

**UNGOVERNED SPACES, TRANSNATIONAL CRIME, AND THE PROHIBITION ON  
EXTRATERRITORIAL ENFORCEMENT JURISDICTION IN INTERNATIONAL LAW**

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**TABLE OF CONTENTS**

<b>I.</b>	<b>TRANSNATIONAL CRIME AND UNGOVERNED SPACES .....</b>	<b>6</b>
<b>II.</b>	<b>THE LEGAL ARCHITECTURE OF SOVEREIGNTY, THE PRINCIPLE OF NONINTERVENTION, AND THE EXERCISE OF EXTRATERRITORIAL JURISDICTION .....</b>	<b>8</b>
A.	<i>The Legal Construct of Sovereignty.....</i>	8
B.	<i>Nonintervention .....</i>	9
C.	<i>The International Law of Jurisdiction and Its Development .....</i>	10
D.	<i>Capitulations and the Old System of Extraterritoriality .....</i>	11
E.	<i>The Modern Idea of Enforcement Jurisdiction .....</i>	16
F.	<i>Extradition, Lawful Removal, and Mutual Legal Assistance .....</i>	19
<b>III.</b>	<b>THE U.S. MILITARY AND THE LAW OF ARMED CONFLICT .....</b>	<b>23</b>
A.	<i>The Law of Armed Conflict .....</i>	24
B.	<i>International Human Rights Law and Domestic Constraints .....</i>	26
C.	<i>Triggering the Law of Armed Conflict.....</i>	29
D.	<i>The Geographic Expanse of the Law of International Armed Conflict.....</i>	31
E.	<i>Civilians and the Law of International Armed Conflict.....</i>	32
F.	<i>What Civilians May Not Do—and What Combatants May Not Do to Them .....</i>	33
<b>IV.</b>	<b>THE EDGE OF THE LOAC-LAW ENFORCEMENT PRECIPICE .....</b>	<b>35</b>
A.	<i>Military Law Enforcement in Non-combat Contexts .....</i>	35
B.	<i>“Conviction-Focused Targeting” and Law Enforcement During Combat and Stability Operations .....</i>	39
<b>V.</b>	<b>THE DISPARITY IN INTERNATIONAL LAW AND THE PROBLEM OF UNGOVERNED SPACES .....</b>	<b>42</b>
A.	<i>An Exception to Remedy the Incongruity in International Law .....</i>	42
<b>VI.</b>	<b>CONCLUSION .....</b>	<b>49</b>

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This Article is dedicated to the memory of M.B. Stigall (1919–2008) who, as a Master Sergeant in the U.S. Army, pursued war criminals across Europe in the aftermath of World War II and, in sharing his memories of that historic period, imparted to his grandson an abiding interest in criminal law and international affairs. The author wishes to express his thanks to Professor Christopher L. Blakesley and Major Todd L. Lindquist for taking the time to read earlier drafts of this article and offering their insight.

## INTRODUCTION

Driven by internationalization efforts such as those that accompanied the global efforts to combat the illicit drug trade, international law enforcement efforts by the United States have developed markedly over the past few decades.<sup>1</sup> Scholars note that “[p]olicing transnational crime has evolved from a limited and ad hoc assortment of police actions and extradition agreements to a highly intensive and regularized collection of law enforcement mechanisms and institutions.”<sup>2</sup> A notable element of this phenomenon has been the increased need by domestic law enforcement agencies to conduct extraterritorial law enforcement operations.<sup>3</sup> This is especially so in areas of the world where there is no governmental counterpart willing or able to take action.<sup>4</sup>

The U.S. response to transnational crime has, however, frequently taken on the characteristics of military action—a trend that has worried policy makers and senior military officials.<sup>5</sup> For instance, in October 2011, the Department of Defense General Counsel, the Honorable Jeh Johnson, in public remarks, warned against the “over-militarization” of the country’s approach to counterterrorism.<sup>6</sup> Mr. Johnson stated that “[t]here is risk in permitting and expecting the U.S. military to extend its powerful reach into areas traditionally reserved for civilian law enforcement in this country.”<sup>7</sup> Regarding areas traditionally reserved for civilian law enforcement, the principal legal advisor in the U.S. Department of Defense further opined that “[t]he military should not and cannot be the only answer.”<sup>8</sup>

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<sup>1</sup> PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 154–55 (2006).

<sup>2</sup> *Id.* at 3 (footnote omitted).

<sup>3</sup> *Id.* at 169 (“The global reach of U.S. law enforcement also substantially expanded in the 1990s with the fall of the Iron Curtain and the end of the cold war.”). *See also, generally*, ETHAN A. NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* (1993) (analyzing the relationship between U.S. foreign policy and U.S. law enforcement).

<sup>4</sup> JEREMY HAKEN, *GLOBAL FINANCIAL INTEGRITY, TRANSNATIONAL CRIME IN THE DEVELOPING WORLD*, at v (2011) (analyzing twelve different types of illicit trade—drugs, humans, wildlife, counterfeit goods and currency, human organs, small arms, diamonds and colored gemstones, oil, timber, fish, art and cultural property, and gold—and finding that “it can be said that these profitable and complex criminal operations originate primarily in developing countries, thrive in the space created by poverty, inequality, and state weakness, and contribute to forestalling economic prosperity for billions of people in countries across the world”).

<sup>5</sup> *See infra* Part IV (analyzing U.S. military activity and the law of armed conflict (LOAC)).

<sup>6</sup> *See* Peter Finn, *Pentagon Lawyer Warns of Militarized Approach to Counterterrorism*, WASH. POST (Oct. 18, 2011), [http://www.washingtonpost.com/world/national-security/pentagon-lawyer-warns-of-militarized-approach-to-counterterrorism/2011/10/18/gIQAfbnjvL\\_story.html](http://www.washingtonpost.com/world/national-security/pentagon-lawyer-warns-of-militarized-approach-to-counterterrorism/2011/10/18/gIQAfbnjvL_story.html).

<sup>7</sup> *Id.* (internal quotation marks omitted).

<sup>8</sup> *Id.* (internal quotation marks omitted). *See also* Micah Zenko & Michael A. Cohen, *Clear and Present Safety: The United States Is More Secure than Washington Thinks*, 91

This trend of militarization in the approach to combatting transnational crime is not a new one, nor are the admonitory pronouncements of senior officials seeking to constrain it. Much of the resistance to this trend is rooted in practical considerations, such as those of various military officers who have observed a negative effect “on the military’s readiness and war-fighting capabilities from engaging in direct or indirect law enforcement missions . . . .”<sup>9</sup> The U.S. General Accounting Office (GAO) has noted that “[t]he extent of degradation depends on a number of factors . . . . [but that] [i]t can take up to 6 months for a ground combat unit to recover from a peace operation and become combat ready.”<sup>10</sup> With such missions expanding in frequency, the result is that, “the United States military may not be immediately or fully available for major theater warfare.”<sup>11</sup> The deleterious nature of this trend was underscored in 1985 by Secretary of Defense Caspar Weinberger when he warned that “[r]eliance on military forces to accomplish civilian tasks is detrimental to both military readiness and the democratic process.”<sup>12</sup> Other commentators have likewise noted that militarized responses to transnational crime can also have noxious effects that are ultimately counterproductive.<sup>13</sup> In the words of E.M. Forster: “[S]oldiers put one thing straight, but leave a dozen others crooked . . . .”<sup>14</sup>

In addition to those important policy considerations are numerous complex legal considerations relating to the appropriateness of military force and the capabilities or limitations of civilian agencies. The interplay of national security with transnational crime only deepens the profound legal dilemma that policymakers and international actors must confront.<sup>15</sup>

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FOREIGN AFF. 79, 81 (2012) (“Because of the chronic exaggeration of the threats facing the United States, Washington overemphasizes military approaches to problems (including many that could best be solved by nonmilitary means).”).

<sup>9</sup> Michael T. Cunningham, *The Military’s Involvement in Law Enforcement: The Threat Is Not What You Think*, 26 SEATTLE U. L. REV. 699, 711 (2003).

<sup>10</sup> *Id.* (quoting NAT’L SEC. & INT’L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-96-14, PEACE OPERATIONS: EFFECT OF TRAINING, EQUIPMENT, AND OTHER FACTORS ON UNIT CAPABILITY, 2-3 (1995)).

<sup>11</sup> *Id.* (footnote omitted).

<sup>12</sup> STEPHEN P. HOWARD, THE MILITARY WAR ON DRUGS: TOO MANY ASSETS, TOO FEW RESULTS 21 (2001), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA407744> (quoting CTR. FOR DEF. INFO., THE PENTAGON’S WAR ON DRUGS: THE ULTIMATE BAD TRIP 1 (1992)) (internal quotation marks omitted).

<sup>13</sup> See ROBERT MANDEL, DARK LOGIC: TRANSNATIONAL CRIMINAL TACTICS AND GLOBAL SECURITY 168 (2011) (“The militarization of anticrime initiatives can alienate citizens against their government, reduce support for anticrime and law-and-order initiatives, and ultimately increase political and social turmoil.”).

<sup>14</sup> E.M. FORSTER, A PASSAGE TO INDIA 172 (Oliver Stallybrass ed., Penguin Books 2005) (1924).

<sup>15</sup> MANDEL, *supra* note 13, at 19 (“Indeed, the nature of transnational criminal activity makes the bureaucratic dividing line between narrow law-and-order issues and broader national defense concerns increasingly artificial and difficult to delineate, causing, in turn, vital security threats to fall between the bureaucratic cracks . . . .”). See also Cunningham, *supra* note 9, at 701 (noting that as the problems faced by the country grew more complex and dangerous, “[c]ivilian law enforcement agencies were perceived to be unable to handle the

Nonetheless, the perceived success of many military operations and the skill with which military operations can be carried out demonstrates why policymakers and political leaders in the United States frequently turn to the military in difficult situations.<sup>16</sup> It is undeniable that the U.S. Armed Forces are uniquely capable and well-resourced organizations able to perform a wide range of complex missions in non-permissive environments. Accordingly, military assets have been called upon to address an ever-increasing number of challenges that would normally be addressed by civilian agencies.<sup>17</sup> In recent years, the U.S. military has played a prominent role in domestic disaster relief, international development, and—importantly for the purposes of this Article—the U.S. response to transnational crime.

A resort to military assets can be practical on multiple levels. But aside from the myriad practicalities which ordinarily compel national leaders to resort to the most capable organ of state power when difficult situations arise, there are also compelling international legal considerations that make the use of military force an even more tempting option when dealing with the unique challenges posed by transnational criminals operating outside the United States. In fact, as this Article demonstrates, the use of military force may frequently be the only option legally permissible under the current state of

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increasing threat from narcotics smuggling, illegal immigration, and terrorism”); Christopher A. Donesa, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 DUKE L.J. 867, 868 (1992) (footnotes omitted):

The emerging claim of a “new world order” thus rests on two pillars: newfound respect for sweeping principles of international law in relations between nations; and increasing willingness to act abroad against individuals or private groups to enforce narrower classes of domestic laws that impact American interests on a global scale. The latter category, in effect, transforms some categories of law enforcement into national security issues, most notably issues such as terrorism and narcotics trafficking. As national security becomes defined as much by law as politics, the military will assume an increasing role in law enforcement, particularly overseas. In turn, policymakers must take increasing care to ensure that enforcement actions themselves are in compliance with legal norms.

<sup>16</sup> See Jeffrey Gettleman, Eric Schmitt & Thom Shanker, *U.S. Swoops in to Free 2 from Pirates in Somali Raid*, N.Y. TIMES (Jan. 25, 2012), [http://www.nytimes.com/2012/01/26/world/africa/us-raid-frees-2-hostages-from-somali-pirates.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/26/world/africa/us-raid-frees-2-hostages-from-somali-pirates.html?pagewanted=all&_r=0) (discussing how military operations can be successful in the piracy context); Shih Hsiu-chuan, *Demonstrators Call for Answers on Slain Captain*, TAIPEI TIMES (June 08, 2011), <http://www.taipetimes.com/News/front/archives/2011/06/08/2003505239> (discussing how military operations can be problematic in the piracy context); Grace Kuo, *MOFA Urges U.S. to Compensate Taiwan Skipper's Family*, TAIWAN TODAY (July 25, 2011), <http://www.taiwantoday.tw/ct.asp?xItem=172626&ctNode=445> (discussing the argument of Taiwan's Ministry of Foreign Affairs (MOFA) that the United States should compensate the family of a Taiwanese sailor who was inadvertently killed by the U.S. military in an anti-piracy mission).

<sup>17</sup> See generally JOHN Y. SCHRADER, RESEARCH & DEV. CORP., *THE ARMY'S ROLE IN DOMESTIC DISASTER SUPPORT: AN ASSESSMENT OF POLICY CHOICES* (1993) (discussing the U.S. military's role in civil emergencies).

international law. This stems from a dramatic dichotomy in international law that tightly constrains the range of conduct permitted during extraterritorial civilian law enforcement operations while granting the military (in certain circumstances) wide latitude to carry out an almost unlimited range of invasive and even lethal activity.<sup>18</sup>

At the heart of this issue are the international legal principles related to statehood, sovereignty, and territory. “As a hallmark of statehood, territorial sovereignty is the basis of the international system.”<sup>19</sup> Buttressing this undergirding principle are a series of accompanying prohibitions on actions of outside actors, all designed to ensure that each sovereign is able to perform its basic functions and to reduce conflict by limiting external interference. While this organizational scheme mitigates conflict in certain respects, it also gives rise to problems associated with transnational crime—problems that can be conflict-generative in their own right. Otherwise stated, while sovereignty creates a theoretically inviolable domain in which each state may function, it can also serve to insulate transnational criminals from justice.

This Article explicates the international legal framework governing State action against transnational crime; it also explores the disparity in what international law permits military actors to do in situations of armed conflict versus what actions civilians may undertake in the course of extraterritorial law enforcement operations. This Article argues that the trend of militarization in the U.S. approach to transnational crime law is, in part, a function of this legal disparity and that this trend could be reversed a degree if international law recognized a greater degree of flexibility for certain limited categories of extraterritorial law enforcement actions by civilian entities. To that end, it is argued that permitting such an exception would simultaneously promote 1) policies of refocusing the military on war-fighting by limiting its role in combating transnational crime and 2) rights-based approaches and government transparency by addressing transnational criminality in a way that comports with constitutional due process and international human rights norms. Otherwise stated, permitting greater latitude in the international legal framework for extraterritorial law enforcement activities conducted by civilians—especially for those activities occurring in areas where there is effectively no sovereign capable or willing to take action—would benefit

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<sup>18</sup> See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 217–19, 298 (2d ed. 1994). See also Memorandum Opinion for the Deputy Counsel to the President, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm> (“[T]he Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States.”).

