



**Center for
Global Legal Challenges**

YALE LAW SCHOOL

**Below the Threshold:
The Law Governing the Use of Force Against Non-State Actors
in the Absence of a Non-International Armed Conflict**

A Report of the Center for Global Legal Challenges¹

December 7, 2015

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INTRODUCTION

Boko Haram attacks civilians in Nigeria. The Islamic State launches attacks in Paris. Terrorists take hostages at a hotel in Mali. Mexican drug gangs threaten government officials and civilians. Houthi rebels seek to take control of the government in Yemen—and succeed. States increasingly face security threats from non-state actors, which have led states and observers to ask what states can do in response. What legal framework should apply? What constraints do states face? When can states resort to the use of military force to address threats posed to them by non-state actors, either on their own territory or on the territory of another state?

The answer to these questions turns on whether the conflict in question rises to the level of a non-international armed conflict (NIAC). Based on the drafting history of international humanitarian law (IHL) governing NIACs, international jurisprudence, recent state practice, and academic commentary, this paper concludes that a NIAC does not exist unless the conflict passes an intensity threshold. In other words, the intensity of the conflict distinguishes generalized violence involving a non-state actor from a NIAC. Once the existence of a NIAC is established, states participating in it will be governed by relevant IHL.

But if states are only governed by the IHL applicable to NIACs once an intensity threshold has been crossed, what law applies below that threshold? The answer varies with the circumstances, depending on whether the state is responding to a threat within its own territory or from outside; and if the threat is from outside the state, whether the host state consents to the use of force against the non-state actor. Thus, to answer the question of what law applies before a NIAC is established, this white paper analyzes three different scenarios in which a state contemplates forceful engagement with a non-state actor. Each scenario presumes that the non-state actor is organized and has engaged in some violence, but that the intensity of the clash has not crossed the intensity threshold and thus has not risen yet to the level of a NIAC.

1. In Scenario One, a state seeks to engage a non-state actor that operates exclusively within the state's territorial borders.
2. In Scenario Two, an intervening state seeks to engage a non-state actor located in another state, with the consent of the host state.
3. In Scenario Three, an intervening state seeks to engage a non-state actor located in another state, without the consent of the host state.

The analysis of each scenario first identifies the authority that governs whether and when the state may initiate forceful engagement with the non-state actor (the “*may* the state use force” evaluation), then discusses which legal regime governs the scope and nature of the resulting use of force (the “*how may* the state use force” evaluation). Different legal regimes govern the acting state's options in each of the scenarios.

Although the authority for action differs, the inquiries for Scenarios One and Two are quite similar. In Scenario One, the acting state may engage the non-state actor with force by virtue of its territorial sovereignty. It must act, however, through a domestic law enforcement framework and in compliance with human rights law. In Scenario Two, the acting state derives

the authority to use force against the non-state actor from the host state's consent. However, it may only rely on that consent insofar as it comports with the host state's human rights obligations under international law.

In raising the possibility of one state violating another state's territorial integrity, Scenario Three raises a different set of questions. The intervening state's threat or use of force within another state's territory is only lawful when authorized by the U.N. Security Council or justified under the Charter's Article 51 self-defense provision. The intervening state's use of force is accordingly regulated by the traditional IHL of international armed conflict.

Where scenarios overlap (when, for example, the intervening state has both consent and Article 51 authority to act), the acting state may rely on more than one source of authority. It must, however, continue to ensure that it has authority to use force and that its use of force comports with the legal framework appropriate for the nature and intensity of the conflict.

It is worth noting at the outset that these scenarios highlight developing areas of international law. Some raise questions that have clear answers in existing legal authority, while others contend with more inchoate legal regimes. Where state practice has not yet solidified into definitive international norms, legal ambiguity remains. In such instances, this white paper notes the existence of ambiguity and examines the history, purposes, and principles of relevant legal regimes to proffer answers.

I. THE *TADIĆ* INTENSITY THRESHOLD IS NECESSARY FOR THE EXISTENCE OF A NIAC

Before turning to the law that applies below the threshold for a NIAC, the paper first considers where that threshold lies. The authoritative articulation of the threshold is found in *Prosecutor v. Tadić*, where the International Criminal Tribunal for the Former Yugoslavia defined a NIAC as a situation in which there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”² The test it articulated applies across all three scenarios described above. Though some have criticized aspects of this test, its intensity prong is nonetheless widely accepted.

A. The Tadić Two Prong Test

The *Tadić* Court's statement that a NIAC exists where there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”³ has become such a familiar formulation for determining whether a NIAC exists that some have suggested it is customary international law.⁴ The *Tadić* formulation is regularly cited as authoritative by states,⁵ international criminal tribunals,⁶ the International Committee of

² *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

³ *Id.*

⁴ See, e.g., Noëlle Quénivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict*, in *APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES* 31, 57 (Derek Jinks et al. eds., 2014).

⁵ See, e.g., MINISTÈRE DE LA DÉFENSE, *MANUEL DE DROIT DES CONFLITS ARMÉS* 34 (2012) (France); FED. MINISTRY OF DEF., *LAW OF ARMED CONFLICT MANUAL* 186-87 (2013) (Germany); MINISTRY OF DEF., *THE JOINT SERVICE*

the Red Cross (ICRC),⁷ and other experts;⁸ it is also employed in the Rome Statute establishing the International Criminal Court.⁹

Tadić's formulation includes two prongs, each of which must be met to establish the existence of a NIAC. First, it requires the non-state actor to have reached a minimum level of organization. At a minimum, the non-state actor must operate with a command structure sufficient to implement obligations under the two IHL instruments governing NIACs: Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions (the Second Additional Protocol).

Second, the *Tadić* test requires "protracted armed violence." This prong is universally understood to be an intensity requirement. In subsequent cases, the International Criminal Tribunal for the Former Yugoslavia articulated factors that might help a court gauge whether the intensity of violence is sufficient to meet *Tadić*'s standard. These include the seriousness of the conflict; the increase and spread of clashes over territory and time; the distribution and type of weapons; the presence of government forces and their use of force; the number of casualties; the incidence of civilians fleeing from the combat zone; the extent of destruction; the blocking, besieging and heavy shelling of towns; the existence and change of front lines; the occupation of territory; the imposition of road closures; and the attention of the U.N. Security Council.¹⁰ Where an organized non-state actor engages in conflict with a state, it is this second prong that determines whether the conflict has become a non-international armed conflict.

B. *Tadić's Intensity Prong*

The intensity requirement in *Tadić* is an articulation of the requirements of Common Article 3. This is important because the intensity requirement is "used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law,"¹¹ a distinction that has its roots in the history and purpose of Common Article 3 and the Second Additional Protocol. State practice and international jurisprudence has also confirmed that the

MANUAL OF THE LAW OF ARMED CONFLICT 386-87 (2004) (United Kingdom); OFFICE OF THE GEN. COUNSEL OF THE DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1010-13 (2015) (United States).

⁶ See, e.g., Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision, ¶ 229 (June 15, 2009), <https://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>; Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 185 (Int'l Crim. Trib. for the former Yugoslavia July 10, 2008), http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 619 (Sept. 2, 1998), <http://www.unict.org/sites/unict.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>.

⁷ International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* 4 (International Committee of the Red Cross Opinion Paper, Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

⁸ See, e.g., TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 87 (Michael N. Schmitt ed., 2013); PROGRAM ON HUMANITARIAN POLICY & CONFLICT RESEARCH AT HARVARD UNIV., COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 58-59 (2010).

⁹ Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90.

¹⁰ *Boškoski*, Case No. IT-04-82-T, ¶ 177.

¹¹ Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997).

Tadić intensity prong is a necessary condition for the existence of a NIAC—and, by extension, for a state to take action under IHL.

1. *Common Article 3 and the Second Additional Protocol*

Historically, states resisted imposing IHL in domestic situations. For example, while negotiating earlier IHL instruments, states refused to consider proposals to apply IHL to domestic conflicts, including full-fledged civil wars.¹² Accordingly, Common Article 3 does not apply to internal unrest such as sporadic riots or criminal activities.¹³ However, it does impose some obligations on states in internal conflicts, justifying one scholar's description of it as a "revolutionary inroad into traditional notions of State sovereignty."¹⁴ Specifically, Common Article 3 mandates that "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum" certain protections.¹⁵ The radical nature of Common Article 3 explains both why states were reluctant to accede to it and the limited nature of the rules governing NIACs relative to other IHL rules.¹⁶

There is significant scholarly consensus about why states were reluctant to create an international legal framework governing internal conflicts and why, once this framework was created, its protections were relatively minimal. First and foremost, states were loath to sacrifice elements of their own sovereignty by allowing international law to creep in.¹⁷ Second, states were deeply concerned that Common Article 3 might tacitly legitimize non-state actors as "Part[ies] to a conflict," as opposed to illegitimate criminals or rebels.¹⁸ As a legal matter, a

¹² COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (Jean Pictet ed., 1960) ("[T]he conflicts referred to in Article 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities'—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.").

¹³ *Id.* at 28-31.

¹⁴ Gabor Rona, *Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?*, 91 INT'L L. STUD. 32, 36 (2015).

¹⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The International Court of Justice has recognized the protections of Common Article 3 as customary international law. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, ¶ 218 (June 27).

¹⁶ Rona, *supra* note 14, at 36 ("[International armed conflict] rules are extensive, while NIAC rules are minimal, reflecting a traditional perspective on sovereignty: States are much more willing to establish international law rules for their mutual relations – even war – than for their internal affairs or their relations with non-State entities.").

¹⁷ See, e.g., Jonathan Horowitz, *Transferring Wartime Detainees and a State's Responsibility to Prevent Torture*, 2 AM. U. NAT'L SEC. L. BRIEF 43, 51 n.45 (2012) ("The law of non-international armed conflict is limited in scope because States wish to protect their sovereignty.").

