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Targeting American ISIL Terrorists

Vincent Ferraro

PART I: INTRODUCTION

“If you threaten America, you will find no safe haven.”¹

- President Obama

The United States (“U.S.”) is in an armed conflict with al-Qaeda and its associated forces.² Currently, the associated force that poses the greatest threat to American national security is the Islamic State of Iraq and the Levant (“ISIL”).³ ISIL considers itself to be the rightful heir to Osama Bin Laden’s legacy and is attempting to establish an Islamic Caliphate within the states of Iraq and Syria.⁴ Previously known as al-Qaeda in Iraq (“AQI”), ISIL has been terrorizing Iraq since the U.S. led invasion in 2003.⁵ When U.S. forces left Iraq in 2011, a power struggle began between the Shiite dominated Iraqi government and the Sunni jihadists of ISIL.⁶ To grow in strength, ISIL began fighting the Bashar al-Assad regime in 2013 when civil war broke out in neighboring Syria.⁷ During both of these conflicts, ISIL killed thousands of civilians, including three American journalists.⁸

1 See *Transcript: Hagel testifies to the Senate Armed Services Committee on the Islamic State*, WASH. POST (Sept. 16, 2014), http://www.washingtonpost.com/world/national-security/transcript-hagel-testifies-to-the-senate-armed-services-committee-on-the-islamic-state/2014/09/16/a4909e26-3dab-11e4-b0ea-8141703bbf6f_story.html [hereinafter Hagel Testimony].

2 See U.S. Dep’t of Justice, *Dep’t of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force*, at 2 (Nov. 8, 2011), available at http://www.cardozolawreview.com/content/Symposium/DOJ_White_Paper.pdf [hereinafter DOJ White Paper] (noting that Congress has authorized the President to use all necessary and appropriate force to combat the threat imposed by al-Qaeda and its associated forces).

3 See generally Hagel Testimony, *supra* note 1; see Zachary Laub and Jonathan Masters, *Islamic State in Iraq and Syria*, COUNCIL ON FOREIGN RELATIONS (Aug. 8, 2014), <http://www.cfr.org/iraq/islamic-state-iraq-syria/p14811>.

4 See Peter Bergen and David Sterman, *ISIS: Is it really a threat to the U.S.?*, CNN (Aug. 20, 2014), http://edition.cnn.com/2014/08/18/opinion/bergen-does-isis-pose-threat-to-us/index.html?hpt=hp_t1 (stating that ISIL is now considered to be a credible alternative to al-Qaeda); Steven Dennis, *Here’s Obama’s Legal Justification for ISIS War*, ROLL CALL (Sept. 11, 2014), <http://blogs.rollcall.com/white-house/heres-the-administrations-legal-justification-for-isis-isil-war> (quoting an al-Qaeda operative, and explaining that ISIL has the same goals that al-Qaeda has always had- establishing an Islamic State); Laub and Masters, *supra* note 3 (saying that ISIL wants to form a transnational Islamic state strictly governed by sharia law).

5 See Dennis, *supra* note 4; Laub and Masters, *supra* note 3.

6 See Laub and Masters, *supra* note 3 (noting that in 2013, 7,818 civilians were killed in terrorist attacks in Iraq as a result of this power struggle).

7 See *id.* (explaining that al-Assad’s government is dominated by the Alawite sect of Shiite Islam); Hagel Testimony, *supra* note 1.

8 See Hagel Testimony, *supra* note 1 (saying that ISIL has killed Sunni, Shiite, Kurdish Iraqis, and a British journalist as well. ISIL’s goal is “to become the new vanguard of the global extremist movement”); Missy Ryan,

The conflicts in Iraq and Syria have attracted thousands of foreign fighters, including hundreds of U.S. and British citizens.⁹ In just eight months, the number of Americans fighting for rebel groups in Syria has doubled.¹⁰ U.S. intelligence agencies have identified at least twelve Americans who traveled to Syria to specifically fight for ISIL.¹¹ And since the beginning of the Syrian conflict, at least four Americans have died fighting for al-Qaeda and ISIL.¹² One fighter has even gone to Syria for training, returned home to Florida, and then went back to Syria as a suicide bomber for al-Qaeda.¹³

Former Secretary of Defense Chuck Hagel succinctly stated during a hearing before the Senate Armed Services Committee, “ISIL clearly poses an immediate threat to American citizens in Iraq and our interest in the Middle East . . . these fighters can exploit ISIL’s safe haven[s] to plan, coordinate, and carry out attacks against the United States and Europe.”¹⁴ Over the past decade, the most effective tool for combatting terrorism was the U.S. targeted killing program.¹⁵ These programs consist of U.S. Special Forces Operators or unmanned aerial vehicles (“UAVs”) killing enemy belligerents incident to the conflict with al-Qaeda and its associated forces.¹⁶

The U.S. military is legally justified under international and domestic law in targeting enemy belligerents on the battlefield.¹⁷ However, the conflict with al-Qaeda and its associated forces has

Karen DeYoung, & Adam Goldman, *Hagel: U.S. Hostage ‘Murdered’ in Yemen*, WASH. POST (Dec. 6, 2014), http://www.washingtonpost.com/world/hagel-us-hostage-murdered-in-yemen/2014/12/06/959c0e4c-7d33-11e4-9a27-6fdb612bfff8_story.html (adding 33 year old photojournalist, Luke Somers, to the list of Americans killed).