<sup>19</sup> THOMAS G. WEISS, *HUMANITARIAN INTERVENTION* 18 (2d. ed. 2012).

military readiness while contemporaneously promoting human rights and the rule of law.<sup>20</sup>

## I. TRANSNATIONAL CRIME AND UNGOVERNED SPACES

An increasingly challenging trend for governments worldwide is the rise of transnational criminal activity occurring in ungoverned spaces,<sup>21</sup> such as the international criminal lurking abroad and victimizing others from within the territory of a country that will not or cannot take action to bring the offensive conduct to a halt and seek justice. In that regard, a persistent challenge to international order is the “incapacity of certain states to effectively exercise authority over their territories and populations.”<sup>22</sup> As Professor Nye notes, “While sovereignty [implies] absolute [control of a territory] in the legal sense, de facto control by a government within its borders is often a question of degree.”<sup>23</sup> There are frequent examples of states that are unable to effectively carry out basic functions.<sup>24</sup> Such weakened states are a source of significant concern for governments. This concern is made evident by statements such as those made in the U.S. Army Field Manual on Stability Operations, which pointedly notes, “The greatest threats to our national security will not come

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<sup>20</sup> See Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL’Y 15, 24 (2006) (footnoted omitted) (“[S]tates are recognized by international law as trustees for the people committed to their care. As trustees, they are supposed to operate lawfully and in a way that is mindful that the peaceful and ordered world that is sought in international law—a world in which violence is restrained or mitigated, a world in which travel, trade, and cooperation are possible—is something sought not for the sake of national sovereigns themselves, but for the sake of the millions of men, women, communities, and businesses who are committed to their care. These millions are the ones who are likely to suffer if the international order is disrupted; they are the ones whose prosperity is secure when the international order is secure.”). See also ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 4 (2011) (footnotes omitted) (“The question of whether fundamental human rights are part of the rule of law or are to be considered as a necessary supplement to the rule of law is a moot one, given the widespread support in the United Nations for a rule of law definition that includes human rights, as well as the customary nature of core civil and political rights.”).

<sup>21</sup> See Stewart M. Patrick, *Are ‘Ungoverned Spaces’ a Threat?*, COUNCIL ON FOREIGN RELATIONS (Jan. 11, 2010), available at <http://www.cfr.org/somalia/ungoverned-spaces-threat/p21165>.

<sup>22</sup> INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT: SUPPLEMENTARY VOLUME TO THE REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 10 (2001).

<sup>23</sup> JOSEPH S. NYE, JR., UNDERSTANDING INTERNATIONAL CONFLICTS: AN INTRODUCTION TO THEORY AND HISTORY 135 (2d. ed. 1997).

<sup>24</sup> See Robin Geiss, *Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties*, 91 INT’L REV. RED CROSS 127, 129 (2009).

from emerging ambitious states but from nations unable or unwilling to meet the basic needs and aspirations of their people.”<sup>25</sup>

In the shadow of this phenomenon, the international community is confronted with an increasing level of transnational crime in which criminal conduct in one country has an impact in another or even several others.<sup>26</sup> Drug trafficking, human trafficking, computer crimes, terrorism, and a host of other crimes can involve actors operating outside the borders of a country which might have a significant interest in stemming the activity in question and prosecuting the perpetrator.<sup>27</sup> “[T]he new transnational crimes take advantage of globalization, trade liberalization and exploding new technologies to perpetrate diverse crimes and to move money, goods, services and people instantaneously for purposes of perpetrating violence for political ends.”<sup>28</sup>

The problems of weakened states and transnational crime create an unholy confluence that is uniquely challenging.<sup>29</sup> When a criminal operates outside the territory of an offended state, the offended state might ordinarily appeal to the state from which the criminal is operating to take some sort of action, such as to prosecute the offender domestically or extradite the offender so that he or she may face punishment in the offended state.<sup>30</sup> Nonetheless, in situations in which a government is unable (or unwilling) to cooperate in the arrest or prosecution of a criminal, the offended state has few options for recourse. In such circumstances, “[s]tates seem increasingly inclined to assume sporadic order maintenance functions in the place of disabled governments so as to maintain the perceived security threat at a tolerable level.”<sup>31</sup> Where other sovereigns fail or refuse to act, states can attempt to fill

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<sup>25</sup> HEADQUARTERS DEP’T OF THE ARMY, FIELD MANUAL NO. 3-07, STABILITY OPERATIONS vi (2008) [hereinafter FIELD MANUAL NO. 3-07].

<sup>26</sup> See MANDEL, *supra* note 13, at 17 (footnote omitted) (“Transnational organized crime has been mushrooming specifically since the early 1990s, as local criminal groups expanded across national boundaries and formed tactical and strategic regional and international alliances.”). See also LINDA E. CARTER, CHRISTOPHER BLAKESLEY, & PETER J. HENNING, GLOBAL ISSUES IN CRIMINAL LAW 22 (2007).

<sup>27</sup> CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 106–07 (2008).

<sup>28</sup> *Id.* at 22 (quoting Bruce Zagaris, *Revisiting Novel Approaches to Combating the Financing of Crime: A Brave New World Revisited*, 50 VILL. L. REV. 509, 509 (2005)). See also Donesa, *supra* note 15, at 882 (footnotes omitted) (“Rapid geopolitical changes have forced the American government to reevaluate carefully these policies as other nations have proven unwilling or unable to deal with challenges to it within their territories. As a result, the United States has demonstrated an increasing willingness to extend the reach of its law enforcement in foreign countries. The executive branch now believes that it is a legitimate extension of presidential authority under the Constitution for the Federal Bureau of Investigation (FBI) and U.S. military to make arrests on foreign soil, even without the consent of the host government.”).

<sup>29</sup> See MANDEL, *supra* note 13, at 23 (footnote omitted) (“The proliferation of fragile or failing states can lead to a host of pernicious consequences, including creating breeding grounds for instability and conflict, terrorism, and sinister networks of all kinds . . .”).

<sup>30</sup> See CARTER, BLAKESLEY, & HENNING, *supra* note 26, at 70.

<sup>31</sup> Geiss, *supra* note 24, at 127.

the void of this inaction by taking positive action to prevent further criminal conduct.

[I]n times of transnational terrorism and transnational criminal networks states increasingly perceive state failure as a direct threat to their security interests. They will thus probably be all the more inclined to partially fill the control gap and assume specific law enforcement functions in place of a disabled government so as to keep potential threats under control.<sup>32</sup>

Yet, for civilian law enforcement authorities, international law imposes rules that can be prohibitive. Thus, it is not surprising that states are more frequently inclined to approach transnational crime through the context of military action. In fact, given the constraints on extraterritorial civilian law enforcement action, it can be fairly argued that international law frequently compels states to explore a militarized option, especially when addressing transnational crime in ungoverned spaces. The roots of this somewhat counterintuitive legal predicament can be traced to the international legal framework undergirding the organization of the contemporary international order.

## **II. THE LEGAL ARCHITECTURE OF SOVEREIGNTY, THE PRINCIPLE OF NONINTERVENTION, AND THE EXERCISE OF EXTRATERRITORIAL JURISDICTION**

Any discussion of extraterritorial law enforcement operations and transnational criminality must begin with an explanation of the concept of sovereignty and the principle of nonintervention. It has been noted that “[s]overeignty and nonintervention are two of the principles that provide order in an anarchic world system.”<sup>33</sup> These two principles are interrelated in that “sovereignty” implies the legal and de facto control by a government over a defined territory, whereas “nonintervention” implies a prohibition against actions that undermine sovereignty. The ideas are irrevocably intertwined as the latter implies the inviolability of the former. As an elucidation of these principles demonstrates, each is central to an understanding of the legality of extraterritorial law enforcement activity.

### **A. *The Legal Construct of Sovereignty***

The Treaty of Westphalia in 1648, which ended the Thirty Years War in Europe, is generally viewed as the critical moment that gave rise to the

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<sup>32</sup> *Id.* at 139.

<sup>33</sup> NYE, *supra* note 23, at 133.



concept of state sovereignty in international relations.<sup>34</sup> This view—which emerged during that era and which still prevails today—holds that the world is divided into discrete territories that are controlled in their entirety by individual and co-equal sovereign authorities.<sup>35</sup> For each respective sovereign, this necessarily implies the absolute authority to enact and enforce the laws within that territory<sup>36</sup> and, concomitantly, “the exclusion of external actors from domestic authority structures.”<sup>37</sup> Pursuant to this legal structure, sovereign states maintain exclusive control over the territory within their borders. Robert Jackson, in his excellent book on the topic, described it by saying, “Sovereignty is an idea of authority embodied in those bordered territorial organizations we refer to as ‘states’ or ‘nations’ and expressed in their various relations and activities, both domestic and foreign.”<sup>38</sup>

In the modern international legal order, states are “the recognized actors in the international legal system” and “the major structural units of the legal-political order of the planet.”<sup>39</sup> And sovereignty, in turn, is the *sine qua non* of statehood. It serves as a starting point and organizing principle for international law and international relations. A necessary concomitant to this basic principle—and one that is central to understanding the limitations on extraterritorial law enforcement activity—is the principle of nonintervention.

### **B. Nonintervention**

In positing what he concedes to be something of a tautology, Brownlie has given what is perhaps the best articulation of what he terms the “master principle” of nonintervention.<sup>40</sup> He notes that “[m]atters within the competence of states under general international law are said to be within the reserved domain, the domestic jurisdiction, of states.”<sup>41</sup> This is reflected in Article 2(7) of the United Nations (U.N.) Charter, which provides that, aside from the application of enforcement measures under Chapter VII, nothing in the Charter “shall authorize the United Nations to intervene in matters which

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<sup>34</sup> See KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 11 (2009). For an interesting discussion of the development of the legal paradigm resulting from the concept of the sovereign state, see *The State Is Back, Big Time. But Just What Kind of State?*, GLOBAL BRIEF (Spring/Summer 2012), <http://globalbrief.ca/editors-brief-summer-2012/> (“The first decade-plus of this new century has seen ample evidence of the return of the State, classical and other. From national security to monetary (Euro) and fiscal (bailout) policy, to the ‘power vertical’ of Asia’s most important country, China, the times will continue to be defined by what happens *within* states and *between* them.”).

<sup>35</sup> RAUSTIALA, *supra* note 34.

<sup>36</sup> *See id.*

<sup>37</sup> STEPHEN D. KRASNER, *POWER, THE STATE, AND SOVEREIGNTY: ESSAYS ON INTERNATIONAL RELATIONS* 193 (2009).

<sup>38</sup> ROBERT JACKSON, *SOVEREIGNTY: EVOLUTION OF AN IDEA* ix (2007) (footnote omitted).

<sup>39</sup> CARTER, BLAKESLEY, & HENNING, *supra* note 26, at 11.

<sup>40</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 290 (6th ed. 2003).

<sup>41</sup> *Id.* (footnote omitted).

are essentially within the domestic jurisdiction of any state . . . .”<sup>42</sup> The International Court of Justice, in *Nicaragua v. United States*, noted that “the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.”<sup>43</sup> Likewise, the U.N. General Assembly’s Declaration on Principles of International Law Concerning Friendly Relations and Cooperation states that “[n]o state [or Group of States] has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”<sup>44</sup>

Like its sister concept of sovereignty, the principle of nonintervention is widely recognized as a cornerstone of the international legal order. But the nature of the conduct that might be sufficient to meet the threshold of an act of intervention is left undefined in broad articulations of this general rule. Professor Joseph S. Nye, Jr., has described the broad range of actions that might be considered—at some level—to constitute a form of intervention.<sup>45</sup> Such conduct ranges from what he terms “low coercion” (such as a speech designed to influence a state’s internal policy) to “high coercion” (such as military action).<sup>46</sup> Certainly, something so apparent as an armed attack would violate the principle of nonintervention and numerous other tenets of international law, but an action need not be as overtly violating as that in order to run afoul of the principle of nonintervention. In fact, far more subtle conduct has been recognized as violating the principle of nonintervention, particularly when such conduct involves matters closely associated with the ordinary functions of the sovereign. Of particular importance are those infringements that relate to another sovereign’s domestic legal processes and control of its criminal justice apparatus.

### C. *The International Law of Jurisdiction and Its Development*

Jurisdiction is another core concept in the subject area of state power and authority—one that emanates from the foundational concept of sovereignty. In simple terms, “jurisdiction” is defined as “the right to prescribe and enforce rules against others.”<sup>47</sup> Scholars have noted that “[e]xercising jurisdiction involves asserting a form of sovereignty”<sup>48</sup> and that “[t]he assertion of criminal jurisdiction over a person is amongst the most coercive activities any society can take.”<sup>49</sup> For this reason, the modern

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<sup>42</sup> U.N. Charter art. 2, para. 7.

<sup>43</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 205 (June 27).

<sup>44</sup> G.A. Res. 20/2131, ¶ 1, U.N. Doc. A/RES/20/2131 (Dec. 21, 1965).

<sup>45</sup> See NYE, *supra* note 23, at 133–35.

<sup>46</sup> *Id.*

<sup>47</sup> VAUGHAN LOWE, *INTERNATIONAL LAW* 171 (2007).

<sup>48</sup> ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 43 (2d ed. 2010).

<sup>49</sup> *Id.* at 22.

international legal framework delimits a state's power by subjecting states to certain jurisdictional restraints. These are limitations on a government's jurisdiction to prescribe (to enact law), to adjudicate (to subject persons or entities to its law), and to enforce (to compel compliance with its law).<sup>50</sup> With regard to each of these categories, a rich and complex body of international law exists which regulates particular types of juridical behavior on the part of states. That body of law, which has been addressed in depth by this author and others,<sup>51</sup> allows for a certain degree of latitude in exercising prescriptive and adjudicative jurisdiction. But it is the last of these categories—enforcement jurisdiction—that is central to the analysis of the conduct of extraterritorial law enforcement operations.

Enforcement jurisdiction generally refers to a state's ability "to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."<sup>52</sup> This is because extraterritorial law enforcement operations are essentially an exercise in enforcement jurisdiction abroad and are generally considered to be "the most intrusive of jurisdictional claims."<sup>53</sup> As such, the modern international law of jurisdiction serves to tightly constrain the exercise of extraterritorial enforcement jurisdiction in most contexts. But those constraints were not always understood as being equally applicable in all circumstances.

#### D. *Capitulations and the Old System of Extraterritoriality*

It is worth noting that the international legal landscape was not always characterized by tight constraints on extraterritorial enforcement jurisdiction. One prevalent exception to the general rule against extraterritorial enforcement jurisdiction was found in the ancient practice among sovereigns of granting to specific groups within a territory the ability to exercise certain powers within their community. Before the rise of the state and the more developed notion of territorial statehood—in which sovereignty implies absolute legal control of a territory—it was common practice for states to grant certain categories of foreigners special rights and immunities.<sup>54</sup>

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<sup>50</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) [hereinafter RESTATEMENT (THIRD)].

<sup>51</sup> See, e.g., Christopher L. Blakesley & Dan E. Stigall, *Wings for Talons: The Case for the Extraterritorial Jurisdiction over Sexual Exploitation of Children through Cyberspace*, 50 WAYNE L. REV. 109 (2004) [hereinafter Blakesley & Stigall, *Wings for Talons*]; Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1 (2007) [hereinafter Blakesley & Stigall, *Myopia*].

<sup>52</sup> RESTATEMENT (THIRD), *supra* note 50, § 401(c).

<sup>53</sup> CRYER ET AL., *supra* note 48, at 44.

<sup>54</sup> Norman Bentwich, *The End of the Capitulatory System*, 14 BRIT. Y.B. INT'L L. 89, 89–91 (1933).

