L 19; Tom Farer & Frederic Bernard, "Killing by Drone: Towards Uneasy Reconciliation with the Values of a Liberal State" (2016) 38 Human Rights Q 108; Naz K Modirzadeh, "Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance" (2014) 5:1 Harvard National Security LJ 225.

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consideration of the question.[7] In comparison, within Canada, there has been no sustained public discussion of the lawfulness of targeted killing, let alone the targeted killing of a Canadian national.[8] The British experience suggests, however, that Canada may confront acute dilemmas in the near future. Canadians have participated in foreign civil conflicts before — including, most famously, in the Spanish Civil War. But, for the first time, a significant number of Canadians are travelling abroad to participate in foreign insurgencies and terrorist groups — including Daesh, Al-Qaeda, and Al-Shabaab — that actively encourage terrorist attacks on Canadians and Canada.[9] Canada is, in fact, involved in an armed conflict with one of these entities — Daesh — in Iraq and Syria. And, so, for the first time since the introduction of the *Canadian Charter of Rights and Freedoms* (*Charter*), the Canadian government may ask its soldiers to target and kill fellow Canadians abroad or to assist allies in doing so.[10]

The increase in Canadian foreign fighting with terrorist groups and Canada's participation in the anti-Daesh military campaign thus raises a host of novel legal issues, including the question of targeted killing that was confronted by the United Kingdom in 2015. We take the view that these legal questions are no longer purely academic and are best discussed publicly in advance rather than resolved retroactively to accommodate operational events. Moreover, the (limited) legal analysis on the topic of targeted killing released to date by other states is typically a blend of domestic and international legal concepts,[11] sometimes hybridized in a manner that creates a sense of false certainty and masks the choices made in areas where there is legal doubt. Not least, in describing their legal position after the 2015 strikes, British government officials articulated views that were internally inconsistent. Key among them were positions on, among other

[7] *Public Committee against Torture et al v Government of Israel, et al*, HCJ 769/02 (14 December 2006).

[8] In a 2005 article with a broader subject matter remit than this one, then deputy Judge Advocate General Kenneth Watkin briefly addressed some of the legal dilemmas central to targeted killing, but without reaching conclusions on the legal implications for Canada specifically. Kenneth Watkin, "Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killings" (2005) 15 Duke J Comp & Intl L 281.

[9] Daesh is variously known as ISIS, ISIL, or the Islamic State. We have selected Daesh for the reasons articulated in Olivia Star, "The Star Now Says 'Daesh' instead of 'the Islamic State' or ISIS," *Toronto Star* (3 March 2016), online: <http://www.thestar.com/news/world/2016/03/03/the-star-now-says-daesh-instead-of-the-islamic-state-or-isis.html>.

[10] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[11] See US Department of Justice, *Lawfulness of a Lethal Operation*, *supra* note 5; Joint Committee on Human Rights, *supra* note 1 (also discussing at times the opaqueness of the UK government's legal position).

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things, the relative scope of international humanitarian and international human rights law.[12]

For all of these reasons, it would be both undesirable and imprudent for Canada to rely simply on the legal reasoning of other states in devising its own legal position on this contentious issue. This article analyzes, therefore, the legal implications surrounding the targeted killing by the Canadian government of Canadian citizens abroad. To reach this objective, it wrestles with issues of international and Canadian public law whose precise parameters are contested, and yet the construal of which may affect the fate of both those targeted and those doing the targeting. We do not believe that all of these legal issues can presently be resolved definitively. Legal advice on the relevant international law would necessarily be provisional and would, in practice, amount to a policy choice. Since the domestic legal ramifications of targeted killing would be coloured by this uncertain international law, domestic legal opinions would also be far from definitive. The purpose of this article, therefore, is not to opine definitively on the legality of a Canadian targeted killing or to consider its wisdom from a policy perspective. Instead, its intent is to suggest, and, indeed, to map, how a Canadian policy of targeted killing would oblige Canada to make conscious policy choices on several weighty matters of international law. These international law issues would, in turn, directly affect the legality of government conduct under Canadian public law.

We divide the article into five sections. In the first section, we define the factual parameters giving rise to new legal dilemmas.[13] Specifically, we explore the phenomena of "foreign fighting," counter-terrorism, and the circumstances of the armed conflict with Daesh as well as other instances of foreign terrorist fighting. In the second section, we examine the Canadian public law rules that apply when the Canadian Armed Forces (CAF)

[12] See, in particular, the UK government's position that while it did not agree that a state of armed conflict existed outside of Syria and Iraq, nevertheless the standards applicable to lethal uses of force against Daesh in other places were governed by international humanitarian law and, moreover, compliance with international humanitarian law (IHL) constituted compliance with international human rights law. This position ignores the fact that, as discussed below, IHL only applies where there is an armed conflict, and where there is no such armed conflict, international human rights law applies in full — therefore, mere compliance with IHL (which is generally more permissive of lethal force than is human rights law) would not satisfy human rights standards, should they extend to the British conduct. *Ibid* at 42, 43, 51. For a further study of the UK legal view, see UK Intelligence and Security Committee (ISC), *UK Lethal Drone Strikes in Syria Report* (April 2017), online: <http://isc.independent.gov.uk/committee-reports/special-reports>.

[13] Portions of this part update and revise the discussion that original appeared in Craig Forcese & Ani Mamikon, "Neutrality Law, Anti-Terrorism and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies" (2015) 48:2 UBC L Rev 305; Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015).

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deploy in armed conflicts overseas. The third section examines international law governing military force, scrutinized from the perspective of the use of force (*jus ad bellum*) and the law of armed conflict (*jus in bello*). In the fourth section, we focus on an alternative body of international law: that governing peacetime uses of lethal force. Finally, in the fifth section, we weave together these areas of law into a single set of legal questions that would necessarily have to be addressed prior to the targeted killing of a Canadian.

Foreign Fighting, Counter-Terrorism, and the Daesh Armed Conflict

This article focuses on the most complex form of targeted killing: a targeted killing by Canada of a Canadian national abroad, either directly or in cooperation with allied forces. By necessity, therefore, our focus is on a sub-category of "foreign fighters." Foreign fighting is a persistent international phenomenon that defies easy classification. A "foreign fighter" is "an intermediate actor category lost between local rebels, on the one hand, and international terrorists, on the other."[14] For the purposes of this article, we follow Thomas Hegghammer in describing a foreign fighter as one who "(1) has joined, and operates within the confines of, an insurgency, (2) lacks citizenship of the conflict state or kinship links to its warring factions, (3) lacks affiliation to an official military organization, and (4) is unpaid."[15]

foreign fighting and international law

Despite its prevalence, foreign fighting is a colloquial, rather than a legal, concept. Certainly, in Resolution 2178 (2014), the UN Security Council (UNSC) responded to the rise of Daesh in Iraq and Syria by requiring states to restrict, among other things, travel by individuals who aim to become "foreign terrorist fighters."[16] Subsequently, in Resolution 2249 (2015), the UNSC (obliquely) suggested that states might use force against Daesh in Iraq and Syria, without clearly authorizing such use.[17] However, there is no separate set of legal rules applicable to "foreign fighters" that places them on a distinct legal footing from conventional armed forces or unconventional militia, guerrilla, or rebel-type insurgent forces.

[14] Thomas Hegghammer, "The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad" (2010/11) 35:3 Intl Security 53 at 55. For an elaboration on foreign fighter issues discussed in this section, see Forcese & Mamikon, *supra* note 13.

[15] Hegghammer, *supra* note 14 at 55.

[16] UNSC Resolution 2178 (2014).

[17] UNSC Resolution 2249 (2015). For a discussion of UNSC Resolution 2249 (2015), and its ambiguity on this question, see note 129 below.

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In fact, foreign fighters, including Canadians, participate in either formal armed conflicts — a critical concept defined later in this article — or acts of terrorism that fall short of armed conflicts. Examples of the latter, "peacetime" foreign fighters are the two Canadian men who died in a 2013 Al-Qaeda-linked terrorist attack that killed as many as sixty individuals at an Algerian gas plant.[18] Canadian foreign fighters also participate in more clearly defined intra-state armed conflicts. For instance, in 2013, a Canadian fighting with an armed insurgency (and terrorist group) Al-Shabaab reportedly participated in a deadly attack in Mogadishu.[19] Intelligence estimates from several years ago suggest as many as twenty Canadians have joined the terrorist group in Somalia. Most notoriously, in 2009, six young Somali Canadians left Toronto to fight in the organization. At least four of them were killed. Two others reportedly became disillusioned and left the terrorist group but remained in Somalia.[20]

Other Canadians have joined Daesh in Syria and Iraq (and possibly in other places such as Bangladesh), and it is the siren call of this group that is the most alarming development. It is difficult to know how many Canadians have already joined Daesh and other terrorist groups — there has been no public accounting by the Canadian government. To be sure, Canadians make up a small percentage of this global foreign terrorist fighter phenomenon. However, on a per capita basis, more Canadians than Americans have travelled abroad to join Daesh.[21] In February 2016, the government was aware of more than 180 individuals with Canadian connections who were abroad and suspected of engaging in terrorism-related activities, more than half of whom were believed to be in Iraq, Syria, or Turkey. Another sixty had returned home.[22] Earlier, in October 2014, the Royal Canadian Mounted Police (RCMP) was reportedly tracking

[18] See Canadian Security Intelligence Service (CSIS), *2011—2013 Public Report*, Catalogue no PS71 (Ottawa: CSIS, 2014), online: <https://www.csis.gc.ca>.

[19] *Ibid* at 14.

[20] Stewart Bell "They Realized What They Were Doing Was Wrong: Two Canadians Quit Extremist Group, al Shabab," *National Post* (12 September 2013).

[21] In February 2016, the American Office of the Director of National Intelligence estimated that since 2012 36,500 individuals from more than 100 countries travelled to Syria to engage in combat as members of various armed groups. While an estimated 6,600 are Westerners, only a few dozen Americans are suspected of joining Daesh. Christopher M Blanchard, Carla E Humud & Congressional Research Service, *The Islamic State and US Policy* (27 June 2016) at 1–2.

[22] Public Safety Canada, *2016 Public Report on the Terrorist Threat to Canada* (August 2016) at 7. Robert Fife, "Spy Agencies See Sharp Rise in Number of Canadians Involved in Terrorist Activities Abroad," *Globe and Mail* (23 February 2016), online: <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2014-pblc-rpr-trrrst-thrt/2014-pblc-rpr-trrrst-thrt-eng.pdf>.

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ninety individuals who intended to travel, or had returned from overseas, although it is not clear how many of these were affiliated with Daesh.[23]

Canadian foreign fighters come from across the country. A recent study conducted by Lorne Dawson, Amaranath Amarasingnam, and Alexandra Bain interviewed forty foreign fighters involved in the conflict in Syria and Iraq. In the course of this research, it became "evident that Canadian foreign fighters have been leaving in fairly distinct clusters, reflecting a pattern of mutual or collective radicalization amongst small groups of largely young men. Such clusters have been traced in Calgary, Edmonton, Ottawa, Toronto, and Montreal."[24] As this article is written, some reports suggest that the flow of foreign fighters into Iraq and Syria has waned.[25] On the other hand, terrorist attacks outside of Syria and Iraq directed or inspired by Daesh are increasing. As discussed next, this is a development consistent with the traditional security fears sparked by foreign fighting.

THE THREAT POSED BY FOREIGN FIGHTERS

Foreign fighting has become an urgent matter for many governments that are far from the areas in which these groups typically operate because of the (often presumed) association between foreign fighting and international terrorism. Specifically, many of the current concerns about foreign fighters reflect preoccupations with the return of fighters to their countries of nationality. This "return" preoccupation can be summarized by the following statement: even though some of the foreign fighters "may not return as terrorists to their respective countries ... all of them will have been exposed to an environment of sustained radicalization and violence with unknowable, but worrying, consequences."[26] Put another way, fears "center around the threat of a 'bleed out' as jihadi veterans, equipped with new knowledge of fighting, training, recruitment, media and technical skills

[23] Daniel Leblanc & Colin Freeze, "RCMP Investigating Dozens of Suspected Extremists Who Returned to Canada," *Globe and Mail* (8 October 2014), online: <http://www.theglobeandmail.com/news/politics/rcmp-investigating-dozens-of-suspected-extremists-who-returned-to-canada/article20991206/>.

[24] Lorne Dawson, Amaranath Amarasingnam & Alexandra Bain, "Talking to Foreign Fighters: Socio-Economic Push Versus Existential Pull Factors," *Canadian Network for Research on Terrorism, Security and Society* (May 2016), online: <http://tsas.ca/wp-content/uploads/2016/07/TSASWP16-14_Dawson-Amarasingam-Bain.pdf>.

[25] In April 2016, US Air Force Major General Peter Gersten, Deputy Commander for Operations and Intelligence for Operation Inherent Resolve (the US Operation against Daesh in Iraq and Syria) told reporters that in comparison to 2015, the number of foreigners travelling to join the Islamic State on a monthly basis had dropped by up to 90 percent. More recent reporting from the Pentagon, however, places that number at closer to 75 percent. Blanchard, Humud & Congressional Research Service, *supra* note 21.

[26] Richard Barrett, *Foreign Fighters in Syria* (June 2014) at 7, online: <soufangroup.com/wp-content/uploads/2014/06/TSG-Foreign-Fighters-in-Syria.pdf>.

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in building bombs, take their skills elsewhere — potentially facilitating the initiation or escalation of terrorism in their home country or in other arenas, and enhancing the power of insurgencies and terrorist groups."[27]

Canadian government officials quite rightly regard many of the groups with whom Canadian foreign fighters have associated as security risks. In 2002, an Al-Qaeda recording singled out Canada — along with France, Italy, Germany, and Australia — for allying itself "with America to attack us in Afghanistan." The speaker — likely Osama bin Laden — asserted "as you kill you will be killed and as you bomb you will be bombed."[28] Canadian officials have since pointed often to this statement — and a follow-up issued in 2005 — when describing the terrorist threat to Canada.[29] For its part, the Somali terrorist group Al-Shabaab has attacked people in Uganda for watching football games and targeted courthouses and other venues in Somalia. Most famously, it killed sixty-three innocent shoppers in the Westgate Mall in Nairobi, Kenya, and 147 innocent students at Kenya's Garissa University. It also called for terrorist attacks in Canada in February 2015. The video called "upon our Muslim brothers, particularly those in the West, to answer the call of Allah and target disbelievers wherever they are … what if such an attack was to occur in the Mall of America in Minnesota? Or the West Edmonton Mall in Canada? Or in London's Oxford Street?"[30]

Daesh's terrorist ambitions in regions far outside of Iraq and Syria are now clear. Moreover, of all of these groups, Daesh is the only one with whom Canada is plainly involved in an armed conflict. In late October 2014, Canada joined the American-led coalition against Daesh in Iraq. The government reported to the UNSC that Canada was invoking individual and collective self-defence under Article 51 of the *Charter of the United Nations* (*UN Charter*), explaining that "[s]tates must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory."[31] In total, 600

[27] Barak Mendelsohn, "Foreign Fighters—Recent Trends" (2011) 55:2 Orbis 189 at 191.

