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**(Pages 21-22)**

**Extraterritorial Targeting of Persons**

The extraterritorial targeting of persons has become a prominent legal and policy issue over the past several years due, *inter alia*, to questions that have been raised about the lawfulness of this practice. For the purposes of this report, extraterritorial targeting is understood as the use of lethal force against a specific person - or persons - by agents of one state in the territory of another (the "territorial" or "host" state). It cannot be emphasized enough that a large part of the difficulty in coming to appropriate legal and policy conclusions in most actual cases lies in the insufficiently known factual circumstances surrounding them and in the fact that states rarely, if ever, justify their extraterritorial actions in advance or provide accounts of operations after the fact.

From a legal point of view, the extraterritorial targeting of a person requires an analysis of the lawfulness of the resort to force by one state in the territory of another (under the *ius ad bellum*) and an analysis of the international legal framework governing the way in which force is used (under the *ius in bello* i.e. IHL, or under human rights law, as the case may be). The latter determination will depend on whether the activities of the individual at issue i) take place within an ongoing armed conflict or ii) have no link to an armed conflict.

i) In a situation of armed conflict, IHL rules on the conduct of hostilities mentioned above apply. This means that lethal force may be used against combatants, that is persons who have the right to take a direct part in hostilities (a legal status inherent only to IAC), as well as against other persons taking a direct part in hostilities, including civilians when they do so.

Who is deemed to be a civilian taking a direct part in hostilities and is therefore not protected from direct attack during such time as he or she takes a direct part in hostilities was elaborated in the ICRC's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* (see further below). Pursuant to the Guidance:

- members of armed forces,<sup>15</sup> or of organized armed groups of a party to the conflict who perform a continuous combat function are not considered civilians for the purpose of the conduct of hostilities and are thus not protected against direct attack for the duration of their performance of such a function.

- civilians are persons who take a direct part in hostilities on a merely spontaneous, sporadic or unorganized basis, and are subject to targeting only for the duration of each specific act of direct participation.

It should be noted that the Interpretive Guidance provides the ICRC's view on the restraints applicable to the use of force in direct attack. Pursuant to Recommendation IX, "[T]he kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances". This does not imply a "capture rather than kill" obligation in armed conflict, which is a law enforcement standard, but is aimed at providing guiding principles for the choice of means and methods of warfare based on a commander's assessment of a particular situation. By way of reminder, the targeting of persons under IHL is subject to further important rules, that of the prohibition of indiscriminate and disproportionate attacks and of the obligation to take feasible precautions in attack.

In practice most questions have been raised about the lawfulness of the use of lethal force against persons whose activity is linked to an ongoing armed conflict, more specifically of individuals who are directly participating in an ongoing NIAC from the territory of a non-belligerent state. A non-belligerent state is one that is not involved in an ongoing armed conflict itself against a non-state armed group in its territory and/or is not involved in a NIAC with such a group that has spilled over from the territory of an adjacent state.

Different legal opinions on the lawfulness of the targeting of a person directly participating in hostilities from the territory of a non-belligerent state may be advanced. Under one school of thought, a person directly participating in hostilities in relation to a specific ongoing NIAC "carries" that armed conflict with him to a non-belligerent state by virtue of continued direct participation (the nexus requirement) and remains targetable under IHL. In other words, provided the requisite *ius ad bellum* test has been satisfied, he or she can be targeted under IHL rules on the conduct of hostilities. These include the principle of proportionality, under which harm to civilians and damage to civilian objects, or a combination hereof, is not deemed unlawful if it is not excessive in relation to the direct and concrete military advantage anticipated from the attack.

Pursuant to other views, which the ICRC shares, the notion that a person "carries" a NIAC with him to the territory of a non-belligerent state should not be accepted. It would have the effect of potentially expanding the application of rules on the conduct of hostilities to multiple states according to a person's movements around the world as long as he is directly participating in hostilities in relation to a specific NIAC. In addition to possible *ius ad bellum* issues that this scenario would raise there are others, such as the consequences that would be borne by civilians or civilian objects in the non-belligerent state(s). The proposition that harm or damage could lawfully be inflicted on them in operation of the IHL principle of proportionality because an individual sought by another state is in their midst (the result of a "nexus" approach), would in effect mean recognition of the concept of a "global battlefield". It is thus believed that if and when the requisite *ius ad bellum* test is satisfied, the lawfulness of the use of force against a particular individual in the territory of a non-belligerent state would be subject to assessment pursuant to the rules on law enforcement (see also below).

ii) There have been cases in which states have extraterritorially targeted individuals whose activity, based on publicly available facts, was outside any armed conflict, whether international or non-international. Leaving aside *ius ad bellum* issues, it is clear that the lawfulness of such a use of force cannot be examined under an IHL conduct of hostilities paradigm, but under human rights law standards on law enforcement. As outlined above, the application of a law enforcement framework means *inter alia* that lethal force may be used only if other means are "ineffective or without promise of achieving the intended result" and that the planning and execution of any action has to be carried out pursuant to the human rights law principles of necessity and proportionality.

A legal issue that could be posed in this scenario is the extraterritorial applicability of human rights law based on the fact that the state using force abroad lacks effective control over the person (or territory) for the purposes of establishing jurisdiction under the relevant human rights treaty. It is submitted that customary human rights law prohibits the arbitrary deprivation of life and that law enforcement standards likewise belong to the corpus of customary human rights law.

It is important to underline that the application of law enforcement rules does not turn on the type of forces or equipment used in a given operation (police or military), but on the fact that human rights law is the governing legal regime, given the absence of armed conflict. The Basic Principles on the Use of Force and Firearms reflect that approach: "The term 'law enforcement officials' includes all officers of the law, whether appointed or elected, who

exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the definition of law enforcement officials shall be regarded as including officers of such services".