Powers of this sort were commonly conferred by treaty. Such treaties were widespread in both geographic and temporal terms. As early as the fifth century A.D., commentators note that the Visigoths in Spain conceded to foreign merchants a special jurisdictional right to be tried by “judges selected from among their own countrymen.”<sup>55</sup> This practice was, likewise, recognized during the Byzantine Empire, prevailed among the Italian City States, and was even a general practice during the Crusades.<sup>56</sup> A global review of such treaties finds them, at various times, present in Egypt and throughout North Africa, Turkey, Persia, China, Siam, and the Malay States.<sup>57</sup>

This jurisdictional scheme, based in the ancient notion of “personality of law,”<sup>58</sup> is, however, most popularly identified with the “capitulations”—the voluntary grants of various rights by Ottoman sultans to European sovereigns in the sixteenth century, including the right of Europeans in Ottoman territory to remain subject to the jurisdiction of their country and immunity from Ottoman jurisdiction.<sup>59</sup> The rights were initially granted from a more powerful to a lesser sovereign and did not, as the term “capitulation” may imply, indicate a concession of power and control from a weaker government to some stronger power.

Capitulation is derived from the Latin “Caput” or “Capitulum,” and its origin is due to the style of earlier grants, which were divided into “heads” or articles. The grantor did not “capitulate” in the modern sense, although the inferior legal status of the States which are at present regulated by Capitulations has encouraged this belief. In the original Capitulations the grantor declares, in grandiloquent terms, the importance of his position; it is the grantee who “prays,” or “begs,” or “complains,” and the grantor who of his “humanitie [sic] and gracious ingrafted disposition” promises redress.<sup>60</sup>

Indeed, scholars have noted that the Ottoman Capitulations of the Sixteenth Century merely recognized the prevailing international practice. In fact, when one of the original treaties of this type was negotiated in 1535 between Francis I and Suleiman the Magnificent, “the granting state was much the stronger of the two.”<sup>61</sup> Norman Bentwich, a Professor of International Relations in the Hebrew University of Jerusalem during the 1930s, noted that

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<sup>55</sup> Nasim M. Soosa, *The Historical Interpretation of the Origin of the Capitulations in the Ottoman Empire*, 4 TEMP. L. Q. 360 (1929–1930) (footnote omitted).

<sup>56</sup> *See id.* at 360–64.

<sup>57</sup> *See* Bentwich, *supra* note 54, at 90.

<sup>58</sup> *Id.* at 89 (internal quotation marks omitted).

<sup>59</sup> *Id.*

<sup>60</sup> JAMES HARRY SCOTT, *THE LAW AFFECTING FOREIGNERS IN EGYPT; AS THE RESULT OF THE CAPITULATIONS, WITH AN ACCOUNT OF THEIR ORIGIN AND DEVELOPMENT* viii (1907).

<sup>61</sup> R. G. Surrige & Rebecca Matthews, *Extraterritoriality—A Vanishing Institution*, 3 CUM. DIG. INT’L L. & REL. 81, 81 (1934).

Turkish authorities had no desire to exercise jurisdiction over “the Christian resident alien” and that Ottoman law “was to him what the *Ius Civile* was to the Roman under the Republic—the privilege of the citizen . . . .”<sup>62</sup>

As the power of the Ottoman Empire declined and European powers increased, the treaties began to acquire the character of unequal treaties by which Europeans in Eastern countries were given a special status and were “immune from the jurisdiction, taxation, and legislation of the local sovereign.”<sup>63</sup>

By the mid-nineteenth century, however, capitulations had acquired an exceptional character, both conceptually and in terms of their impact. Conceptually, the jurisdictional concessions contained in capitulations became an exception when the international order progressively moved toward the principle of territorial sovereignty, which coalesced once the European political order abandoned the personal link between sovereign and subject as a basis for political organization.<sup>64</sup>

As Ottoman power declined, the legal landscape of the international order was also changing in ways that made the Capitulations less durable. The general practice of allowing countries to exercise a degree of extraterritorial jurisdiction over its citizens within the territory of another sovereign<sup>65</sup> would decline at the dawn of the twentieth century.

The capitulatory regime has its origin in a once universally observed principle, namely, the principle of “personality of law” by which the foreigner carried his own laws wherever he went. In origin, it was the development of a normal procedure; it is exceptional now, because with the decline of the city state of the middle ages, jurisdiction, throughout all progressive nations, has become territorial. The firmly established theory of territorial rights, *jus territoriale*, by which a state has exclusive sovereignty over its territory grafted an anomalous character on the capitulatory system.<sup>66</sup>

In 1933, Bentwich described the capitulatory system as being “out of accord with the system of the modern world,” which, by that time, considered the vast constellation of territorial states to be organized as a body of coequal

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<sup>62</sup> Bentwich, *supra* note 54, at 89.

<sup>63</sup> *Id.* at 90.

<sup>64</sup> Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT’L L.J. 475, 507 (2010) (footnote omitted).

<sup>65</sup> *Id.*

<sup>66</sup> Soosa, *supra* note 55, at 371.

sovereigns.<sup>67</sup> The capitulatory regime, therefore, declined as the modern notion of sovereignty and noninterference coalesced.

Other noteworthy historic examples of exceptions to this general prohibition on extraterritorial enforcement jurisdiction include the immunity granted to military forces in transit and the practice that was known as “the law of the flag.”<sup>68</sup> Historically, international law excepted foreign soldiers who had been permitted to pass through the territory of another sovereign from the jurisdiction of that sovereign. Vattel noted that when one sovereign granted to another the right to allow military forces to pass through its territory, “[t]he grant of permission to pass includes a grant of [everything] which is naturally connected with the passage of troops,” including “that of exercising military discipline on the soldiers and officers . . . .”<sup>69</sup> In Vattel’s view, if “the licentiousness of the soldiers” should occasion damage within the territory of the state that has allowed their passage, such actions gave rise to an obligation on the part of the troops’ sovereign to make reparation to the offended state—but the ability to exercise jurisdiction over the soldiers remained that of the sovereign to which the troops belonged.<sup>70</sup>

Remnants of this doctrine can be found into the nineteenth century. For instance, this doctrine was also addressed in U.S. Supreme Court jurisprudence in the case of *The Schooner Exchange v. McFadden*.<sup>71</sup> There, Chief Justice Marshall considered the case of a ship named *The Schooner Exchange* that had been captured by France only to find its way again to a U.S. port where, to the chagrin of the original owner, it was docked under a French flag and bore the name *The Balaou*.<sup>72</sup> In this landmark decision, occasioned by the lawsuit filed by the ship’s original owner in an attempt to regain possession, Chief Justice Marshall articulated the basic rule that “[t]he jurisdiction of the nation within

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<sup>67</sup> Bentwich, *supra* note 54, at 89.

<sup>68</sup> Steven G. Hemmert, *Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. INT’L L.J. 215, 218–19 (1999).

<sup>69</sup> EMER DE VATTEL, *THE LAW OF NATIONS* 539 (Béla Kaposy & Richard Whatmore eds., 2008).

<sup>70</sup> *Id.* at 343. *See also id.* at 479–80, noting:

Good order and subordination, so useful in all places, are nowhere so necessary as in the army. The sovereign should exactly specify and determine the functions, duties, and rights of military men,—of soldiers, officers, commanders of corps, and generals. He should regulate and fix the authority of commanders in all the gradations of rank,— the punishments to be inflicted on offenders,— the form of trials, [etc]. The laws and ordinances relative to these several particulars form the military code.

Those regulations, whose particular tendency is to maintain order among the troops, and to enable them to perform their military service with advantage to the state, constitute what is called military discipline. This is of the highest importance.

<sup>71</sup> *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

<sup>72</sup> *Id.* at 118.

its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”<sup>73</sup> Notably, however, Chief Justice Marshall recognized that there could be exceptions to this rule, such as when the sovereign has consented “to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.”<sup>74</sup> Key examples of this exception to the general rule of sovereignty were when “the person of the sovereign” entered a foreign country<sup>75</sup> or when a sovereign allowed a foreign minister to enter its territory.<sup>76</sup> Likewise, for purposes of the litigants in *The Schooner Exchange*, another situation in which a sovereign was understood to have ceded a portion of his territorial jurisdiction was where the sovereign allowed “the troops of a foreign prince to pass through his dominions.”<sup>77</sup> As the Court noted, “The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.”<sup>78</sup>

Chief Justice Marshall, however, took great pains to emphasize the limited scope of such immunity. He explained that it applied to appendages of the foreign sovereign and was not of general application to foreign visitors and merchant vessels.<sup>79</sup> The general rule of exclusive territorial sovereignty and the disallowance of extraterritorial enforcement jurisdiction remained the norm.

This immunity given to visiting troops—and the concomitant grant of extraterritorial enforcement jurisdiction—was the prevailing practice among

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<sup>73</sup> *Id.* at 136.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 137.

<sup>76</sup> *Id.* at 138.

<sup>77</sup> *Id.* at 139.

<sup>78</sup> *Id.* at 144.

<sup>79</sup> *Id.*

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

most nations of the world until the 1950s.<sup>80</sup> As previously discussed, however, the twentieth century saw the erosion of this principle in international law. In modern international practice, soldiers abroad in contemporary operations are not considered immune from the host nation's jurisdiction absent some agreement by which that sort of jurisdiction is preserved.<sup>81</sup> Similarly, with the development of the modern idea of territorial sovereignty, the exercise of jurisdiction by a foreign sovereign within the borders of another sovereign is now anathema.<sup>82</sup>

### *E. The Modern Idea of Enforcement Jurisdiction*

In contrast to these historic examples, the contemporary international law of jurisdiction tightly constrains the exercise of extraterritorial enforcement jurisdiction in most contexts. “The exercise of enforcement jurisdiction is an exercise of State sovereignty, and the rule that governs it is simple. No State may exercise its enforcement jurisdiction in the territory of another State without that State's permission.”<sup>83</sup> Indeed, the limitations particular to the extraterritorial exercise of enforcement jurisdiction are now well settled. In 1927, the Permanent Court of International Justice (PCIJ) noted that “the first and foremost restriction imposed by international law on a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”<sup>84</sup> As noted, the exercise of power envisioned in this prohibition need not be something so dramatic as the use of military force. Activities such as the carrying out of investigations in the territory of another sovereign are considered “contrary to the broader principle of non-intervention.”<sup>85</sup> On that score, most law enforcement activity has been interpreted as being an exercise of enforcement jurisdiction and thus an activity that is restricted in its unilateral exercise. Therefore, “a state cannot investigate a crime, arrest a suspect, or enforce its judgment or judicial processes in another state's territory without the latter state's permission.”<sup>86</sup> Law enforcement actions such as

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<sup>80</sup> See Hemmert, *supra* note 68, at 218–19.

<sup>81</sup> *Id.* at 220.

<sup>82</sup> See Lorca, *supra* note 64.

<sup>83</sup> LOWE, *supra* note 47, at 184.

<sup>84</sup> S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 45 (Sept. 7).

<sup>85</sup> D. W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, in *STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 555, 567 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983). See also CRYER ET AL., *supra* note 48, at 44 (defining “executive (or enforcement) jurisdiction” as “the right to effect legal process coercively, such as to arrest someone, or undertake searches and seizures.”).

<sup>86</sup> INT'L BAR ASS'N [IBA], REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 10 (2009), available at <http://documents.law.yale.edu/sites/default/files/Task%20Force%20on%20Extraterritorial%20Jurisdiction%20-%20Report%20.pdf>.



investigations and arrests are, therefore, strictly forbidden absent the consent of the sovereign in whose territory the action is to occur.<sup>87</sup>

Reflecting this basic rule, the Restatement (Third) of Foreign Relations Law notes that although a state is generally free to enforce its criminal law within its own territory,<sup>88</sup> “a state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.”<sup>89</sup> The comments to the Restatement make the requirement of host nation consent clear:

It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter’s consent. Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state, . . . its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with that state’s consent. Within a state’s own territory, the rules governing arrest and other steps in criminal law enforcement generally apply regardless of the nationality, residence, or domicile of the person accused or investigated, subject only to defined exceptions for persons enjoying diplomatic or consular immunity . . . and to the obligation to observe basic human rights . . . .<sup>90</sup>

The comment also notes that if a state’s law enforcement officials exercise their functions in the territory of another state without host nation consent, the offended state is entitled to protest and, in certain cases, may even receive reparation from the offending state.<sup>91</sup>

The basis for such a prohibition on extraterritorial law enforcement is not difficult to discern. The conduct of criminal investigations is an inherent

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<sup>87</sup> Bowett, *supra* note 85.

<sup>88</sup> RESTATEMENT (THIRD), *supra* note 50, § 432(1). The Restatement does note some limitations on the ability of a state to enforce laws even within its own territory. It states:

A state may enforce its criminal law within its own territory through the use of police, investigative agencies, public prosecutors, courts, and custodial facilities, provided

- (a) the law being enforced is within the state’s jurisdiction to prescribe;
- (b) when enforcement is through the courts, the state has jurisdiction to adjudicate with respect to the person who is the target of enforcement; and
- (c) the procedures of investigation, arrest, adjudication, and punishment are consistent with the state’s obligations under the law of international human rights.

*Id.*

<sup>89</sup> *Id.* § 432(2).

<sup>90</sup> *Id.* § 432 cmt. b.

<sup>91</sup> *Id.* § 432 cmt. c.

function of the sovereign. Professor Christopher Blakesley, in his discussion of extraterritorial jurisdiction, noted the indissoluble link between criminal law and the sovereign: “At the inception of the nation-state as a sovereign unit, the ‘king’s peace’ was the ideological tool used to promote the consolidation of power against ‘private justice.’”<sup>92</sup> And as Jean Bodin wrote, “It is most expedient for preservation of the state that the rights of sovereignty should never be granted out to a subject, still less to a foreigner, for to do so is to provide a stepping stone where the grantee himself becomes the sovereign.”<sup>93</sup> It is, therefore, little wonder that modern governments now forcefully object to the unauthorized operations of foreign law enforcement agents within their borders.

The domestic national law of various countries also reflects this restrictive view of exercising enforcement jurisdiction abroad. With regard to an extraterritorial arrest, such action is considered to be a use of force in the territory of another sovereign<sup>94</sup> and is tantamount to abduction. In such circumstances, the Restatement posits that international law requires the person be returned.<sup>95</sup> If, however, the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws.

Accordingly, while states are afforded a certain degree of latitude in exercising prescriptive and adjudicative jurisdiction,<sup>96</sup> restrictions on enforcement jurisdiction are markedly constrained and deemed violative of the “master principle” of nonintervention. As Ryngaert notes, “Only the exercise of extraterritorial enforcement jurisdiction—the carrying out of certain material acts on another State’s territory—has been deemed to infringe upon the principle of non-intervention and, thus, on the sovereignty of a foreign State.”<sup>97</sup>

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<sup>92</sup> CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY* 103 (1992).

<sup>93</sup> JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* [THE SIX BOOKS OF THE COMMONWEALTH] 49 (M.J. Tooley ed. & trans., B. Blackwell 1955) (1576).

<sup>94</sup> Bowett, *supra* note 85. See also 18 U.S.C. § 951(a) (2006) (It is a criminal offense for anyone “other than a diplomatic or consular officer or attaché [to act] in the United States as an agent of a foreign government without prior notification to the Attorney General.”); 28 C.F.R. § 73.3 (2012) (detailing the requirements for notifications to the Attorney General by agents of foreign governments). These statutes effectively make it a crime in the United States for a foreign agent to conduct law enforcement activity within U.S. territory without first coordinating with appropriate U.S. officials.

<sup>95</sup> RESTATEMENT (THIRD), *supra* note 50, § 432 cmt. c.