[28] "Osama's List," *National Post* (14 November 2002).

[29] See, eg, Commons Subcommittee on National Security of the Standing Committee on Justice and Human Rights, *Evidence* (1 April 2003), Ward P Elcock, Director, Canadian Security Intelligence Service, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=808452&Mode=1&Language=E>; Special Senate Committee on the Anti-terrorism Act, *Evidence* (31 October 2005), Jim Judd, Director, Canadian Security Intelligence Service, online: <http://www.parl.gc.ca/Content/SEN/Committee/381/anti/18eva-e.htm?comm_id=597&Language=E&Parl=38&Ses=1>.

[30] "RCMP Investigating Al-Shabab Video Calling for Terrorist Attack on West Edmonton Mall," *National Post* (22 February 2015).

[31] Letter from the Deputy Permanent Representative of Canada to the United Nations Addressed to the President of the Security Council, UN Doc S/2015/221 (31 March 2015). *Charter of the United Nations*, (1945) 39 AJIL 190 [*UN Charter*].

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military personnel were deployed as part of Joint Task Force Iraq, and six CF-18 fighter aircraft supported the coalition in the conduct of airstrikes against Daesh forces, infrastructure, and equipment.[32] Another sixty-nine armed forces personnel worked in an advisory and assistance role providing strategic and tactical advice to Iraqi security forces.[33] In March 2015, the deployment was extended for a year and expanded to include Daesh targets in Syria. Under the Trudeau government, the mission, dubbed "Operation Impact," was extended until 31 March 2017 and refocused on providing training and assistance to Iraqi security forces. Canadian CF-18 fighter aircraft ceased conducting airstrikes on 15 February 2016, but Canadian reconnaissance and refuelling aircraft continued to support coalition air operations.[34] At the time of writing, Canadian troops also continue to identify and mark targets for coalition strikes.[35]

FOREIGN FIGHTING AND TARGETED KILLING

Given this factual context, it is possible, if not likely, that Canada will be faced with the question of whether to use lethal force against a Canadian foreign fighter associated with one or more of these terrorist groups abroad. That occasion may arise either directly — the CAF targets the Canadian — or indirectly — Canadian officials intentionally aid and assist an ally in the targeting, resulting in a strike mounted by that ally. Either way, similar complicated legal issues arise.[36] From an international law perspective, those legal issues bifurcate depending on the precise circumstances of the targeted killing. The most perilous prospect is a targeted killing outside of an armed conflict, involving peacetime use of lethal force. The least fraught circumstance is one in which the killing occurs within an armed

[32] National Defence and the Canadian Armed Forces, "Operation Impact: Joint Task Force Iraq," online: <http://www.forces.gc.ca/en/operations-abroad-current/op-impact.page>.

[33] *Ibid.*

[34] *Ibid.*

[35] Peter Zimonjic, "Canada's New Training Mission in Iraq and Syria Passes Commons Vote," *CBC News* (8 March 2016), online: <http://www.cbc.ca/news/politics/isis-vote-mission-iraq-syria-1.34816607>.

[36] We have crafted this article imagining a hypothetical direct, targeted killing by Canada. However, we are persuaded that concepts of aiding and abetting in Canadian and international criminal law, the causality concepts in the *Charter*, discussed below in relation to cases like *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 [*Suresh*], and the rules of aiding and assisting in the commission of an internationally wrongful act in art 16 of the *Rules of States Responsibility* (reprinted in (2001) 2:2 YB ILC 65), mean that all of the issues raised in this article would need to be addressed even if the Canadian involvement amounts to a provision of information to an ally in order to facilitate the targeted killing of a Canadian. Therefore, we do not make a distinction in the remainder of this article between direct or indirect Canadian involvement.

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conflict in which Canada is a party and the Canadian target is taking a direct part in the hostilities. Even here, however, a determination of the legality of that killing hinges on a cascade of legal questions.

How a targeted killing of a Canadian abroad would be assessed in domestic law is even more uncertain. Accordingly, in the next section, we begin our analysis by examining the domestic legal standards that, while woefully underdeveloped, do exist. It is ultimately our position that international law should be the reference point when interpreting these Canadian standards. As such, in the third section of this article, we canvass the international law that would apply should Canada wish to advance the argument that its use of force was compliant with the legal norms on use of force and armed conflicts. In the fourth section, we examine international law and the use of lethal force in a peacetime context.

Canadian Public Law and the Militarization of Anti-terrorism

The Canadian executive has the competency to order the CAF to kill a Canadian foreign fighter abroad. A decision to deploy the CAF to perform its military functions is made exclusively by the executive branch as an exercise of the royal prerogative.[37] The domestic law governing the lawfulness of this order stems from a variety of sources. In this article, we focus briefly on criminal and constitutional law standards, as these are likely engaged by any prospective targeted killing.

criminal law

Canada is a party to the *Geneva Conventions* and their *Additional Protocols*.[38] These instruments, discussed below, and their customary analogues comprise the core of international humanitarian law (IHL), often referred to by service members as the law of armed conflict (LOAC). The actions of CAF members deployed internationally are governed by LOAC and the

[37] A 2006 Library of Parliament study concluded: "The Federal Cabinet can, without parliamentary approval or consultation, commit Canadian Forces to action abroad, whether in the form of a specific current operation or future contingencies resulting from international treaty obligations." Library of Parliament, *International Deployment of Canadian Forces: Parliament's Role*, Doc PRB 00-06E (18 May 2006) at 1. Some of the material in this section is adopted, but substantially recrafted, from Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008). He also expresses doubt that a parliamentary role may exist by way of constitutional convention.

[38] *Geneva Conventions*, 12 August 1949, 1125 UNTS 3; *Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 6 August 1977, 1125 UNTS 3; *Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 6 August 1977, 1125 UNTS 609 [*Additional Protocol II*].

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CAF's Code of Conduct, which operationalizes the rules of IHL.[39] The *Geneva Conventions* and the *Additional Protocols* are made part of the law of Canada by the *Geneva Conventions Act*, which makes grave breaches of the *Geneva Conventions* and *Additional Protocol I*, such as wilful killing or torture, a crime prosecutable in Canada.[40] Parliament has also enacted the *War Crimes and Crimes against Humanity Act*, anticipating prosecutions for war crimes occurring both within and outside Canada.[41]

Moreover, the general territorial limits of Canada's criminal law do not apply to CAF members deployed overseas.[42] This means that convictions may be entered against CAF members who violate Canada's criminal law abroad. For this reason, a CAF member committing a crime while deployed internationally is most likely to be charged with a conventional *Criminal Code* offence — such as murder — and face court martial under the Code of Service Discipline.[43] This code is enacted in Part III of the *National Defence Act* (*NDA*) and, among other things, imposes regular Canadian criminal law on CAF members, prosecutable before civilian or military courts.[44] A relatively recent example is the court martial of Army Captain Robert Semrau in 2010 for allegedly shooting a wounded Afghan on the battlefield. Semrau faced four charges under the *NDA*, including two under section 130, which stipulates that an "act or omission" is an offence "that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament."[45] Semrau was acquitted of second-degree murder and attempt to commit murder using a firearm as defined under section 235(1) and section 239(1)(a)(i) of the *Criminal Code*.

[39] Judge Advocate General, *Code of Conduct for CF Personnel*, Doc B-GG-005-027/AF-023 (20 October 1999).

[40] *Geneva Conventions Act*, RSC 1985, c G-3, s 3.

[41] *War Crimes and Crimes against Humanity Act*, SC 2000, c 24.

[42] See *Criminal Code*, RSC 1985, c C-46, s 5: "Nothing in this Act affects any law relating to the government of the Canadian Forces."

[43] Canada, National Defence, *Law of Armed Conflict Manual*, Doc B-GJ-005-104/FP-021 (13 August 2001) at 16-8. *Criminal Code*, *supra* note 42.

[44] *National Defence Act*, RSC 1985, c N-5, s 60ff [*NDA*].

[45] *Ibid*, s 130(1) (specifying that an act or omission "that takes place outside Canada and would, if it had taken place in Canada" have constituted an offence under the *Criminal Code* or any other Act of Parliament is liable to conviction); see also s 273: "Where a person subject to the Code of Service Discipline does any act or omits to do anything while outside Canada which, if done or omitted in Canada by that person, would be an offence punishable by a civil court, that offence is within the competence of … a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place"). For a recent discussion on s 130 (albeit in a different context), see *R v Moriarity*, 2015 SCC 55 at paras 5ff, [2015] 3 SCR 485.

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Soldiers are, of course, expected to engage and kill lawful targets in a theatre of war. Canadian criminal law does not include any emphatic "combatant's privilege" analogous to the principle applied in international humanitarian law, discussed below. However, in the (unlikely) event that prosecutors bring charges following an internationally lawful use of military force, certain defences would probably be available. First, the *Criminal Code* preserves common law defences — that is, "every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge."[46] Since a combatant's privilege exists as part of customary international humanitarian law (for, at least, international armed conflicts) and since customary international law is part of the common law of Canada,[47] a common law defence to otherwise criminal conduct undertaken in a time of armed conflict may exist. Second, Canadian law includes a defence of "necessity" — that is, an excuse for non-compliance with the criminal law "in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience."[48] The defence is available "in urgent situations of clear and imminent peril"[49] and not as part of a premeditated policy outside of this context.[50] Compliance with the law must also be "demonstrably impossible."[51] Finally, there must be proportionality "between the harm inflicted and the harm avoided."[52] Third, the *Criminal Code* contains a more conventional self-defence provision, exonerating a person who acts reasonably in self-defence to protect themselves or a third person from a use or threat of force.[53]

CONSTITUTIONAL LAW

The *Charter* guarantees, among other things, "the right to life, liberty and security of the person and the right not to be deprived thereof except in

[46] *Criminal Code, supra* note 42, s 8(3).

[47] *R v Hape*, 2007 SCC 26 at paras 36ff, [2007] 2 SCR 292 [*Hape*]. It is also possible that a defence of superior orders might exist at common law. See discussion in *R v Ribic*, 2008 ONCA 790 at paras 65ff, 63 CR (6th) 70. However, this defence is usually associated with a war crime or crime against humanity — and we do not assume such a crime in this article. Moreover, culpability would likely rest with someone within the chain of command.

[48] *R v Perka*, [1984] 2 SCR 232 at 248 [*Perka*].

[49] *Ibid* at 244, 251.

[50] *R v Campbell*, [1999] 1 SCR 565 at para 41.

[51] *Perka, supra* note 48 at 251.

[52] *R v Latimer*, [2001] 1 SCR 3 at para 28.

[53] *Criminal Code, supra* note 42, s 34.

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accordance with the principles of fundamental justice."[54] This section 7 right reaches maltreatment causally tied to the conduct of the Canadian state.[55] While the courts have never had to decide the matter directly, a targeted killing almost certainly would engage the right to life.[56] Its lawfulness would depend, therefore, on whether the *Charter* reached a targeted killing conducted overseas and, if so, whether that killing was inconsistent with section 7's guarantee and with section 1 of the *Charter*.

Charter*'s Extraterritorial Reach*

Whether Canadian constitutional obligations follow the CAF overseas is an uncertain issue at present. The starting point in understanding the extraterritorial reach of the *Charter* is the Supreme Court of Canada's decision in *R v Hape*.[57] In this matter, the RCMP conducted an overseas criminal investigation with the express consent of the foreign authorities and in partnership with them. Justice Louis LeBel, writing for a majority of the Court, looked to international law and the principle of the comity of nations to construe the reach of the *Charter*. The Court held that section 8 of the *Charter* did not reach the RCMP's conduct in this context. He reasoned that the extension of section 8 extraterritorially without the consent of the territorial state would be an intrusive invasion of state sovereignty and would necessarily "entail an exercise of the enforcement jurisdiction that lies at the heart of territoriality."[58]

However, the Supreme Court of Canada, in *obiter*, included a caveat: the *Charter* could reach overseas conduct by a Canadian agency where compliance with Canada's international obligations was at issue: "The principle of comity does not offer a rationale for condoning another state's breach of international law."[59] The Court has since commented on this *Hape* exception: "[T]he Court was united on the principle that comity cannot be used

[54] *Charter*, *supra* note 10, s 7. Also of potential relevance is s 12, guarding against cruel and unusual treatment, a right also likely engaged infringed by the targeted deprivation of life. See *United States of America v Burns*, [2001] 1 SCR 283 at para 83 [*Burns*] (discussing capital punishment). However, since the Court has also said that s 12 informs the content of s 7, we proceed with a s 7 analysis in this article (at para 57).

[55] See *ibid* (fundamental justice applies even to deprivations of life, liberty, or security done by foreign states where there is a sufficient causal connection between the Canadian government's actions and the deprivation). *Suresh*, *supra* note 36 at para 54 (noting that the principle articulated in *Burns* is a "general one," not limited to extradition cases).

[56] It is difficult to see how the Supreme Court of Canada could conclude that a judicially sanctioned death penalty engages s 7, per *Burns*, *supra* note 54 at para 84, but that extrajudicial targeted killings do not.

[57] *Hape*, *supra* note 47.

[58] *Ibid* at paras 52, 58, 65, 87.

[59] *Ibid* at paras 50, 51; see also paras 52, 90, 101.

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to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations."[60] Since then, the Supreme Court of Canada has applied the *Hape* exception to extend the *Charter* overseas where Canadian state actors are in violation of Canada's international human rights obligations.[61] Adding considerable confusion to this jurisprudence, the federal courts have confined the reach of this *Hape* exception to circumstances where the victim of the international human rights wrong was a Canadian citizen.[62] And, in fact, the Federal Court of Appeal declined to apply the *Charter* to detainee transfer practices employed by the CAF in Afghanistan.[63] However, that case hinged in large measure on the foreign nationality of the Afghan detainees — it should not be read as a general bar on the application of the *Charter* to extraterritorial Canadian military conduct jeopardizing a Canadian citizen's rights.[64]

It is also notable that nothing in the *Hape dicta* confines its exception strictly to violations of international human rights norms. In *Khadr v Canada*, the Court concluded that Canada was in violation of the *Geneva Conventions* and "that participation in the Guantanamo Bay process which violates these international instruments would be contrary to Canada's binding international obligations."[65] As noted, the *Geneva Conventions* are international humanitarian law, a branch of international law distinct from international human rights law. Given that the Supreme Court of Canada has already reached beyond human rights law to identify circumstances

[60] *Khadr v Canada*, 2008 SCC 28 at para 18, [2008] 2 SCR 125 [*Khadr* 2008]. See also *Khadr v Canada*, 2010 SCC 3 at paras 14ff, [2010] 1 SCR 44 [*Khadr* 2010].