¹⁸ See, e.g., Kenneth Roth, *The Human Rights Movement and International Humanitarian Law*, in HUMAN RIGHTS: FROM PRACTICE TO POLICY, 25, 30 (Carrie Booth Walling & Susan Waltz eds., 2011) ("There also was a concern—much more in the past than these days—about legitimizing rebel groups by addressing them. The question here was whether the application of IHL to a rebel group in and of itself constituted a political act, with the effect of raising the stature of the . . . group."); Marko Milanovic, *Footnote Filching and Other Unsavory Practices in the US Supreme Court, Part III*, OPINIO JURIS (May 2, 2007, 5:51 AM), <http://opiniojuris.org/2007/05/02/footnote-filching->

state's subjective classification of strife is irrelevant to determining whether a NIAC exists.¹⁹ Nevertheless, states' reticence to classify conflicts as NIACs helps explain why an objective intensity threshold exists to separate NIACs from internal disturbances of lesser severity.

The history of Common Article 3 strongly suggests that IHL rules for NIACs apply only once internal conflict reaches certain intensity and do not apply at any point before that condition is met. States' reticence to classify conflicts as NIACs indicates their original understanding that IHL does not apply to internal situations that more closely resemble criminality or isolated violence. While states eventually acceded to Common Article 3 after an extensive lobbying process by the ICRC, the protections extended to NIACs were far less expansive than those initially envisaged. Put differently, states' concerns about creating and implementing an IHL framework of NIAC suggest that the circumstances in which that law applies are narrow.

Though not universally binding, the Second Additional Protocol nonetheless adds some textual clarity to the relatively narrow scope of the IHL applicable in NIACs. First, it extends new rights and obligations to parties to a NIAC and expands protections for civilians.²⁰ Second, the Protocol clarifies that it "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."²¹ While the Second Additional Protocol's definition of a NIAC does not supplant Common Article 3's definition,²² it is still instructive.

Given the text and the history, the fairest reading of Common Article 3 and the Second Additional Protocol is that a state may act pursuant to IHL with regard to a non-state actor only when violence has reached the *Tadić* intensity threshold. Short of this, states must act in accordance with domestic law and international human rights law.

2. *State Practice, International Jurisprudence, and Academic Commentary*

Recent state practice suggests that *Tadić*'s intensity threshold is a mandatory floor for establishing the existence of a NIAC. A 2011 year-end U.S. State Department Report indicated that armed conflict began in Yemen in May 2011 and a Human Rights Watch report indicated the same month as the beginning of armed conflict.²³ Both the State Department and Human Rights Watch identified May 2011 as the "start date" for a NIAC, notwithstanding that the non-state opposition appeared to be sufficiently organized and that there were some skirmishes prior

and-other-unsavory-practices-in-the-us-supreme-court-part-iii/ ("States have always feared that applying IHL to rebels might somehow legitimize them.").

¹⁹ See, e.g., YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 2 (2014).

²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. The United States is not a signatory.

²¹ *Id.* art. 1 (2).

²² See, e.g., Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts* 5 (Harvard Program on Humanitarian Policy & Conflict Research, Background Paper, 2003), <http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf>.

²³ Louise Arimatsu & Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen, and Libya*, CHATHAM HOUSE 28 (2014), https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf.

to that date. A representative of Saferworld (an NGO) later explained in a Chatham House report:

Despite the excessive use of force by government forces against the demonstrators. . . . [h]uman rights law continued to apply exclusively . . . primarily because the attacks against the demonstrators, albeit lethal at times, were sporadic for the most part and because those armed groups that sided with the pro-democracy protesters appeared to limit their use of force to defending the demonstrators against attacks rather than proactively engaging with government loyalists or State forces. . . . The evidence appears to suggest that it was not until May 2011 that armed clashes between the defecting units and those that remained loyal to former president Saleh reached the requisite threshold of intensity to trigger an armed conflict.²⁴

To the extent that a similar calculus led the State Department or Human Rights Watch to identify May as the “start date,” this implies that the United States recognizes the intensity requirement. Additionally, various states’ military manuals routinely cite *Tadić* or its two prongs as the prevailing test for when a NIAC exists.²⁵

International legal instruments and judicial precedent also support this reading. The Rome Statute establishing the International Criminal Court draws from *Tadić* in defining its jurisdiction over crimes committed in NIACs. International tribunals regularly cite *Tadić*’s two-pronged definition of a NIAC, to the point where some have identified it as customary international law.²⁶ Only one case appears to challenge the *Tadić* framework, and it does so in the context of subsidiary refugee law.²⁷ Notwithstanding its analysis, the case cites *Tadić* as the prevailing test for the purpose of identifying a NIAC that triggers the applicability of IHL.²⁸

Lastly, academic commentary also recognizes the *Tadić* test as authoritative, as myriad academics and expert reports routinely accept and apply *Tadić*.²⁹ Moreover, there is little scholarly appetite for challenging its intensity prong. There appear to be only two academic

²⁴ *Id.* at 28-29.

²⁵ *See supra* note 5.

²⁶ *See, e.g.,* Quénivet, *supra* note 4, at 57 (describing the “*Tadić* case [as] now . . . ingrained in customary international law”). For some of the myriad international criminal cases that cite *Tadić*, see *supra* note 6.

²⁷ The Court of Justice for the European Union has held that “it must be acknowledged that an internal armed conflict exists, for the purposes of applying [a] provision [of refugee law], if a State’s armed forces confront one or more armed groups or if two or more armed groups confront each other,” and that the Court need not engage in an analysis of organization and intensity. Case C-285/12, *Diakité v. Commissaire Général aux Réfugiés et aux Apatrides*, ¶ 35 (2014), <http://curia.europa.eu/juris/liste.jsf?num=C-285/12>. The Court’s decision was based on the notion that the “EU legislature wished to grant subsidiary protection not only to persons affected by ‘international armed conflicts’ and by ‘armed conflict not of an international character’, as defined in international humanitarian law, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence.” *Id.* ¶ 21.

²⁸ *Id.* ¶ 22.

²⁹ *See supra* note 8.

articles that question *Tadić* or its subsequent application, and each debates the relevance of the organizational prong far more than the intensity prong.³⁰

In conclusion, *Tadić*'s articulation of an intensity threshold to separate NIACs from internal unrest is firm and incontrovertible, supported by the history and text of IHL instruments governing NIACs, state practice, international jurisprudence, and the dearth of scholarship challenging the intensity prong.

The stakes of this conclusion are significant, as *Tadić* establishes a dividing line between instances in which a state may respond to a rising insurgency with force governed by IHL and instances in which a state may respond to such an insurgency with force governed by the far more restrictive human rights law. The next several sections operationalize the consequences of this distinction in three scenarios, each of which concerns a state that faces rising violence from a non-state actor whose actions fall short of the *Tadić* intensity threshold. The circumstances of each scenario implicate different legal regimes, but each highlights the threshold's import.

II. SCENARIO ONE: TERRITORIAL STATE ENGAGEMENT WITH A DOMESTIC NON-STATE ACTOR

In Scenario One, a state is faced with a rising insurgency contained within its borders. The non-state actor is organized and has engaged in some violence, but the violence has not yet reached the *Tadić* intensity threshold. May the state use deadly force against members of the non-state actor, and if so, what law governs that use of force? This section concludes that the state may use deadly force against the non-state actor, but only inasmuch as this force conforms to international human rights law. Specifically, the state may only use lethal force when absolutely necessary to save the lives of others and only when the use of such force is proportional. Moreover, the state must plan its law enforcement operations in such a manner as to minimize the likelihood that such force will be necessary.

A. May the Territorial State Use Deadly Force Against the Non-State Actor?

A core component of sovereignty is that the sovereign has supreme authority within its territory to enforce its laws, with force if necessary.³¹ Indeed, a state has a wealth of tools that it may employ before the non-state actor's violence reaches sufficient intensity to qualify as a NIAC. Depending on the nature of the violence in which the non-state actor is engaged, a state may even have a positive obligation to act in order to stifle the violence.³² There are, however, legal limits on the scope of a state's permissible actions, even before the intensity threshold is met. Those limits are provided by both domestic law and by international human rights law.

³⁰ See Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT'L L. 693 (2013); Arne Willy Dahl & Magnus Sandbu, *The Threshold of Armed Conflict*, 45 MIL. L. REV. 369 (2006).

³¹ See *Island of Palmas* (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) ("Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusivity of any other States, the functions of a State.").

³² See, e.g., COUNCIL OF EUROPE, HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM: THE COUNCIL OF EUROPE GUIDELINES 8 (2005) ("States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present Guidelines.").

B. What Law Governs?

In taking action to combat the non-state actor's violence, the state may act within the contours of its domestic law enforcement authority to effect the arrest or disarmament of non-state actors. While each state's domestic law will set different standards for the actions of its agents in such an operation, international human rights law provides the minimum standards to which states must conform when using lethal force.

The right not to be arbitrarily deprived of life is a *jus cogens* norm to which all states must adhere.³³ Moreover, a number of prominent human rights instruments include protection of the right to life beyond the *jus cogens* norm, thus limiting the state's use of lethal force in pursuing law enforcement measures.³⁴ While no human rights treaty bars a territorial state's use of deadly force, the right to life is generally regarded as a central, non-derogable tenet of international human rights law. As such, international bodies and courts have set certain standards that constitute a minimum standard of respect for the right to life in law enforcement operations.³⁵ These instruments share a core commitment to the principles of legality, necessity, proportionality, and a requisite level of care in planning operations. Furthermore, most include a mandate that any exceptions be construed narrowly.³⁶

First, the use of deadly force is governed by the principle of legality. Because “[t]he deprivation of life by the authorities of the State is a matter of the utmost gravity . . . the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”³⁷ Specifically, the legality principle requires that the state legislate the circumstances in which state agents may use lethal force and train its law enforcement officers.³⁸

Second, relevant national laws or regulations must conform to the principle that the use of lethal force is permissible only when strictly necessary. Law enforcement officers may use lethal force only “in their own defence or that of others, or . . . [when] necessary to effect the

³³ See, Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 431 (1989) (“The right to life, called the most fundamental human right, is a *jus cogens* rule.”).