9 See Hagel Testimony, *supra* note 1 (noting that the foreign fighters are using ISIL safe havens to plan and organize attacks against Americans); Michael S. Schmidt & Eric Schmitt, *U.S. Identifies Citizens Joining Rebels in Syria, Including ISIS*, THE NEW YORK TIMES (Aug. 28, 2014), <http://www.nytimes.com/2014/08/29/world/middleeast/us-identifies-citizens-joining-rebels-in-syria.html> (adding that England has identified over 500 of its own citizens who are fighting in Syria); see also Bergen and Sterman, *supra* note 4 (estimating that in Syria there are 700 fighters from France and 270 fighters from Germany as well).

10 See Schmidt and Schmitt, *supra* note 9.

11 See *id.* (noting that the intelligence agencies are able to identify the Americans based on travel records, information gathered from family members, intercepted communications, social media postings, and surveillance activities).

12 See *id.* (describing Minnesotan Douglas McAuthor McCain); Bergen and Sterman, *supra* note 4 (describing Nicole Mansfield of Flint, Michigan)

13 See Bergen and Sterman, *supra* note 4 (stating that Moner Mohammad Abu-Salha grew up in Vero Beach, Florida and returned home before killing himself in Syria for al-Qaeda); see also *id.* (noting that eight Americans have also been indicted on crimes relating to ISIL or the al-Qaeda conflict in Syria: Abdella Tousini from Aurora, Illinois was charged with providing material support to al-Qaeda; Sinh Vinh Ngo from Southern California plead guilty to attempting to providing material support to terrorism for fighting for al-Qaeda in Syria and telling an informant he planned to help the jihadi movement more; and Gufran Mohammed, an American citizen living in Saudi Arabia, helped to recruit veteran al-Qaeda fighters from Somalia to fight in Syria).

14 See Hagel Testimony, *supra* note 1.

15 See generally Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, EUROPEAN COUNCIL ON FOREIGN RELATIONS, 1-4, July 2013, available at http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf (estimating that there have been 370 drone strikes in Pakistan that have killed 2,500-3,500 people, 50 strikes in Yemen that have killed 240-349 people, and 3-9 strikes in Somalia that have killed 7-27 people).

16 See *id.* at 4.

17 See Jeh Charles Johnson, Gen. Counsel Dept. of Homeland Security, *Dean’s Lecture at Yale Law School: National Security Law, Lawyers and Lanyering in the Obama Administration*, LAWFARE (Feb. 22, 2012), <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school> [hereinafter Jeh Johnson speech] (providing the legal basis of

complicated the notion of a single battlefield.¹⁸ Al-Qaeda is a non-state actor that observes no borders and does not fight according to international law.¹⁹ Over the past ten years, the group has become very decentralized and operates far from hot battlefields like Afghanistan.²⁰ Moreover, a small number of U.S. citizens have joined al-Qaeda and ISIL to perform violent acts of terrorism against Americans.²¹ This has led to the complicated issue of whether U.S. forces can target and kill U.S. citizens who are fighting for al-Qaeda or its associated forces under international and domestic law.²²

The first time the United States lethally targeted one of its own citizens was in 2011 when it killed Anwar al-Aulaqi in Yemen.²³ Born in New Mexico, al-Aulaqi grew up to become the chief of external operations for al-Qaeda in the Arabian Peninsula.²⁴ He posted hateful sermons online assailing the United States, and he inspired, planned, and directed many attacks.²⁵

After the targeting operation against al-Aulaqi, many lawmakers called for President Obama's legal justification for killing an enemy combatant that was also a U.S. citizen.²⁶ Many critics believed that the operation violated al-Aulaqi's Fifth Amendment due process rights and his Fourth Amendment right against unlawful seizure.²⁷ In response, the Department of Justice released a White Paper to Congress titled the "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qaida or An Associated Force."²⁸ The paper combined international law, domestic law, and policy considerations to establish a legal framework for when the U.S. government can lethally target U.S. citizens abroad.²⁹

This paper argues that under the international and domestic legal frameworks, the U.S. government should be able to target and kill U.S. citizens fighting for ISIL abroad. While it is

current targeting operations).

18 See generally *id.* (explaining that the AUMF provides authorization without geographic limitation because al-Qaeda is not centralized and spans multiple nations).

19 See *id.*

20 See *id.* (noting that this fact should not be considered justification for having a "Global War on Terror," but adding that the United States must still follow international law when invading another state's sovereignty).

21 See DOJ White Paper, *supra* note 2, at 3.

22 See generally *id.* (laying out certain policy requirements the Obama administration follows before it targets U.S. citizens).