<sup>96</sup> See, e.g., Blakesley & Stigall, *Wings for Talons*, *supra* note 51; Blakesley & Stigall, *Myopia*, *supra* note 51. See also, generally, Francisco Javier Zamora Cabot, *Kiobel and the Question of Extraterritoriality* (“El Tiempo de los Derechos”, Working Paper No. 2, Sandra Kingery, trans., 2013), available at <http://conflictflaws.net/2013/kiobel-and-the-question-of-extraterritoriality-paper>.

<sup>97</sup> RYNGAERT, *supra* note 27, at 144 (2008).

### F. *Extradition, Lawful Removal, and Mutual Legal Assistance*

Given the extraordinary limits on the exercise of extraterritorial enforcement jurisdiction, states have, by necessity, developed mechanisms to cooperate in transnational criminal matters. The primary mechanisms used in this regard are extradition, lawful removal, and mutual legal assistance. These devices are the principal means by which cooperation in transnational criminal matters is requested and afforded.

Extradition is the mechanism by which one sovereign requests and obtains custody of a fugitive located within the jurisdiction and control of another sovereign.<sup>98</sup> It is an ancient mechanism, dating back to at least the thirteenth century, when an Egyptian Pharaoh negotiated an extradition treaty with a Hittite King.<sup>99</sup> Through the extradition process, a sovereign (the requesting state) typically makes a formal request to another sovereign (the requested state).<sup>100</sup> If the fugitive is found within the territory of the requested state, then the requested state may arrest the fugitive and subject him or her to its extradition process.<sup>101</sup> The extradition procedures to which the fugitive will be subjected are dependent on the law and practice of the requested state.<sup>102</sup>

When there is no extradition agreement in place, or when applicable extradition agreements are inapplicable, a sovereign may still request the expulsion or lawful return of an individual pursuant to the requested state's domestic law.<sup>103</sup> This can be accomplished through the immigration laws of the requested state or other facets of the requested state's domestic law.<sup>104</sup> Similarly, the codes of penal procedure in many countries contain provisions allowing for extradition to take place in the absence of an extradition agreement.<sup>105</sup> Sovereigns may, therefore, still request the expulsion or lawful return of a fugitive from the territory of a requested state in the absence of an extradition treaty.<sup>106</sup>

A concept related to extradition that has significant implications in transnational criminal law is that of *aut dedere aut judicare*. This maxim represents the principle that states must either surrender a criminal within their

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<sup>98</sup> See CARTER, BLAKESLEY, & HENNING, *supra* note 26, at 63.

<sup>99</sup> *Id.* (citing *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986)).

<sup>100</sup> See CRYER ET AL., *supra* note 48, at 95.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 101.

<sup>105</sup> *Id.*

<sup>106</sup> See, e.g., Code de Procédure Pénale art. 308 et seq. (Tunis.); Code de Procédure Pénale art. 694 et seq. (Alg.); Code de Procédure Pénale, Loi N° 71-77 (Sen.).

<sup>106</sup> See Special Rapporteur on the Expulsion of Aliens, *Preliminary Report on the Expulsion of Aliens*, Int'l Law Comm'n, ¶ 14, U.N. Doc. A/CN.4/554 (June 2, 2005) (by Maurice Kamto) (footnote omitted) ("International law therefore recognizes the discretionary power of each State to grant or refuse entry to its territory. Equally, international law recognizes the right of the State itself to set the conditions for the entry and residence of aliens in its territory.").

jurisdiction to a state that wishes to prosecute the criminal or prosecute the offender in its own courts.<sup>107</sup> Hugo Grotius, the seventeenth-century Dutch jurist, first elaborated upon the concept as an obligation in international law:

Grotius' argument was "that a general obligation to extradite or punish exists with respect to all offenses by which another state is particularly injured." Moreover, a state that had been so particularly injured obtained a natural right to punish the offender, and any state holding the offender should not interfere with that right. Thus, such a holding state should be considered bound to either extradite or punish; there was no third alternative.<sup>108</sup>

Some contemporary scholars hold the opinion that *aut dedere aut judicare* is not an obligation under customary international law but rather "a specific conventional clause relating to specific crimes"<sup>109</sup> and, accordingly, an obligation that only exists when a state has voluntarily assumed the obligation. Cherif Bassiouni, however, has posited that, at least with regard to international crimes, it is not only a rule of customary international law but a *jus cogens* principle.<sup>110</sup> Professor Michael Kelly, moreover, citing Israeli and Austrian judicial decisions, has noted that "there is some supporting anecdotal evidence that judges within national systems are beginning to apply the doctrine on their own."<sup>111</sup>

Even so, a wide array of international instruments now contains provisions for *aut dedere aut judicare*.<sup>112</sup> These include all four 1949 Geneva Conventions,<sup>113</sup> the U.N. Convention for the Suppression of Terrorist

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<sup>107</sup> See RYNGAERT, *supra* note 27, at 104.

<sup>108</sup> Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 496–97 (2003) (footnotes omitted).

<sup>109</sup> RYNGAERT, *supra* note 27, at 105. See also Kelly, *supra* note 108, at 500 (footnote omitted) ("At a minimum, *aut dedere aut judicare* exists as a general norm of law, theoretically binding on all states.").

<sup>110</sup> M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 24–25 (1995); Kelly, *supra* note 108, at 105, at 500 (footnote omitted) ("At a minimum, *aut dedere aut judicare* exists as a general norm of law, theoretically binding on all states.").

<sup>111</sup> Kelly, *supra* note 108, at 502.

<sup>112</sup> Lee A. Steven, Note, *Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 447 (1999).

<sup>113</sup> (First) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; (Second) Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; (Third) Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; (Fourth) Geneva Convention Relative to

Bombings,<sup>114</sup> the U.N. Convention Against Corruption,<sup>115</sup> the Convention for the Suppression of the Unlawful Seizure of Aircraft,<sup>116</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>117</sup> the Convention for the Protection of Cultural Property in the Event of an Armed Conflict,<sup>118</sup> and the International Convention for the Suppression and Punishment of the Crime of Apartheid.<sup>119</sup>

Lastly, aside from mechanisms for the return of fugitives, states have also developed mechanisms for requesting and obtaining evidence for criminal investigations and prosecutions. When evidence or other forms of legal assistance, such as witness statements or the service of documents, are needed from a foreign sovereign, states may attempt to cooperate informally through their respective police agencies or, alternatively, resort to what is typically referred to as requests for “mutual legal assistance.”<sup>120</sup> The practice of mutual legal assistance developed from the comity-based system of letters rogatory,<sup>121</sup> though it is now far more common for states to make mutual legal assistance requests directly to the designated “Central Authorities” within each state.<sup>122</sup> In contemporary practice, such requests may still be made on the basis of reciprocity but may also be made pursuant to bilateral and multilateral treaties that obligate countries to provide assistance.<sup>123</sup>

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the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter, collectively, Geneva Conventions].

<sup>114</sup> International Convention for the Suppression of Terrorist Bombings, art. 6(4), Dec. 15, 1997, 2149 U.N.T.S. 284 (“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction . . .”).

<sup>115</sup> Convention Against Corruption, art. 42(3), *opened for signature* Dec. 9, 2003, 43 I.L.M. 37 (“For the purposes of Article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.”).

<sup>116</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

<sup>117</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>118</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

<sup>119</sup> Convention for the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

<sup>120</sup> See CRYER ET AL., *supra* note 48, at 102.

<sup>121</sup> *Id.*

<sup>122</sup> See Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 WM. & MARY BILL RTS. J. 209, 226 (2002).

<sup>123</sup> *Id.* (footnote omitted). See also U.N. OFFICE ON DRUGS & CRIME, MANUAL ON INTERNATIONAL COOPERATION IN CRIMINAL MATTERS RELATED TO TERRORISM 24, Module 1.B.6 (2009) (footnote omitted) (“In some countries, the mechanisms of mutual legal assistance may be provided for by domestic legislation, which is applied either generally to all other States or to designated States on the basis of reciprocity.”).

Many countries are able to provide a broad range of mutual legal assistance to other countries even in the absence of a treaty.<sup>124</sup> In some developing countries, however, domestic laws can actually create obstacles to effective law enforcement cooperation and mutual legal assistance. For instance, Article 59 of the Libyan Criminal Procedure Code provides as follows:

Investigation procedures and their results shall be considered confidential. Investigators, prosecution members and their assistants of clerks and experts who are related to the investigation or attend to their profession or post shall undertake not to disclose same. Anyone who breaches this provision shall be punished in accordance with Article 236 of the Penal Code.<sup>125</sup>

According to a filing by the Government of Libya before the International Criminal Court, this provision of Libyan law serves to criminalize many forms of international cooperation.<sup>126</sup> In fact, Libya has argued before the International Criminal Court that this provision makes it impossible for Libyan authorities to share basic details of domestic Libyan investigations with international authorities.<sup>127</sup> Such domestic legal obstacles are obviously inimical to effective law enforcement cooperation and serve to obstruct mutual legal assistance efforts.

A notable feature of both extradition and mutual legal assistance is that each mechanism is designed to respect the sovereignty of other states and avoid acts of extraterritorial enforcement jurisdiction. Importantly, each takes the form of a request from one sovereign to another and relies upon the willingness of the requested state for the result to be successful. Needless to say, in situations where the requested state is unwilling or unable to afford

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<sup>124</sup> See, e.g., 18 U.S.C. § 3512 (2006) (permitting U.S. authorities to provide a broad range of mutual legal assistance based on a foreign request and without the requirement of a treaty). See also Code de Procédure Pénale (Tunis.), *supra* note 105, at art. 331–335 (permitting mutual legal assistance based on the request of a foreign authority without the requirement of a treaty.).

<sup>125</sup> Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ¶ 39 (May 1, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf> (quoting Libyan Criminal Procedure Code art. 59).

<sup>126</sup> See *id.* ¶ 40 (“The practical effect of Article 59 of Libya’s Criminal Procedure Code is that for the duration of the investigative phase of proceedings, the Libyan prosecution services (Prosecutor-General for civilians and Military-Prosecutor for military persons) may only disclose summary reports of their investigations to persons who are not involved in the Libyan investigative or prosecutorial team. Disclosure of actual evidence, including witness interviews or other documentary evidence, or even details such as witnesses’ names and contact details before the case reaches the accusation stage of proceedings, would violate [Libyan law].”).

<sup>127</sup> *Id.*

assistance, none of these mechanisms will prove effective. As a result, such mechanisms are incapable of fully addressing the problem of transnational criminality in ungoverned spaces. A review of the legal framework under which civilian authorities must address transnational crime, therefore, reveals significant limitations and lacunae.

### III. THE U.S. MILITARY AND THE LAW OF ARMED CONFLICT

In contrast to the restrictions imposed by international law on extraterritorial activity by civilian agencies, the military is capable of operating outside of U.S. territory in multiple contexts without such onerous legal constraints. In that regard, among the most notable—and visible—examples of extraterritorial activity in present times is that of U.S. military operations abroad. Examples range from the nightly raids of insurgent strongholds in Iraq and Afghanistan to the lethal targeting of Osama Bin Laden in Pakistan.<sup>128</sup> This seemingly unbound ability to engage in extraterritorial activity is possible under international law because military activity is, under most circumstances, governed by a separate—and vastly more permissive—regime of law. This regime of law is known as the Law of Armed Conflict (LOAC).

Military activity under LOAC is fundamentally different from law enforcement activity. From a functional perspective, military operations seeking to neutralize legitimate targets in a combat zone are not seeking to enforce their nation's domestic criminal law, nor are they, in typical circumstances, attempting to usurp the legitimate functions of another sovereign. To the contrary, as a general matter, military operations seek to use combat power, pursuant to well-recognized legal framework, “to accomplish the military objectives that support achieving the conflict's overall political goals.”<sup>129</sup>

Understanding the differences in—and limits of—these legal concepts is key to a comprehensive understanding of transnational criminal law because what is permissible for one actor in one circumstance is strictly prohibited in another. Likewise, what may seem like an expansive grant of authority under international law for one purpose can morph into a prohibited practice in other circumstances.

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<sup>128</sup> See Jane Perlez, *Pakistani Army Chief Warns U.S. on Another Raid*, N.Y. TIMES (May 5, 2011), <http://www.nytimes.com/2011/05/06/world/asia/06react.html>.

<sup>129</sup> HEADQUARTERS DEP'T OF THE ARMY, FIELD MANUAL NO. 3-0, OPERATIONS app. A, ¶ A-2 (2008).

### A. *The Law of Armed Conflict*

LOAC is defined as “that part of international law that regulates the conduct of armed hostilities.”<sup>130</sup> Scholars typically divide LOAC into the subcategories of *jus ad bellum*, the law regulating when the use of military force is permissible; *jus in bello*, the law regulating how military force is employed during an armed conflict; and *jus post bellum*, the law regulating post-conflict activities.<sup>131</sup>

The starting point for understanding the legal basis for this extraordinary ability on the part of military forces is *jus ad bellum*, the international law permitting the use of force. The U.N. Charter prohibits the use of force by states, except in cases of self-defense.<sup>132</sup> Article 2(3) of the U.N. Charter provides that states “shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>133</sup> Likewise, Article 2(4) of the U.N. Charter provides that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>134</sup> Nonetheless, the U.N. Charter provides that states may resort to armed force for purposes of self-defense<sup>135</sup> and when authorized by the U.N. Security Council under the provisions of Chapter VII of the U.N. Charter.<sup>136</sup>

While requiring that “belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes”<sup>137</sup> and to protect civilians who are not engaged in hostilities, LOAC, quite obviously, permits states to employ violence and military force to achieve permissible military objectives.<sup>138</sup> As a general matter, LOAC permits any level of lethal and destructive force to be used against lawful military objectives (one which, by its location, nature, purpose, or use, is such that its destruction offers a military advantage)<sup>139</sup> so long as “the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” would not “be excessive in relation to the concrete and direct military

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<sup>130</sup> U.S. ARMY INT’L & OPERATIONAL LAW DEP’T, OPERATIONAL LAW HANDBOOK 11 (2012) [hereinafter OPERATIONAL LAW HANDBOOK] (footnoted omitted) (internal quotation marks omitted).

<sup>131</sup> See RICHARD P. DIMIGLIO ET AL., U.S. ARMY INT’L & OPERATIONAL LAW DEP’T, LAW OF ARMED CONFLICT DESKBOOK 10 (2012) [hereinafter LOAC DESKBOOK].

<sup>132</sup> U.N. Charter art. 51.

<sup>133</sup> *Id.* at art. 2, para. 3.

<sup>134</sup> *Id.* at para. 4.

<sup>135</sup> *Id.* at art. 51.

<sup>136</sup> LOAC DESKBOOK, *supra* note 131, at 29.

<sup>137</sup> *Id.* at 8 (footnoted omitted) (internal quotation marks omitted).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 137.



advantage anticipated.”<sup>140</sup> As a general rule, anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict may be similarly targeted.<sup>141</sup> LOAC, accordingly, permits large-scale killing and destruction—even of innocent civilians—so long as the direct target is a lawful military target and the civilian deaths are incidental and “proportional.”<sup>142</sup>

The level of force permitted under LOAC is extraordinary. The annals of history are replete with examples of the level of violence that war occasions. From the campaign of “shock and awe” used against Iraq at the outset of Operation Iraqi Freedom<sup>143</sup> to the ongoing predator drone strikes that target terrorists yet still frequently kill innocent civilians,<sup>144</sup> the level and scale of violence permitted under LOAC is fundamentally different from the sorts of monopolized violence that states may lawfully use in a law enforcement context. As one military officer has noted:

It is important to remember that law enforcement missions are inherently different from military missions. Law enforcement agents use force as the last resort. The military uses deadly force as their primary instrument. Not only is it their primary means of settling conflict, militaries use overwhelming and indiscriminate force to quickly and efficiently end the conflict. This has huge political and social implications on civilians and non-combatants.<sup>145</sup>

Even when acting in self-defense, the sort of force used by states is no less extraordinary, most scholars agreeing that the force used in self-defense may greatly exceed the force of the initial attack—the measure being what force was required to “halt and repulse” the aggressor.<sup>146</sup> Kunz takes this even further, arguing that once the initial attack has occurred, the attacked state may resort to “a justified war, to carry this war to victory, to impose a peace treaty

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<sup>140</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Convention Protocol I].