[61] *Khadr* 2010, *supra* note 60 at paras 14ff.

[62] Most notably, the Federal Court in *Slahi* suggested that s 7 of the *Charter* would not apply in circumstances where a foreign national was detained by a foreign government in an internationally wrongful manner because of information provided by and from Canada, unless it could also be shown that Canada participated in the actual detention "contrary to its international law obligation." *Slahi v Canada (Minister of Justice)*, 2009 FC 160 at para 52, 186 CRR (2d) 160, aff'd (without mention of this issue), 2009 FCA 259.

[63] *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FCA 401, 394 NR 352 [*Amnesty*].

[64] In its decision, the Federal Court of Appeal dismissed the lawsuit at least in part because the victims were not Canadians; this article, in comparison, is about the targeted killing of Canadians. *Ibid* at paras 12, 13. The *Amnesty* decision also hinged on the fact that, by agreement, Afghanistan had consented to the Canadian military presence and had established governing rules that did not include application of Canadian law to Afghan nationals. *Ibid* at paras 26ff. Again, it is difficult to see how these considerations would apply to a targeted killing of a Canadian in a foreign jurisdiction, especially in places like Syria where Canada operates without the consent of the territorial sovereign. The issue of "effective control" discussed (with some misunderstanding) by the Court of Appeal is relevant — and is addressed later in this article.

[65] *Khadr* 2008, *supra* note 60 at para 25.

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that trigger the *Hape* exception, it might reasonably follow that violating a foreign state's sovereignty (a breach of Canada's international obligations) could also implicate the *Charter*'s extraterritorial dimension.

Indeed, the Supreme Court of Canada's holding in *Hape* created unexpected murkiness on this question. In a puzzling exegesis, it implied without any reference to positive law that the exercise of "enforcement jurisdiction" — that is, enforcing Canada's laws on the territory of another state — without the consent of the territorial state will be beyond the legal competency of any Canadian agency,[66] regardless of whether that conduct is authorized by the legislation: "Neither Parliament nor the provincial legislatures have the power to authorize the enforcement of Canada's laws over matters in the exclusive territorial jurisdiction of another state."[67] We discuss the issue of enforcement jurisdiction in the next section.

The Scope of the Charter *'s Protection*

Should the *Charter* apply, the question of whether a targeted killing complies with it becomes acute. The right to life in section 7 is not absolute. Rather the *Charter* guards against deprivations that are not in accordance with "principles of fundamental justice." Exactly what this means in the targeted killing context is unknown. But of obvious relevance is the line of cases holding that the use of lethal force by police officers "constitutes a *prima facie* breach of s. 7 of the *Charter*."[68] Moreover, since in other contexts, the scope of *Charter* rights has been assessed with an eye to international law standards, it is plausible that a targeted killing done in violation of international law would also transgress section 7.[69]

Whether this conduct could then be justified as a reasonable limitation on the *Charter* right under section 1 would hinge on the facts. Under the *Oakes* test, section 1 may exonerate rights-impairing conduct where the government proves that the measure has an important objective: that there

[66] See John Currie, "Khadr's Twist on Hape: Tortured Determinations of the Extraterritorial Reach of the Canadian Charter" (2008) 46 CYIL 319.

[67] *Hape, supra* note 47 at para 105; see also paras 68, 69.

[68] *R v Davis (PW)*, 2013 ABCA 15 at para 78, 75 Alta LR (5th) 386 (per Fraser CJA, dissenting), rev'd 2014 SCC 4 (effectively agreeing with Fraser CJA). See *R v Nasogaluak*, 2010 SCC 6 at para 38, [2010] 1 SCR 206 [*Nasogaluak*]: "The excessive use of force by the police officers, compounded by the failure of those same officers to alert their superiors to the extent of the injuries they inflicted on Mr. Nasogaluak and their failure to ensure that he received medical attention, posed a very real threat to Mr. Nasogaluak's security of the person that was not in accordance with any principle of fundamental justice"; *R v Laforme*, 2014 ONSC 1457 at para 175, 310 CRR (2d) 140: "Excessive use of force can give rise to a violation of s. 7 of the Charter." See also *R v Lines,* [1993] OJ No 3284 at para 55 [*Lines*].

[69] See, eg, *Suresh, supra* note 36.

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is a rational connection between the objective and the means, that there is a minimal impairment of the right in question, and that there is proportionality between the impact on the right and the benefits of the measure in question.[70] It seems likely that the proportionality criterion would be a (if not the) key consideration in relation to any targeted killing. Although not necessarily doing so as part of a formal section 1 discussion, courts have focused on "principles of proportionality, necessity and reasonableness" in cases implicating allegations of excessive use of force by police.[71]

We suspect that in a targeted killing context, *bona fide* exigency in staving off a terrorist attack may be enough to satisfy these standards. We also hazard that the government's case would become more difficult, especially in relation to the proportionality test, the more hypothetical, less immediate, and less dire the risk posed by the target.[72] An obvious question in the British 2015 incident, for example, is whether other means could have been pursued to stop a terrorist attack in the United Kingdom engineered from distant Syria. Imminence, necessity, and proportionality, therefore, become important questions. As we discuss below, these concepts also drive much of the international law in this area. The bottom line from this discussion is that Canada's domestic legal standards — whether in terms of prospective criminal culpability or constitutionality — may well end up being indexed to international law. And so addressing the standards applicable to a Canadian targeted killing abroad obliges a review of just when, exactly, a CAF targeted killing operation would satisfy international law.

International Law of Militarized Counter-Terrorism

The international lawfulness of a targeted killing must be scrutinized with reference to two different categories of law: the law that governs a state's use and scope of military force in a conflict and the law that governs a state's use of lethal force in other circumstances. In this section, we focus on the first category — international law applicable to military force in an armed conflict. International law on the use of military power is divided into two broad categories. Both categories include doctrines relating to the scope and scale of military force, but, speaking generally, use-of-force

[70] *R v Oakes*, [1986] 1 SCR 103.

[71] *Nasogaluak*, *supra* note 68 at para 32: "[T]he allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness."

[72] See *Lines*, *supra* note 68 at paras 55, 58 (concluding that a *Criminal Code* provision authorizing deadly force to stop a fleeing "felon" violating the right to life, because of the "prospect of deprivation thereof for the most trifling offence is not in accordance with the principles of fundamental justice." Moreover, the provision did not satisfy s 1: "The use of deadly force does not impair the right 'as little as possible'. The potential use of deadly force in such a broad range of situations as it may be envisioned is overbroad and entirely lacks proportionality."

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rules — known more classically as *jus ad bellum* — determine when recourse to military force is lawful. The laws of armed conflict — *jus in bello* — determine what type of military force is lawful and contain more specific rules on, for instance, who can be targeted. Both of these areas of law developed in response to classic inter-state conflicts. While today's insurgencies and militarized counter-terrorism campaigns place serious interpretative strain on the applicable rules, it remains true that any legal justification of a targeted killing as a legitimate use of military force would need to meet both the *jus ad bellum* and *jus in bello* standards.

USE OF FORCE AND COUNTER-TERRORISM

Article 2(4) of the *UN Charter* constitutes the core of the modern law on the use of force. It specifies that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[73] The rule exists also as customary international law,[74] and commentators widely regard it as a *jus cogens* norm.[75] Debate occasionally arises as to the reach of Article 2(4) and its customary equivalent. The rule might be parsed in quest of a use of force that does not impair the "territorial integrity or political independence of any state."[76] Practically, it is difficult to imagine any non-consensual use of force that falls short of this impairment standard. The very act of using force without the consent of the territorial state is inconsistent with a state's sovereign control over affairs within its borders[77]

[73] *UN Charter*, *supra* note 31.

[74] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* [1986] ICJ Rep 14 at para 187ff [*Military and Paramilitary Activities*].

[75] A *jus cogens* — or peremptory — norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS 1155 at 331, art 53. See discussion in Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) at 147. For a different view on art 2(4)'s *just cogens* status, see James Green, "Questioning the Peremptory Status of the Prohibition of the Use of Force" (2011) 32 Mich J Intl L 215.

[76] The narrow interpretation of art 2(4) is sometimes raised to justify "humanitarian intervention." See discussion, eg, in Celeste Poltak, "Humanitarian Intervention: A Contemporary Interpretation of the Charter of the United Nations" (2002) 60 UT Faculty L Rev 1.

[77] See discussion in International Law Association (ILA), *Draft Report on Aggression and the Use of Force* (May 2016) at 3 [ILA, *Draft Report on Aggression*]. Support for this strict reading of the prohibition on the use of force is found in the UN General Assembly's influential *Declaration on Principles of International Law concerning Friendly Relations and Co-operation*, GA Resolution 2625, Annex, 25 UN GAOR, Supp (No 28), UN Doc A/5217 (1970) at 121. The declaration denounces "armed intervention and all other forms of

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and is "inconsistent with the Purposes of the United Nations."[78] There are, however, supplemental threshold issues that deserve further inquiry. First, in what circumstance does an act of violence constitute a "use of force"? Second, there is an attribution issue: does use-of-force law permit military violence directed at a non-state actor located on the territory of a state that is unwilling or unable to forestall the violent conduct of that non-state actor? We deal with the first question in the next section and the second question below.

Meaning of "Force"

If the coercion visited by one state on another does not reach the threat or use of force, it is not governed by Article 2(4) and, absent some other restraint in international law, is lawful. Some covert actions undertaken by states may impinge, for instance, on the sovereignty interests of other states but fall short of the use of force.[79] Thus, economic coercion or intervention are not uses of force.[80] Likewise, the training and equipping of groups conducting acts of armed violence against another state is a use of force, but "the mere supply of funds" to them is not.[81] The intrusion of armed forces onto the territory of another state in the absence of armed coercion is likely also not a use of force.[82] The deployment of troops for

interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law." While not binding in its own right, the declaration "elaborates the major principles of international law in the *UN Charter*, particularly on use of force, dispute settlement, nonintervention in domestic affairs, self-determination, duties of cooperation and observance of obligations, and 'sovereign equality.' [I]t has become the international lawyer's favorite example of an authoritative UN resolution." Oscar Schachter, "United Nations Law" (1994) 88 AJIL 1. Referring in part to this declaration, Schachter has strongly urged a strict reading of the art 2(4) prohibition. See Oscar Schachter, "The Right of States to Use Armed Force" (1984) 82 Mich L Rev 1620. This approach is consistent with the International Court of Justice's (ICJ) ruling in *Case Concerning Armed Activities on the Territory of the Congo*, [2005] ICJ Rep 168 at paras 163ff [*Case Concerning Armed Activities*]: "The Court further affirms that acts which breach the principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations."

[78] Tom Ruys, "The Meaning of 'Force' and the Boundaries of the Jus Ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?" (2014) 108 AJIL 159 at 163.

[79] See discussion in note 193 below and accompanying text.

[80] Oliver Dörr, "Use of Force, Prohibition of" in *Max Planck Encyclopedia of Public International Law* (September 2015) at para 12, online: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427>.

[81] *Military and Paramilitary Activities*, *supra* note 74 at para 228.

[82] Dörr, *supra* note 80 at para 19.

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surveillance purposes is one example that would conceivably fall short of an Article 2(4) violation. However, the question of whether low-intensity uses of actual military violence may fall below the use-of-force threshold is hotly debated and, thus, is a key question for militarized counter-terrorism.

There is some support for the existence of a *de minimis* intensity or gravity threshold for "force." Without any true analysis, the European Union's independent international fact-finding mission on the conflict in Georgia recorded a view in a footnote that some military incidents could fall below this threshold, such as "the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft."[83] If this approach is correct, it necessarily raises a question as to the degree of violent coercion required before the conduct graduates to "force." Here, terminology proliferates. For instance, while Article 2(4) "is applicable to any military operations conducted by one state against another," Olivier Corten concludes that military force is distinguishable from "a simple police measure."[84] However, the breadth of the latter, colloquial concept raises its own doubts. A targeted, surgical forcible abduction may be regarded as a police measure.[85] But if the forcible abduction implicates a more massive military presence, then its gravity as a coercive act increases — and, therefore, so too the prospect that it is "force." Again, however, there is no clear litmus test for this transformation from police act to military force.[86] Corten concludes that the threshold is more likely

[83] *Independent International Fact-Finding Mission on the Conflict in Georgia* (September 2009), vol 2, n 49, online: <https://www.legal-tools.org/uploads/tx_ltpdb/Independent_International_Fact-Finding_Mission_on_the_Conflict_in_Georgia_Volume_II_2.pdf>. See also Mary Ellen O'Connell, "The Prohibition on the Use of Force," in Nigel D White & Christian Henderson, eds, *Research Handbook on International Conflict and Security Law* (Cheltenham, UK: Edward Elgar, 2013) at 106 (noting, for instance, "[l]imited armed force to pluck hostages away from armed captors would also appear to be outside of the Article 2(4) prohibition"). See also discussion in ILA, *Draft Report on Aggression*, *supra* note 77 at 3 (suggesting that a *de minimis* standard may exist but, seemingly, limiting it to true law enforcement actions).

[84] Olivier Corten, *The Law against War* (Oxford: Hart Publishers, 2010) at 52–92.

[85] *Ibid* at 53 (pointing to Adolph Eichmann's rendition from Argentina by Israeli agents).

[86] Commentators have suggested criteria. Corten proposes that context and state intent matters. He proposes six criteria: first, where the coercive activity occurs in another state's territory, then it is more likely to transgress art 2(4); second, characterization as use of force is more likely where it arises in circumstances of political or military tension between two (or more) states; third, activity that is approved at the highest level of the state is more likely to be characterized as use of force than is conduct stemming from subordinate approval; fourth, if the target of the military action is the foreign state itself, as opposed to private actors, the conduct is more likely to be a use of force; fifth, an operation precipitating a confrontation or clash between agents of the two (or more) states is more likely to be a use of force; and sixth, the scale of the military intervention is critical, with military conduct involving, eg, bombings likely passing the use of force threshold. *Ibid* at 91–92.

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crossed where, among other things, the military coercion is directed at another state rather than at a non-state actor.[87] If so, such criteria may have the effect of potentially excluding the applicability of Article 2(4) to certain targeted killings directed at, for instance, terrorist groups located in the territory of another state.