23 See Jason Leopold, *A Justice Department Memo Provides the CIA's Legal Justification to Kill a US Citizen*, VICE NEWS (Sept. 9, 2014), <https://news.vice.com/article/a-justice-department-memo-provides-the-cias-legal-justification-to-kill-a-us-citizen>; Office of the Attorney General, Letter to the Chairman of the Senate Committee on the Judiciary (May 22, 2013), available at http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html?_r=0 (noting that three other Americans have been killed by U.S. forces, but they were not specifically targeted: Samir Khan, 'Abd al-Rahman Anwar al-Aulaqi, and Jude Kenan Mohammed).

24 See Attorney General Letter, *supra* note 23.

25 See *id.* (saying that Umar Farouk Abdulmutallab attempted to blow up an airplane over Detroit on Christmas day in 2009 at the direction of al-Aulaqi. Al-Aulaqi had Abdulmutallab stay at his house for three days, helped him make a martyrdom video, and gave the suicide bomber his last instructions. Al-Aulaqi also took part in the development and testing of explosive devices that were to be sent on cargo planes and blown up over the United States).

26 See Leopold, *supra* note 23.

27 See DOJ White Paper, *supra* note 2, at 5-6.

28 See generally *id.*

29 See generally *id.*

uncontroversial that the U.S. military can kill enemy belligerents who are citizens on a battlefield, this paper claims that the United States is legally justified in killing American citizens outside of hot battlefields who are members of ISIL.³⁰

Part II of this paper will describe ISIL in more detail and illustrate its rise to power.³¹ Part III will explain that under international law, states must adhere to *jus ad bellum* principles when invading the sovereignty of another nation. Then, if the use of force is justified, *jus in bello* governs whether there is an armed conflict and who may be targeted.³² Part IV will discuss U.S. domestic law related to lethal targeting. The President needs domestic authorization to use force against ISIL members. To target U.S. citizen ISIL members specifically, however, the U.S. government must ensure it is not violating the Constitution. Additionally, President Obama has imposed certain policy restrictions on targeting U.S. citizens, such as requiring that they pose an imminent threat of harm.³³

Part V of this paper analyzes the conflict with ISIL under international and domestic law.³⁴ While the Department of Justice justifies targeting a U.S. citizen who is a senior member of al-Qaeda, this paper will justify targeting a U.S. citizen who is a member of an associated force of al-Qaeda. A person's targetability depends on his status as a member to the conflict, not necessarily on their location.³⁵ Lastly, Part VI will conclude that international and domestic law does not require some of the U.S. policy restrictions.³⁶

U.S. citizenship does not immunize enemy combatants from lethal targeting.³⁷ While there is "no private interest more weighty than a person's interest in his life," the government's interest in protecting American lives will always be greater when that person is a terrorist.³⁸

PART II: ISIL BACKGROUND

ISIL is an Islamic terrorist organization based out of Iraq.³⁹ Founded by Abu Musab al-Zarqawi, the group's goal is to create a single Islamic state between the borders of Iraq and Syria.⁴⁰

30 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519, 526 (2004); Jeh Johnson speech, *supra* note 17 ("[B]elligerents who also happen to be U.S. citizens do not enjoy immunity where non-citizen belligerents are valid military objectives. Reiterating principles from *Ex Parte Quirin* in 1942, the Supreme Court in 2004, in *Hamdi v. Rumsfeld*, stated that '[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'").

31 See *infra* Part II.

32 See *infra* Part III.

33 See *infra* Part IV.

34 See *infra* Part V.

35 See Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUM. J. TRANSNAT'L L. 77, 97-98 (2013) [hereinafter Schmitt, *Extraterritorial Lethal Targeting*] (arguing that the geographic scope of armed conflicts has evolved).

36 See *infra* Part VI.

37 See DOJ White Paper, *supra* note 2, at 3; Attorney General Letter, *supra* note 23; Jeh Johnson speech, *supra* note 17.

38 See DOJ White Paper, *supra* note 2, at 2.

39 See Laub and Masters, *supra* note 3.

40 See *id.* (noting that al-Zarqawi is an Arab of Jordanian descent and came to Iraq after commanding forces in Herat, Afghanistan).

At the beginning of the U.S.-Iraq war in 2003, al-Zarqawi was leading the Arab faction of a militant Kurdish separatist movement called Ansar al-Islam.⁴¹ The U.S. invasion sparked a massive Sunni insurgency that led to the formation of major jihadi movements.⁴² From Ansar al-Islam, al-Zarqawi formed a new organization called AQI and pledged allegiance to Osama bin Laden in 2004.⁴³ Even in the beginning, al-Qaeda leadership was concerned with al-Zarqawi's brutal tactics, which included indiscriminately killing fellow Muslims.⁴⁴ When the United States killed al-Zarqawi with an airstrike in 2006, however, the savage fighting style did not change.⁴⁵

Today, the insurgent group is led by Abu Bakr al-Baghdadi, and after many rebranding attempts, it is known as either ISIL or Islamic State in Iraq and Syria.⁴⁶ When civil war erupted in neighboring Syria, ISIL took advantage of the turmoil and created a new source of funding, fighters, and area of operations for the group.⁴⁷ While originally aligned with al-Qaeda, bin Laden's successor, Ayman al-Zawahiri, dissolved the merger and ordered ISIL to stay in Iraq.⁴⁸ Despite that command, Baghdadi extended ISIL's reach into Syria and declared himself the leader of all true Muslims.⁴⁹ As the "Caliph of the Islamic State," Baghdadi consolidated ISIL's control over a vast area of land on the border of Iraq and Syria.⁵⁰