<sup>141</sup> See LOAC DESKBOOK, *supra* note 131, at 138–39.

<sup>142</sup> *Id.* at 13.

<sup>143</sup> See, e.g., Harlan K. Ullman, *Shock and Awe a Decade and a Half Later: Still Relevant, Still Misunderstood*, 2 PRISM 79, 81 (2010) (explaining that “shock and awe” meant “affecting, influencing, and controlling will and perception,” as related to the Iraq War).

<sup>144</sup> See Michael Martinez, *U.S. Drone Killing of American al-Awlaki Prompts Legal, Moral Debate*, CNN (Sept. 30, 2011), <http://www.cnn.com/2011/09/30/politics/targeting-us-citizens/index.html>.

<sup>145</sup> See HOWARD, *supra* note 12, at 40. See also Cunningham, *supra* note 9, at 702 (“The military tends to think in terms of ‘complete victory’ over an opponent through the use of overwhelming force, which may not be a useful mindset in law enforcement operations.”).

<sup>146</sup> NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 65 (2010) (quoting Special Rapporteur on State Responsibility, *Addendum to the Eighth Report on State Responsibility*, Int’l Law Comm’n, ¶ 121, U.N. Doc. A/CN.4/318/Add.5-7 (Feb. 29, 1980) (by Roberto Ago)).

upon the vanquished aggressor . . . .”<sup>147</sup> In this view, “[t]he right of self-defense is . . . a right to resort to war.”<sup>148</sup>

### ***B. International Human Rights Law and Domestic Constraints***

While LOAC does seek to provide protections to civilians during an armed conflict, those protections are significantly different in nature from those that civilians enjoy under ordinary domestic and international legal frameworks. As noted, the incidental death of innocent civilians is permitted under LOAC, as are a wide range of activities that no government would be permitted to undertake in other circumstances.

In contrast with military activities during a war or other armed conflict, law enforcement activity takes place in a far more regulated realm, which offers individuals subject to state power far more protections. States conducting law enforcement activities do so while respecting the rule of law and the cordon of legal constraints embodied in applicable domestic and international law. For instance, at the domestic level, government officials in the United States must conduct investigations and law enforcement activity while respecting the rights of individuals granted by the U.S. Constitution and other relevant statutes. This means that, absent exceptional circumstances, people cannot be arrested or their houses searched without a warrant issued by an independent magistrate because the U.S. Constitution forbids it.<sup>149</sup> Similarly, the “due process clause” of the Fifth Amendment of the U.S. Constitution asserts that no person shall “be deprived of life, liberty, or property, without due process of law,”<sup>150</sup> and the Due Process Clause of the Fourteenth Amendment declares, “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”<sup>151</sup>

Interpreting these provisions, the U.S. Supreme Court has required that the government may only execute someone if that person meets certain requirements, has been found guilty of certain offenses after a lawful trial, and has been afforded due process; even then, that person may only be executed by

<sup>147</sup> *Id.* (quoting Josef L. Kunz, Editorial Comment, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT’L L. 872, 876–77 (1947)).

<sup>148</sup> *Id.* (quoting Josef L. Kunz, Editorial Comment, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT’L L. 872, 877 (1947)).

<sup>149</sup> U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>150</sup> U.S. CONST. amend. V.

<sup>151</sup> U.S. CONST. amend. XIV, § 1.

certain means.<sup>152</sup> Police are not empowered to send a missile into a suspect's home, nor may they knowingly engage in a course of conduct that will result in the deaths of innocent civilians. But U.S. officials have clearly noted that all of these protections—even for U.S. citizens—vanish the moment that LOAC becomes the applicable legal framework.<sup>153</sup> At that point, U.S. citizens may be killed or detained without the need for a trial, a criminal conviction, or any of the legal process available in ordinary contexts.<sup>154</sup>

In addition to those protections afforded by domestic legislation, such as the U.S. Constitution, states are required, at the international level, to respect those rights protected by international human rights law (IHRL). Commentators note that IHRL is a relatively recent development in international law which has rapidly developed since the end of World War II.<sup>155</sup> The goal of IHRL is to grant individuals throughout the world certain basic rights,<sup>156</sup> and as such, its development represented something of a revolution in international law, which historically considered the way in which a state treated persons within its territory to be a purely domestic matter.<sup>157</sup> As sovereigns in the international system, states could expect other states not to interfere in their internal affairs. Human rights law, however, pierced the “veil of sovereignty” by seeking directly to regulate how states treated their own people within their own borders.<sup>158</sup>

A number of international instruments have been enacted to confer on individuals certain basic human rights. Among these are widely accepted

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<sup>152</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (holding that the death penalty, in the instant murder and rape cases before the Supreme Court, would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

<sup>153</sup> See John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, Remarks at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

<sup>154</sup> *Id.* See also Martinez, *supra* note 144; Presidential Policy Directive No. PPD-14, Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012 (Feb. 28, 2012), available at <http://www.fas.org/irp/offdocs/ppd/ppd-14.pdf> (outlining the U.S. government's ability to use the provisions of Sections 1021 and 1022 of the National Defense Authorization Act for FY 2012, which grants the U.S. government authority to indefinitely detain certain classes of persons engaged in terrorist activities or in support of terrorist organizations); JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, *THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FY2012: DETAINEE MATTERS* (2012) (noting that an amendment that would have expressly barred U.S. citizens from long-term military detention on account of enemy belligerent status was considered and rejected). For a review of what rights and protections are ordinarily provided to U.S. citizens—even suspected terrorists—under U.S. domestic law, see DAN E. STIGALL, *COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION* (2009).

<sup>155</sup> See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 590 (2006). See also STIGALL, *supra* note 154, at 9–10.

<sup>156</sup> RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 18 (James Crawford & John S. Bell eds., Cambridge Univ. Press 2005).

<sup>157</sup> See LOAC DESKBOOK, *supra* note 131, at 196.

<sup>158</sup> *Id.*

multilateral treaties such as the International Covenant on Civil and Political Rights (ICCPR)<sup>159</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>160</sup> The ICCPR, to which the United States is a party, articulates many of the basic human rights associated with a Western democracy:

It guarantees numerous civil and political rights to all individuals. These rights are “essentially those civil and political rights reflected in the Western, liberal, democratic tradition.” These “rights are primarily limitations upon the power of the State to impose its will upon the people under its jurisdiction.” Specific rights enumerated in the ICCPR include: freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of association; the right of peaceful assembly; the right to vote; equal protection of the law; the right to liberty and security of the person; the right to a fair trial, including the presumption of innocence; the right of privacy; freedom of movement, residence, and immigration; freedom from slavery and forced labor; protection from torture or cruel, inhumane, or degrading treatment or punishment; and the right to life.<sup>161</sup>

Human rights also exist in customary international law. Although there is no exhaustive list of which human rights are considered customary international law, the Restatement (Third) of Foreign Relations Law outlines an illustrative list, providing:

[A] state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman, or degrading treatment or punishment; (e) prolonged arbitrary detention, (f) systematic racial discrimination; or (g) a consistent pattern of gross violations of internationally recognized human rights.<sup>162</sup>

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<sup>159</sup> International Covenant on Civil and Political Rights (ICCPR), *adopted* Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>160</sup> International Covenant on Economic, Social, and Cultural Rights (ICESCR), *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>161</sup> Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 734–35 (1995) (footnotes omitted) (quoting various articles of the ICCPR).

<sup>162</sup> RESTATEMENT (THIRD), *supra* note 50, § 702.

Although there is ongoing debate regarding the extraterritorial application of certain IHRL treaties,<sup>163</sup> it is accepted that states are bound to respect those rights which are part of customary international law no matter where the agents of a state may be operating.<sup>164</sup>

Importantly, however, the United States has adopted the view that, like the protections of the U.S. Constitution, IHRL does not apply in situations for which LOAC is the applicable legal framework. Otherwise stated, once the criteria for the applicability of LOAC are met, LOAC becomes the *lex specialis*, applying “in lieu of, not alongside, IHRL.”<sup>165</sup> This has a notable impact on the legality of state action under international law and the extent to which a state may kill or detain someone and, by creating respective limitations and capabilities, forms the approach of state actors to significant transnational problems. Professor Mary Ellen O’Connell highlights the distinction in the options presented in the LOAC-IHRL dichotomy:

The law governing when human life may be intentionally ended, when the limitation on “arbitrary” deprivation is avoided, falls into two categories: peacetime rules and rules within the law of armed conflict. In peace, a state may only take a human life when “absolutely necessary in the defense of persons from unlawful violence.”<sup>166</sup>

The impact of LOAC’s talismanic rights-eclipsing effect is also significant as it, in legal terms, creates an essentially Janus-faced world order. Humanity may live in geographic zones in which human rights and domestic legal protections exist, or else endure life in less fortunate geographic zones where legal protections are scant and in which extraordinary levels of violence, overwhelming force, and the constant risk of becoming collateral damage characterize one’s daily existence.

### C. *Triggering the Law of Armed Conflict*

Given the U.S. view that neither international human rights nor constitutional rights apply when LOAC is applicable, the question of when it applies is a salient one. Any argument for the application of the law of

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<sup>163</sup> See Matthew Waxman, Head of U.S. Delegation, Principal Deputy Dir. of Policy Planning, Dep’t of State, Opening Statement to the U.N. Human Rights Committee (July 17, 2006), available at <http://2001-2009.state.gov/g/drl/rls/70392.htm> (speaking on the extraterritorial application of the ICCPR).

<sup>164</sup> See LOAC DESKBOOK, *supra* note 131, at 199 (“If a specific human right falls within the category of [customary international law], it should be considered a ‘fundamental’ human right. As such, it is binding on U.S. forces during all overseas operations.”).

<sup>165</sup> *Id.* at 198 (footnote omitted).

<sup>166</sup> Mary Ellen O’Connell, *Adhering to Law and Values Against Terrorism*, 2 NOTRE DAME J. INT’L & COMP. L. 289, 296 (2012) (citing *McCann & Others v. United Kingdom*, 21 Eur. Ct. H.R. 97 (ser. A) (1995); *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 150, 69 (July 5, 2006)).

international armed conflict to any particular operation presupposes that there is an armed conflict. Accordingly, before applying this body of law to extraterritorial operations, the circumstances must be such that an armed conflict, as defined by relevant international law, is deemed to be in existence.<sup>167</sup>

It is commonly accepted that there are two different categories within the LOAC framework: the laws applicable to international armed conflicts and the laws applicable to non-international armed conflict.<sup>168</sup> The threshold for an international (or inter-state) armed conflict is codified in Common Article 2 of the Geneva Conventions, which provides, in relevant part, that “the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more . . . High Contracting Parties . . . .”<sup>169</sup> Non-international (or intra-state) armed conflicts, in turn, are regulated by a separate regime of law which is expressed in Common Article 3 of the Geneva Conventions and Additional Protocol II of 1977.<sup>170</sup>

Conflicts that are neither international armed conflicts nor non-international armed conflicts not regulated by LOAC are, instead, regulated by the more restrictive rules governing law enforcement activity and the exercise of extraterritorial enforcement jurisdiction.<sup>171</sup> On that score, the threshold for the existence of a non-international armed conflict in international law remains somewhat indeterminate.<sup>172</sup> The Commentary to the Geneva Conventions offers non-binding criteria, such as whether the group has an organized military force; whether the members of a group are subject to some authority; whether the group controls territory; whether the group respects LOAC; and whether the government response to the group involves the use of government forces.<sup>173</sup> Scholars and international tribunals have posited more simplified tests for the existence of such a conflict, such as looking to the level of violence of the conflict and the level of organization of the non-state actor involved.<sup>174</sup> Absent these circumstances, there is no trigger for the law of international armed conflict and, therefore, no possibility of arguing that it applies to a given operation. As Robin Geiss has remarked:

The nature of a genuine law enforcement operation does not change simply because it is conducted in a failed state or in a

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<sup>167</sup> See LUBELL, *supra* note 146, at 164. Other authors have already given considerable attention to this subject. For an excellent overview of the topic, see Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 1 (2009).

<sup>168</sup> LUBELL, *supra* note 146, at 92.

<sup>169</sup> Geneva Convention I, *supra* note 113, at art. 2.

<sup>170</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 14–15 (1st ed. 2004).

<sup>171</sup> See LUBELL, *supra* note 146, at 85.

<sup>172</sup> LOAC DESKBOOK, *supra* note 131, at 26 (discussing the framework of LOAC).

<sup>173</sup> *Id.* (citing Geneva Convention I, *supra* note 113, Commentary).

<sup>174</sup> See LUBELL, *supra* note 146, at 129.

territory where an armed conflict is in progress. In other words, the mere existence of an already high level of violence does not automatically transform each and every law enforcement operation into an involvement in a non-international armed conflict governed by [LOAC].<sup>175</sup>

As noted, if a law enforcement operation does not meet these criteria or occur within a context that would allow for the applicability of LOAC, then the applicable framework would be the ordinary legal regime regulating extraterritorial enforcement jurisdiction, the relevant provisions of international human rights law, and the absence of any *lex specialis* to offer state actors greater latitude.

#### ***D. The Geographic Expanse of the Law of International Armed Conflict***

Inherent in the idea of *jus ad bellum* is the idea that it is lawful for one state to use force against another state in the territory of that state. Otherwise stated, LOAC presupposes extraterritoriality. If the circumstances exist for the lawful use of force under *jus ad bellum*, then so long as a state abides by the rules articulated in *jus in bello*, that state's extraterritorial actions are considered lawful.<sup>176</sup> This only becomes problematic in the context of cross-border strikes against non-state actors, which require military action in the territory of a third country that is not a party to the conflict. In such circumstances, some scholars have opined that the use of force against non-state actors who are launching attacks from within the territory of a third country is permissible when that third country is unwilling or unable to take measures to stop those attacks.<sup>177</sup> It should be noted, however, that such a

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<sup>175</sup> Geiss, *supra* note 24, at 141.

<sup>176</sup> See *supra* text accompanying note 131 (defining *jus ad bellum* and *jus in bello*).

<sup>177</sup> See DINSTEIN, *supra* note 18, at 244–46. See also Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483 (2012). But see O’Connell, *supra* note 166, at 301 (footnotes omitted) (asserting that international law contains no rule justifying the use of force with respect to a state unable or unwilling to use force to control terrorist activity on its territory):

In this author’s research, the phrase “unable or unwilling” appears to have surfaced in connection with justifying resort to military force against foreign sovereign states in the document titled “The Chatham House Principles of International Law on the Use of Force in Self-Defence.” The document was sponsored by the foreign affairs think tank Chatham House (the Royal Institute of International Affairs). The reference to resort to force against states “unable or unwilling” to control terrorism on their territory has no citation to authority in international law. Apparently the Principles include the “unable and unwilling” basis because the drafters of the Principles understood this to be a basis for resort to force that states want, rather than a basis that currently exists in international law. It is, therefore, a proposal for a future rule but one that contradicts the UN Charter.

view is not universal, and textual authority for such cross-border attacks is limited.<sup>178</sup> Nonetheless, even taking into account the indeterminacy of its exact geographic limits, it is clear that LOAC allows militaries to engage in a vast amount of extraterritorial activity.