Other commentators, however, have resisted this approach and the very idea of a *de minimis* threshold for the use of force. The counter-position (probably most commonplace among international scholars) is that "no specific gravity threshold can be read into Art. 2(4) *UN Charter* nor be shown to exist in the customary practice of States."[88] On the topic of targeted killings, Tom Ruys argues:

> [W]henever one state deliberately sends military or police forces into the territory of another (without the latter's authorization) to take forcible action, the international relations between those states (in the sense of Article 2(4)) are necessarily affected. This finding remains valid even though the targets in question are private individuals, not state organs, even if the private individuals do not have the nationality of the territorial state in which the operation takes place, and even if no actual damage is done to state infrastructure.[89]

He also notes (correctly) that the *de minimis* concept depends on the state on whose territory the armed intervention takes place, opting for passivity in the face of conduct that might otherwise reasonably be expected to precipitate a clash.[90] Put another way, the characterization of "use of force" proffered by defenders of a *de minimis* theory depends on the territorial state's response (or knowledge of the incursion), not on the nature of the intervening state's conduct. This is an unhelpfully contingent manner of establishing a legal threshold.

More than this, there is no compelling state practice situating targeted killing in a different category than other forms of military action for the purposes of Article 2(4). Canvassing incidents, Ruys concludes that "one can reasonably infer that the claim that targeted operations are, as such, outside the scope of *UN Charter* Article 2(4) does not correspond to state practice."[91] He also asserts "any deliberate projection of lethal force onto the territory of another state — even if small-scale and even if not targeting the state itself — will normally trigger Article 2(4). The characterization of

[87] *Ibid.*

[88] Dörr, *supra* note 80 at paras 18, 19.

[89] Ruys, *supra* note 78 at 192.

[90] *Ibid* at 192.

[91] *Ibid* at 195.

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such operations as a use of force is not contingent on whether they result in actual armed confrontations with the territorial state."[92]

Exceptions to Article 2(4)

Even where it applies, there are limited exceptions to the prohibition found in Article 2(4). For one thing, use of force by one state within the territory of another is permissible where the territorial state gives its permission. Otherwise, use of force directed by one state against another is permissible in international law in only two circumstances, both expressly anticipated by the *UN Charter*. First, pursuant to Chapter VII of the *UN Charter*, the UNSC may legitimize and authorize the use of force. Second, the *UN Charter* also acknowledges (but does not itself create or define) an inherent right to self-defence.

Since the UNSC has not clearly authorized the use of force as a form of counter-terrorism under Chapter VII, we focus in this article on self-defence.[93] Article 51 of the *UN Charter* preserves "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." As the reference to "inherent right" suggests, the self-defence concept is part of customary international law, although the precise relationship between the customary norm and Article 51 is a point of some controversy.[94] Certainly, in all cases, the act of self-defence must meet the classic customary requirements of being both proportional and necessary.[95] Recently, the more controversial question is that of "armed attack" and imminence — that is, whether the defending state must actually have suffered the blow of the "armed attack" before responding. The issues of "armed attack," necessity, proportionality, and imminence are discussed in turn below.

Armed Attack

As with "use of force," the concept of "armed attack" prompts its own difficult questions of definition. Not every use of force is an armed attack. In *Military and Paramilitary Activities in and against Nicaragua*

[92] *Ibid* at 209.

[93] For a discussion of UNSC Resolution 2249 (2015) and its ambiguity on this question, see note 120 below.

[94] See *Military and Paramilitary Activities*, *supra* note 74. For a discussion of art 51 and the persistence of a parallel customary source of the right to self-defence, see Leo Van Den Hole, "Anticipatory Self-Defence under International Law" (2003) 19 Am U Intl L Rev 69.

[95] *Military and Paramilitary Activities*, *supra* note 74 at para 176. See also *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, [2003] ICJ Rep 161 at para 76 [*Oil Platforms*].

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(Nicaragua v United States of America), the International Court of Justice (ICJ) distinguished (obliquely) between "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[96] It focused on the "scale and effects" of the clash, differentiating between an armed attack and a "mere frontier incident."[97] Accordingly, commentators have concluded that "not just any violation of article 2(4) necessarily gives entitlement to a right of self-defence. A minor use of force, such as a border incident, entails its author's international responsibility. It does not, however, allow its victim to riposte by military action," absent a UNSC resolution.[98] Exactly when the threshold from a lesser use of force to an armed attack is crossed — and, indeed, whether it can be crossed through the accumulation of those lesser forms of military action — is uncertain.[99] It seems likely, however, that the military conduct in question must lead to "considerable loss of life and extensive destruction of property."[100]

As a result, most acts of terrorism will not rise to the level of an "armed attack" as they will be of insufficient scale or effect. The events of 11 September 2001 constitute a widely recognized exception.[101] More problematically, the UK government has asserted that "[t]he scale and effects of [Daesh's] campaign are judged to reach the level of an armed attack against the UK."[102] The basis for this conclusion is fragile. The UK government pointed to "six terrorist plots having been foiled in the UK in the preceding 12 months," a problematic threshold for "armed attack" given the standards discussed above.[103] However, even if a series of terrorist incidents can be an armed attack, there is another thorny question of definition: can an "armed attack" triggering self-defence ever stem from a non-state actor?

[96] *Military and Paramilitary Activities*, *supra* note 74 at para 191.

[97] *Ibid* at para 195.

[98] Corten, *supra* note 84 at 403.

[99] See discussion in Karl Zemanek, "Armed Attack" in *Max Planck Encyclopedia of Public International Law* (October 2013) at para 9, online: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241>. See also discussion in ILA, *Draft Report on Aggression*, *supra* note 77 at 4.

[100] Zemanek, *supra* note 99 at para 10.

[101] *Ibid* at para 19.

[102] UK government memorandum, cited in Joint Committee on Human Rights, *supra* note 1 at 41.

[103] *Ibid* at 44. The UK Parliament report takes comfort from UNSC Resolution 2249 (2015) and its invocation of terrorist attacks by Daesh in many locations outside Syria and Iraq through 2015 to conclude that the armed attack threshold was met. The ISC report expresses clear discomfort with the concept of armed attack in the context of the 2015 targeted killings: "Whether terrorist activity might be so severe that it is at the same level as an armed attack by a State is clearly a subjective assessment. While we believe that the threat posed by Khan was very serious, we are unable to assess the process by which Ministers determined that it equated to an 'armed attack' by a State." ISC, *supra* note 12 at paras 29–30.

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Self-Defence and Non-State Actors

The ICJ has concluded that acts of violence directed against a state by non-state actors cannot generally trigger a right to self-defence under Article 51, at least when the non-state actor operates from within that state or from a territory occupied by that state.[104] Nevertheless, Article 51's concept of "armed attack" does not expressly preclude violence by non-state actors against a state triggering a right to self-defence,[105] an assessment affirmed by the post-9/11 reaction. Given the enormous scale and effect of the terrorist strikes on 11 September 2001, and the fact that they were so evidently directed against the territory of the United States, the international community quickly embraced the view that self-defence against the terrorist perpetrators was warranted, despite their non-state nature. The UNSC, for instance, invoked the right to self-defence in condemning the terrorist acts.[106] For its part, the North Atlantic Treaty Organization (NATO) declared that the 9/11 acts satisfied the requirements of an "armed attack" under Article 5 of the *North Atlantic Treaty*, triggering a collective response from NATO.[107] The Organization of American States arrived at a similar conclusion, invoking Article 3 of the *Inter-American Treaty of Reciprocal Assistance*.[108]

These responses, and the widespread reaction of individual states offering assistance to the United States, support the conclusion that Al-Qaeda's

[104] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136 at para 139 [*Construction of a Wall*]. The ICJ declined the opportunity to clarify where self-defence against non-state actors existed in other circumstances in its judgment. *Case Concerning Armed Activities*, *supra* note 77 at para 147: "[T]he Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces."

[105] See, eg, Major Darren C Huskisson, "The Air Bridge Denial Program and the Shootdown of Civil Aircraft under International Law" (2005) 56 Air Force L Rev 109 at 144: "The concept of an armed attack was left deliberately open to the interpretation of Member States and UN Organs, and the wording is broad enough to include the acts of non-State actors as 'armed attacks.'" See also Carsten Stahn, "'Nicaragua Is Dead, Long Live Nicaragua': The Right to Self-defence under Art. 51" in Christian Walter et al, *Terrorism as a Challenge for National and International Law: Security versus Liberty* (Berlin: Springer, 2003) 830. See also discussion in ILA, *Draft Report on Aggression*, *supra* note 77 at 11.

[106] UNSC Resolution 1368 (2001); UNSC Resolution 1373 (2001).

[107] North Atlantic Treaty Organization, *Invocation of Article 5 Confirmed*, Press Release (2 October 2001). *North Atlantic Treaty*, 4 April 1949, 34 UNTS 243.

[108] *Inter-American Treaty of Reciprocal Assistance*, 9 February 1947, OASTS no 8. See Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, *Terrorist Threat to the Americas*, OAS Doc RC.24/Res.1/01 (21 September 2001). Art 3 reads: "[A]n armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by art 51 of the Charter of the United Nations."

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terrorist act on 9/11 reached the level of an "armed attack." Under these circumstances, a common (although not unanimous view) is that the armed response against Al-Qaeda was compliant with international law, so long as the other elements of self-defence law such as proportionality and necessity were observed.[109]

Geography of Self-Defence against Non-State Actors

More awkward is the question of geography. Where a state embarks on an armed attack against another state, the locus of the response in self-defence is reasonably clear: the attacking state has territory, and the victim state's right of self-defence serves as an obvious exception to the attacker's rights to territorial sovereignty, again subject to the provisos of necessity and proportionality. In comparison, non-state actors are not territorial sovereigns. Directing military force against a non-state actor almost always requires, therefore, use of force on the territory of another state. In instances where a territorial state bears responsibility for the conduct of the non-state actor, the rules of attribution generally accommodate that use of force on its territory.[110] In more recent times, however, non-state actors — and, specifically, terrorist groups such as Al-Qaeda, Daesh, and Al-Shabaab — have operated from the territory of states who are either unwilling or unable to suppress their activities but are not responsible for them under classic rules of attribution.

Unquestionably, where a state consciously declines to suppress terrorist activity on its territory, it clearly violates its international obligations,[111] is arguably complicit in, and potentially has international responsibly for, attacks mounted by such groups. Where a state is incapable of suppressing these activities, that lack of capacity does injury to another state, plausibly again raising questions of responsibility. And, yet, uncooperative or under-resourced state (mis)conduct does not itself meet the definition of "armed attack" justifying military force used in self-defence. That is, the breach of a state's international anti-terrorism obligations does not graduate to conduct that, under the *UN Charter* framework, justifies self-defence.

Still, there is serious incongruity in the idea that a non-state actor may use violence whose scope and effect rises to the level of armed attack and then hide behind the territorial sovereignty of a state that, however unwillingly or unwittingly, serves as the host. And as a practical matter, some

[109] See, eg, Jordan Paust, "Use of Armed Force against Terrorists in Iraq, Afghanistan and Beyond" (2002) 35 Cornell Intl LJ 533.

[110] We do not, in this article, outline the rules of attribution in the law of state responsibility. For a useful summary, see Alexander Kees, "Responsibility of States for Private Actors" in *Max Planck Encyclopedia of Public International Law* (March 2011), online: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1092>. See also discussion in ILA, *Draft Report on Aggression*, *supra* note 77 at 12.

[111] Note, eg, UNSC Resolution 1373 (2001) at para 2.

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states, including, especially, the United States, have rejected this formalistic approach in the area of *jus ad bellum*. These states have instead pursued a doctrine of "unwilling or unable." In Ashley Deeks' words,

> [t]he "unwilling or unable" test requires a victim state to ascertain whether the territorial state is willing and able to address the threat posed by the nonstate group before using force in the territorial state's territory without consent. If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the nonstate group. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the nonstate group poses.[112]

Whether "unwilling or unable" is truly part of customary international law is hotly debated. In her exhaustive survey, Deeks identifies thirty-nine instances between 1817 and 2011 where armed attacks attributable "entirely or primarily to a nonstate armed group or a third state" prompted a military response from a victim state on a territorial state that had not consented to this use of force on its territory.[113] The most famous of these was the notorious 1837 *Caroline* affair between the United Kingdom and the United States. In that dispute, a British force entered the United States from Canada to scuttle a ship being used to ferry fighters and supplies to a Canadian island occupied by insurgents in preparation for an invasion of Canada. In the resulting diplomatic exchange — widely regarded as incisive in the history of international self-defence law — the United Kingdom claimed that the US federal and New York state government knowingly permitted the rebels to make their preparations or that they were incapable of controlling the border region. In either instance, the British were entitled to enter US territory since it was no longer neutral territory.[114]

A handful of states have invoked similar logic in much more recent conflicts. During the post-Second World War period, Israel adopted the unwilling or unable standard to justify actions against the Palestine Liberation Organization in Lebanon and against Hezbollah in Lebanon and Syria. The United States invoked the doctrine against Al-Qaeda in Sudan, Afghanistan, and Pakistan, while Russia used it against Chechen rebels in Georgia, and Turkey used it against the Kurdistan Workers'

112 Ashley S Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense" (2012) 52(3) Va J Intl L 483 at 487–88.

113 *Ibid* at 549.

114 Abraham D Sofaer, "On the Necessity of Pre-emption" (2003) 14 EJIL 209 at 218–19. For a discussion of the *Caroline* dispute, see exchange of letters between Daniel Webster and Lord Ashburton (1842), online: <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

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Party in Iraq.[115] In general, the international community has demonstrated more receptivity — although certainly not enthusiasm — for the doctrine since 9/11 and especially since 2014.[116] Most notably, events in Iraq and Syria and the conflict with Daesh have drawn more states into the category of those prepared to apply the "unwilling or unable" approach, justifying use of force against Daesh in Syria even without the consent of Syria's Assad regime. The United States[117] and Turkey[118] have reaffirmed the existence of an unwilling or unable doctrine to justify self-defence against Daesh in Syria, and they are not alone. They have been joined by Australia,[119] Belgium,[120] Canada,[121]

[115] See discussion in Deeks, *supra* note 112 at 486.

[116] See discussion in Christian J Tams, "The Use of Force against Terrorists" (2009) 20:2 EJIL 359.

[117] Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, Doc S/2014/695 (23 September 2014): "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in art 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."

[118] Letter from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, Doc S/2015/563 (24 July 2015): "It is apparent that the regime in Syria is neither capable of nor willing to prevent these threats emanating from its territory, which clearly imperil the security of Turkey and the safety of its nationals."