In November 2014, two al-Qaeda insurgent groups fighting in Syria began to broker a reconciliation agreement with ISIL.⁵¹ The Khorasan group, al-Nusra, and ISIL may be merging.⁵² Even though ISIL's goals are at odds with al-Qaeda, pressure and losses from U.S. airstrikes may be moving the two groups closer together.⁵³

41 See *id.* (noting that al-Zarqawi fled from Afghanistan to northern Iraq in 2001).

42 See *id.* (noting that the second order of the Coalition Provisional Authority (CPA) "disbanded the Iraqi army and security services, creating hundreds of thousands of new coalition enemies").

43 See *id.* (adding that the United States designated al-Qaeda in Iraq (AQI) as a foreign terrorist organization that same month).

44 See *id.* (reciting al-Zarqawi's four-point plan for fighting the U.S. forces: "[I]solate U.S. forces by targeting its allies; discourage Iraqi collaboration by targeting government infrastructure and personnel; target reconstruction efforts through high-profile attacks on civilian contractors and aid workers; and draw the U.S. military into a Sunni-Shiite civil war by targeting Shiites.").

45 See Hagel Testimony, *supra* note 1 (describing ISIL's actions including the killing of civilians).

46 See Laub and Masters, *supra* note 3 (noting that ISIL was previously Islamic State of Iraq).

47 See *id.* (explaining that most of ISIL's money comes from smuggling, extortion, taxes, and donations from jihadist members).

48 See *id.* (noting that ISIL had previously merged with Jabhat al-Nusra, who has legitimacy in Syria).

49 See Jamie Dettmer, *ISIS and Al Qaeda Ready to Gang Up on Obama's Rebels*, THE DAILY BEAST (Nov. 11, 2014), <http://www.thedailybeast.com/articles/2014/11/11/al-qaeda-s-killer-new-alliance-with-isis.html> (noting al-Baghdadi's incursions into Syria)

50 See *id.*

51 See *id.* (noting that all three groups have at some point either been linked to or actually apart of mainstream al-Qaeda).

52 See *id.*

53 See *id.*; Laub and Masters, *supra* note 3 (describing how the United States is providing Hellfire missiles and surveillance drones to a counterterrorism unit in Iraq that reports directly to the Prime Minister).

PART III: INTERNATIONAL LAW

Analyzing the legality of a targeted killing operation under international law encompasses the extraterritoriality and the lethality of the action.⁵⁴ The analysis considers four questions: (1) under *jus ad bellum*, can the striking state legally breach the sovereignty of another nation to use force; (2) under *jus in bello*, if there is an armed conflict, which international law governs; (3) under International Humanitarian Law (“IHL”), who exactly can the striking state lethally target; and (4) what is the geographical scope of the battlefield?⁵⁵ This section will briefly overview each step to the analysis.

1. Jus ad Bellum

The first step in the analysis is whether a nation may legally breach the sovereignty of another state to use force.⁵⁶ States are generally prohibited from using force against each another under the United Nations (“UN”) Charter Article 2(4).⁵⁷ However, there are four recognized exceptions to that prohibition.⁵⁸

First, a state may use force against another state pursuant to a UN Security Council Resolution under Article 39 of the Charter.⁵⁹ A UN Security Council Resolution would provide the clearest basis for using force.⁶⁰ The resolution can recommend action, authorize the use of force, or authorize the use of non-forceful measures to resolve the situation.⁶¹

Second, in an international armed conflict (“IAC”), the law of neutrality imposes an obligation on neutral states to expel belligerent states from their territory.⁶² The neutral state may use force, and such force cannot be considered an act of hostility against the belligerent state.⁶³ If the neutral state fails to expel the belligerent state, a separate belligerent state may then breach the sovereignty of the neutral state to expel its enemy.⁶⁴

Third, a state may consent to the use of force within its borders.⁶⁵ However, the activities of the other state’s forces are limited to the scope of consent.⁶⁶

54 See Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUM. J. TRANSNAT’L L. 77, 78 (2013) [hereinafter Schmitt, *Extraterritorial Lethal Targeting*].

55 See generally Jennifer K. Elsea, *Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities*, CONGRESSIONAL RESEARCH SERVICE, May 2012; Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54.

56 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 79.

57 United Nations Charter art. 2(4).

58 See Ashley Deeks, *U.S. Airstrikes Against ISIS in Syria? Possible Legal Theories*, LAWFARE (Aug. 23, 2014), <http://www.lawfareblog.com/2014/08/u-s-airstrikes-against-isis-in-syria-possible-international-legal-theories>.

59 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 80.

60 See generally Deeks, *supra* note 58.

61 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 80-81 (explaining that the actual existence of an armed conflict, or lack thereof, has no affect on the scope or application of a Security Council resolution).