³⁴ International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; American Convention on Human Rights art. 4, Nov. 22, 1969, OEA/ser. K/XVI/1.1, doc. 65 rev. 1, corr. 2 (1970).

³⁵ The following discussion of the right to life combines case law from the European Court of Human Rights, the Inter-American Court of Human Rights, and the U.N. Human Rights Committee, as well as principles set forth in the U.N.'s Basic Principles on the Use of Force and Firearms by Law Enforcement Officers. Together, these sources provide a detailed analysis of the state's responsibility to protect the right to life in law enforcement operations.

³⁶ See U.N. Human Rights Comm., General Comment No. 6: Article 6 (Right to Life), ¶ 1 (Apr. 30, 1982), U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994) [hereinafter HRC Comment No. 6] (observing that the right to life “should not be interpreted narrowly”); *McCann v. United Kingdom*, App. No. 18984/91, ¶ 149 (Eur. Ct. H.R. Sept. 27, 1995) (noting that exceptions to the right to life “indicate[] that a stricter and more compelling test of necessity must be employed from that normally applicable”).

³⁷ HRC Comment No. 6, *supra* note 36, ¶ 3.

³⁸ *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85 (Oct. 24, 2012); Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27 to Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ¶¶ 1, 11 [hereinafter Basic Principles].

arrest or prevent the escape of the persons concerned,”³⁹ if the potential escapee poses a serious safety threat to others. Even then, force can be used only “when strictly unavoidable in order to protect life”⁴⁰ and “only when less extreme means are insufficient to achieve these objectives.”⁴¹ The principle of necessity “does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life.”⁴²

Third, the use of deadly force must be proportional. Law enforcement must “[e]xercise restraint in such use [of force] and act in proportion to the seriousness of the offence and the legitimate objective to be achieved.”⁴³ Proportionality also requires the state agent to act with a “level of force . . . keep[ing] with the level of resistance offered,” meaning that “agents must apply the criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required.”⁴⁴ To this end, states have a series of affirmative obligations to minimize scenarios in which such necessity is relevant, including training officers in non-lethal practices, ensuring the distribution of self-defensive equipment that minimize the police’s need to use deadly force, and employing nonlethal weaponry that can incapacitate suspects without killing them.⁴⁵

Fourth, plans involving the potential use of deadly force must be carried out with a level of care. When embarking on law enforcement operations, the state must exercise the “degree of caution expected from a law-enforcement body in a democratic society” and its actions must be “compatible with the standard of care prerequisite to an operation . . . involving the use of lethal force by State agents.”⁴⁶ Specifically, the operation must be “planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised.”⁴⁷ This care includes planning and executing the operation in a way that accounts for potential intelligence mistakes, maximizing opportunities for arrest, and implementing other measures that could prevent the eventual resort to absolute necessity in using lethal force.⁴⁸ Authorities can be liable for the violation of the right to life if they “fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life.”⁴⁹ While there is no per se

³⁹ U.N. Human Rights Committee, *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Communication No. R.11/45, U.N. Doc. Supp. No. 40 (A/37/40), ¶ 13.2 (1982).

⁴⁰ Basic Principles, *supra* note 38, ¶ 9.

⁴¹ *Id.*

⁴² *McCann v. United Kingdom*, App. No. 18984/91, ¶ 148 (Eur. Ct. H.R. Sept. 27, 1995).

⁴³ Basic Principles, *supra* note 38, ¶ 5(a).

⁴⁴ *Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85 (Oct. 24, 2012).

⁴⁵ Basic Principles, *supra* note 38, ¶ 2.

⁴⁶ *Isayeva v. Russia*, App. No. 57950/00, ¶ 191 (Eur. Ct. H.R. Feb. 24, 2005). While *Isayeva* dealt with a situation in Chechnya that is almost certainly a NIAC, the principles included in this discussion are human rights law principles. See Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT’L REV. RED CROSS 737, 742-44 (2005).

⁴⁷ *Isayeva*, App. No. 57950/00, ¶ 175.

⁴⁸ See *McCann v. United Kingdom*, App. No. 18984/91, ¶¶ 212-13 (Eur. Ct. H.R. Sept. 27, 1995).

⁴⁹ *Isayeva*, App. No. 57950/00, ¶¶ 174-76.

prohibition on the use of military force to achieve a law enforcement end, the use of such military personnel without proper law enforcement training might reflect a failure to exercise “the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society.”⁵⁰ In a similar vein, the use of military-grade weaponry without a prior evacuation of civilians may, depending on the circumstances, violate the right to life, as “[t]he massive use of indiscriminate weapons” does not reflect the requisite care required by human rights law.⁵¹

The principle of progressive use of force highlights the importance of distinguishing the moment that the state initiates a law enforcement action (“T₀”) from the moment that the violence crosses the *Tadić* intensity threshold and a NIAC exists (“T₁”). At T₀, the state must conform to its domestic law enforcement regime and to relevant human rights law. This means that the state must attempt to effect the arrest or disarmament of the non-state actor without the use of lethal force. If, however, the non-state actor responds to the state’s engagement in a manner that threatens the lives of the state’s law enforcement officers or of civilians, the state is entitled to use lethal force. Such lethal force need not in itself trigger a NIAC; utilizing snipers, for example, might be a permissible use of lethal force, but is unlikely to trigger a NIAC. More extensive application of force, however, might include the use of tactics and weaponry that more closely resemble military measures. Regardless, the state must attempt to subdue the insurgency without deadly force and increase its use of force only as strictly necessary and proportionally appropriate.

When the state gradually increases force in response to the non-state actor’s reactions, it may at some point use force sufficient to convert the situation into a NIAC. Functionally, this might mean that a state, in comporting with its human rights obligations through law enforcement at T₀, might find itself in a NIAC at T₁, at some point during or by the end of the operation. The Inter-American Court of Human Rights, for example, has held that a thirty-hour battle between a state and an insurgent group constituted a NIAC due to the intensity of the fighting.⁵² Yet the classification of the situation to allow for the applicability of IHL at T₁ does not retroactively apply IHL to the state’s action at T₀. This is the logical corollary of the *Tadić* intensity threshold: Until the threshold is crossed, a NIAC does not exist and a law enforcement paradigm applies.

The *Tadić* threshold may also have consequences for how the state may detain the non-state actor. There is serious scholarly debate over the extent to which the IHL of NIACs provides independent detention authority. On one side of the debate, scholars argue that the IHL of NIACs does include such implicit authority, distinct from detention authority established under domestic law⁵³; on the other side of the debate, the English Court of Appeal⁵⁴ and several scholars⁵⁵

⁵⁰ *McCann*, App. No. 18984/91, ¶ 212.

⁵¹ *Isayeva*, App. No. 57950/00, ¶ 191.

⁵² *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. (1997).

⁵³ See, e.g., Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INT’L L. STUD. 60 (2015); Sean Aughey & Aurel Sari, *IHL Does Authorise Detention in NIAC: What the Sceptics Get Wrong*, EJIL: TALK! (Feb. 11, 2015), <http://www.ejiltalk.org/ihl-does-authorise-detention-in-niac-what-the-sceptics-get-wrong> [hereinafter Aughey & Sari, *IHL Does Authorise Detention in NIAC*]; Kubo Mačák, *No Legal Basis Under IHL for Detention in Non-*

suggest that the IHL of NIACs does not include any independent detention authority and that the state's ability to detain always is derived from its domestic law, subject to human rights law limitations. To the extent that the former camp is correct, the state's authority to detain non-state actors increases significantly once a NIAC is established. In particular, the former camp argues that "the legal basis for status-based detention is both implicit in the scheme of Common Article 3 and the Second Additional Protocol,"⁵⁶ and that customary IHL governs detention in a NIAC.⁵⁷ Scholars in this camp have argued, for example, that customary IHL allows status-based detention in NIAC.⁵⁸ To be sure, a state can derogate from some (but not all) international human rights law commitments regarding detention whether or not it is in a NIAC⁵⁹; however, derogation must be proclaimed openly, notice must be given to the relevant international bodies, and derogation is only permissible with proper justification due to public emergency. As a result, states are often reticent to derogate as a functional matter, depending on the intricacies of the political situation on the ground.⁶⁰

C. Territorial States Must Act Within the Confines of International Human Rights Law and its Protections for the Right to Life

When faced with a domestic non-state actor that is organized and violent, but whose violence falls short of *Tadić*'s intensity threshold, a state must act within the confines of its domestic law enforcement regime. While the domestic regime may impose additional restrictions on the state's actions, international human rights law – and in particular the protection of the right to life – establishes a floor. This floor requires the state and its agents to use lethal force only when absolutely necessary to prevent loss of life and only in proportion to the response of the non-state actor. The state must also take care in planning the relevant law enforcement operation to ensure that the intelligence, training, and methods used comport with protections for the right to life. Only once those measures have been taken may a state escape liability under

International Armed Conflicts? A Comment on Serdar Mohammed v. Ministry of Defence, EJIL: TALK! (May 5, 2014), <http://www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence>.

⁵⁴ *Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB) (U.K.).

⁵⁵ See, e.g., Jonathan Horowitz, *Guest Post: IHL Doesn't Regulate NIAC Internment—A Drafting History Perspective*, OPINIO JURIS (Feb. 9, 2015, 8:41 AM), <http://opiniojuris.org/2015/02/09/guest-post-ihl-doesnt-regulate-niac-internment-drafting-history-perspective/>; Ryan Goodman, *Authorization vs. Regulation of Detention: What Serdar Mohammed v. MoD Got Right and Wrong*, JUST SECURITY (Feb. 5, 2015, 8:15 AM), <https://www.justsecurity.org/19755/authorization-vs-regulation-detention-serdar-mohammed-v-mod-wrong>;

Lawrence Hill-Cawthorne & Dapo Akande, *Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari*, EJIL: TALK! (June 2, 2014), <http://www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari>; Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014), <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts>.