[119] Letter from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, Doc S/2015/693 (9 September 2015): "States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory."

[120] Letter from the Permanent Representative of Belgium to the United Nations address to the President of the Security Council, Doc S/2016/523 (7 June 2016): "ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not, at this time, exercise effective control. In the light of this exceptional situation, States that have been subjected to armed attack by ISIL originating in that part of the Syrian territory are therefore justified under Article 51 of the Charter to take necessary measures of self-defence."

[121] Letter from the Charge d'affairs a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, Doc S/2015/221 (31 March 2015): "States must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory." See also the public defence of the bombing presented by then Minister of National Defence Jason Kenney, video, reproduced in David Pugliese, "Gen Tom Lawson Tries to Dig Jason Kenney Out of a Bomb Crater of His Own Making," *National Post* (31 March 2015), online: <http://news.nationalpost.com/news/canada/canadian-politics/david-pugliese-gen-tom-lawson-tries-to-dig-jason-kenney-out-of-a-bomb-crater-of-his-own-making> (in which the minister declares the unwilling and unable standard as a "clear principle of customary international law").

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Germany,[122] and, implicitly at least, Denmark,[123] Norway,[124] and the United Kingdom.[125] In response to the US notification to the United Nations, then Secretary General Ban Ki-moon reportedly stated: "I also note that the strikes took place in areas no longer under the effective control of that [the Syrian] government.[126] Other states, such as Jordan, Bahrain, Qatar, and the United Arab Emirates have participated in air strikes in Syria without articulating legal justifications, leading at least one commentator to posit that they are "relying on the same legal theory as the United States and UK."[127] Still other states, such as France,[128] have effectively embarked on a similar course under the shelter of a UNSC resolution that is creatively ambiguous about the legal authority for directing force

[122] Letter from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, Doc S/2015/946 (10 December 2015): "ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic."

[123] Letter from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, Doc S/2016/34 (13 January 2016).

[124] Letter from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, Doc S/2016/513 (3 June 2016).

[125] Identical letters from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, Doc S/2015/851 (26 November 2014); Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, Doc S/2015/688 (7 September 2015); Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, Doc S/2015/928 (3 December 2015) (all invoking art 51 self-defence to justify use of force in Syria, although not expressly "unwilling and unable").

[126] Reported in Marty Lederman, "The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group [updated to add statement of the UN Secretary-General]," *Just Security* (23 September 2014), online: <https://www.justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/>.

[127] Ashley Deeks, "The UK's Article 51 Letter on Use of Force in Syria," *Lawfare Blog* (12 December 2014), online: <https://www.lawfareblog.com/uks-article-51-letter-use-force-syria>.

[128] Identical letters from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, Doc S/2015/745 (9 September 2015).

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at Daesh in Syria.[129] Collectively, this constitutes considerable state practice and, in the case of the United States, Turkey, Canada, Australia, Belgium, and Germany, emphatic *opinio juris* supportive of the "unable or unwilling" doctrine as a basis for invoking Article 51.

State practice of what is less clear. It is one thing to intrude on a state's territory in order to exercise self-defence strictly limited to the attacking non-state actor. It is quite another to stray beyond this terrorist-specific targeting and direct force against the territorial state's own assets or infrastructure. The risk of such over-breadth might be best policed through strict adherence to the separate necessity and proportionality concepts in self-defence law, which is discussed in the next section.[130]

Terrorism, Necessity, and Proportionality

Even if the armed attack requirement for the use of force in self-defence is met, any armed response must be necessary and proportional. "Necessity" means that the force used in self-defence must be necessary to respond to (and presumably repel) the armed attack. In *Military and Paramilitary Activities,* there was no necessity where the use of force in alleged self-defence took place months after the putative armed attack had been repulsed.[131] In *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America),* the ICJ viewed force as unnecessary where, on the facts, it was directed at targets considered targets of opportunity by the allegedly defending state.[132]

[129] UNSC Resolution 2249 (2015) at para 5 (calling on UN member states "to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq"). See discussion on the imprecision of this resolution in Dapo Akande & Marko Milanovic, "The Constructive Ambiguity of the Security Council's ISIS Resolution," *EJIL Analysis* (21 November 2015) (arguing, in essence, that the wording permits an "eye of beholder" validation of different legal positions on use of military force on the territory of Syria), online: <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>.

[130] For instance, ILA, *Draft Report on Aggression, supra* note 77 at 12 urges that "[r]ather than being relied upon as a new justification for resort to force, the unwilling or unable test should be viewed as a component of the necessity criteria. It is an additional test that must be satisfied when taking action against a non-state actor on the territory of another state, and does not obviate the need to adhere to all other obligations attached to the exercise of self-defence. Even after seeking resolution through the host state proves futile, forcible measures by the victim state must be proportionate and be limited to those strictly necessary in the context of self-defence against the non-state actor. Accordingly, even if accepting the right of self-defence against non-state actors, if the forcible measures taken by the victim state unnecessarily include use of force directly against the host state, this may be an instance in which self-defence comes in conflict with Article 2(4)."

[131] *Military and Paramilitary Activities, supra* note 74 at para 237.

[132] *Oil Platforms, supra* note 95 at para 76.

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Military responses to terrorism, in particular, have often precipitated debate among states and scholars as to whether they are truly "necessary" to repel the attack or rather simply retaliatory.[133]

Proportionality is usually taken to mean use of force in self-defence no greater than is required to halt and repel the armed attack — that is, proportional to the necessary military objective of countering the threat.[134] For some jurists, however, proportionality is assessed with reference to the scale of the armed attack defended against.[135] These are quite different measures. Assessed against the second standard, for instance, the response to a terrorist's "armed attack" may become disproportionate if the consequences of the response (in civilian casualties, for instance) outstrip those of the terrorist attack. Assessed against the first standard, armed force is proportional if properly directed at dislodging the terrorists and thus forestalling the occurrence or recurrence of the attack. This is presumably true even if the exercise of force produced civilian causalities in excess of those injured in the initial attack.

[133] International criticism describing military action as reprisals rather than self-defence was acute, eg, after the 1986 US bombing of Libya and in response to at least some Israeli responses to terrorism. See discussion in William V O'Brien, "Reprisals, Deterrence and Self-Defense in Counterterror Operations" (1990) 30 Va J Intl L 421. For a discussion of necessity and the objectives associated with the act of self-defence, see ILA, *Draft Report on Aggression*, *supra* note 77 at 8–9.

[134] See discussion in Malcolm Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003) at 1031, n 88; Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) at 162: "[T]he proportionately test should be applied *vis-à-vis* the requirements of averting the threat, as opposed to in respect of the scale of that threat or of any prior armed attack. Arguments as to numbers of persons killed in the original attack outweighing numbers killed in subsequent counter-measures are of political relevance only."

[135] For a discussion of the different methods of computing proportionality, applied in the specific case of terrorism, see Robert J Beck & Anthony Clark Arend, "'Don't Tread on Us': International Law and Forcible State Responses to Terrorism" (1994) 12 Wisconsin Intl LJ 153 at 206. Notably, in several cases, the ICJ has apparently contrasted the harm caused by armed attack against the scale of the act of self-defence in assessing the existence of proportionality. In *Military and Paramilitary Activities*, *supra* note 74 at para 176, the ICJ described proportionality as "proportional to the armed attack," without further discussing this point. In *Oil Platforms*, *supra* note 95 at para 76, the Court concluded that the destruction by the United States of two Iranian oil platforms, "two Iranian frigates and a number of other naval vessels and aircraft" was not proportionate to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life." *Ibid* at para 77. See also *Case Concerning Armed Activities*, *supra* note 77 at para 147 (noting, without deciding, "that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence").

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Terrorism and Pre-emptive Self-Defence

A final, pressing issue in contemporary discussions of self-defence is whether the attack prompting the act of self-defence must be immediate or whether a more remote threat may justify an armed response. The issue of imminence was addressed most famously in the *Caroline* incident (albeit in factual circumstances where Canadian territory had already been occupied by the non-state insurgents). In their exchange of letters, the US and UK governments expressed the view, apparently shared by both sides, that self-defence was only warranted where the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[136]

Article 51 of the *UN Charter* captures this sense of imminence. It specifies that the right to self-defence arises if "an armed attack occurs." Whether self-defence is permitted in customary international law where the threat is less immediate is a point of contention among international lawyers. It seems plausible (although far from universally accepted) that "anticipatory self-defence" is permitted under customary international law: "[W]here there is convincing evidence not merely of threats and potential danger but of *an attack being actually mounted*, then an armed attack may be said to have begun to occur, though it has not passed the frontier."[137] In the words of the International Law Association (ILA), "there may be reason to accept that when faced with the clear and present danger of a specific imminent attack, states may engage in measures to defend themselves in order to prevent the attack."[138]

Much more contentious and doubtful is whether "anticipatory self-defence" should be expanded to incorporate a concept of "pre-emptive self-defence," sometimes referred to as the "Bush Doctrine." In the 2002 National Security Strategy of the United States, the Bush administration asserted the right to act in self-defence against nascent threats and not just those that were imminent in the conventional or even anticipatory sense.[139] While the Bush doctrine is held in considerable disfavour among states and scholars, imminence is a particularly acute issue for militarized counter-terrorism.[140] At issue is a contest against diffuse and secretive

[136] Letter from Daniel Webster to Lord Ashburton (6 August 1842), online: <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

[137] CHM Waldock, "The Regulation of the Use of Force by Individual States in International Law" (1952) 81 Hague Recueil 451 at 498 [emphasis added].

[138] ILA, *Draft Report on Aggression*, *supra* note 77 at 10.

[139] White House, *National Security Strategy of the United States* (2002) at 15. See also reporting on President George Bush's commencement address at West Point. Mike Allen & Karen DeYoung, "Bush: US Will Strike Out First against Enemies; In West Point Speech, President Lays Out Broader US Policy," *Washington Post* (14 June 2002) at A01.

[140] See discussion in W Michael Reisman & Andrea Armstrong, "The Past and Future Claim of Preemptive Self-Defence" (2006) 100 AJIL 525.

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terrorist groups inclined to sudden acts of violence in a civil population. Here, accurate predictions as to imminence may be impossible. As a US Department of Justice legal memorandum on targeted killing argues, "a 'terrorist war' does not consist of a massive attack across an international border, nor does it consist of one isolated incident that occurs and is then past. It is a drawn out, patient, sporadic pattern of attacks. It is very difficult to know when or where the next incident will occur."[141] For similar reasons, the UK government now endorses a "flexible approach" to imminence that would "include an ongoing threat of a terrorist attack from an identified individual who has both the intent and the capability to carry out such an attack without notice."[142]

Summary

The legal doctrine discussed in this part necessarily guides Canada's military response to foreign fighters. The applicable rules can be summarized in the following way. Absent consent from the territorial state or UNSC authorization, Canada may not use force on the territory of another state except in response to an armed attack. This general proposition is without doubt. But the specific application raises interpretative controversy concerning the concept of use of force and the self-defence exception. There are restrictive and more permissive construals of both of these concepts, applicable in armed responses to foreign fighters. A restrictive view of international law doctrine on the use of force would be that in the absence of an UNSC resolution or where the territorial state has not given consent and is not itself responsible for the armed attack, Canada cannot deliberately send military forces onto another state's territory to take any sort of forcible action, even strictly against non-state actors. A more permissive construal of the use of force concept would be that Canada may conduct a surgical, limited military strike within the territory of another state directed strictly against a non-state actor that does not involve an actual clash with the territorial state's forces. This view hinges on a *de minimis* concept of use of force that would take pinprick-style military action outside the scope of Article 2(4) of the *UN Charter* and vitiate any need to justify the action as a matter of self-defence in response to an armed attack. As such, it is not an approach that appears to have garnered much state practice or scholarly support.

[141] US Department of Justice, *Lawfulness of a Lethal Operation*, *supra* note 5 at 7.

[142] Joint Committee on Human Rights, *supra* note 1 at 45. The parliamentary committee itself raised concerns about the indefiniteness of this standard. *Ibid* at 47. See also the discussion of imminence and the difficulties associated with it in militarized anti-terrorism in ISC, *supra* note 12 at para 40.

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However, even applying a more conventional analysis, and considering the matter with an eye to the law of self-defence, there are restrictive and permissive construals of at least the concept of armed attack, imminence, the identity of the attacker, the geography of the response, proportionality, and necessity. Table 1 lays out the choices on all of these issues that Canadian policy makers would need to make.

Table 1: Disputes in the Law of Self-Defence

	Restrictive	**Permissive**
Armed attack	The scale and effect of the incident must lead to considerable loss of life/destruction of property.	The scale and effect of the incident need only reach a lower threshold in terms of loss of life/destruction of property.
Imminence	The armed attack must actually be suffered.	The armed attack may be en route, or even simply a prospect, in the form of an ongoing and identified threat of a terrorist attack.
Identity of the attacker	The attacker must be a state.	The attacker may be a non-state actor.
Geography of the response (where there is no consent by the territorial state)	Self-defence may only be directed against the territory of another state if the state itself is responsible under rules of attribution for the armed attack in question.	Self-defence may be conducted on the territory of a state that is unwilling or unable to respond to the armed attack undertaken by a non-state actor from its territory.
Proportionality	The proportionality of the self-defence conduct is measured with an eye to the scale of the armed attack.	The proportionality of the self-defence conduct is judged by what is required to stave off the armed attack and may result in a use of force whose consequences exceed the consequences of the armed attack itself.
Necessity	A use of force is necessary only where it is needed to stop a plausibly persisting and ongoing armed attack.	A use of force is necessary even where there is no clear basis to conclude that the armed attack defended against will continue or recur.

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As our discussion in this section suggests, it is unlikely that either the purely restrictive or the purely permissive approaches to self-defence constitute international law. In our estimation, the following statement expresses a plausible estimate of the present state of the law. An armed attack involves a considerable loss of life or destruction of property that must be at least en route, if not already suffered. The attacker whose conduct triggers the right to self-defence may be a non-state actor. Self-defence may be conducted on the territory of a state that is unwilling or unable to respond to the armed attack undertaken by a non-state actor from its territory. But the defending state cannot target the territorial state's own assets unless the conduct of the non-state actor is properly attributable to the territorial state under the separate rules of attribution in international law. The proportionality of the self-defence conduct is judged by what is required to stave off the armed attack and may result in a use of force, the consequences of which exceed the consequences of the armed attack itself. But a use of force is necessary only where it is needed to stop a plausibly persisting and ongoing armed attack and is not simply retaliatory.