62 See *id.* at 81-82.

63 See *id.*

64 See *id.*

65 See Deeks, *supra* note 58 (giving an example of Pakistan inviting the United States to conduct drone strikes on al-Qaeda members within its borders).

66 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 82-83 (noting that often, a state may publically condemn

Lastly, use of force may be legal as an action in self-defense.⁶⁷ Article 51 of the UN Charter states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”⁶⁸ Because it is an inherent right, the self-defense justification comes from customary international law.⁶⁹ The self-defense justification permits a state to use force in the attacker’s territory, in the victim state’s territory, or in international waters or airspace.⁷⁰

Experts disagree over what is considered an “armed attack,” when such an attack “occurs,” and how a state can use the self-defense exception during a non-international armed conflict (“NIAC”) when one of the parties is a non-state actor.⁷¹ An armed attack is a narrower category of force than actions mentioned in Article 2(4).⁷² Therefore, not all uses of force will amount to an armed attack justifying the use of self-defense.⁷³ U.S. Secretary of State Daniel Webster described the requirements for using the self-defense exception during the Caroline incident in 1837.⁷⁴ He stated that uses of force under such an exception could be justified only where “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”⁷⁵ Every exercise of self-defense must comply with the principles of necessity and proportionality.⁷⁶ The principle of necessity requires that there be no other way to solve the situation, either diplomatically or with law enforcement.⁷⁷ The principle of proportionality requires that the use of force in self-defense be no greater in scope, duration, or intensity than necessary.⁷⁸

Another way to justify a use of force under the self-defense exception arises when a non-state actor, within the territory of a state, commits the initial breach of sovereignty.⁷⁹ If a non-state actor within the borders of state B attacks state A, and state B is unwilling or unable to remove the threat of the non-state actor, state A may defend itself from the non-state actor by breaching state B’s sovereignty.⁸⁰ Since the right to defend oneself is inherent, and “[n]othing in the present Charter shall impair” that right, Article 2(4)’s prohibition on the use of force cannot keep a state from

the use of force within its territory while secretly permitting the activity behind closed doors).

67 See Elsea, *supra* note 55, at 6.

68 United Nations Charter art. 51.

69 See generally Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 83-84; see also Deeks, *supra* note 58 (discussing the three types of self-defense: basic self-defense, anticipatory self-defense, and collective self-defense).

70 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 84.

71 See *id.* at 83-86 (contending that some scholars believe a non-state actor must be acting on behalf of a state for another state to use force against them; however, the majority of experts recognize the self-defense exception with regards to non-international armed conflicts (“NAIC”)).

72 United Nations Charter art. 2(4), 51; see generally Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54.

73 See *id.*

74 See Elsea, *supra* note 55, at 7.

75 Letter from Secretary of State Daniel Webster to Lord Ashburton of August 6, 1842, set forth in JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906).

76 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 87-88.

77 See *id.* at 87 (explaining that using force to kill a terrorist in another state would be improper if cooperation and law enforcement methods could bring the terrorist to justice).

78 See *id.* at 88.

79 See Elsea, *supra* note 55, at 7.

80 See *id.* at 7-8.

defending itself against a non-state actor within the borders of a non-consenting host state.⁸¹

2. *Jus in Bello*

After determining whether a state may use force and whether there is an armed conflict, the second part of the analysis considers what law governs the armed conflict.⁸² The default legal framework that applies in the absence of an armed conflict is International Human Rights Law (“IHRL”).⁸³ Under IHRL, lethal force can only be used when it is absolutely necessary to protect life. The use of lethal force is severely restricted.⁸⁴ To the contrary, IHL applies when there is an armed conflict.⁸⁵ During an IAC or NIAC, states may lethally target members of the enemy’s armed forces, civilians who are Directly Participating in Hostilities (“DPHing”), and civilians who are performing a Continuous Combat Function (“CCFing”).⁸⁶

To be considered an IAC, certain conditions must be present.⁸⁷ First, the parties to a conflict must be High Contracting Parties to the 1949 Geneva Convention.⁸⁸ And second, the conflict must be armed.⁸⁹ On the other hand, a NIAC is defined as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁹⁰ There are two necessary criteria for the existence of a NIAC.⁹¹ First, the organized armed group must have a particular level of organization.⁹² The level of organization necessary is determined on a case-by-case basis.⁹³ Second, the conflict must reach a certain level of intensity.⁹⁴ Riots and “isolated and sporadic acts of violence” do not amount to a NIAC.⁹⁵

81 United Nations Charter art. 2(4), 51; *see* Elsea, *supra* note 55, at 7.

82 *See* Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT’L L. STUD. 1, 2 (2014) [hereinafter Schmitt, *NLACs*].

83 *See id.*; Elsea, *supra* note 55, at 4 (noting that the United States considers IHL and IHRL to be exclusive).

84 *See* Schmitt, *NLACs*, *supra* note 82, at 2 (observing that IHRL only applies to state forces, while IHL binds all parties to a conflict).

85 *See id.*

86 *See* Elsea, *supra* note 55, at 4.

87 *See* Schmitt, *NLACs*, *supra* note 82, at 3.

88 Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 135 (noting that this applies even if the state is not recognized by one or any of the other parties to a conflict).