⁵⁶ Aughey & Sari, *IHL Does Authorise Detention in NIAC*, *supra* note 53.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ States may derogate from certain detention norms. See, e.g., *Lawless v. Ireland*, App. No. 332/57 (Eur. Ct. H.R. 1961). Other norms, such as *habeas corpus* are non-derogable. See, e.g., International Committee of the Red Cross, *Customary IHL* r. 99, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99.

⁶⁰ See, e.g., U.N. Human Rights Comm., General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); ICCPR, *supra* note 34, art. 4; European Convention, *supra* note 34, art. 15; United Nations Econ. & Soc. Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (Sept. 28, 1984).

international human rights law for loss of life, even if at the relevant moment of engagement, an individual state agent is justified in using lethal force against the non-state actor. This process might lead to a NIAC being established, a possibility that does not obviate the state's responsibility to plan and undertake its law enforcement operation in conformance with human rights law. Moreover, the *Tadić* threshold might have important consequences for the state's ability to detain suspected non-state actor members without derogating from human rights agreements, although the relationship between a NIAC and detention authority remains an unsettled matter of international law.

III. SCENARIO TWO: INTERVENING STATE USE OF FORCE WITH HOST STATE'S CONSENT

Scenario Two mirrors Scenario One, except for one important difference: instead of a territorial state seeking to engage a non-state actor within its borders, an intervening state seeks to use force against the non-state actor with the host state's consent. As in Scenario One, this scenario presumes that neither the host state nor the intervening state is engaged in a NIAC with the non-state actor because the *Tadić* intensity threshold has not yet been crossed. Scenario One establishes that the host state owes domestic law and human rights law obligations to the non-state actor; Scenario Two examines the effect of the consensual substitution of the intervening state. Because consent is the key variable that distinguishes Scenario Two from Scenario One, this Part focuses on the lawfulness of consent from both the host and intervening state's perspectives.

As a practical matter, human rights law will govern the intervening state's use of force, just as it does the territorial state's in Scenario One. While a state may lawfully consent to another's use of force on its territory, the scope of that consent cannot exceed the outer boundaries set by the host state's human rights obligations.

A consent-receiving state, although usually entitled to presume the validity of consent, cannot rely on consent that is clearly invalid under international law. Thus Scenario Two comes to the same conclusion as Scenario One, albeit by a different route: The human rights law limitations that constrain the host state also constrain the intervening state seeking to use deadly force with the host state's consent. Hence, even if the intervening state does not directly owe human rights obligations to the people in the host state's jurisdiction, it nevertheless must eschew taking action based on consent that it knows or should know is in violation of the host state's international obligations.

A. *May the Intervening State Use Deadly Force Against the Non-State Actor?*

Whereas authority to use deadly force in Scenario One derives from the territorial state's sovereignty, authority to use deadly force in Scenario Two derives from the sovereign host state's consent. Non-coerced consent renders a state's use of force lawful under *jus ad bellum*—the law governing the resort to force between states,⁶¹ and therefore obviates the need to pursue a

⁶¹ See YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 118-23 (5th ed. 2011); Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 53 INT'L & COMP. L.Q. 211 (2004). In very limited circumstances, consent may also be null if its invalidity under domestic law is manifest.

lawful exception to Article 2(4)'s prohibition on the use of force.⁶² Under Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, valid consent extinguishes any claim the consent-giving state may have against the consent-receiving state for breach of its territorial sovereignty.⁶³ However, as discussed in the next section, while consent may preclude a claim of unlawful aggression by the consent-giving host state against the consent-receiving intervening state, it does not make all use of force lawful.

B. What Law Governs?

Although the law in this area is unsettled, this paper concludes that international law (1) forbids a host state from consenting to a violation of its international law obligations and (2) requires the intervening state to eschew taking action on the authority of a host state's consent that is granted in violation of these obligations.

1. The Host State's Human Rights Obligations When Giving Consent

In situations where a host state cannot use force itself, it cannot lawfully consent to the use of force by an intervening state. First, a state cannot delegate authority it does not have, so a state cannot consent to an action that it does not itself have authority to take. Second, and more specifically, the act of consenting to unlawful force can itself constitute a violation of the host state's human rights obligations. The host state owes the individuals in its jurisdiction an affirmative obligation to maintain conditions in which their human rights are respected. Consenting to arbitrary killing by a third-party state violates the host state's affirmative obligation to withhold such consent.

The claim that a state cannot consent to an action that it cannot itself take has an intuitive, logical appeal. *Nemo plus iuris ad alium transferre potest, quam ipse habet*—no one can transfer a greater right than he himself has.⁶⁴ A principal cannot delegate authority to an agent that the principal does not have, so the host state cannot give the intervening state permission to act in contravention of the host state's human rights obligations.

Case law, although admittedly sparse in this area, also supports the principle that a state cannot consent beyond its authority. In *Kadi v. Council and Commission*, the Court of First Instance of the European Communities stated, "By concluding [the Treaty establishing the European Economic Community] between them [Member States] could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under [the United Nations] Charter."⁶⁵ Following a similar principle, in *Soering v.*

⁶² U.N. Charter art. 2(4); Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 15 n.43 (2013).

⁶³ U.N. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 53d Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles]. However, consent-receiving states must remain within the scope of the consent actually given, and they must desist if consent is withdrawn. DINSTEIN, *supra* note 61, at 121-22.

⁶⁴ Terry D. Gill, *Military Intervention at the Invitation of a Government*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 229, 230 (Terry D. Gill & Dieter Fleck eds., 2010).

⁶⁵ Case T-315/01, *Kadi v. Council and Comm'n*, 2005 E.C.R II-3659, ¶ 195; *see also* Deeks, *supra* note 62, at 33 n.134 (discussing *Kadi*).

United Kingdom, the European Court of Human Rights prevented the transfer of a juvenile from the United Kingdom to the United States because of the possibility that the juvenile might face the death penalty, in violation of international human rights law.⁶⁶ According to Deeks, this decision exemplifies the European Court of Human Rights' doctrine that "a Council of Europe member state may not consent to certain actions (or risk of actions) by another state that the member state itself could not undertake."⁶⁷

Although the validity of authority that exceeds consent is under-theorized in international law scholarship, those who have addressed the issue appear to have reached a similar conclusion. Deeks argues that "[c]onsent—at least when it is used to affect legal relationships—generally contemplates a transfer only of those rights, privileges, powers, or immunities that the consenting entity itself possesses."⁶⁸ She points to property law,⁶⁹ contract law,⁷⁰ agency law,⁷¹ and separation of powers⁷² to support this idea. Terry Gill concurs, writing that a state's inability to consent to more than it can do is "a logical consequence of the fact that a State's government may not grant more authority than it itself possesses under international law."⁷³ Michael Schmitt has also intimated this argument in discussing the use of drones in Pakistan, suggesting that Pakistan cannot consent to action by the United States that it itself cannot take. He implicitly limits the scope of consent before an armed conflict exists to circumstances in which the host state "requests the other state's assistance in complying with its obligation to police its own territory" or "seeks assistance with its own law enforcement operation against terrorists."⁷⁴ Schmitt also cautions that "[i]n law enforcement operations, human rights law is applicable," suggesting that a state cannot consent to action it could not take.⁷⁵

Consent to violate human rights not only exceeds the consenting state's authority, it also affirmatively violates the consenting state's obligation to safeguard the human rights of

⁶⁶ *Soering v. United Kingdom*, App. No. 14038/88 (Eur. Ct. H.R. July 7, 1989); see also Deeks, *supra* note 62, at 34 n.137 (discussing *Soering*).

⁶⁷ Deeks, *supra* note 62, at 34.

⁶⁸ *Id.*

⁶⁹ *Id.* at 34 n.136 (citing the common law property rule of *nemo dat quod non habet*).

⁷⁰ *Id.* (quoting W. EDWARD SELL, *SELL ON AGENCY* 8 (1975), for the proposition that, "[i]n general, a principal can authorize an agent to perform any act or enter into any transaction which he himself could do, and with the same results and legal consequences").

⁷¹ *Id.* (quoting Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 292 (1986) for the proposition that "the enforceability of all agreements is limited by what rights are capable of being transferred from one person to another").

⁷² *Id.* (quoting *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447, 450 (W.D. Wash. 1978) for the proposition that "the rule-making power delegated by Congress to the Supreme Court is limited in scope to those which Congress could have rightfully exercised").

⁷³ Gill, *supra* note 64, at 230.

⁷⁴ *Meeting Summary: International Law and the Use of Drones*, CHATHAM HOUSE 6 (Oct. 21, 2010) (summarizing Schmitt's comments).