### *E. Civilians and the Law of International Armed Conflict*

As a general rule, the LOAC framework serves to prohibit the intentional targeting of civilians and to minimize the role that civilians can play in an armed conflict.<sup>179</sup> Even so, civilian law enforcement personnel are now operating abroad, including in conflict zones such as Iraq and Afghanistan.<sup>180</sup> In those environments, civilian law enforcement agencies work in cooperation with military and intelligence counterparts,<sup>181</sup> and at least on the surface, there is some symmetry between the work of law enforcement agents and military operations. In such an environment, the work of civilians and their military counterparts may be overlapping in substance and function. In some cases, the work of the military may even seem identical to that performed by civilians. For instance, one commentator has noted that “[i]n the conduct of armed conflict, a State may not only kill or wound combatants fighting on behalf of its enemies, but it may also take them prisoner and hold them until the end of the conflict.”<sup>182</sup> Thus, military operations may closely resemble ordinary law enforcement operations in that they involve apprehension and investigation rather than lethal targeting.<sup>183</sup>

Given those similarities and the more permissible rules that govern armed conflict, it may seem tempting to find room under that rubric for extraterritorial law enforcement operations by civilian agencies. After all, “[t]hese rules allow for a higher level of force and a looser finger on the trigger

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<sup>178</sup> O’Connell, *supra* note 166, at 301.

<sup>179</sup> See, e.g., Geneva Convention Protocol I, *supra* note 140, at art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between . . . civilian objects and military objectives . . .”), and Geneva Convention Protocol I, *supra* note 140, at art. 51(3) (noting that civilians shall enjoy protection against the dangers arising from military operations “unless and for such time as they take a direct part in hostilities”).

<sup>180</sup> See ANDREAS & NADELMANN, *supra* note 1, at 193 (footnote omitted) (“In Afghanistan, for example, FBI agents reportedly accompanied soldiers on missions in order to interrogate prisoners, and in Pakistan, FBI and CIA agents apparently accompanied Pakistani security forces in the raid of an al Qaeda cell and capture of Abu Zubaydah.”).

<sup>181</sup> *Id.*

<sup>182</sup> James A. Schoettler Jr., *Detention of Combatants and the Global War on Terror*, THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 67, 67 (2009) (footnote omitted).

<sup>183</sup> Steve D. Berlin, *Conviction-Focused Targeting: Targeting Violent Extremists While Developing Rule of Law Capacity*, SMALL WARS J. (Aug. 24, 2010), <http://smallwarsjournal.com/jrnl/art/conviction-focused-targeting>.



than if IHL were not applicable.”<sup>184</sup> An analysis of LOAC demonstrates, however, that a similarity in objectives does not equate to parity under international law, and civilian law enforcement operations are granted no special privileges by the law of war.

***F. What Civilians May Not Do—and What Combatants May Not Do to Them***

Even if the preliminary threshold is met and LOAC applies, there are still fundamental reasons why its application to extraterritorial law enforcement operations by civilian agencies is implausible. This is because LOAC, though allowing greater latitude in certain respects, is still a highly regulated legal framework that limits the use of force by strictly defining the parties authorized to use force and the parties against whom it may be used.<sup>185</sup>

Under the law of international armed conflict, persons are classified as combatants, noncombatants, or civilians.<sup>186</sup> Combatants are those who meet the criteria of that category under the Geneva Conventions, including being part of the armed forces of a party to a conflict or part of a militia that is an organized force subject to a command structure; having a fixed distinctive sign that is recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws of war.<sup>187</sup> Noncombatants are those personnel, such as medical personnel and chaplains, who are allowed on the battlefield but may not engage in active combat without losing their protected status.<sup>188</sup> All other persons are classified as civilians.<sup>189</sup>

Article 51(3) of the 1977 Protocol Additional I to the Geneva Conventions (“Protocol I”), states that civilians enjoy immunity from attack during international armed conflict “unless and for such time as they take a direct part in hostilities.”<sup>190</sup> Such language reflects the general rule that combatants are allowed to attack other combatants and military targets but are prohibited from targeting civilians.<sup>191</sup> The loss of such protections is a significant event because civilians who lose such protections can be targeted (i.e., killed) are not entitled to POW (prisoner of war) status upon capture and “may be tried by an opposing force’s judicial system for actions taken while directly participating in hostilities.”<sup>192</sup> This is because the use of force under

<sup>184</sup> See LUBELL, *supra* note 146, at 123 (footnote omitted).

<sup>185</sup> See DINSTEIN, *supra* note 18, at 27 (“[C]ivilians are not allowed to participate actively in the fighting . . .”).

<sup>186</sup> DINSTEIN, *supra* note 170, at 29.

<sup>187</sup> Eric T. Jensen, *Targeting Persons and Property*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 37, 45 (2009).

<sup>188</sup> *Id.* (footnote omitted).

<sup>189</sup> *Id.* (footnote omitted).

<sup>190</sup> Geneva Convention Protocol I, *supra* note 140, at art. 51(3).

<sup>191</sup> See DINSTEIN, *supra* note 170, at 27.

<sup>192</sup> Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 J. TRANSNAT’L L. & POL’Y 281, 289 (2010) (footnoted omitted).

the law of international armed conflict is the special privilege of the combatant—and something forbidden to civilians. Civilians, therefore, are to be neither the targets nor the wielders of military force under the law of international armed conflict. Dinstein notes, “The goal is to ensure in every feasible manner that international armed conflicts [are] waged solely among the combatants of the belligerent Parties.”<sup>193</sup>

It is important to emphasize that the law of international armed conflict makes the participation of civilians in hostilities an illegal act, which not only deprives civilians of the protections that they are normally due but also subjects them to criminal sanctions for their acts of belligerency.<sup>194</sup> On that score, U.S. civilian law enforcement will typically not meet the criteria of a lawful combatant in that they are not part of the U.S. Armed Forces and are thus not part of the regular forces of a belligerent state.<sup>195</sup> Similarly, U.S. civilian law enforcement agencies are not part of a militia or volunteer corps. Their purpose is to investigate crime rather than to fight wars.<sup>196</sup> Their participation in the hostilities would, therefore, be deemed an illegal act. Civilian law enforcement agents, therefore, cannot lawfully avail themselves of the more permissible rules available to combatants under the law of international armed conflict.

Moreover, many (and perhaps most) of the subjects of law enforcement operations—even those conducted in zones of persistent conflict—will be civilians.<sup>197</sup> While there will doubtlessly be those situations in which a particular subject might be suspected of activities that deprive him of protected status, there remains a vast and varied universe of criminality (e.g., economic crimes) that could not be realistically linked to direct participation in hostilities. Not only would the U.S. law enforcement agent be considered a civilian who is not permitted to wield force under the law of international armed conflict but the suspect would be considered a civilian who is protected from such uses of force. “The legality of an operation designed for intentional use of force directed at individuals can hinge on the determination of their

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<sup>193</sup> DINSTEIN, *supra* note 170, at 27.

<sup>194</sup> *Id.* at 30 (“[T]he fulcrum of unlawful combatancy is that the judicial proceedings may be conducted before regular domestic (civil or military) courts and, significantly, they may relate to acts other than those that divested the person of the status of lawful combatant. Even when the act negating the status of a lawful combatant does not constitute a crime *per se* (under either domestic or international law), it can expose the perpetrator to ordinary penal sanctions (pursuant to the domestic legal system) for other acts committed by him that are branded as criminal.”).

<sup>195</sup> *Id.* at 36.

<sup>196</sup> See generally ROBERT M. PERITO, U.S. INST. OF PEACE [USIP], SPECIAL REPORT 191, U.S. POLICE IN PEACE AND STABILITY OPERATIONS (2007) (noting stark differences in the roles of military personnel and civilian police).

<sup>197</sup> See *Transnational Organized Crime: A Growing Threat to National and International Security*, WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/nsc/transnational-crime/threat> (last visited Jan. 27, 2013) (noting the possibility of a terrorism-criminal nexus and also describing different sorts of non-terrorism transnational criminal activities, such as corruption, drug trafficking, human smuggling, intellectual property theft, and cybercrime).

status and if the person is a protected civilian then intentional force against them will fail this initial stage of lawful validation.”<sup>198</sup>

In short, the law of international armed conflict is a poor fit for most extraterritorial law enforcement operations by civilian agencies. Nothing in its mechanics or undergirding philosophy would easily lend to its application in such a manner. This is true even though the law enforcement agent may be working in an extremely dangerous environment. Although certain extraterritorial operations may be justified on such grounds, given the right set of circumstances,<sup>199</sup> for the vast majority of law enforcement operations—conducted by civilian agents against civilian suspects—LOAC will simply not provide the operative legal framework.

#### IV. THE EDGE OF THE LOAC-LAW ENFORCEMENT PRECIPICE

Given the wide-ranging activities of military forces, it is unsurprising that military activity sometimes transcends thematic classification. On occasion, military personnel perform civilian-like roles in the context of an armed conflict. Similarly, military personnel may perform law enforcement tasks outside of the context of armed conflict. Contemporary military activities, accordingly, may occur at the fine edge of the lines, which distinguish LOAC-based activities from law enforcement activity. Nonetheless, although these activities may often seem to mirror one another, the legal basis for each sort of activity remains distinct.

##### A. *Military Law Enforcement in Non-combat Contexts*

Separate from the question of what abilities are permissible to military forces operating pursuant to LOAC is the question of what extraterritorial investigative and law enforcement capabilities are permissible outside the conflict zone and during times of relative peace. When not acting pursuant to LOAC, military investigators abroad operate under the same basic constraints as their civilian counterparts.<sup>200</sup>

The potential for extraterritorial law enforcement by the military highlights two fundamental tensions. First, any action taken abroad must be reconciled with the general presumption that nations retain sovereignty within their own territory. Without the approval of foreign nations, American agents who operate abroad risk offending comity between nations as well as the international legal system. In some cases, they may

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<sup>198</sup> LUBELL, *supra* note 146, at 159.

<sup>199</sup> See Berlin, *supra* note 183.

<sup>200</sup> See Doneso, *supra* note 15, at 868–69.

expose themselves to criminal liability within other countries.<sup>201</sup>

The U.S. Armed Forces have an array of investigative services that are charged with the investigation of crime (both military and civilian) as a routine part of the regulation of military society wherever military installations are found. The major military investigative entities are the Air Force Office of Special Investigations (AFOSI), the Naval Criminal Investigative Service (NCIS), the Army Criminal Investigation Command (CID), and the Defense Criminal Investigative Service (DCIS).<sup>202</sup> These entities are charged with investigating civilian misconduct as well as crimes committed by members of the military,<sup>203</sup> and due to the international presence of the U.S. military on installations across the globe, the investigative purview of these entities is not limited to the territorial United States but rather extends to military installations abroad.

Due to the seemingly broad license of military personnel to investigate and even prosecute abroad,<sup>204</sup> there may, at a superficial level, appear to be parity among armed forces using military force abroad, those conducting stability operations, and the ability of military investigators to operate extraterritorially. After all, on a daily basis, military investigators abroad conduct investigations in foreign territories such as Germany, Italy, and Korea and, should they produce sufficient evidence, military courts-martial frequently prosecute U.S. service members in courthouses that rest on what is technically foreign soil.<sup>205</sup>

Though it may seem as though the military actors in each circumstance are merely operating in accord with the same permissive grant of power, the regulation of the standard extraterritorial activity of the military's criminal justice apparatus is actually quite limited. It exists not pursuant to the tenets of LOAC but as a function of specific international agreements designed to

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<sup>201</sup> *Id.* (footnote omitted).

<sup>202</sup> Thomas Dukes, Jr. & Albert C. Rees, Jr., *Military Criminal Investigations and the Stored Communications Act*, 64 A.F. L. REV. 103, 104 n.1 (2009).

<sup>203</sup> See *Marrone v. Hames*, No. 93-35744, 1994 WL 273885 (C.A.9 (Alaska)), at \*4 (9th Cir. June 17, 1994) (holding that prevention of drug trafficking by civilians involving military personnel was a valid military purpose for the CID investigation and that, therefore, there was no violation of the Posse Comitatus Act (PCA)). See also *Hayes v. Hawes*, 921 F.2d 100, 103-04 (7th Cir. 1990) (holding that there is no violation of the PCA when the purpose of an investigation is to prevent illicit drug transactions); *Moon v. State*, 785 P.2d 45, 48 (Alaska Ct. App. 1990) (holding that the Army had a valid military purpose in preventing illicit drug transactions involving active duty personnel); *Harker v. State*, 663 P.2d 932, 937 (Alaska 1983) (holding that the prevention of illicit drug transactions involving military personnel is an independent military purpose for an investigation).

<sup>204</sup> The military practice of prosecuting U.S. soldiers at bases overseas through courts-martial is now routine. See, e.g., Rick Emert, *Soldier Gets 12 Years in Rape of Nuremberg College Student*, STARS & STRIPES (Jan. 15, 2004), <http://www.stripes.com/news/soldier-gets-12-years-in-rape-of-nuremberg-college-student-1.15398> (detailing a court-martial of a U.S. soldier in Germany for the rape of a German national in Germany).

<sup>205</sup> See, e.g., *id.*

provide a framework to govern the status of U.S. military personnel abroad. These agreements are known as Status of Forces Agreements (SOFAs).<sup>206</sup>

A SOFA is an agreement that establishes the framework under which armed forces operate within a foreign country. The agreement provides for rights and privileges of covered individuals while in the foreign jurisdiction, addressing how the domestic laws of the foreign jurisdiction shall be applied to U.S. personnel while in that country. It is important to note that a SOFA is a contract between parties and may be cancelled at the will of either party. SOFAs are peacetime documents and therefore do not address the rules of war, the Laws of Armed Conflict, or the Laws of the Sea. In the event of armed conflict between parties to a SOFA, the terms of the agreement would no longer be applicable.<sup>207</sup>

SOFAs are wide-ranging agreements that regulate a broad spectrum of activity, from relevant rights and privileges of service members in the foreign jurisdiction and questions of jurisdiction to claims mechanisms for damage done by visiting forces.<sup>208</sup> Although the United States is party to more than 100 such agreements, the most prominent SOFA is the North Atlantic Treaty Organization (NATO) SOFA,<sup>209</sup> which governs the treatment of U.S. forces present in NATO countries.<sup>210</sup>

Under the NATO SOFA, extraterritorial investigative activity by military entities is largely covered by Paragraph 10 of SOFA Article VII.<sup>211</sup> Paragraph 10(a) provides that “[r]egularly constituted military units or formations of a force shall have the right to police any camps, establishment or other premises which they occupy as the result of an agreement with the receiving State.”<sup>212</sup> This provision gives U.S. forces present in a foreign country the ability to conduct certain law enforcement operations that occur on specific installations occupied “as the result of an agreement with the receiving State.”<sup>213</sup> Paragraph 10(b) of that same article provides a circumscribed ability to conduct law enforcement operations outside such installations:

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<sup>206</sup> R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2009).