Targeted Killing in an Armed Conflict against Terrorists

Regardless of the legitimacy of a use of force, as measured by *jus ad bellum*, the actual manner in which violence is used in that military response must comply with the *jus in bello*. The core content of this *jus in bello* includes IHL. For the purposes of this article, IHL's most important rule is that of "distinction": "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."[143] As this principle suggests, IHL partitions people into combatants and civilians. Generally speaking, combatants may target and kill other combatants without that conduct constituting a war crime — in international armed conflicts, this is part of what is meant by "combatant's immunity." Generally speaking, civilians may not be targeted, although they do not enjoy absolute protection against being killed. The targeting of civilians is a war crime. However, IHL accepts that civilians may be "collateral casualties," to use the colloquial phrase. That is, they may be injured or killed, though not targeted, where that outcome is proportional to a concrete and direct military advantage in the conflict between combatants.[144]

[143] International Committee of the Red Cross (ICRC), *Customary IHL, Rule 1. The Principle of Distinction between Civilians and Combatants*, online: <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1>.

[144] ICRC, *Customary IHL, Rule 14. Rule 6. Proportionality in Attack*, online: <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14>.

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As a result of the important legal dichotomy between combatants and civilians, IHL includes criteria for these statuses. In classic, inter-state conflicts (known in IHL parlance as "international armed conflicts"), state armed forces are typically arrayed against other state armed forces, distinguished from civilians by such things as uniforms and command structures. In "non-international armed conflicts" (NIACs), which have been, classically, civil conflicts and, more recently, ill-defined contests between states and shadowy networks of terrorists and insurgencies, these fine points of demarcation blur. Rebels, insurgents, and terrorists generally do not wear distinguishing emblems, for instance. Instead, they are generally embedded in a civilian population, distinguishable only by their violent conduct and not by any other means.

TERRORISTS AND DIRECT PARTICIPATION IN HOSTILITIES

As a result of the practical difficulties of distinction in many conflicts, IHL acknowledges a hybridized status: civilians who participate actively in the armed conflict. Thus, "[c]ivilians are protected against attack, *unless and for such time as they take a direct part in hostilities.*"[145] Exactly what it means to take a direct part in hostilities is contested. In the International Committee of the Red Cross (ICRC)'s words, "[a] precise definition of the term 'direct participation in hostilities' does not exist."[146] It is relatively uncontroversial to assert that those who organize themselves as an armed group to take continuous and direct part in hostilities lose their protected status as civilians.[147] But more episodic participation in hostilities raises greater complexities. For instance, can a state's military forces target the person who is a baker by day and an insurgent by night during the period in which that person is baking?

In a 2009 guidance document, the ICRC proposes a series of tests responsive to this situation. The first set of proposed requirements requires a causal link between the person's intentional violent conduct and sufficiently injurious military consequences or "death, injury, or destruction" of "persons or objects protected against direct attack."[148] Direct participation also includes "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and

[145] ICRC, *Customary IHL, Rule 6. Rule 6. Civilians' Loss of Protection from Attack*, online: <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6> [emphasis added].

[146] *Ibid.*

[147] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) at 33ff, online: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

[148] *Ibid* at 46.

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the return from the location of its execution."[149] Controversially, however, the guidance limits the civilian's loss of protected status to "the duration of each specific act amounting to direct participation in hostilities."[150] Put another way, the baker cannot be targeted during his day job.

The result is a "revolving door" between protected and combatant status, an outcome contested by some states. The United States, for instance, sees direct participation as a threshold that, once crossed, renders the person liable to targeting until that person has permanently ceased participation in hostilities.[151] Canada's official position has not been so clearly enunciated, at least publicly.[152] It is not certain, therefore, what stance Canada's judge advocate general would take on the targeting of a civilian who has taken direct part in hostilities but who is not so engaged at the time of targeting. Nevertheless, the bottom line is clear: once IHL becomes the applicable legal standard, deadly force can usually be used against combatants and those civilians who have abandoned their protected status by participating directly in hostilities. The key threshold issue, therefore, is whether IHL applies at all, permitting recourse to this lethal force.

TRIGGER FOR IHL

IHL applies in circumstances of armed conflict, a term that is not precisely defined. The existence of an armed conflict does not require a declared war.[153] Instead, armed conflict usually requires the use of military force reaching a certain threshold of intensity. It does not, for instance, exist simply by reason of "riots, isolated and sporadic acts of violence,"[154]

[149] *Ibid* at 65.

[150] *Ibid* at 70.

[151] US Department of Defense, *Law of War Manual* (June 2015) at 230–32, online: <http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf> [US Department of Defense, *Law of War Manual*].

[152] For a critique of the existing Canadian doctrinal documents in this area, see Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford: Oxford University Press, 2015) at 58.

[153] Christopher Greenwood, "Scope of the Application of Humanitarian Law," in Dieter Fleck, ed, *The Handbook of Law in Armed Conflicts* (Oxford: Oxford University Press, 1995) at 41. The *Geneva Conventions*, *supra* note 38, provide, in Common Article 2, that the Conventions "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 Parties, *even if the state of war is not recognized by one of them*" [emphasis added]. A declared war may trigger the application of the *Geneva Conventions*, as will a situation of military occupation, even when not met by armed resistance. *Ibid* at 41.

[154] ILA, *The Hague Conference, Use of Force: Final Report on the Meaning of Armed Conflict in International Law* (2010) at 28, online: <http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf> [ILA, *Hague Conference*], citing *Additional Protocol II*, *supra* note 38, art 1(2).

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"banditry, unorganised and short lived insurrections or terrorist activities,"[155] and "civil unrest, [and] single acts of terrorism."[156] In practice, the applicable threshold varies depending on the nature of the armed conflict. The ICRC urges that the threshold is very low for conflicts between states (international armed conflicts): "Any difference arising between two States and leading to the intervention of armed forces is an armed conflict, … even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place."[157]

The threshold for NIACs — that is, conflicts between states and non-state actors — is more demanding. In deciding the application of IHL, the international criminal tribunals for the former Yugoslavia and Rwanda have suggested that acts of violence between states and non-state actors must be "protracted" for a situation of "armed conflict" to arise.[158] How this test relates to counter-terrorism is murky. For instance, it has not always been clear that the NIAC concept extends to actions against terrorists who are acting clandestinely as part of a diffuse, geographically disparate network and who are not acting as dissident armed forces controlling territory.[159] Part of this difficulty stems from uncertainty as to the level of

155 *Ibid*, citing ICTY, *Prosecutor v Tadic*, Case no. IT-94-1-T, Opinion and Judgment, Trial Chamber (7 May 1997) at para 562 [*Tadic*].

156 ILA, *Hague Conference*, *supra* note 154 at 28, citing ICTY, *Prosecutor v Kordić and Ćerkez*, Case no IT-95-14/2-A, Judgment, Appeals Chamber (17 December 2004) at para 341.

157 ICRC Commentary to art 2 of *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 [*Geneva Convention I*].

158 *Tadic*, *supra* note 155 at para 70; ICTY, *Prosecutor v Zejnil Delalic*, Case no IT-96-21, Judgment (1998) at para 184 (in internal conflicts, "in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved"); ICTR, *Prosecutor v Jean Paul Akayesu*, Case no ICTR-96-4-T (1998) at para 619 (citing *Tadic*).

159 ICRC Commentary to art 3 of *Geneva Convention I*, *supra* note 157 (noting that Common Article 3 of the *Geneva Conventions* is not intended to deal with banditry or unorganized and short-lived insurrections. Although clearly not meant as exhaustive, the criteria proposed by the ICRC to distinguish the latter situation from a genuine non-international armed conflict tend to imagine insurgents formed as militaries and potentially controlling portions of state territory). For an emphatic territorial control requirement, see *Additional Protocol II*, *supra* note 38, art 1 (applying to "armed conflicts … which take place in the territory of a [state party] … between its armed forces and *dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations*" [emphasis added]). Some observers take the view that the *Additional Protocol II*-type of non-international armed conflict is a subset of the full range of such conflicts and that Common Article 3 does not have a robust geographic limiter. See Michael N Schmitt, "Charting the Legal Geography of Non-International Armed Conflict" (2014) 90 Intl L Studies 1 at 14.

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organization that must be exhibited by a non-state actor before his or her acts of violence can be said to give rise to an armed conflict. On the one hand, "[v]iolence perpetrated by the assassin or terrorist acting essentially alone or the disorganized mob violence of a riot is not armed conflict."[160] On the other hand, a non-state actor coheres sufficiently for the purposes of satisfying the criteria for the existence of an armed conflict where, e.g., there is a "command structure; exercise of leadership control; governing by rules; providing military training; organized acquisition and provision of weapons and supplies; recruitment of new members; existence of communications infrastructure; and space to rest."[161] Nominal adherence to a shared ideology would not, on these standards, make an organization out of individual terrorists.

Second, the intensity threshold is itself ambiguous. Non-determinative factors used to gauge whether violence has reached the requisite intensity level include "the number of fighters involved; the type and quantity of weapons used; the duration and territorial extent of fighting; the number of casualties; the extent of destruction of property; the displacement of the population; and the involvement of the Security Council or other actors to broker cease-fire efforts."[162] As noted above, this violence must also occur over a "protracted period."[163] These considerations of organization, intensity, and protraction interact: "[I]ntensity and protraction, are linked and a lesser level of duration may satisfy the criterion if the intensity level is high. The reverse is also the case. The idea of 'protraction' is also relevant to the 'organisation' criterion, as it requires a certain level of organisation to undertake protracted hostilities."[164]

Applying these standards to an extraterritorial terrorist movement creates real dilemmas. The prevalent view in the United States is that the intensity test cumulates geographically disparate acts by such terrorist groups, allowing an armed conflict to arise even where there is no "hot" theatre of hostilities.[165] The obvious difficulty with this approach is that it depends on these disparate acts being attributable to a tangible organization with

[160] ILA, *Hague Conference*, *supra* note 154 at 28.

[161] *Ibid.* These factors relate to the degree of organization required for a non-international armed conflict (NIAC) under Common Article 3 of the *Geneva Conventions*, *supra* note 38. NIAC's governed by *Additional Protocol II*, apply where additional standards are met by the non-state actor, namely control over a part of its territory as to enable them to carry out sustained and concerted military operations. See *Additional Protocol II*, *supra* note 38, art 1(1). For a similar list of variables see, UN Special Rapporteur, *Addendum: Study on Targeted Killings*, *supra* note 3 at 17.

[162] ILA, *Hague Conference*, *supra* note 154 at 30.

[163] *Ibid.*

[164] *Ibid.*

[165] For a particularly cogent discussion of these issues, see Schmitt, *supra* note 159 at 13ff.

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whom the state then enters into armed conflict. It demands that "the groups concerned can reasonably be characterized as a single coherent organization operating collaboratively."[166] Measuring the organizational coherence of a secretive terrorist enterprise is difficult, especially when the organization morphs into ideology, and so-called "lone wolf" terrorists can unilaterally affiliate with a simple tweet. Practically speaking, a threshold dependant on some measure of coherent organization is unhelpfully uncertain in defining the scope of a non-international armed conflict.[167]

The alternative limiter is geography. On this issue, again, there is debate about whether a NIAC is confined to a zone of "hot" hostilities. The generally accepted position within the United States has been that IHL governs its use of military force against Al-Qaeda (and, increasingly, Daesh) globally,[168] at least where Al-Qaeda or an associated force "has a significant and organized presence and from which Al-Qaida or an associated force, including its senior operational leaders, plan attacks against U.S. persons and interests."[169] This position has not been widely embraced outside the United States. The ICRC, for instance, urges:

[T]he notion that a person "carries" a NIAC with him to the territory of a non-belligerent state should not be accepted. It would have the effect of potentially expanding the application of rules on the conduct of hostilities to multiple

166 *Ibid* at 13.

167 For a discussion on this point, see UN Special Rapporteur, *Addendum: Study on Targeted Killings*, *supra* note 3 at 17. See also UN Special Rapporteur, *Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Doc A/68/382 (13 September 2013) at para 65 [UN Special Rapporteur, *Extrajudicial, Summary or Arbitrary Executions*]: "It is to be questioned whether the various terrorist groups that call themselves Al-Qaida or associate themselves with Al-Qaida today possess the kind of integrated command structure that would justify considering them a single party involved in a global non-international armed conflict."

168 See, eg, US Department of Justice, *Lawfulness of a Lethal Operation*, *supra* note 5 at 3ff. A notable dissenter to this US view is Mary Ellen O'Connell, "Combatants and the Combat Zone" (2009) 43 U Rich L Rev 845.

169 See US Department of Justice, *Lawfulness of a Lethal Operation*, *supra* note 5 at 5. There appears to be surprisingly little additional official amplification of this position. In 2012, John Brennan, assistant to the president for homeland security and counterterrorism, asserted at the Wilson Center: "There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat." John O Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy," *Wilson Center*, online: <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>. The US Department of Defense, *Law of War Manual*, *supra* note 151 at 198, cites this speech in asserting that "[t]he law of war does not require that attacks on enemy military personnel or objectives be conducted near ongoing fighting, in a theater of active military operations, or in a theater of active armed conflict."

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states according to a person's movements around the world as long as he is directly participating in hostilities in relation to a specific NIAC.[170]

The ILA has also voiced resistance to geographically diffuse NIACs:

> If armed conflict exists when organized armed groups are engaged in intense fighting, then, logically, armed conflict does not begin until these criteria are present; armed conflict ends when the criteria are no longer present, and armed conflict extends to territory where organized armed fighting is occurring … States rarely recognize armed conflict beyond the zone of intense fighting, whether the fighting is in an international or non-international armed conflict."[171]

Likewise, having reviewed the threshold criteria for NIACs, the UN special rapporteur on extrajudicial executions concluded in 2010:

> [T]hese factors make it problematic for the US to show that — outside the context of the armed conflicts in Afghanistan or Iraq — it is in a transnational non-international armed conflict against "al Qaeda, the Taliban, and other associated forces" without further explanation of how those entities constitute a "party" under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist.[172]

The best that can be said about these questions is that they are contested. And exactly where the Canadian government stands on these issues is not clear, at least to us.

Before leaving these matters, it is worth underscoring their implications in a concrete context. By any standard, the conflict with Daesh — currently in possession of territory — qualifies as a NIAC in Syria and Iraq. Less clear is the application of IHL to those persons who claim affiliation with Daesh in places outside of the zone of active hostilities. Under the geographically unbounded, cumulative theory of intensity, IHL would apply to these distant locations — for instance, Libya, Bangladesh, or, indeed, any other state where sufficiently organized individuals assert a Daesh allegiance, regardless of the existence (or not) of hostilities on these territories. Indeed, the armed conflict would persist for some analysts even if Daesh were displaced from its present territory and became solely a

[170] ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," Doc 31IC/11/5.1.2 (Paper presented at the thirty-first International Conference (October 2011) at 22, online: <https://app.icrc.org/e-briefing/new-tech-modern-battlefield/media/documents/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf>.