⁷⁵ *Id.*; see also John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World Order*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 113, 116-17 (Lori F. Damrosch & David J. Scheffer eds., 1991) ("In general, conduct involving the threat or use of force by one state, in derogation of the sovereign prerogatives of another, is unlawful. Such conduct may, however, be made lawful by the consent of the latter state – provided it does not entail activities which would have been unlawful by the latter state if acting alone. (The last point has nothing peculiarly to do with forcible intervention, but follows from the fact that states, being sovereign, have the capacity to consent to restrictions on their sovereign rights if they find it useful to do so, and that moreover, they can lawfully do together what—but only what—one of them might lawfully do alone.)").

individuals in its territory.⁷⁶ The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions has expressed this view in the context of a state's ability to consent, noting:

States cannot consent to the violation of their obligations under international humanitarian law or international human rights law. A State that consents to the activities of another State on its territory remains bound by its own human rights obligations, including to ensure respect for human rights and thus to prevent violations of the right to life, to the extent that it is able to do so.⁷⁷

This positive obligation to safeguard human rights includes the responsibility to refuse permission for armed attacks by intervening states.⁷⁸

States' positive obligation to protect life is noted by international bodies. The Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights have found, respectively, that the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights include positive obligations on the part of the states to protect the right to life.⁷⁹ This entails, for example, obligations to protect citizens against terrorism and violence by non-state actors.⁸⁰

2. *The Intervening State's Independent Human Rights Obligations*

The extent to which the intervening state's human rights obligations apply to its extraterritorial use of force turns on two inquiries: the threshold question of whether human rights laws apply extraterritorially, and the subsequent question of what conditions trigger their application. Both of these assessments are highly contested by international bodies and international legal scholars.⁸¹

First, the intervening state must determine whether and which of its human rights obligations, under domestic and international law, may have legal effect outside of its territorial

⁷⁶ See ICCPR, *supra* note 34, art. 2.1; see also U.N. Human Rights Comm., General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

⁷⁷ Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, submitted in Accordance with Assembly Res. 67/108, transmitted by Note of the Secretary-General, ¶ 38, U.N. Doc. A/68/382 (Sept. 13, 2013).

⁷⁸ Louise Doswald-Beck, *Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation*, 11 SANTA CLARA J. INT'L L. 1, 11 (2012) ("[A] State has human rights obligations toward those within its jurisdiction and normally extra-judicial executions are a violation of the right to life. . . . Asking or allowing another State to attack . . . is a violation of the asking State's human rights obligations, and the attacking State is complicit in that violation.").

⁷⁹ See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, HUMAN RIGHTS, TERRORISM AND COUNTER-TERRORISM 8 nn.10-12 (2007), <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

⁸⁰ *Id.* It is worth noting that IHL also imposes some positive obligations on states to protect their own civilians. IHL, of course, would not be applicable if the host state consents to the use of force and the intervening state's clash with the non-state actor has not yet become a NIAC; nevertheless, these rules reflect a principle in international law that even in extreme contexts, certain positive obligations to protect life remain. See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT 17-18 (2011), http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf.

⁸¹ See Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L STUD. 20, 20-25 (2014).

borders. Most international bodies have stated that various human rights treaties apply extraterritorially in certain circumstances.⁸² In general, the United States has taken a more conservative view. The United States currently maintains that the International Covenant on Civil and Political Rights does not apply outside its sovereign territory,⁸³ although this position is hotly debated.⁸⁴ Until 2014, the United States rejected the extraterritorial application of the Convention Against Torture; it now acknowledges the Convention's applicability outside of U.S. borders in areas over which the United States exercises control as a government authority.⁸⁵

Second, for those laws that apply extraterritorially, the intervening state must assess whether its planned intervention will establish the kind of control that triggers the application of its human rights obligations. Different international bodies explicating different treaties have developed different tests, but, generally, they have converged around a control test. Beth Van Schaack explains, "[A] longitudinal review of the cases reveals a distinct trend toward an understanding that States' human rights obligations follow their agents and instrumentalities offshore whenever they are in a position to respect—or to violate—the rights of individuals they confront abroad."⁸⁶ This control test is grounded in the text of human rights instruments. For example, the International Covenant on Civil and Political Rights, which prohibits the arbitrary deprivation of life,⁸⁷ obligates a state to ensure human rights for all persons "within its territory and subject to its jurisdiction."⁸⁸

Whether a particular extraterritorial use of force will constitute enough control to trigger human rights obligations is context-specific and controversial. International bodies seem ambivalent on the question of extraterritorial targeting. In *Banković*, which concerned NATO airstrikes, the European Court of Human Rights explained:

[R]ecognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: [the Court] has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad . . . , exercises all or some of the public powers normally to be exercised by that Government.⁸⁹

The Inter-American Commission on Human Rights reached the opposite conclusion, however, in *Brothers to the Rescue*, which addressed the downing of a civilian aircraft in international

⁸² See *id.* at 31-33.

⁸³ See Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARV. INT'L L.J. 81, 102 (2015).

⁸⁴ See, e.g., Jordan J. Paust, *Operationalizing Use of Drones Against Non-State Terrorists Under the International Law of Self-Defense*, 8 ALB. GOV'T L. REV. 166, 190, 190 n.64 (2015); Van Schaack, *supra* note 81, at 53-65.

⁸⁵ See Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SECURITY (Nov. 14, 2014, 11:18 AM), <https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/>.

⁸⁶ Van Schaack, *supra* note 81, at 32; see also SIKANDER AHMED SHAH, INTERNATIONAL LAW AND DRONE STRIKES IN PAKISTAN: THE LEGAL AND SOCIO-POLITICAL ASPECTS 121-38 (2015) (surveying various standards for assessing the extraterritorial application of human rights laws and evidencing, in general, a common preliminary requirement that the state exercise some level of control over the territory before human rights obligations apply to its behavior).

⁸⁷ ICCPR, *supra* note 34, art. 6.

⁸⁸ *Id.* art. 2.

⁸⁹ *Banković v. Belgium*, App. No. 52207/99, ¶ 71 (Eur. Ct. H.R. Dec. 12, 2001). However, for an argument that *Banković* has been "all but limited . . . to its facts," see Van Schaack, *supra* note 81, at 44-48.

airspace by Cuban forces.⁹⁰ Legal scholars are similarly conflicted. Some argue that any use of deadly force creates control over the targeted person,⁹¹ while others argue that control does not exist until the intervening state exercises a more sustained occupation of the territory.⁹²

Without taking a position on the types of deadly force that may trigger the intervening state's human rights obligations, the remainder of this Section addresses situations in which the intervening state has concluded that its own obligations do not apply to its extraterritorial actions. Even if the intervening state's human rights laws do not apply, the *host* state's human rights obligations implicate the validity of its consent and, as a result, the ability of the intervening state to rely on such consent.

3. *Limits on the Intervening State's Ability to Rely on Consent*

Though the issue has not been squarely addressed by an authoritative international legal body, reasonable inferences from parallel international legal obligations imply that international law obligates states to refrain from relying on consent that is obviously in violation of the consenting state's human rights obligations. It is well established that states may not lawfully consent to violations of their human rights obligations; given this, consent-receiving states cannot rely on consent they know or should know to be invalid.

To see why the host state's human rights obligations place constraints on the permissible scope of consent to the use of deadly force, consider the following hypothetical: both an intervening state and a host state would like to use force against an insurgent group, but the insurgent group's activities have not yet crossed the *Tadić* intensity threshold. The host state, which owes human rights obligations to the group, cannot arbitrarily deprive non-state actors of life. The host state grants the intervening state permission to strike the group. The intervening state, having not yet entered a NIAC against the insurgent group, is not constrained by IHL. Similarly, because the intervening state does not exercise control over the territory, it concludes that it does not owe any significant human rights obligations to the non-state actors. If the host state's consent is not bounded by its human rights obligations, the intervening state would arguably be able to engage in actions that the host state could not undertake.

The law that governs this potential loophole is not settled.⁹³ While exploitation of this loophole is not clearly prohibited under international law,⁹⁴ most scholars agree that, as a

⁹⁰ Armando Alejandro, Jr. et al. v. Cuba, Case 11,589, Inter-Am. Comm'n H.R., Report No. 86/99, OAS/Ser.L/V/II.104, ¶ 25 (1999).

⁹¹ See, e.g., Jake William Rylatt, *An Evaluation of the U.S. Policy of "Targeted Killing" Under International Law: The Case of Anwar al-Aulaqi (Part II)*, 44 CAL. W. INT'L L.J. 115, 137 (2014) (surveying the academic literature and arguing that "targeting someone with the intention to take their life is the very definition of controlling an individual, body and fate, even for the split second before their life ends").

⁹² See, e.g., Van Schaack, *supra* note 81, at 35-39; see also Paust, *supra* note 84, at 190-91 ("[T]he global human right to freedom from arbitrary deprivation of life under the International Covenant will only apply to persons who are either within the territorial jurisdiction of the United States (including U.S. occupied territory) or within its actual power or effective control. It is evident, therefore, that persons being targeted by a high-flying drone in a foreign country will not be entitled to protection with respect to the human right to life that is otherwise guaranteed in the International Covenant.").

⁹³ One of the most recent discussions of the issue of consent notes that "the role of consent to the use of force in international law is ambiguous and under-theorized." Deeks, *supra* note 62, at 4; see also John C. Dehn, *Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations*, 54 HARV.

normative matter, it is undesirable for states to use consent to maneuver around human rights law.⁹⁵ Some even argue that a consent-receiving state inherits all of the human rights obligations of the consent-giving state.⁹⁶ This paper makes the more modest claim that a consent-receiving state must consider that consent circumscribed by the host state's known international law obligations.

In most situations, a state may presume that another state's consent was validly given. In the treaty context, for instance, unless the error is glaring and highly significant, a state cannot argue that an agreement is invalid either (1) because the approval process was flawed under domestic law or (2) because the substantive content of the agreement is inconsistent with domestic law.⁹⁷ Defects in consent under domestic law abrogate a treaty only if "that violation [of internal law] was manifest and concerned a rule of its internal law of fundamental importance."⁹⁸ A violation is manifest "if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."⁹⁹

INT'L L.J. ONLINE 84, 90 (2012) ("What is less clear, given the lack of attention to these matters thus far, is precisely how [a host state's internal and external human rights obligations] should influence our understanding of the law regulating targeted killing. To suggest that an attacking state must observe the full measure of human rights law when targeting a non-state actor with which it is engaged in armed conflict seems overly simplistic. To permit targeting pursuant to the permissive standards of international humanitarian law beyond active battlefields might allow too much.").

⁹⁴ See Deeks, *supra* note 62, at 26-27 ("International law today does not clearly prohibit states from using consent as a partial or complete rationale for their forcible actions in another state's territory, even where that consent purports to authorize an activity that the host state legally could not undertake. It is therefore reasonable to expect that states will continue to take advantage of the current ambiguity about consent to the use of force to evade or ignore host state domestic laws that otherwise might limit that force.").