89 *See id.*; Schmitt, *NLACs*, *supra* note 82, at 5 (remarking that a conflict between a state and non-state may be considered an IAC as well if the non-state is virtually being controlled by an actual state).

90 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 (defining a NIAC as “not of an international character”); *see* Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 94 (quoting the International Criminal Tribunal for the Former Yugoslavia).

91 *See* Schmitt, *NLACs*, *supra* note 82, at 8.

92 *See* Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 94; Schmitt, *NLACs*, *supra* note 82, at 8 (noting that the organization requirement comes from the Geneva Convention’s reference to a “Party”).

93 *See* Schmitt, *NLACs*, *supra* note 82, at 8.

94 *See* Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 96 (“[E]xtraterritorial operations directed against groups that engage in only a single (and last) act of violence, no matter how destructive, or that engage in violence on an infrequent basis, are not subject to international humanitarian law norms.”).

95 *See* Schmitt, *NLACs*, *supra* note 82, at 8.

3. Lethal Targeting

After confirming there is an armed conflict, the analysis turns to who can be lethally targeted.⁹⁶ Under IHL, members of the government's armed forces, legitimate military objectives, civilians DPHing, and civilians CCFing can all be lawfully targeted on the battlefield.⁹⁷ If an individual is subject to targeting, there is no requirement that they be given the opportunity to surrender.⁹⁸

There is some controversy regarding when members of non-state groups are subject to targeting.⁹⁹ One school of thought believes they should be targetable at all times since members of the opposing state forces are targetable at all times.¹⁰⁰ The fighters would be subject to lethal targeting anywhere on the battlefield and irrespective of their role in the organization.¹⁰¹ On the other hand, the International Committee of the Red Cross believes that only the members of a non-state group with a continuous combat function should be subject to targeting.¹⁰² While under the first approach, an individual is subject to targeting based solely upon their membership in an organization, the second approach considers members who are not CCFing to be protected civilians.¹⁰³

Nevertheless, all civilians lose their immunity from attack when they directly participate in hostilities.¹⁰⁴ To be DPHing, a civilian's specific act must meet the threshold of harm, be directly causing the harm, and have a sufficient belligerent nexus.¹⁰⁵ Experts extensively debate over what amounts to direct participation, and the full breadth of the arguments are beyond the scope of this paper.¹⁰⁶

No matter who or what is targeted, each use of force must comply with four IHL principles.¹⁰⁷ First, the principle of necessity requires that the use of military force must actually

96 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 99.

97 See Elsea, *supra* note 55, at 3; *see infra* Part III.4 (discussing whether a person can be targeted outside a hot battlefield).

98 *See id.*

99 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 101.

100 *See id.*

101 *See id.*

102 INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 32, 35 (Nils Melzer ed., 2009) [hereinafter Interpretive Guidance].

103 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 102-03.

104 See Interpretive Guidance, *supra* note 102, at 26.

105 *See id.* at 16 (defining threshold of harm as "likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack," direct causation as "a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part," and belligerent nexus as being "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another").

106 See generally Elsea, *supra* note 55, at 3; Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 105-07.

107 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 107 (discussing principles concerning efforts to limit collateral damage); Attorney General Letter, *supra* note 23, at 3 (noting that U.S. officials determined the targeted killing of al-Aulaqi was consistent with applicable law of war principles).

be necessary to achieve a legitimate military goal.¹⁰⁸ Second, the principle of proportionality requires that the attacker weigh the civilian collateral damage that is expected against the military advantage to be gained.¹⁰⁹ Third, the principle of distinction requires that the decision to attack be reasonable when distinguishing between civilian and military targets.¹¹⁰ Lastly, an attacker must take humanitarian concerns into consideration and not cause unnecessary suffering.¹¹¹

4. *Geographical Scope of the Battlefield*

After determining that there has been a use of force that rises to the level of an armed conflict, a state must analyze the location of a fighter subject to lethal targeting.¹¹² In an IAC, the geography of the battlefield is simple.¹¹³ Combatants are targetable within the territories of the parties to the conflict and within international water and airspace.¹¹⁴

The geographic scope of a NIAC is more difficult.¹¹⁵ In the case of a NIAC justified under the self-defense exception, the non-state actor may be conducting armed attacks from within a state that is not a party to the conflict.¹¹⁶ While the law of self-defense does not impose any geographical limits, a state's sovereignty must be taken into account. Traditionally, however, IHL applies wherever the hostilities occur.¹¹⁷

The most restrictive approach believes IHL only governs the hostilities within a state's borders, and IHRL governs hostilities outside of a state.¹¹⁸ This belief treats a state's sovereignty with the utmost importance.¹¹⁹ Proponents of this approach would like IHL to "fade with the distance from a 'hot battlefield'."¹²⁰

108 See Elsea, *supra* note 55, at 9 (distinguishing military necessity under *jus in bello* from necessity under *jus ad bellum*, which "consists of imminence and seriousness of the threat, along with the lack of peaceful alternative means").