[171] ILA, *Hague Conference*, *supra* note 154 at 30, 32.

[172] UN Special Rapporteur, *Addendum: Study on Targeted Killings*, *supra* note 3 at 18.

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geographically indefinite, extraterritorial terrorist movement, so long as the acts of violence attributable to it and cumulated worldwide met the "protracted" intensity threshold. But, as the Daesh phenomenon becomes an ideological movement and less an organizational enterprise, how does one incorporate lone wolf acts of violence into that intensity accounting? For example, would the terrorist murder in Orlando in June 2016 by an individual simply inspired by Daesh (and, indeed, reportedly also drawing inspiration from groups like Al-Qaeda, which is at odds with Daesh) contribute to a conclusion that a state of NIAC persists?

The risk of applying the NIAC analysis in a manner that allows for the aggregation of terrorist violence done in the name of a particular cause is obvious. Human rights law (discussed further below) is at least partially displaced as IHL is triggered, and the IHL legal regime permits the intentional targeting of combatants with lethal force and is accepting of proportional injury and death to civilians. In summary, as with *jus ad bellum*, there are restrictive and permissive construals of the applicable rules of IHL. Table 2 sets out the current dilemmas. We do not believe that there is currently sufficient state practice to resolve these matters definitively, although we are inclined to view the notion of a geographically diffuse NIAC advanced by the United States with considerable suspicion.

Lethal Force and Peacetime Counter-terrorism

Outside of an armed conflict, the applicable rules governing targeted killings come from international human rights law.[173] Human rights law is much less accommodating of lethal force than international humanitarian law. Article 6 of the *International Covenant on Civil and Political Rights* (*ICCPR*), for instance, specifies: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[174]

[173] We acknowledge that human rights law also persists even in an armed conflict, subject to being displaced in the event of conflict with the *lex specialis*, IHL. However, in relation to killing, it seems clear that where IHL does apply, human rights law is interpreted in a manner consistent with its rules on, eg, distinction, permitting the targeted killing of combatants and, presumably, civilians taking a direct part in hostilities. See *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226, cited in *Construction of a Wall*, *supra* note 104 at para 105 (the *ICCPR*'s, *infra* note 174, "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*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities"). Put another way, we do not see human rights law as providing any additional guidance to the legality of a targeted killing in a circumstance of armed conflict.

[174] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [*ICCPR*].

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Table 2: Disputes in the Law of Armed Conflict

	Restrictive	**Permissive**
Existence of a NIAC between a state and non-state actor	There are sufficiently intense and protracted hostilities between a state and dissident armed forces or other organized armed groups.	There is the accumulation of acts of violence regardless of location that collectively constitute sufficiently protracted hostilities, attributable to persons or groups who can reasonably be characterized as a single coherent organization.
Geographic scope of a NIAC	It is confined to the state in which the NIAC exists because of sufficiently protracted hostilities there and other such places in which the hostilities are also sufficiently protracted, such as adjacent "spillover" regions.	Once an NIAC exists, it extends wherever fighters engaged in direct participation in hostilities may be located, including places where fighters undertake acts preparatory to actual acts of violence.
Targeting of civilians engaged in direct participation in hostilities	It is possible only for the duration of each specific act amounting to direct participation in hostilities, their preparation, and return.	It is possible once a civilian has engaged in direct participation in hostilities until such time as he or she has permanently abandoned such activities.

Application of this (and other) human rights norms to targeted killings of terrorists operating from foreign states raises complexities of its own, different in form (although not in kind) from those associated with IHL. First, there is no absolute prohibition on the use of lethal force under international human rights law; it may be permissible in circumstances of exigency. Second, there is considerable uncertainty concerning the geographic reach of the *ICCPR* and, by consequence, its relevance to extraterritorial targeted killings. Third, the ability to use legal force in peacetime may be confounded by still other, geographic-based strictures in international law.

LETHAL FORCE

Human rights law is not a suicide pact. The *UN Code of Conduct for Law Enforcement Officials* provides: "Law enforcement officials may use force

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only when strictly necessary and to the extent required for the performance of their duty."[175] Likewise, the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* specifies that officials may resort to such measures where "other means remain ineffective or without any promise of achieving the intended result."[176] Where violence is unavoidable, officials must "exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved," among other things.[177] The UN special rapporteur on extrajudicial, summary, or arbitrary executions described these particular principles as "rigorous applications of legal rules that States have otherwise assumed under customary or conventional international law."[178] He concluded that recourse to lethal force is lawful (and may even be obligatory) by state officials in exigent circumstances, where the lives of others are at stake, but is constrained by strict standards of necessity and proportionality.[179] Summarizing the applicable standards, Special Rapporteur Philip Alston noted:

> A State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force *necessary*). The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others. The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture.[180]

[175] Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly Resolution 34/169 (17 December 1979) art 3; see also art 1, commentary (a), (b), online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx> [Code of Conduct]. Note that "law enforcement officials" "reaches all government officials exercising 'police powers', sometimes including 'military authorities' and 'security forces' as well as police officers." *Interim Report on the Worldwide Situation in Regard to Extrajudicial, Summary or Arbitrary Executions Submitted by Philip Alston, Special Rapporteur*, UN Doc A/61/311 (5 September 2006) n 31. See also *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990) preamble, note [*Basic Principles*].

[176] *Basic Principles, supra* note 175, art 4.

[177] *Ibid*, art 5.

[178] UN Special Rapporteur, *Extrajudicial, Summary or Arbitrary Executions*, *supra* note 167 at paras 35ff.

[179] *Ibid* at para 35. On a similar point in relation to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (*ECHR*), see Joint Committee on Human Rights, *supra* note 1.

[180] UN Special Rapporteur, *Addendum: Study on Targeted Killings*, *supra* note 3 at para 32 [emphasis added]. This position is consistent with those taken in views issued by the UN Human Rights Committee (HRC), interpreting the *ICCPR*. See, eg, UN HRC, *Baumgarten v Germany*, UN Doc CCPR/C/78/D/960/2000 (31 July 2003) at para 9.4

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Critically, this "law enforcement" standard is dramatically different from those applicable in IHL.[181] IHL permits the killing of combatants and imposes proportionality strictures to ensure minimal impact on non-combatants. Conversely, human rights law prohibits killings and is only relaxed pursuant to proportionality and necessity standards driven by the need to save others. Thus, as Special Rapporteur Alston notes, "under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation."[182]

This position is relatively non-contentious. More problematic is the application of this standard to extraterritorial state conduct. The question

(even when used as a last resort lethal force may only be used, under article 6 of the Covenant, to meet a proportionate threat"); UN HRC, *Camargo (on behalf of Suarez de Guerrero v Colombia*, UN Doc CCPR/C/15/D/45/1979 (31 March 1982) at para 13.2: "[T]he police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant"). The special rapporteur's summary is also supported by the standard for lawful killing under the *ECHR*. Like art 6 of the *ICCPR*, the *ECHR*, *supra* note 179, guards a right to life. It specifies in art 2, however, that this right is not violated where use of force is "no more than absolutely necessary" in "defence of any person from unlawful violence"; "in order to effect a lawful arrest or to prevent the escape of a person lawfully detained"; or "in action lawfully taken for the purpose of quelling a riot or insurrection." The Inter-American human rights system applies similar standards. See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc OEA.Sev.L/V/II.116 (22 October 2002) at para 87, online: <http://www.cidh.oas.org/Terrorism/Eng/toc.htm>: "[I]n situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate." See also discussion in Gabriella Blum & Philip Heymann, "Law and Policy of Targeted Killing" (2010) 1 Harv Natl Sec J 145 at 160ff.

181 The US legal analysis confuses this point. US legal memoranda tend to bundle domestic constitutional and statutory considerations with public international law standards to create, effectively, a hybridized approach. So, eg, at the same time as they argue that a targeted killing directed at a US citizen who is an operational leader of Al-Qaeda is governed by the law of armed conflict, US legal advisors counsel that the kill mission is only legal if the individual constitutes an imminent threat and a capture operation is infeasible. See US Department of Justice, *Lawfulness of a Lethal Operation*, *supra* note 5 at 6.

182 UN Special Rapporteur, *Addendum: Study on Targeted Killings*, *supra* note 3 at para 33.

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of "necessity" will be measured quite differently when the perceived imminent threat is located in a far-off land as opposed to a state's own territory. Within the state's territory, dangerous people are more readily amenable to capture and detention. When the person posing the threat is overseas, these non-lethal forms of incapacitation may be impractical, if not impossible, especially where the territorial state is uncooperative.[183] What is more, the loss of life by forces tasked with a capture mission may pose an unacceptable risk for state leaders.[184] Finally, to the extent that necessity also implicitly requires imminence[185] — the sense that the feared violence is so proximate other strategies are implausible — distance also matters. Imminence may be a more pliable concept when the person is at a distance and perhaps only ephemerally within the targeting state's reach. The US targeted killing legal position asserts, for instance, "imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."[186] Taken together, all of these considerations may convert a "necessity" standard into one of "expediency."

GEOGRAPHIC CONUNDRUMS

The law enforcement justification for lethal force poses two, more general, problems.

The Reach of State Human Rights Obligations

First, there is considerable uncertainty concerning the extraterritorial reach of the *ICCPR* and, as a consequence, the right to life under it. Article 2 describes the scope of a state's overall *ICCPR* obligations as follows: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." An important issue, therefore, is whether individuals subject to extraterritorial intelligence collection are within the "territory and subject to [the state's] jurisdiction." Article 2

[183] See, eg, US Department of Justice, *Lawfulness of a Lethal Operation*, *supra* note 5 at 8: "[C]apture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation."

[184] *Ibid* at 8: "Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant."

[185] See, eg, *Basic Principles*, *supra* note 175, art 9: "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury."

[186] US Department of Justice, *Lawfulness of a Lethal Operation*, *supra* note 5 at 8.

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talks about territory and jurisdiction, implying either that both must be coincident for the obligation to attach to a state or that the two concepts are alternative descriptions of the *ICCPR*'s reach. The first position seems a more plausible construction of the grammar. The second possibility is accommodated by international law, which clearly views jurisdiction and territory as separate concepts. For instance, states may exercise prescriptive jurisdiction in relation to their nationals, irrespective of their location.[187]

Importantly, both the UN Human Rights Committee (HRC) and the ICJ have opted for the broader construction. They have concluded that individuals may be within a state's jurisdiction, even while not on its territory. In the original HRC case in which this doctrine was first pronounced, a Uruguayan citizen was kidnapped, abused, and secreted out of the country by Uruguayan security agents operating in Argentina.[188] The HRC considered that the victim was nevertheless within the jurisdiction of Uruguay. More recently, the HRC and the ICJ have concluded that a person may be within a state's jurisdiction when that person is within the power or "effective control" of the state, even if he or she is not in the state's territory.[189]

[187] See Restatement (Third) of Foreign Relations Law of the United States (1986) s 402 (generally, a "a state has jurisdiction to prescribe law with respect to … the activities, interests, status, or relations of its nationals outside as well as within its territory").

[188] UN HRC, *Lopez v Uruguay*, UN Doc CCPR/C/13/D/52/1979 (29 July 1981).

[189] UN HRC, *Mohammad Munaf v Romania*, UN Doc CCPR/C/96/D/1539/2006 (21 August 2009) at 14.2 (an Iraqi-American national claimed that Romania had violated his rights under the Covenant because its embassy had handed him over to the US Army who subsequently tortured him. The committee found that the claim was admissible because of "its jurisprudence that a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction." A state engaged in targeted killing would clearly meet this test). UN HRC, *General Comment 31*, UN GAOR, 59th Sess, Supp no 40, vol 1 at 175, 177, UN Doc A/59/40 (2004) at para 12 (noting that art 2(1)'s references to jurisdiction and territory "does not imply that the State party concerned cannot be held accountable for the violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it" and observing that "a State party must respect and ensure the rights laid down in the Covenant to anyone within *the power or effective control* of that State Party, *even if not situated within the territory* of the State Party") [emphasis added]. In its review of state reports on compliance with the *ICCPR*, the committee has also suggested that state obligations extend to a state's armed forces stationed abroad. See, eg, UN HRC, *Concluding Observations of the Human Rights Committee: Netherlands*, UN Doc CCPR/CO/72/NET (2001) at para 8 (relating to the "alleged involvement of members of the [Netherlands] State party's peacekeeping forces in the events surrounding the fall of Srebrenica, Bosnia and Herzegovina, in July 1995"). More recently, the ICJ referred to this committee jurisprudence in *Construction of a Wall*, *supra* note 104 at para 111. In this advisory opinion, it concluded that a state's *ICCPR* obligations had extraterritorial reach: "[T]he Court considers that the *International Covenant on Civil and Political Rights* is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."

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This position is contested by several states, including the United States.[190] Canada's own position on the extraterritorial reach of the *ICCPR* appears ambiguous but sceptical.[191] But even if the "effective control" test is good law, it is not entirely clear that it offers any safeguard against targeted killing. "Effective control" is really about the status of the victim — specifically, are they under the control of the state? While it stands to reason that someone physically detained by a state is within its effective control, a person targeted by a drone missile (and in no way in the targeting state's physical control) may not be. In consequence, this "status-of-the-victim" approach to the *ICCPR*'s geographic reach risks a serious incongruity: human rights may demand more of detaining states than they do of states that kill from a distance.

Unfortunately, the effective control test gives every appearance of being concocted initially by the UN HRC and lately by the ICJ without an eye to traditional rules of state responsibility. These later standards depend more on the identity and degree of (and effective control over) the perpetrator of an unlawful act, not on the state's control over the victim.[192] And, thus, the precise reach of the *ICCPR* to extraterritorial targeted killing is unhelpfully ambiguous. There are two rebuttals to this concern, each having the effect of imposing human rights obligations on extraterritorial targeted killing. First, authorities have described the right to life "as a general principle of international law and a customary norm. This means that, irrespective of the applicability of treaty provisions recognizing the right to life, States are bound to ensure the realization of the right to life when they use force, whether inside or outside their borders."[193] Second, "[i]t has been argued that the deliberate killing of selected individuals through extraterritorial drone strikes is likely to bring the affected persons within the jurisdiction of the operating State" because "human rights treaties cannot be interpreted so as to allow a State party to perpetrate violations of the treaty on the territory of another State, which it could not perpetrate on its own territory."[194]

[190] Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America*, 36th Sess, UN Doc CAT/C/USA/CO/2 (2006) at para 15; Charlie Savage, "U.S, Rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad," *New York Times* (13 March 2014).

