

## **Effect of Geography to Counterterrorism Operations Unrelated to an Ongoing Armed Conflict**

In a series of speeches over the past two years, U.S. administration officials have justified targeted killing operations under both an armed conflict and self-defense rationale. A recent speech by CIA General Counsel Stephen Preston suggested that self-defense is the primary basis justifying the agency's use of lethal force, with a law of war authorities providing back-up support. As he put it: "Where, for example, the United States has already been attacked, and its adversary has repeatedly sought to attack since then and is actively plotting to attack again, then the United States is entitled as a matter of national self-defense to use force to disrupt and prevent future attacks." Others have suggested that the right to self-defense would extend even to situations where the non-state actor has not yet attacked, but the acting state believes it has the will and means to do so.

This is an undeveloped and highly contested area of law that raises numerous unresolved questions, both about the scope of permissible self-defense actions and about geographic limits to such actions. As an initial matter, some continue to object to the notion that non-state actors can engage in the type of "armed attack" that triggers the right to self-defense. But even if agreement is reached on that foundational question, additional questions abound. In what circumstances, if ever, is preemptive self-defense justified? After the Caroline incident of 1837, then-Secretary of State Daniel Webster argued that preemptive self-defense is limited to situations in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." The U.S. government has since argued for a "flexible" definition of imminence, without any clear definition of the definition's outer bounds. Unresolved questions include the level of certainty required in identifying a threat; the degree to which states must pursue alternative means of addressing the threat; and the legal standards that apply to the conduct of any such operation.

Of central relevance to this workshop, the circumstances in which a state violate the territorial integrity of another (the host state) to engage in self-defensive uses of force a non-state actor found there remains highly contested. Some argue that international law requires either consent from or attribution to the host state in order to act against a non-state actor found there. In the case of attribution, the self-defensive action is taken not just against the non-state actor but the host state, thereby potentially initiating a state-to-state or international armed conflict. Others persuasively assert that a non-state actor should not be given a free pass simply because the state is unable or unwilling to take action against the terrorist in its midst, even if its unwillingness does not rise to the level of complicity that would justify attribution. This then triggers the same set of questions that apply to the crossing of a border during a NIAC: Must the host state be warned and given an opportunity to address the threat? What if a warning and opportunity to respond will jeopardize the operation, either because of the time it would take to provide fair warning or because of a concern about the state tipping off the terrorist? Does the

acting state's use of force in the host state constitute an act of aggression against the host state?

The goal of this session is to explore these highly contested, important, and timely issues.

### Key Questions

- (1) If acting outside an armed conflict, what law governs, both as to the initial decision to act in self-defense and as to the conduct of operations?
- (2) When, if ever, is anticipatory or preemptive self-defense permitted? What is the line between preventive and preemptive?
- (3) Assuming preemptive self-defense is permitted, what evidentiary standards apply?
  - How sure does the state need to be of a pending attack?
  - How sure does the state need to be that alternative means of addressing the attack will be ineffective?
- (4) What, if any, are the geographic limitations on self-defense actions?
  - Is consent of the state required?
  - Is attribution to the state required? If so, what standards apply? Effective control (*e.g.*, the ICJ opinion in the *Nicaragua* case)? Knowingly harboring the non-state actor (*e.g.*, the Taliban in Afghanistan)?
  - What if the state is unable or unwilling to respond but unwillingness falls short of complicity justifying attribution? If so, is there a requirement to notify the state? What if notification will lead the host state to tip off the enemy or result in costly delay?