109 See *id.* (distinguishing proportionality under *jus in bello* from proportionality under *jus ad bellum*, which "measures the extent of the use of force against the overall goals legitimately sought"); Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 108 (specifying that it is not exactly a balancing test, but it instead asks whether a reasonable warfighter would hesitate to attack because of the severity of the collateral damage).

110 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 107-08 (discussing a higher level of certainty under U.S. policy compared to IHL).

111 See *id.* at 105, n. 115 (stating there is no obligation to minimize harm against a lawful target except for means that cause unnecessary harm).

112 See *id.* at 97 (discussing complexities associated with non-traditional actors such as transnational terrorists when these actors are engaged in an armed conflict with a traditional state actor).

113 See generally Schmitt, *NLACs*, *supra* note 82, at 5.

114 See *id.*

115 See *id.* at 8-18 (describing three approaches: operations limited to the territory of the state, spillover conflicts, and geographically unfocused conflicts).

116 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 85.

117 See *id.* at 96-97 (explaining that originally, NIACs were only thought of as a state suppressing an armed rebellion within its own territory; however, the geography of war has changed).

118 Schmitt, *NLACs*, *supra* note 82, at 9.

119 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 86-87 (recognizing that states have misused the self-defense exception as an excuse to invade another nation).

120 *Id.* at 98; see Schmitt, *NLACs*, *supra* note 82, at 9 (explaining that it finds support in the plain meaning of the language in Common Article 3 of the Geneva Convention).

Others argue that IHL follows combatants no matter where they are.¹²¹ This approach recognizes that the state providing sanctuary to a non-state actor has a responsibility to quash the threat within its border.¹²² If the sanctuary state is unwilling or unable to deal with the threat, then the victim state is able to breach state sovereignty and defend itself.¹²³ This approach recognizes that non-state actors may exploit restrictive territorial laws to fight where states cannot.¹²⁴

A more balanced third approach believes the battlefield can follow combatants, but there must be a nexus to the original armed conflict.¹²⁵ If a member of an organized armed group leaves the battlefield, they would not be targetable unless they were attacking or participating in the armed conflict from the new state.¹²⁶

PART IV: DOMESTIC LAW

In over two hundred years, the United States has fought five declared wars, five undeclared foreign wars, and the President has deployed the armed forces more than three hundred times.¹²⁷ The U.S. Constitution gives both Congress and the President war powers.¹²⁸ While the President is the Commander in Chief of the armed forces, Congress has the power to fund, or not to fund, military campaigns.¹²⁹ This dynamic has shaped U.S. military operations for centuries.¹³⁰

The President has the power to repel armed attacks without asking Congress for permission.¹³¹ He may also ask Congress to formally declare war, or he may ask for an authorization to use force.¹³² Since September 18, 2001, the Authorization for Use of Military Force (AUMF) has served as the congressional basis for military operations against al-Qaeda and its associated forces.¹³³ While the AUMF granted the President broad power to wage a defensive war, there are certain constitutional and statutory restrictions on lethally targeting U.S. citizens.¹³⁴

1. Authorization for Use of Military Force

After the attacks on September 11, 2001, Congress passed the AUMF, which authorized

121 See Elsea, *supra* note 55, at 5; Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 97 (stating that the U.S. legal position is that an individual combatant's targetability depends on his status under IHL and not on his location).

122 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 86 (stating that reasonable time must be given to the state to fix the problem, and that the "duration of such an opportunity depends on how pressing the need to conduct defensive operations is for the victim State").

123 See *id.* at 86-87.

124 See Schmitt, *NIACs*, *supra* note 82, at 17 (noting specifically the rise of cyber attacks by organized armed groups).

125 See *id.* at 18.

126 See generally *id.* (discussing how the NIAC criterion of intensity and organization would still apply).

127 See Stephen Dycus et al., NATIONAL SECURITY LAW 343 (5th ed. 2011).

128 U.S. CONST. art. I, § 8; U.S. CONST. art. II, § 2.

129 U.S. CONST. art. II, § 2.

130 See Dycus, *supra* note 127, at 343.

131 See *id.* at 344.

132 See *id.* at 343.

133 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

134 See *infra* Part IV.2.

the U.S. military to participate in an armed conflict with al-Qaeda and its associated forces.¹³⁵ The AUMF states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States¹³⁶

It does not limit U.S. military operations to hot battlefields and the President may use necessary and appropriate force anywhere in the world.¹³⁷ According to the U.S. government, associated forces of al-Qaeda have two characteristics.¹³⁸ First, an associated force is an organized armed group that enters the fight alongside al-Qaeda.¹³⁹ Second, it has entered into hostilities against the United States as a co-belligerent with al-Qaeda.¹⁴⁰

2. Targeting U.S. Citizen ISIL Members

The United States targets two classes of individuals.¹⁴¹ First, the United States kills high value targets, which requires the identity, function, and importance of the individual to be determined before the strike.¹⁴² Second, the United States kills unknown combatants who are deemed to be targetable based upon their actions.¹⁴³ U.S. citizens are not immune from lethal targeting by the United States on the battlefield.¹⁴⁴ However, citizenship does provide an individual with constitutional and statutory protections that must be taken into consideration before a lethal strike is carried out.¹⁴⁵ Additionally, President Obama has put forth policy guidelines that restrict

135 See DOJ White Paper, *supra* note 2, at 3.

136 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

137 See Jeh Johnson speech, *supra* note 17.

138 See *id.*

139 See *id.*

140 See *id.* (noting that the concept is based upon IHL's concept of co-belligerency).

141 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 100.