⁹⁵ See, e.g., *id.* at 27-33; Mark Gibney et. al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 268 (1999).

⁹⁶ See, e.g., ELIAV LIEBLICH, INTERNATIONAL LAW AND CIVIL WARS 157-58 (2013) ("[A] state cannot abrogate its international obligations by inviting a third-party to act in its territory; and accordingly, . . . an external intervenor cannot conduct activities that the territorial state is prohibited from undertaking itself. According to this logic, if the territorial state is party to human rights conventions, the intervening state is bound to them automatically."); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, at 16 (Notre Dame Law School Legal Studies Research Paper No. 09-43, 2010), <https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/OConnellDrones.pdf> ("If a government seeks assistance from another state or international organization, the party providing assistance may only use that level of force that the government itself has the right to use. Those commenting on the right of the United States to use drones in Pakistan often overlook this important set of legal principles governing internal armed conflict. For much of the period that the United States has used drones on the territory of Pakistan, there has been no armed conflict. Therefore, even express consent by Pakistan would not justify their use.").

⁹⁷ Vienna Convention on the Law of Treaties arts. 27, 46, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Although not party to the Vienna Convention, the United States recognizes that most of its provisions constitute binding customary international law. See, e.g., Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 721 n.71 (2005). Additionally, insofar as the Vienna Convention describes customary international law, it applies to all "international agreements." See Eliaiv Liebllich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT'L L.J. 337, 362-63 (2011) (citing Vienna Convention, *supra*, art. 3). Thus, even if consent is not formalized in a treaty, the Vienna Convention's provisions provide useful, and potentially binding, guidance on the interpretation of the agreement.

⁹⁸ Vienna Convention, *supra* note 97, art. 46.

⁹⁹ *Id.* The "manifest and fundamentally important" language also appears in the Draft Articles on the Law of Treaties between States and International Organizations or Between International Organizations. U.N. Int'l Law

This presumption of validity extends beyond international treaties to consent more generally.¹⁰⁰ Deeks explains:

International law allows one state to take at face value the commitments made to it by another state. A state need not search behind another state's consent to unearth tensions between the international arrangement and the consenting state's domestic law. Nor may a state invoke its own domestic law as a reason to breach its international obligations.¹⁰¹

Hence, in most circumstances, a state may lawfully act on consent from another state, even if it was unlawfully given as a matter of the consenting state's domestic law.

However, this presumption of validity is inappropriate when the consented-to action clearly violates the host state's international law obligations. Although a state cannot be expected to look behind another state's consent to unearth tension with that state's domestic law, it can be expected to recognize violations of shared international human rights law obligations. Moreover, treaty and customary law indicate that reliance on consent is not justified when such reliance would clearly aid a state in violating its human rights obligations. Deeks observes:

An overriding goal in developing international human rights law over the last half-century has been to respond to perceived inadequacies in the way states protect individual rights under their own laws. As a result, it has been salutary to rely on . . . [un-interrogated] consent to allow new international legal protections to trump inconsistent domestic laws.¹⁰²

Indeed, the Draft Articles require states to be aware of, and not to assist in, violations of international law by other states.¹⁰³ Article 16 provides that a state "which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so" if it does so knowingly and if "the act would be internationally wrongful if committed by that State."¹⁰⁴ The Commentary further explains that Article 16 applies to situations in which "a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question."¹⁰⁵ Article 41 further requires that "[n]o State shall recognize as lawful a situation created by a serious breach" of a peremptory norm of

Comm'n, Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations with Commentaries art. 46, *in* Report of the Law Commission on the Work of Its Thirty-fourth Session, U.N. GAOR, 34th Sess., Supp. No. 10, U.N. Doc. A/37/10 (1982).

¹⁰⁰ See Deeks, *supra* note 62, at 7-8.

¹⁰¹ *Id.* at 3.

¹⁰² *Id.* at 11 (footnote omitted).

¹⁰³ The Draft Articles are non-binding; they purport "to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts." Draft Articles, *supra* note 63, general cmt. 1. However, the ICJ has recognized Article 16 as reflecting customary international law, see HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 3 (2011), while the status of Article 41(2) remains questionable, *id.* at 343.

¹⁰⁴ Draft Articles, *supra* note 63, art. 16.

¹⁰⁵ *Id.* art. 16 cmt. 1.

international law “nor render aid or assistance in maintaining that situation.”¹⁰⁶ Interpreting Article 41, the International Court of Justice (ICJ) has found that states are required to deny legal effect to state actions in violation of peremptory norms.¹⁰⁷ If states must treat such violations as “null and void,”¹⁰⁸ they cannot give legal weight to consent that permits a serious breach of a peremptory norm. Admittedly, the application of these articles to Scenario Two is not perfectly straightforward; if the intervening state is assisting a violation, it is by permitting the host state to consent to acts that violate the host state’s human rights obligations. Nonetheless, at a minimum, the Draft Articles indicate that international law at times requires states to refrain from actions that would facilitate the breach of another state’s international law obligations.¹⁰⁹

While states are not required to inquire into domestic law violations in the granting of consent,¹¹⁰ consent must meet a higher standard under international law. Article 16 of the Draft Articles assigns responsibility to the assisting state whenever it offers aid “with knowledge of the circumstances of the internationally wrongful act.”¹¹¹ In Scenario Two, the wrongful act would be the grant of consent itself, and the consent-receiving state would quite obviously know, as a factual matter, that consent was given. As a legal matter, the consent-receiving state is likely to have knowledge of the international law that renders such consent wrongful. The intervening state will have knowledge of the human rights that are protected by treaties to which the intervening state is party (even if, by virtue of its extraterritorial action, the intervening state does not owe direct obligations to the host state’s citizens under the treaty). Additionally, for consent that violates peremptory norms, commentary to Article 41 notes that “it is hardly conceivable that a State would not have notice of the commission of a serious breach [of a peremptory norm] by another State.”¹¹² After all, peremptory norms are, by definition, universally known.

C. Intervening States May Not Rely on Consent that They Know or Should Know is Given in Violation of Host States’ International Law Obligations

A state may use force without violating Article 2(4) of the U.N. Charter whenever it has consent, but the valid scope of that consent is not limitless. The host state cannot validly consent to an action that violates its human rights obligations, both because it does not have the legal authority to issue such consent and because consenting to the use of force would likely violate its

¹⁰⁶ *Id.* art. 41. The set of rights that count among peremptory norms is not firmly established, but it likely includes protection against the arbitrary deprivation of life. *See generally*, Parker & Neylon, *supra* note 33, at 431-32.

¹⁰⁷ Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9) (finding an obligation “not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory”); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 122 (June 21) (finding that U.N. Member States had an obligation not to enter into treaties with South Africa that recognized the country’s unlawful claim to its former territory Namibia).

¹⁰⁸ Lea Brilmayer & Isaias Yemane Tesfaldet, *Third State Obligations and the Enforcement of International Law*, 44 N.Y.U. J. INT’L L. & POL. 1, 30-34 (2011).

¹⁰⁹ Similar obligations not to assist a violation may be found in G.A. Res. 3314 (XXIX), annex, art. 3(f), Definition of Aggression (Dec. 14, 1974).

¹¹⁰ An intervening state cannot rely upon consent that obviously violates a fundamentally important domestic law in the host state; however, such a violation must be manifest and thus requires no affirmative investigation by the intervening state. *See supra* notes 97-101 and accompanying text. In other words, in most circumstances the intervening state can lawfully rely on consent that was unlawfully given in contravention of domestic law.

¹¹¹ Draft Articles, *supra* note 63, art. 16.

¹¹² *Id.* art. 41 cmt. 11.

affirmative obligations to protect the human rights of individuals within its jurisdiction. Less clear are the intervening state's independent human rights obligations; it may or may not direct obligations to the individuals in the host state. Regardless, in most circumstances the host state will be bound, as a practical matter, by the host state's human rights obligations. Despite the fact that an intervening state may usually presume the validity of the host state's consent under domestic law, this presumption of validity does not extend to consent that violates the host state's international law obligations. States cannot rely on consent when they know or should know of its invalidity under international law.

IV. SCENARIO THREE: INTERVENING STATE USE OF FORCE WITHOUT HOST STATE'S CONSENT

In Scenario Three, the intervening state seeks to engage the non-state actor without the consent of the host state. As with Scenarios One and Two, the non-state actor has not conducted violence that meets the *Tadić* intensity threshold; consequently, neither the intervening state nor the host state is in a NIAC with the non-state actor.

In the absence of the host state's consent, the lawfulness of the intervening state's actions will be evaluated under Article 2(4) of the U.N. Charter, which prohibits use of force in violation of another state's territorial integrity.¹¹³ This section first evaluates sources of authority for the intervening state's use of force under two possible exceptions to Article 2(4): authorization by the U.N. Security Council and self-defense pursuant to Article 51. This section then considers what law governs how the intervening state may engage the non-state actor once it has satisfied the *jus ad bellum* inquiry.

In most circumstances, the non-state actor's actions that justify the lawful use of self-defense pursuant to Article 51 will also satisfy the *Tadić* intensity threshold; the intervening state would then be regulated by the IHL of NIAC. In the scenario where the non-state actor is not in a NIAC with either state and an intervening state wishes to use force against the non-state actor, the intervening state's use of force will be regulated by the IHL of international armed conflicts. Under this legal regime, non-state actors are considered civilians in the conflict between the intervening state and the host state. The intervening state must be aware that the host state has the prerogative to protect its citizens under its non-derogable human rights law obligations with force and in other ways that may frustrate the intervening state's efforts.¹¹⁴

¹¹³ U.N. Charter art. 2(4).