<sup>207</sup> *Id.* (footnotes omitted).

<sup>208</sup> See Captain Jeffrey S. Palmer, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 232 (1997).

<sup>209</sup> Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, art. VII(10), Jun. 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

<sup>210</sup> See, e.g., Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, 2000 ARMY LAW. 23, 23 (2000).

<sup>211</sup> NATO SOFA, *supra* note 209.

<sup>212</sup> *Id.* at art. VII (10)(a).

<sup>213</sup> *Id.*

Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.<sup>214</sup>

Thus, when operating outside the premises agreed upon by the host nation and the visiting forces, military law enforcement can operate only with the agreement of the host nation, only in coordination with their law enforcement officials, and only when such operations are necessary for regulation of order and discipline of the visiting forces.<sup>215</sup> The U.S.-Iraq Security Agreement<sup>216</sup> contains similar language. Article 22(1) of that agreement states that “[n]o detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law . . . .”<sup>217</sup> Likewise, “[t]he United States Forces may not search houses or other real estate properties except by order of an Iraqi judicial warrant and in full coordination with the Government of Iraq, except in the case of [combat operations].”<sup>218</sup>

It is worth highlighting the similarity between SOFAs and the treaties that created the capitulatory regime. SOFAs grant an exception to the general rules of sovereignty and non-interference by permitting a foreign sovereign to exercise extraterritorial enforcement jurisdiction within the territory of a host nation. As such, the international legal order continues to permit, in certain circumstances, a degree of pluralism in which one sovereign exercises extraterritorial enforcement jurisdiction within the territory of another. The practice notable during the capitulatory regime endures through the force of such agreements.

Without these agreements, however, U.S. military investigators would find themselves confronted with the same limitations as their civilian counterparts when it comes to conducting law enforcement activity abroad. Accordingly, although U.S. military investigators enjoy more expansive geographic investigative capabilities, those increased capabilities are treaty-based—their capabilities are both enhanced and delimited by the agreements that define their status and capabilities. As such, with regard to extraterritorial law enforcement activity in ungoverned spaces to which the relevant treaties do not apply, military investigators and civilian law enforcement agents encounter the same legal prohibitions.

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<sup>214</sup> *Id.* at art. VII (10)(b).

<sup>215</sup> *Id.*

<sup>216</sup> Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, art. 22(1), Nov. 17, 2008, T.I.A.S. No. 09-101.1 [hereinafter U.S.-Iraq Security Agreement].

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at art. 22(5).

**B. “Conviction-Focused Targeting” and Law Enforcement During Combat and Stability Operations**

One of the most fascinating and dramatic developments implicating international law and enforcement jurisdiction is the increasingly common practice of state-building and the conduct of “stability operations” by military forces: military missions, tasks, or activities conducted in foreign countries and in coordination with other instruments of national power “to maintain or reestablish a safe and secure environment and provide essential government services . . . .”<sup>219</sup> This practice presents a limited exercise of extraterritorial enforcement jurisdiction in that foreign actors will be conducting law enforcement activity, albeit in support of the domestic legal institutions. In this sort of activity, the foreign sovereign intrudes upon the core function of the host nation—but in support of the host nation and not in support of the foreign nation’s own laws.

Articulating the doctrinal basis for this practice, the U.S. Army Field Manual on Stability Operations notes that military forces may be called upon to “provide a broad range of activities to protect the civilian populace,” including “interim policing and crowd control” and “perform[ing] civilian police functions, including investigating crimes and making arrests.”<sup>220</sup>

Integral to establishing civil control is the support military forces provide to law enforcement and policing operations. Host-nation civilian law enforcement agencies and organizations may provide this capability if the security environment permits. However, in a fragile state, these institutions may have become corrupt or failed altogether. In failed states, especially during and immediately after conflict, military police forces are the only organizations able to fill this void.<sup>221</sup>

This practice has given rise to the use of the military in certain law enforcement actions abroad. Professor Robert Chesney has described the reality of this unorthodox military role in Iraq, noting that “[d]riven by strategic necessity, the military in Iraq has embraced its law enforcement support function to a remarkable extent in recent years” and that the U.S. military “is more capable of and interested in facilitating prosecutorial outcomes today than it was in years past—much more so than is commonly appreciated—notwithstanding the fact that this transformation is taking place in an overseas, quasi-battlefield context.”<sup>222</sup>

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<sup>219</sup> U.S. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS V-1 (2008).

<sup>220</sup> FIELD MANUAL 3-07, *supra* note 25, at 3-6, ¶ 3-22.

<sup>221</sup> *Id.* at 3-6–3-7, ¶ 3-24.

<sup>222</sup> Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT’L L. 549, 598 (2011).

Similarly, Major Steve Berlin, a U.S. Army Judge Advocate (JAG), has expounded upon the practice of—and continued need for—what he terms “conviction-focused targeting” by U.S. military forces conducting stability operations.<sup>223</sup> Major Berlin posits that, as U.S. forces shift to stability operations, military commanders must shift their targeting philosophy to combat violent extremist networks by simultaneously harnessing and nurturing the capabilities of host nation criminal justice institutions: “The host nation systems in turn become stronger; thus, [U.S. forces] will target [violent extremist networks] while simultaneously strengthening the host nation . . . .”<sup>224</sup>

Such non-lethal targeting became even more important to U.S. operations in the context of Iraq as U.S. military operations shifted from a law of armed conflict paradigm to a law enforcement paradigm.<sup>225</sup> With the entry into force of the U.S.-Iraq Security Agreement, the U.S. military presence and the conduct of operations became based on the consent of the Iraqi government rather than the law of armed conflict or the legal regime of belligerent occupation.<sup>226</sup> Such a paradigm shift meant that U.S. forces were required to transition from conducting operations under the rather expansive grants of authority provided by the law of armed conflict to operating under the far more strict authorities of a law enforcement paradigm.<sup>227</sup> This transition meant that the foreign criminal justice system became a central focus of U.S. military operations and that those operations, now dependent on host nation consent, took on a more police-like character. Highlighting the extensive role that the U.S. military has played in Iraqi criminal justice since the operational transition that occurred upon implementation of the U.S.-Iraq Security Agreement, Professor Chesney notes:

What did this transition entail in actual practice? Simply put, it meant that, from 2009 onward, the U.S. military would function in significant part as a criminal investigation, arrest, and trial support service in Iraq. In that capacity, it assisted

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<sup>223</sup> Berlin, *supra* note 183.

<sup>224</sup> *Id.*

<sup>225</sup> See Alexandra Perina, *Legal Bases for Coalition Combat Operations in Iraq, May 2003–Present*, 86 INT’L L. STUD. 86, 89 (2010) (“In practice, the MNF-I generally continued to apply the more robust rules applicable to international armed conflicts to its operations in Iraq. During this period, however, MNF-I’s operations also began to shift from a purely war paradigm to a law-enforcement paradigm, which fostered cooperation with the government of Iraq and paved the way for Iraqi assumption of security responsibility. Detention operations, in particular, incorporated law-enforcement elements within the purview of the Iraqi government alongside the security detentions authorized under Resolution 1546.”).

<sup>226</sup> *Id.* at 91 (“Since the expiration of the UN mandate for the MNF-I and the entry into force of the Security Agreement on January 1, 2009, the legal basis for the US military presence and operations in Iraq has been the consent of the Iraqi government.”).

<sup>227</sup> *Id.* at 92 (footnote omitted) (“Consistent with this approach, the agreement requires that all such military operations are subject to the agreement of the government of Iraq and must be coordinated with Iraqi authorities.”).



with the arrest and prosecution of at least 1393 individuals between January 2009 and July 15, 2010 (mostly described as members or associates of al-Qa'ida in Iraq, according to press releases issued by U.S. Forces-Iraq), while simultaneously screening more than 15,000 legacy detainees for either outright release or transfer into the Iraqi criminal justice system.<sup>228</sup>

It is too soon to tell the extent to which Iraq will serve as a model for future stability operations—especially given that the approach to each such endeavor will necessarily depend on the specific context of the country at issue. What is certain, however, is that such operations straddle the line between traditional military operations and civilian law enforcement activity, involving aspects of both and even employing civilian law enforcement agencies in furtherance of their objective.<sup>229</sup> The legal bases for action in such operations can be complex and confusing<sup>230</sup> because military forces may, depending on circumstances, seek to operate under the aegis of military authority operating pursuant to the law of armed conflict or, alternatively, on behalf of the host nation and pursuant to the law of the host nation (as was the case in Iraq after 2009).<sup>231</sup> In such circumstances, it may sometimes seem as

<sup>228</sup> Chesney, *supra* note 222, at 601 (footnote omitted).

<sup>229</sup> See *Deputy Assistant Secretary of Defense for Partnership Strategy and Stability Operations*, OFFICE OF THE UNDER SEC'Y OF DEF. FOR POL'Y, U.S. DEP'T DEF., <http://policy.defense.gov/solic/pssso/index.aspx> (last visited Jan. 27, 2013) (“Integrated military and civilian operations are the now [sic] the norm with most military operations taking place in the midst of civilian populations.”).

<sup>230</sup> Dale Stephens, *Military Involvement in Law Enforcement*, 92 INT'L REV. RED CROSS 453, 453 (2010). Captain Stephens notes:

The conduct of contemporary military operations takes place in a highly complex and contested terrain of legal and social norms. Whether a military force is engaged in conventional armed conflict, counter-insurgency, anti-terrorism, peacekeeping/enforcement, stability operations, or law enforcement, there is a convergence of a dense mixture of law, doctrine and policy that guides military decision-making. Within this highly pluralist environment, the synchronization of law and policy on the one hand, and of formalism and social effect on the other, needs to be constantly reconciled.

*Id.* (footnote omitted).

<sup>231</sup> See OPERATIONAL LAW HANDBOOK, *supra* note 130, at 163. According to the handbook:

After January 1, 2009, U.S. forces are supporting the Government of Iraq and are conducting operations in accordance with a security agreement. Under the security agreement, “no detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi Law and pursuant to Article 4.” Article 4 allows U.S. forces to conduct military operations that are coordinated with Iraqi authorities and conducted in accordance with Iraqi law. “In the event the United States Forces detain or arrest persons as

though the international law vis-à-vis extraterritorial enforcement jurisdiction becomes more malleable or blurred. But this is merely an illusion caused by the incrementally shifting authorities under which military forces operate in such circumstances. Once the ability to operate under the law of armed conflict ceases, the law enforcement paradigm prevails and the prohibition on extraterritorial enforcement jurisdiction applies.

## V. THE DISPARITY IN INTERNATIONAL LAW AND THE PROBLEM OF UNGOVERNED SPACES

As the discussion above demonstrates, civilian law enforcement agents operate in a far more regulated legal universe than military entities. In the course of their activities, civilian law enforcement entities must abide by domestic and international laws that grant individuals certain basic rights and, with regard to extraterritorial activity, must refrain from most unilateral actions because “[n]o state may exercise its enforcement jurisdiction in the territory of another State without that State’s permission.”<sup>232</sup> Military entities, in contrast, may use lethal and destructive force with far fewer limitations and operate in the context of a legal regime that assumes that they will be operating extraterritorially. Moreover, the legal framework in which the military operates is one in which even the most basic human rights can be disregarded so long as the resultant death or deprivation is considered necessary and proportional and was occasioned in the pursuit of a legitimate military objective.<sup>233</sup>

### A. *An Exception to Remedy the Incongruity in International Law*

The disparate nature of the two regimes is dramatic and somewhat counterintuitive, leading to legal results that can seem incongruous. Once there is a basis for the use of force under *jus ad bellum*, the range of permissible activity under *jus in bello* is extensive. For instance, once the

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authorized by . . . [the] agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within twenty-four hours from the time of their detention or arrest.” Therefore, the detention regime in Iraq has changed from one based on international law, where detention was necessary for imperative reasons of security, to a law enforcement detention regime grounded in Iraq’s domestic criminal law.

*Id.* (footnotes omitted).

<sup>232</sup> LOWE, *supra* note 47, at 184.

<sup>233</sup> Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SEC. J. 145, 154 (2010) (“In a traditional war context, killing fourteen civilians along with the highest military commander of the enemy could be considered proportionate collateral damage. For comparison’s sake, the special report of the prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the NATO operation in Kosovo determined that ten (and according to some reports, seventeen) civilian casualties were legitimate collateral damage for the attack on the Serbian television station.”).

prerequisites for the use of force are met under international law, an individual in a foreign country who is considered a legitimate target under LOAC can be lethally targeted by a missile fired from a predator drone. This is true even if—somewhat more arguably—that person is located in the territory of a third state that is not a party to the conflict.<sup>234</sup> If, however, LOAC were not applicable, it would be a violation of international law for civilian law enforcement agents to enter foreign territory uninvited, merely in order to investigate the person’s activities, and an even more egregious violation to arrest the suspect—even if that arrest were effected so that the criminal could be flown to the United States to face trial where he or she would be afforded the full panoply of rights granted by the U.S. Constitution.<sup>235</sup> No special triggering mechanism exists to permit civilian law enforcement to take unilateral action in the territory of a foreign sovereign for the purposes of addressing transnational crime. International law is most forgiving to the form of extraterritorial conduct that is most destructive and least protective of rights and, conversely, most restrictive on the form of extraterritorial conduct that is least destructive and most protective of rights.

Given this mind-wrenching decision of all or nothing, it is evident why governments seek to argue for LOAC to be applicable in an increasingly broad range of circumstances and eschew law enforcement approaches in favor of military solutions. As Robert Mandel, Professor of International Affairs at Lewis & Clark College, poignantly notes:

Traditional distinctions are now blurring between military and police activities, between defense and law enforcement functions, and between internal and external security. Facets of the murky military/police divide include the recently emerging pattern of military forces becoming more involved in domestic security missions such as border patrol; policing functions becoming more internationalized and militarized; the police and the criminal justice system relying more heavily on the military/war model for their rationale and policy dealing with crime, drugs, and terrorism; and criminality often being redefined as insurgency and crime control often being redefined as low-intensity conflict.<sup>236</sup>

The recontextualization of transnational crime as a military matter is the engine that drives the “over-militarization” that worries senior military leaders. But given the increasing level of transnational criminality and the

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<sup>234</sup> See DINSTEIN, *supra* note 18 at 244–46. See also Deeks, *supra* note 177. But see O’Connell, *supra* note 166, at 301.

<sup>235</sup> Blum & Heymann, *supra* note 233, at 161 (2010) (“As a general principle of international law, a country is strictly prohibited from engaging in law enforcement operations in the territory of another country, and much more so when the law enforcement operation includes killing a person.”).

<sup>236</sup> MANDEL, *supra* note 13, at 19 (footnotes omitted).

enduring problem of ungoverned spaces, how can states more efficiently respond using civilian law enforcement without recontextualizing a transnational crime as a military matter? A fair solution to the conundrum would be for international law to recognize a degree of laxity in the general limits on the extraterritorial exercise of enforcement jurisdiction by civilian law enforcement authorities vis-à-vis ungoverned spaces. An exception of this sort to the general prohibition would permit states to more readily employ civilian, rather than military, resources when dealing with transnational crime. The result would be a paradigm shift both in the international law of jurisdiction and in the way that governments approach transnational crime—but it is a result that would ultimately be of benefit to international law, to those countries to which the ungoverned spaces belong, and even to the transnational criminals who would be ferreted out.