[191] See *Comments by the Government of Canada to the Human Rights Committee*, Draft General Comment no 36, Article 9: Liberty and Security of the Person (6 October 2014) at paras 6–7, online: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx>.

[192] See discussion in Kees, *supra* note 110.

[193] UN Special Rapporteur, UN Special Rapporteur, *Extrajudicial, Summary or Arbitrary Executions*, *supra* note 167 at paras 30, 44.

[194] *Ibid* at paras 49, 51.

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Sovereignty Issues

Even if human rights law does not have cross-border reach, other rules of international law would apply to peacetime targeted killings. Most notable among these are classic rules of sovereignty. In circumstances where the laws of armed conflict apply, conventional doctrines precluding interference in the sovereign affairs of other states are inapplicable. However, in the absence of either a UNSC resolution authorizing use of force or an armed attack justifying self-defence, these regular sovereignty norms apply in full. Sovereignty contains several ingredients, one of which is the principle of non-intervention, which is part of customary international law.[195] In *Military and Paramilitary Activities*, the ICJ concluded that, at a minimum, the principle of non-intervention

> forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.[196]

As previously highlighted, in the particular context of *Military and Paramilitary Activities*, the ICJ concluded that prohibited interventions included "methods of coercion," even when these fell short of the use of force.[197] On a similar basis, some commentators have concluded that to constitute unlawful "intervention the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention."[198] It is arguable whether a targeted killing directed at a non-state actor on another state's territory constitutes coercion against that state and, thus, interference in its affairs.

But, more critically, there are other, more general strictures on the exercise of state power across borders. Famously, the Permanent Court of International Justice in the *SS Lotus* case noted:

> [T]he first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction

[195] *Military and Paramilitary Activities, supra* note 74 at para 202.

[196] *Ibid* at para 205.

[197] *Ibid.*

[198] Robert Jennings & Arthur Watts, eds, *Oppenheim's International Law: Peace*, 9th ed (Oxford: Oxford University Press, 2008) at 418.

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is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[199]

The exercise of state power is known as "enforcement jurisdiction," and the prohibition on the imposition of non-consensual enforcement jurisdiction extraterritorially, on the territory of another state, remains a bedrock principle of international law: "[T]he legal regime applicable to extraterritorial enforcement is quite straightforward. Without the consent of the host State such conduct is absolutely unlawful because it violates that State's right to respect for its territorial integrity."[200] In the result, international law precludes non-consensual, extraterritorial conduct *jure imperii* — that is, involving the exercise of government functions.[201] This would certainly extend to a state's use of physical force on the territory of another state[202] and unquestionably include a targeted killing. Indeed, it also includes captures and arrests.[203]

[199] *SS Lotus (France v Turkey)*, 1927 PCIJ (ser A) No 10 at 18, 19.

[200] Menno T Kamminga, "Extraterritoriality" in *Max Planck Encyclopedia of Public International Law* (November 2012), online: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=74KqX2&result=1&prd=EPIL>.

[201] Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge: Cambridge University Press, 2000) at 280.

[202] Frederick A Mann, "The Doctrine of International Jurisdiction Revisited after Twenty Years" (1984) 186 Collected Courses of the Hague Academy of International Law 38.

[203] In this last respect, the most famous instance of covert extraterritorial enforcement jurisdiction was the Israeli abduction of Adolph Eichmann in 1960. Mossad agents covertly snatched Nazi war criminal Eichmann from Argentina. Raanan Rein, "The Eichmann Kidnapping: Its Effects on Argentine-Israeli Relations and the Local Jewish Community" (2001) 7:3 Jewish Social Studies 101 at 105; Stephan Wilske, "Abduction, Transboundary" in *Max Planck Encyclopedia of Public International Law* (October 2012), online: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e83?rskey=vKAg4D&result=2&prd=EPIL>. Argentina protested, declaring the conduct "contrary to international norms." Rein, *supra* note 203 at 106 (citing then Israeli ambassador to Argentina Levavi to Foreign Ministry (2 June 1960), reprinted in *Teudot li-mdiniyut ha-huts shetyisrael 1960* (Jerusalem, 1997) at 14:801-2). It submitted a complaint to the UN Security Council, precipitating an unusual resolution from the Council. That resolution declared that acts such as the kidnapping "affect the sovereignty of a Member State," "cause international friction," and may "endanger international peace and security." The UNSC called on Israel to offer reparations. UNSC Resolution 138 (1960). More recent examples of covert renditions include the Central Intelligence Agency kidnapping rendition of Abu Omar in Milan in 2003. Rachel Donadio, "Italy Convicts 23 Americans for CIA Renditions," *New York Times* (4 November 2009). These modern, Bush-era renditions differ, however, from Eichmann in that most seem to have been done with the cooperation or tacit consent of the territorial state (or its security agencies).

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All of this is to say that regardless of whether human rights law governs a state's overseas activities, and regardless of whether a law enforcement justification for use of lethal force is reconcilable with that human rights law, nothing in international law permits the exercise of this (or any other kind of) power on the territory of another state, without its consent, absent the same sorts of justifications that trigger a right to self-defence. This is true even if one accepts that there is a *de minimis* form of force that is not regulated by Article 2(4) and that this *de minimis* threshold is not exceeded by targeted killings. Even if a targeted killing abroad is not a use of force *per se*, it is still an exercise of enforcement jurisdiction and therefore prohibited by international law. The only exception to the enforcement jurisdiction and sovereignty rules would be circumstances where the standards of Article 2(4) and its exceptions were met, such as self-defence in relation to an "armed attack." However, in most instances, it seems likely that once the threshold of "armed attack" validating self-defence has been crossed, the matter has reached the point of an "armed conflict" within the meaning of IHL, negating the need to rely on the law enforcement justifications for lethal force at all. The attacks of 9/11, for instance, were both an armed attack under *jus ad bellum* standards and also likely constituted enough to initiate an "armed conflict" triggering IHL rules.

We believe that only in the narrowest circumstances would the degree of violence meeting the "armed attack" threshold be insufficient to meet the intensity test for a NIAC. But one key possibility presents itself. To the extent that self-defence rules permit anticipatory action, it may be the case that hostilities have not actually arisen before military force is taken in self-defence. Thereafter, a single targeted killing in self-defence may not, alone, constitute the protracted hostilities required to meet the *jus in bello* threshold for "armed conflict." In the result, we may have an exercise of military force in self-defence, but not clearly governed by IHL. As a policy matter, militaries may wish nevertheless to respect IHL standards in such circumstances.[204] This would be problematic, as it opens the door to IHL's more accepting views on killing. Instead, we propose the following implications of an anticipatory "first strike" in self-defence: the rules of enforcement jurisdiction are suspended through the operation of *jus ad bellum* self-defence standards, but the human rights rules for the use of lethal force persist.

Guidance on Canadian Targeted Killings

In this final section, we propose an analytical framework for approaching a Canadian targeted killing. In so doing, we do not opine on the wisdom

[204] On this point, see discussion in ILA, *Hague Conference*, *supra* note 154 at 31.

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or necessity of such a course of action. Rather, our objective is to lay out concretely the legal issues a Canadian government would need to resolve should it decide that national security demands the extraterritorial targeted killing of a Canadian citizen. Our purpose is to underscore precisely how many choices the government would need to make regarding matters of law that are contested.

DOMESTIC LEGAL QUESTIONS

Would the government commit a crime in ordering a targeted killing? Would the government breach the Charter *in ordering a targeted killing?*

Canadian soldiers would not be culpable of a crime unless their acts violated Canada's war crimes laws or the *Criminal Code*. A use of military or lethal force compliant with international law could plausibly satisfy these standards, either because it falls outside the scope of a war crime or because it is justifiable under a *Criminal Code* defence. In relation to the *Charter*, again, we believe the key inquiry here would be adherence to international law standards.[205]

INTERNATIONAL LEGAL QUESTIONS

Assessing the international legality of Canada's conduct would require, at minimum, consideration of the following matters. We assume for the purposes of this discussion that a use of force has not been authorized by a UNSC resolution.

When can Canada use military force on the territory of another state?

Where the target (or his or her organization) is already engaged in conduct that risks considerable loss of life or destruction of property in Canada, he or she is conducting an "armed attack." This attack should be sufficiently imminent. Exactly what this means in the realm of militarized counter-terrorism is contested, requiring Canada to make a choice. We prefer an approach that requires the attack to be en route — that is, some physical steps have been taken to bring it about — rather than merely a perceived conspiracy. Similarly, a target's membership in an organization that has called for attacks against Canada or generally threatened to

[205] If we take seriously the Supreme Court of Canada's comment in *Hape*, *supra* note 47, that neither "Parliament nor the provincial legislatures have the power to authorize the enforcement of Canada's laws over matters in the exclusive territorial jurisdiction of another state," a targeted killing would be *ultra vires* the Canadian government. Since it is patently the case that (at least in an armed conflict), Canada does exercise enforcement jurisdiction in the territory of another state, without its consent, we do not think this statement to be a considered one by the Court. See note 67 and discussion.

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engage in acts of violence against Canada is, on its own, insufficient to make them an imminent threat.[206]

In response to an imminent armed attack, Canada may, in the absence of other alternatives, engage in a proportional use of military force that is required to stave off this attack. This force may be directed against the target on the territory of a state where that state consents and (more controversially) if that state is unwilling or unable to respond to the armed attack undertaken by the non-state actor. Since the air war in Syria, Canada has already endorsed the unwilling and unable doctrine. Whether the Trudeau government's choice to cease such operations may signal its uneasiness with the doctrine as a justification for military action is unclear at this time. In the absence of such an "armed attack," Canada is not legally entitled to use military force or otherwise engage in any form of enforcement jurisdiction on the territory of a non-consenting state. Even where a state consents, the legality of that use of force is governed either by IHL, if there is an armed conflict, or untempered international human rights law obligations where there is no armed conflict.

What sort of force could Canada use?

Two possible bodies of law govern the kind of military force that may be used.

Is there an armed conflict?

If the armed attack (and the response to it) are part of (or amount to) protracted hostilities between Canada and an organized armed group, the targeted killing is part of an armed conflict and is governed by IHL. This would be true so long as the targeting takes place in the state in which an armed conflict exists because of sufficiently protracted hostilities there with an organized non-state actor and such other places in which the hostilities with an organized non-state actor are also sufficiently protracted, such as adjacent "spillover" regions. We prefer, in other words, a narrow geographic delimiter on the application of IHL, thereby preserving a broad reach for international human rights law. On this question too, however, Canada would need to make a choice between the narrower geographic standard we support and the more permissive view on the geographic extent of an armed conflict taken by the United States. If the armed attack is merely anticipated, and there have been no actual hostilities, it seems likely the targeted killing is not conducted as part of an armed conflict.

[206] Nor would their participation in acts of violence against or within a foreign state that does not pose considerable threat to Canadian life or property, except where Canada is participating in collective self-defence in association with that foreign state.

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Instead, international human rights law applies, in full, without the need to reconcile it with IHL.

What standards apply if there is an armed conflict?

IHL and human rights law impose different standards that would govern the targeted killing. IHL permits the targeted killing of civilians engaged in direct participation in hostilities, including measures preparatory to the execution of a specific act of direct participation in hostilities. What this means in practice is not settled. We prefer the narrower approach to the "revolving door" question — limiting the targeting to the period of actual participation in hostilities — with other circumstances governed by human rights law, discussed below. Here too, Canada would be making a policy choice on the shape of the governing law. That said, how much the revolving door issue matters in relation to foreign terrorist fighters is debatable. It may not be necessary to draw the line between fighting and more mundane activities when the target is a Canadian who chooses to travel to a foreign country for the singular purpose of joining and supporting the violent activities of a terrorist organization. This is a person who appears to have opted to take a continuous and direct part in hostilities and who has therefore lost their protected status as a civilian.

What standards apply if there is no armed conflict?

Where international human rights law applies in full, targeted killing is only legal if necessary to protect life and there are no other means, such as capture or non-lethal incapacitation, of protecting that life. Put another way, Canada could only use the least amount of force against the target necessary to protect life. The sole purpose of the targeting cannot be to kill. In applying this standard, Canada would be agreeing that its human rights obligations extend extraterritorially, either as a matter of customary international law of the sort discussed above or because of a broad construal of Article 2 of the *ICCPR* (both in terms of geographic scope and what it means to be in a state's "effective control"). As noted, Canada has shown no enthusiasm for the extraterritorial reach of the *ICCPR*.

Where the basis for the use of force on the territory of another state is grounded in self-defence, we suspect that the human rights necessity and proportionality analyses would overlap in practice with considerations of necessity and proportionality in assessing the force that can be used in self-defence. Where the basis for the use of force on the territory of another state is consent by that territorial state, the human rights necessity and proportionality tests would need to be undertaken independently — but still undertaken.

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Conclusion

Based on the assessment in this article, targeted killing may be legal in international law. As a result, it may also be legal in domestic law, to the extent that the latter is indexed to international law. But the details matter. Applying uniformly the more constraining construals of international law discussed in this article would greatly limit the prospect of such killings and, indeed, probably make them legally possible in only extremely narrow situations. Applying uniformly the permissive construals of international law would create broad reach for targeted killings.

As we have suggested, the most likely course involves a mix of permissive and restrictive construals on the many uncertain legal issues in this area. We end, however, with a specific caution. Transparency on the legal basis of targeted killings by those states that engage in it has been modest, giving rise to the fear that such killings amount simply to expedient assassinations. Should the Canadian government embark on the path of targeted killings of Canadian nationals abroad (and, indeed, the extraterritorial use of force at all outside conventional "hot" armed conflicts), it should aim to meet a higher standard of accountability. The UK parliamentary committee studying the United Kingdom's 2015 targeted killings made repeated observations about the indefiniteness of the UK government's legal positions on key issues, a sobering assessment. It also observed, correctly, that

> for the Government's policy to command public confidence, and to make it more likely that decisions pursuant to it do not lead to breaches of the right to life, the decision-making process must be robust, with sufficient challenge built into the process, rigorous testing of intelligence to minimise the risk of mistakes, and access to the requisite advice including legal advice at the appropriate stages in the process.[207]

After all, targeted killing both presumes guilt and applies the sternest sanction any state could impose. It follows that for the sake of its credibility — and to preserve its personnel from legal exposure — the Canadian government should make its choices on the difficult legal conundrums raised in this article now rather than in the midst of a crisis. What is more, the government should articulate and debate those positions openly since these questions demand difficult policy choices that are not, in many instances, preordained by clear, existing law.

[207] Joint Committee on Human Rights, *supra* note 1 at para 4.24. See also ISC, *supra* note 12 at para 72, expressing related process concerns.

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