¹¹⁴ If, however, members of the non-state actor are determined to be "directly participating" in the hostilities, the intervening state may use necessary force against those members. See NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 46 (2009) (explaining the three criteria to qualify as direct participation in hostilities: "(1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict"). See generally Forum, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 637 (2010) (presenting a number of critical analyses of the ICRC Interpretive Guidance).

A. *May the Intervening State Use Deadly Force Against the Non-State Actor?*

Absent U.N. Security Council authorization to engage the non-state actor or consent from the host state,¹¹⁵ a state may only use force in another state's territory without that host state's consent if justified by self-defense under Article 51 of the U.N. Charter. Article 51 protects "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."¹¹⁶ Article 51 "was not intended to create a new right of self-defense" as an exception to Article 2(4); rather, it simply preserved "the inherent right of self-defense" that states had previously enjoyed under customary international law.¹¹⁷

This paper assumes that armed attacks launched by unattributed non-state actors may be considered a lawful basis for self-defense pursuant to Article 51. The traditional view of self-defense pursuant to Article 51, espoused in ICJ jurisprudence, rejects its applicability in response to armed attacks launched solely by non-state actors. Instead, it requires that the armed attack be attributable to the host state.¹¹⁸ In the wake of 9/11, there has been a general shift to a more modern view that "not only can non-state actors be the perpetrators of 'armed attacks' for the purposes of triggering the right of self-defense, but that the relationship that exists between them and their host state does not have the rigid consequence for a victim state that it once did."¹¹⁹

The ICJ articulated the basic standard for violence constituting an "armed attack" in *Nicaragua*, indicating that such attacks must constitute "the most grave forms of the use of force" producing a sufficient "scale and effects" of harm.¹²⁰ Violence from non-state actors "at the least would be expected to cause casualties and significant harm."¹²¹ While some scholars propose that attacks by non-state actors should be assessed against a higher threshold than attacks from states,¹²² some states have argued that a heightened threshold for non-state actors would create an unrealistic and dangerous gap between low-level non-state actor violence and Article 51-level violence.¹²³ In addition, the "accumulation doctrine," which remains contested,

¹¹⁵ U.N. Charter arts. 39, 42.

¹¹⁶ *Id.* art. 51.

¹¹⁷ See, e.g., Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769, 771 (2012) (tracing the right of self-defense to the *Caroline* incident in 1837); Jordan J. Paust, *Self-Defense Targetings of Non-state Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 241 (2010); Raphaël van Steenberghe, *Self-Defense in Response to Attacks by Non-state Actors in the Light of Recent Practice: A Step Forward?*, 23 LEIDEN J. INT'L L. 183, 185 (2010).

¹¹⁸ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 146-47 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 129 (July 9); Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. 14, ¶ 155 (June 27).

¹¹⁹ Christian Henderson, *Non-State Actors and the Use of Force*, in NON-STATE ACTORS IN INTERNATIONAL LAW 77, 96 (Math Noortmann et al. eds., 2015); see also Raphaël van Steenberghe, *State Practice and the Evolution of the Law of Self-defence: Clarifying the Methodological Debate*, 2 J. ON USE OF FORCE & INT'L L. 81 (2015).

¹²⁰ Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 51 (Nov. 6); *Nicaragua*, 1986 I.C.J. 14, ¶¶ 191, 195; see also Henderson, *supra* note 119, at 88 (noting that the ICJ derived that language from the 1974 Definition of Aggression, ¶ 3(g) to extrapolate that "the actions of the non-state actors should be 'of such gravity as to amount' to an act of armed force by traditional forces of a state").

¹²¹ NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 81 (2010).

¹²² *Id.*

¹²³ See, e.g., Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L. Q. 963, 966 (2006) ("An armed attack means any use of armed force, and does not need to cross some threshold of intensity.").

might permit a state's use of force in response to a series of relatively small attacks conducted over time (the kinds of events likely to be carried out by non-state actors) by aggregating the violence from the separate incidents to meet the gravity threshold.¹²⁴ While this analysis does not determine the temporal boundaries of "imminence" for anticipatory self-defense,¹²⁵ the gravity accorded to "pin-prick" events under the accumulation doctrine will affect when an intervening state can lawfully use force in self-defense.¹²⁶

Last, even if a state has a right to self-defense against a non-state actor, it must only act if the host state is "unwilling or unable" to address the non-state actor's violence.¹²⁷ This analysis assumes that the host state is not harboring the NSA by sending it "by, or on behalf of," the host state¹²⁸; the host state must therefore be "unwilling or unable" to respond to the NSA.¹²⁹ Although the factors for determining unwillingness or inability are not clearly defined, "the fact that states currently are acclimated to using the 'unwilling or unable' test suggests that any other test would have to overcome a high bar to become the preferred test."¹³⁰ Examples of state invocation of the "unwilling or unable" standard, such as during the 2002 Russian incursion into Georgia and the 2008 Turkish incursion into Iraq, provide the best guidance.¹³¹

¹²⁴ See Claus Kress, *Extraterritorial Targeted Killings of Non-State Actors by States in Response to Transnational non-State Violence*, in TARGETED KILLING, UNMANNED AERIAL VEHICLES AND EU POLICY 3, 4 (European Univ. Inst., Robert Schuman Ctr. for Advanced Studies ed., 2013) ("Under the *lex lata*, there is room to argue the intensity threshold [for an armed attack] may be reached through an accumulation of lower scale acts of force."); Steve Ratner, *Self-Defense Against Terrorists*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER 334 (Larissa van den Herik & Nico Schrijver eds., 2013); Christian Tams, *The Use of Force Against Terrorists*, 20 EUR. J. OF INT'L L. 359, 388 (2009) (interpreting state reaction to Israel and Turkey's invocation of the doctrine to suggest that states accept it, "at least in situation involving constant terrorist attacks which are part of a deliberate policy of violence"). But see STEVEN J. BARELA, LEGITIMACY AND DRONES: INVESTIGATING THE LEGALITY, MORALITY AND EFFICACY OF UCAVs 41 (2015) ("[T]he trend toward recognition of the accumulation doctrine is far from consolidated – in fact there is little express mention of it in official documents."); LUBELL, *supra* note 122, at 51-54 (maintaining that "the 'accumulation of events' approach itself constitutes a problematic basis for claiming a right to self-defence, unless involving a current ongoing armed attack or imminent threat of one").

¹²⁵ See, e.g., James A. Green, *The Ratione Temporis Elements of Self-defense*, 2 J. ON USE OF FORCE & INT'L L. 97 (2015); Alan L. Schuller, *Inimical Inceptions of Imminence*, 18 UCLA J. INT'L L. & FOR. AFF. 161 (2014); see also DINSTEIN, *supra* note 61, at 274-77; LUBELL, *supra* note 122, at 81-82; GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR, 162-64 (2010). But see Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12*, 107 AM. J. INT'L L. 570, 574-75 (2013) (arguing that the U.S. operations in Afghanistan were targeted at both the Taliban government and Al-Qaeda, and therefore that the U.N. Security Council resolutions in the immediate wake of 9/11 condoned the U.S. activity as in part directed towards a state).

¹²⁶ See, e.g., Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 245, 251-52 (2011) (arguing that states are increasingly held accountable for activities that they simply lack the capacity to prevent, which bolsters the accumulation doctrine and undermines traditional imminence).

¹²⁷ See Ashley Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483, 506 (2012); see also Brian Finucane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30 BERKELEY J. INT'L L. 35 (2012) (discussing the concept of "unwilling and unable" in relation to the host state's control over the non-state actor).

¹²⁸ Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. 14, ¶ 195 (June 27).

¹²⁹ *Id.* at 18.

¹³⁰ See Deeks, *supra* note 127, at 489.

¹³¹ See *id.* app. 1 (providing a chart of instances where states have invoked the "unwilling and unable" test); see also Louise Arimatsu & Michael N. Schmitt, *Attacking "Islamic State" and the Khorasan Group: Surveying the*

B. What Law Governs?

If a state concludes that it may engage the non-state actor on another state's territory on the basis of self-defense pursuant to Article 51 without the host state's consent or a U.N. Security Council resolution,¹³² it must separately assess what type of force it may use against the non-state actor when there is no NIAC.¹³³ As a practical matter, non-state actor violence that produces the requisite "scale and effects" to be an "armed attack" for Article 51 purposes will almost always satisfy the separate *Tadić* intensity threshold for NIAC classification, so the intervening state will often be bound by IHL for NIACs. However, on rare occasions, the intervening state may theoretically have recourse to anticipatory self-defense under Article 51 even though the non-state actor's violence does not yet meet the *Tadić* intensity threshold (or, alternatively, it might decide to act in contravention of Article 2(4)).

Even if there is no direct conflict between the intervening state and the host state's armed forces, the very fact of intervention in a state without that state's consent arguably constitutes an international armed conflict. Common Article 2 of the Geneva Conventions recognizes an international armed conflict between two states "even if the state of war is not recognized by one of them," or in the event that "both the Parties to an armed conflict were to deny the existence of a state of war."¹³⁴ The intervening state's subjective belief that it is not in an armed conflict with the host state does not obviate the fact that it is using force in the host state's territory without permission.¹³⁵

International Law Landscape, 53 COLUM. J. TRANSNAT'L L. BULLETIN 1 (2014) (elaborating the "unwilling and unable" test in the context of operations against terrorist groups).

¹³² Even under the Article 51 self-defense exception, the legality of an intervening state's use of force further depends on the necessity and proportionality of its actions. *See, e.g.*, David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum*, 24 EUR. J. INT'L L. 235, 239 (2013).

¹³³ Scholars emphasize the importance of distinguishing between legitimate use of force under *jus ad bellum* and the applicable regime of *jus in bello*. *Jus ad bellum* determines under what circumstances a state may use force in self-defense, whereas *jus in bello* governs the type of force to be used. *See, e.g.*, Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT'L REV. RED CROSS 963, 968 (2008) ("Simultaneous application of *jus ad bellum* and *jus in bello* should not imply that the two concepts are linked or interdependent. . . . an attack that is inconsistent with *jus in bello* does not necessarily affect the legality of the use of force."). In particular, justification under Article 51 self-defense and compliance with Article 51 necessity and proportionality requirements do not automatically validate certain actions under *jus in bello*, which may require consideration of appropriate targets and acceptable levels of collateral damage.