The counterargument for such a proposal is that an increase in the permissible range of activity that one state may carry out within the territory of another would increase the likelihood of international conflict.<sup>237</sup> But by virtue of their activity, transnational criminals are already in the process of creating those conflicts, and there is an equally strong argument that allowing such activity to continue unabated is likely to be even more conflict-generative. By creating a legal regime to regulate such extraterritorial activities by civilian law enforcement, policymakers could somewhat ameliorate the propensity for conflict that extraterritorial law enforcement activity would occasion.

In that regard, it must be noted that some scholars have already argued, in the context of counterterrorism, that international law should “[permit] minor territorial breaches for the greater good of global security . . . .”<sup>238</sup> This theory of permissible intrusion, taking its name from contract theory, is commonly referred to as “efficient breach.”<sup>239</sup> Notably, Andrew Calica has proposed a seven-part test to justify an extraterritorial abduction in cases involving terrorists abroad.<sup>240</sup> Under this proposed model, extraterritorial abduction would be permissible in situations where (1) the terrorist threat is imminent, (2) the opportunity for abduction is fleeting, (3) the target nation is unwilling to extradite or prosecute, (4) the international community is gridlocked, (5) the territorial infringement is reasonably limited, (6) the operation involves minimal threat to bystanders, and (7) the accused receives humane treatment and a fair trial.<sup>241</sup>

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<sup>237</sup> See LUBELL, *supra* note 146, at 79 (footnote omitted) (“The prospect of opening the door to allow states the relative freedom of defining what is a threat that justifies sending forces to operate in the territory of another state, is one that does not bode well for international order.”).

<sup>238</sup> Gregory S. McNeal & Brian J. Field, *Snatch-and-Grab Ops: Justifying Extraterritorial Abduction*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 491, 519 (2007).

<sup>239</sup> Andrew J. Calica, Note, *Self-Help Is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists*, 37 *CORNELL INT’L L.J.* 389, 393 n.13 (2004).

<sup>240</sup> *Id.* at 394 (footnote omitted).

<sup>241</sup> *Id.*

Permitting the arrest and transfer of fugitives from within the territory of another sovereign under an “efficient breach” theory has been promoted as benefitting the international community because it “remov[es] a serious threat from international travel and action.”<sup>242</sup> But the need for extraterritorial law enforcement activity extends beyond the sole act of arrest (or “abduction”) and for cases aside from those linked to terrorism. What is needed in international law, therefore, is not merely a narrow exception for abductions in counterterrorism matters but a more comprehensive exception to the general prohibition on the exercise of extraterritorial enforcement jurisdiction in ungoverned spaces—an exception that allows for a broader range of law enforcement activity to counteract transnational crime of every variety.

Lubell has obliquely suggested a potential approach “to develop the extraterritorial law enforcement concept into a wider notion, allowing for lower scales of force,” which would not violate Article 2(4) of the U.N. Charter.<sup>243</sup> Lubell ultimately rejects such an approach because Article 2(4) is meant to prohibit all force and because “whilst international law does sanction, and even demand, state action against certain individuals or groups, it does so in a way that does not endorse extraterritorial force used in another state without consent.”<sup>244</sup> But Lubell’s conclusion serves only to highlight the problem. If the current international legal framework does not permit extraterritorial activity except for very limited exceptions that entail military responses, then it is only natural that states will make increasing use of those military-centric exceptions as transnational crime becomes more prevalent and ungoverned spaces increasingly serve as a base for transnational criminal activity.

As a solution to this incongruence—an incongruence that only serves to increasingly militarize state approaches to transnational criminality—it is proposed that states should recognize a limited exception in international law for extraterritorial law enforcement operations that occur in territories where there is no government capable or willing to counter a specific transnational criminal element. In cases involving transnational criminals who are operating or are present in ungoverned spaces, international law should allow for an exception to the general prohibition against extraterritorial enforcement jurisdiction by civilian actors.

At the outset, from a historical perspective, it is worth noting that the exception to the rule against extraterritorial law enforcement advocated in this Article is not without some precedent. As the discussion above demonstrates, history is replete with examples of extraterritorial enforcement jurisdiction, albeit much of it based on treaties such as capitulations and SOFAs.<sup>245</sup> In

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<sup>242</sup> McNeal & Field, *supra* note 238, at 520 (footnote omitted).

<sup>243</sup> LUBELL, *supra* note 146, at 77.

<sup>244</sup> *Id.* at 78.

<sup>245</sup> See, e.g., Bentwich, *supra* note 54, at 89 (noting the voluntary grant by Ottoman sultans to Europeans in Ottoman territory to remain subject to the jurisdiction of their country and immune from Ottoman jurisdiction).

addition, the special challenges posed by piracy, and the ungoverned spaces from which they operate, have given rise to an exceptional and limited authorization for states to exercise extraterritorial enforcement jurisdiction in places such as Somalia.<sup>246</sup> Moreover, even in the absence of such U.N. authority, contemporary literature is replete with examples of states conducting such operations extraterritorially, though in apparent violation of international law as it currently stands.<sup>247</sup>

In addition, a certain number of scholars now contend that the modern LOAC framework provides an analogous exception with regard to military engagements with non-state actors in the territories of third countries. Under such circumstances, these scholars theorize that it is permissible to use military force in the territory of a third country against non-state actors who are launching attacks from within the territory of that country when that third country is unwilling or unable to take measures to stop those attacks.<sup>248</sup> If such a rule is accepted, reasoning *a fortiori* (*a maiore ad minus*), international law should also permit less invasive activity on foreign soil against non-state actors by civilian law enforcement personnel. Even if such a broad rule for cross-border attacks under LOC is rejected, however, such a rule may be considered operable in the context of law enforcement operations in ungoverned spaces. In that regard, it must be noted that a sound argument exists in international law that, in cases where intransigent governments have refused to take action against a transnational criminal whose activities create cross-border effects, thereby violating the rule of *aut dedere aut judicare*, some limited law enforcement action might be permissible as a countermeasure.<sup>249</sup> Under such an approach, law enforcement activity, such as surveillance, other forms of investigation, and ultimately even arrest, could be viewed as a permissible countermeasure because it is action in response to a violation of international

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<sup>246</sup> See Geiss, *supra* note 24, at 139. Discussing law enforcement operations by third parties, Robin Geiss notes:

Resolution 1851 of 16 December 2008, like previous resolutions on the subject, explicitly recognizes ‘the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia . . . [.]’ It is against this background that the Security Council, by virtue especially of Resolutions 1816, 1846 and 1851, has defined and extended the legal basis for the exercise of enforcement and adjudicative jurisdiction by third parties with regard to the repression of piracy in the area.

*Id.* (footnote omitted).

<sup>247</sup> See *United States v. Verdugo-Urquidez*, 90 I.L.R. 691, 694 (S. Ct. 1990) (U.S.) (noting extraterritorial operations to obtain custody of fugitives carried out by Canadian, Israeli, German, and U.S. law enforcement authorities).

<sup>248</sup> See DINSTEN, *supra* note 18, at 244–46; Deeks, *supra* note 177.

<sup>249</sup> See MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 229 (2008) (“States and international organizations may use countermeasures in response to violations of international legal obligations.”).

law, so long as the extraterritorial law enforcement activity was truly necessary to avoid significant harm, was therefore a proportional response,<sup>250</sup> and did not rise to the level of an “armed attack,” thus triggering the right to self-defense under Article 51 of the U.N. Charter.<sup>251</sup>

Moreover, from a policy perspective, permitting an exception to the rule against extraterritorial enforcement jurisdiction in ungoverned spaces would serve a number of purposes. From a rights-based perspective, permitting extraterritorial law enforcement activity under such circumstances would increase the probability and frequency of cases in which transnational criminals are made to face justice in a forum that provides the protections available under domestic law and international human rights law (rather than lethally targeted in a military operation). This is because, as detailed above, civilian law enforcement officials typically must operate pursuant to the constraints of domestic law and international human rights law. As such, enhancing the ability of civilian law enforcement to conduct activities extraterritorially would serve to increase the number of cases potentially addressed under these legal frameworks. Policymakers would then also be free to dedicate resources to civilian agencies so that capabilities for unilateral extraterritorial operations could be enhanced and developed.

Conversely, permitting extraterritorial law enforcement activity in ungoverned spaces would likely decrease the overall number of cases addressed through military action because military action would no longer be the exclusive lawful approach under international law. Instead, a viable civilian approach would exist under international law, permitting civilian law enforcement authorities to take unilateral extraterritorial law enforcement action in a limited set of circumstances. Importantly, such action would have to occur under a legal framework that, as a general rule, does not permit lethal targeting and, instead, mandates that a certain level of due process be afforded the transnational criminal before a punishment could be implemented. As such, transnational criminals would be less frequently the subject of a military response and more frequently the subject of judicial proceedings at which they would be afforded a fair trial. As a result, though the principle of nonintervention would be caveated, domestic legal protections and international human rights law would be made applicable to a host of matters that would otherwise be governed solely by the *lex specialis* of LOAC.

In addition, it may also be fairly argued that the creation of such an exception would bring international law more in line with the contemporary practice of states. It is worth noting that contemporary literature is replete with examples of states conducting such operations extraterritorially in potential

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<sup>250</sup> See generally Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715 (2008) (discussing the proportionality principle in relation to military matters).

<sup>251</sup> *Id.* at 719–20. See also U.N. Charter art. 51.

violation of international law.<sup>252</sup> Recognizing a limited range of cases in which extraterritorial law enforcement activity is permissible would, in many regards, merely align international law with the reality of contemporary state practice.

Permitting extraterritorial law enforcement action in ungoverned spaces would also serve to help rebalance civilian and military roles with regard to transnational crime. As noted, this trend of militarization has been viewed with a jaundiced eye by both rights advocates and those in the military establishment who see the trend as a distraction from the core mission of the armed forces:

The real threat posed by increasing military participation in law enforcement is that use of the military in law enforcement operations will dull the critical war-fighting skills the military services need. Fundamentally, the nation must think and choose wisely, using the military in law enforcement judiciously, when its capabilities can be of most use, of greatest success, and complementary to the skills the military needs to be effective in a modern combat environment.<sup>253</sup>

Creating a zone of permissible extraterritorial law enforcement action in international law would serve to relieve the burden of the military by making civilian law enforcement responses to transnational crime more tenable and fundamentally altering the equation for those cases in which a military response—and the recontextualizing of a matter as a military threat—is the only available option under international law.

Lastly, extraterritorial law enforcement operations in ungoverned spaces might also be considered less objectionable because the sovereignty in question, the sovereignty being violated, is that of a government unable to effectively control its own territory. In that regard, the extraterritorial law enforcement action being undertaken could even be perceived as a positive development; though such an exception would likely mean that ungoverned spaces would likely be more prone to foreign authorities acting on their soil, those ungoverned areas would be less prone to use by transnational criminals as bases for operations and places of hiding. This acceptance of foreign law enforcement would be at the cost of some degree of sovereignty but would allow countries with a lack of control over their territories to obtain, even if episodically, a form of authority operating within their territory to counter-criminal elements. Importantly, the invasive action would be in furtherance of law enforcement action that would be, in various stages, governed by domestic legal protections and international human rights law, resulting in a legal

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<sup>252</sup> See *Verdugo-Urquidez*, 90 I.L.R. at 694 (noting extraterritorial operations to obtain custody of fugitives carried out by Canadian, Israeli, German, and U.S. law enforcement authorities).

<sup>253</sup> Cunningham, *supra* note 9, at 702.



process in which the suspect would be afforded rights and a degree of due process—rather than simply being destroyed by a missile. Permitting the exception to the prohibition against extraterritorial enforcement jurisdiction in such circumstances would, therefore, serve to advance human rights and due process.

## VI. CONCLUSION

The phenomenon of transnational criminal activity occurring in ungoverned spaces is a mounting challenge for governments seeking to protect their citizens—a challenge exacerbated as technology creates new capabilities and opportunities for transnational criminals. Compounding the complexity of this quandary is the proliferation of “politically fragile or failing states,”<sup>254</sup> a phenomenon that allows transnational criminals to exploit “globally vulnerable areas with weak governments and resurgent ethnic and regional conflicts.”<sup>255</sup> Responding to the problem of transnational crime, states have gravitated toward military responses and exploited the legal fact that international law permits military action extraterritorially in certain circumstances while civilian law enforcement agents must almost invariably operate in a far more regulated legal universe. The U.S. response to transnational crime, in particular, has frequently taken on the characteristics of military action—a trend that has worried policymakers and senior military officials. This dangerous trend undermines military readiness, can have counterproductive effects on crime control and political stability in affected areas,<sup>256</sup> and poses dangers to democratic principles and the rule of law by eschewing the legal protections of both domestic law and international human rights law.

Military responses will, obviously, remain appropriate choices for many problems and threats faced by modern states. But as both transnational crime and failed states burgeon, the prospect of an increasingly militarized approach to transnational crime—one that obviates basic domestic and international legal protections—is a troubling one. To permit the encroachment of a rights-eclipsing legal regime into ordinary criminal matters, the domestic sphere, and an increasingly broad category of affairs portends ominously for democratic regimes.<sup>257</sup> Policymakers should, therefore, take

<sup>254</sup> MANDEL, *supra* note 13, at 21.

<sup>255</sup> *Id.* at 23 (footnote omitted).

<sup>256</sup> *Id.* at 163.

<sup>257</sup> See THE FEDERALIST NO. 51 (James Madison).

The interest of the man must be connected to the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the

caution to ensure that the law of war remains a positive force that imbues an otherwise chaotic and lawless battlefield with an element of humanity and constraint, thereby “alleviating as much as possible the calamities of war,”<sup>258</sup> rather than acting as a corrosive element that serves to blight existing rights and protections in the domestic sphere.

To that end, the trend of militarization in the U.S. approach to transnational crime could be reversed to a degree if international law recognized a greater degree of flexibility for certain limited categories of extraterritorial law enforcement actions by civilian actors. Though the use of civilian law enforcement would certainly mean greater restrictions on international activity in many situations, as Lord Acton poignantly noted, the fate of every democracy depends on the choice it makes between “absolute power on the one hand, and on the other the restraints of legality and the authority of tradition.”<sup>259</sup> Permitting an exception to the prohibition on extraterritorial enforcement jurisdiction would represent the triumph of legality over loosely constrained force. And that, after all, is the *raison d’être* of international law.<sup>260</sup>

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great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

<sup>258</sup> DINSTEIN, *supra* note 170, at 9 (footnote omitted) (internal quotation marks omitted) (citing the 1868 St. Petersburg Declaration Renouncing the Use in Time of War, of Explosive Projectiles under 400 Grammes Weights).

<sup>259</sup> LORD ACTON, POLITICAL CAUSES OF THE AMERICAN REVOLUTION (1861), *reprinted in* 1 SELECTED WRITINGS OF LORD ACTON: ESSAYS IN THE HISTORY OF LIBERTY 216, 216 (J. Rufus Fears ed., Liberty Classics 1985).

<sup>260</sup> See NOLLKAEMPER, *supra* note 20, at 1 (footnote omitted) (“It is the *raison d’être* of international law to bring power under law.”). See also ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 1 (1947) (“And there is tremendous drama in the eventful struggle of statesmen and thinkers to substitute among nations the rule of law for untrammelled brutality—a struggle which, even where unsuccessful, has been inspired and exalted by the noblest motives of mankind.”).