¹³⁴ COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean Pictet ed., 1958) [hereinafter COMMENTARY TO GENEVA CONVENTION IV] ("The occurrence of de facto hostilities is sufficient A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self defense."); *see also Framework of the Law of Armed Conflict*, in U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF ARMED CONFLICT DESKBOOK 19, 24 (5th ed. 2015); THE WAR REPORT: ARMED CONFLICT IN 2013 13 (Stuart Casey-Maslen ed., 2013) ("[A]n [international armed conflict] also exists whenever one state uses armed force against the territorial integrity of another state, irrespective of whether the latter state fights back."); International Law Association, Final Report on the Meaning of Armed Conflict in International Law, The Hague Conference: Use of Force, at 4 (2010) ("[W]hether or not armed conflict exists depends on the satisfaction of objective criteria."); Jann K. Kleffner, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 44, 45 (Dieter Fleck ed., 2013) ("The existence of an international armed conflict is a question of fact.").

¹³⁵ *See, e.g.*, Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 75 (Elizabeth Wilmshurst ed., 2012) ("International armed conflicts are

The existence of an international armed conflict in such circumstances is contested. Some argue that the intervening state does not need the host state's consent to engage in self-defense pursuant to Article 51,¹³⁶ and others contend that the host state's territorial integrity is not entitled to absolute deference as a barrier to the intervening state's use of force.¹³⁷ Both grounds, however, appear to conflate *jus ad bellum* and *jus in bello*. This is because self-defense pursuant to Article 51 only authorizes an intervening state to use force, subject to the requirements of proportionality and necessity. A separate *jus in bello* regime further regulates the nature of the intervening state's use of force.

If the use of force in a state without that state's consent constitutes an international armed conflict, then the applicable law is the law of international armed conflict.¹³⁸ The IHL of NIAC is inapplicable if the non-state actor's violence has not met the *Tadić* intensity threshold. Non-state actors, moreover, may not be party to an international armed conflict. As a consequence, before the *Tadić* threshold is met, non-state actors must be treated as civilians in an international armed conflict. The intervening state may therefore not use force against non-state actor members unless they are direct participants in the hostilities between the intervening state and the host state;¹³⁹ even then, the intervening state must also observe the requirements and restrictions on detention under IHL.¹⁴⁰

Finally, as Scenario One established, the host state must operate in accordance with its human rights obligations and its domestic law in relation to the non-state actor when the two are not in a NIAC. The host state has human rights obligations to protect its civilians, a category that includes non-state actors when the two entities are not engaged in a NIAC. Those requirements continue when another state uses force against its citizens within its territory. Thus, while the intervening state may have justification pursuant to Article 51 to engage the non-state actor, the

conflicts between States. A government is but one part of a State. A State is also made of people and territory in addition to a government in control of the territory.”).

¹³⁶ See, e.g., Paust, *supra* note 117, at 256-57.

¹³⁷ See, e.g., Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and National Defense*, 126 MIL. L. REV. 89, 106 (1989).

¹³⁸ Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 1, 33 (2009) (“[T]he legal fiction that the use of military combat power to respond to [terrorist] threats is in reality just extraterritorial law enforcement . . . fails to acknowledge the essential nature of such operations. Because these operations involve the inherent invocation of the authority of the [law of armed conflict], they should and must be treated as armed conflicts.”).

¹³⁹ See *supra* note 114.

¹⁴⁰ See generally Geneva Convention III, *supra* note 15; Geneva Convention IV, *supra* note 15; COMMENTARY TO GENEVA CONVENTION IV, *supra* note 134, at 258; International Committee of the Red Cross, *Customary IHL* r. 106-08, 118-28, <https://www.icrc.org/customary-ihl/eng/docs/v1>. This paper does not address whether IHL requires the intervening state to capture, instead of kill, when possible; however, it should be noted that the preferred policy articulated by the current administration is to capture when feasible. See, e.g., Jeffrey Bovarnick & Jack Vrett, *Detention Operations at the Tactical and Operational Levels: A Procedural Approach*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 307, 314-15 (Geoffrey S. Corn et al. eds., 2015) (providing a brief overview of the debate); President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (“America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute.”).

host state is not only permitted, but perhaps even required, to defend against the intervention in order to satisfy its human rights obligations to protect its civilians.¹⁴¹

C. Intervening States May Use Force in Self-Defense Pursuant to Article 51 According to International Humanitarian Law Rules for International Armed Conflicts

Absent consent, an intervening state may only use force against a non-state actor in another state's territory if authorized by a U.N. Security Council resolution or pursuant to Article 51. Such action will likely trigger an international armed conflict, and IHL requires the intervening state to treat the non-state actors as civilians. As a practical matter, this means that an intervening state likely may not target members of a non-state actor on the territory of another state unless the non-state actor has first satisfied the *Tadić* intensity threshold (which, again, will nearly always be the case in any circumstance that meets the "armed attack" standard).

CONCLUSION

Determining which legal regime governs a state's use of force against a non-state actor is a fact-specific inquiry. In practice, two questions must be answered when deciding if and how force may be used:

1. Is the state engaged in a NIAC with the non-state actor?
2. Does the state have authority to use force within the sovereign territory containing the non-state actor?

First, the intervening state must assess whether a NIAC exists between the state and an organized non-state actor. The *Tadić* test is the well-established standard: a NIAC does not exist until its intensity threshold has been crossed. A state's exercise of lawful force before a NIAC exists may cause the non-state actor to escalate violence into a conflict constituting a NIAC. However, until the *Tadić* threshold is crossed, the state must operate in accordance with its domestic law and international human rights law.

Second, the intervening state must identify the source of authority that allows it to use force in the territory. If the intervening state is the territorial state, then its authority derives from its sovereignty over the territory. If the intervening state is an extraterritorial state, then it must obtain the consent of the host state, procure a Security Council resolution authorizing the use of force, or provide a lawful self-defense justification under Article 51. Assuming that a NIAC does not yet exist, three potential scenarios emerge.

In Scenario One, the state using force is the territorial state. Its source of authority to deploy deadly force derives from its sovereignty, and its use of force is constrained by domestic law and international human rights obligations.

¹⁴¹ But see Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 157, 184 (Michael N. Schmitt & Jelena Pejic eds., 2007) (arguing that if the host state interferes with the intervening state's use of force within the limitations of self-defense, the host state "commits an armed attack, thereby permitting the counterterrorist operation to expand . . . since an international armed conflict now exists in light of the interstate hostility[s]").

In Scenario Two, the state using force is an extraterritorial state acting with the consent of the host state. The intervening state relies on consent as its source of authority to use force. Its actions are limited by: its own human rights obligations, to the extent that they apply extraterritorially; the host state's actual consent, to the extent it contains any conditions or limitations; and the lawful limits on the validity of the host state's consent, i.e., the host state's human rights obligations.

In Scenario Three, the state using force is again an extraterritorial state, but it does not act with the consent of the host state. In this scenario, the intervening state must derive authority to use force from the lawful exceptions to Article 2(4). Its use of force must conform to IHL principles for international armed conflicts, including the obligation to treat non-state actors as civilians (unless they are directly participating in hostilities).¹⁴²

Figure 1. Applicable Law in Each Scenario Below the NIAC Threshold

	State Using Force	Source of Authority to Use Force	Legal Regime Governing the Use of Force
Scenario One	Territorial State	Sovereignty	International Human Rights Obligations and Domestic Law
Scenario Two	Extraterritorial State, with Consent	Consent	Host State's Known Human Rights Obligations and Intervening State's Human Rights Obligations, to the Extent They Apply Extraterritorially
Scenario Three	Extraterritorial State, without Consent	U.N. Security Council Resolution or Self-Defense Pursuant to Article 51	International Humanitarian Law for International Armed Conflicts

Scenarios Two and Three may blur together when the intervening state both has consent to use force and also can offer a self-defense justification for doing so. In such a situation, the intervening state must determine whether an operation is justified by consent (the state does not have a self-defense justification for the strike), by self-defense (the state does not have consent for the strike),¹⁴³ or by both (the state has both a self-defense justification and consent for the strike). Where consent and self-defense authorities overlap, the existence of consent means that the intervening state's use of force will not begin an international armed conflict. The only operative legal framework will be human rights law, as in Scenario Two.

¹⁴² For elaboration on the criteria for direct participation in hostilities, see *supra* note 114.

¹⁴³ Although a lawful self-defense justification obviates the need for consent under international law, there may be strong diplomatic reasons to secure permission even when consent is not a legal prerequisite to the use of force.

Despite their different legal paths, all three scenarios reach in a similar conclusion: before a NIAC exists, non-state actors cannot be targeted as combatants. The human rights law applicable in Scenarios One and Two and the IHL applicable in Scenario Three all prohibit targeting civilian non-state actors with deadly force. Thus, the requirement of *Tadić* intensity for NIAC classification raises the stakes for a state seeking the broadest set of options for responding to a non-state actor. Before the *Tadić* threshold is crossed, the state's options are limited.

Across all three scenarios, the *Tadić* threshold reinforces two basic principles in international law. First, the use of force is a last resort. Second, states' asymmetric relationship with non-state actors may produce asymmetric obligations. The intensity requirement functions as a temporal constraint on preventive use of force, tethering states to a sufficiently imminent threat or grave harm suffered. It further affirms that states may not use force against presumptively weaker parties, such as individuals and organized non-state actors, without those parties demonstrating the ability to use adequate force. The *Tadić* threshold thereby ensures that a state cannot respond to an insurgent non-state actor with war-like force unless justified by the non-state actor's own violence per established principles of international law.