142 See *id.*

143 See *id.* (explaining that signals intelligence, human intelligence, and imagery are used to track the unknown individuals).

144 See *Ex Parte Quirin*, 317 U.S. 1 (1942); DOJ White Paper, *supra* note 2, at 4; Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 106 (noting that under IHL, citizenship plays no role in determining the legality of an attack); see also Jeh Johnson speech, *supra* note 17.

145 See Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 107; see generally DOJ White Paper, *supra* note 2 (assuming that constitutional protections attach to a U.S. citizen even while abroad). Also describing the Fourth Amendment, Fifth Amendment, Executive Order 12333- ban on assassinations, 18 U.S.C. § 1119- the unlawful killing statute, or The War Crimes Act, 18 U.S.C. § 2441 (2006)). Only the Fourth Amendment, Fifth Amendment, and Executive Order 12333 will be discussed in this paper.

U.S. lethal targeting operations even further.¹⁴⁶

a. Legal Restrictions

The first constitutional protection restricting lethal targeting of a U.S. citizen is the Fourth Amendment.¹⁴⁷ It states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”¹⁴⁸ The constitutionality of a seizure is scrutinized by balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”¹⁴⁹ In the context of domestic law enforcement, an officer may use lethal force against a suspect when there is probable cause that the suspect poses a threat of serious harm.¹⁵⁰

The second constitutional protection restricting lethal targeting of a U.S. citizen is the Fifth Amendment.¹⁵¹ It states, “No person shall be . . . deprived of life, liberty, or property, without due process of law”¹⁵² The Fifth Amendment’s due process clause is intended to protect U.S. citizens from arbitrary government power.¹⁵³ To establish a due process violation, a citizen must assert that he has a protected interest in his life, liberty, or property, and that the government knowingly deprived him of the interest.¹⁵⁴

In *Hamdi v. Rumsfeld*, the Supreme Court used the *Mathews v. Eldridge* balancing test to determine whether a person’s Fifth Amendment rights had been violated in the context of law-of-war detention.¹⁵⁵ Under the test, the court must consider three factors:

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and
- (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.¹⁵⁶

146 See *id.* at 105.

147 See *Al-Aulaqi v. Panetta*, No. CV 12-1192 (RMC), 2014 WL 1352452, at 10 (D.D.C. Apr. 4, 2014); DOJ White Paper, *supra* note 2, at 9.

148 U.S. CONST. amend. IV.

149 See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); DOJ White Paper, *supra* note 2, at 9.

150 See *Garner*, 471 U.S. at 11.

151 See DOJ White Paper, *supra* note 2, at 5.

152 U.S. CONST. amend. V.

153 See *Al-Aulaqi v. Panetta*, No. CV 12-1192 (RMC), 2014 WL 1352452, at 11 (D.D.C. Apr. 4, 2014).

154 See *id.* (specifying that the government cannot be merely negligent, and the government official needs to be so indifferent to the citizen’s constitutional rights that it shocks the conscience).

155 See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Mathews v. Eldridge*, 424 U.S. 319 (1976); DOJ White Paper, *supra* note 2, at 6.

156 *Mathews*, 424 U.S. at 321.

The U.S. government considers no private interest more substantial than the interest one has in their life.¹⁵⁷

A third restriction on lethally targeting a U.S. citizen is Executive Order 12333's ban on assassinations.¹⁵⁸ Hays Parks, former Special Assistant for Law of Matters to The Judge Advocate General of the Army, believes the meaning of assassination is different in peacetime and in war.¹⁵⁹ During peacetime, assassination entails killing a public figure or private person for a political purpose and through covert means.¹⁶⁰ During war, however, lethally targeting an enemy combatant is legal.¹⁶¹ Therefore, assassination during war must include the element of treachery.¹⁶² Moreover, unintentionally killing a civilian during a lawful strike on a military objective would not be considered assassination.¹⁶³

b. Policy Restrictions

In addition to the domestic law restrictions, President Obama has also imposed policy restrictions on his administration's lethal targeting operations.¹⁶⁴ The default preference is to capture the combatant whenever feasible.¹⁶⁵ Lethal force will not be used as a punitive measure.¹⁶⁶ It will only be used to prevent or stop attacks.¹⁶⁷ Further, lethal force will be used outside of a hot battlefield when there is a legal basis for using lethal force, the target poses a continuing and imminent threat to U.S. persons, and the following criteria are met:

- 1) Near certainty that the terrorist target is present;
- 2) Near certainty that non-combatants¹ will not be injured or killed;
- 3) An assessment that capture is not feasible at the time of the operation;
- 4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
- 5) An assessment that no other reasonable alternatives exist to

¹⁵⁷ See DOJ White Paper, *supra* note 2, at 6.

¹⁵⁸ See Elsea, *supra* note 55, at 10 (noting that the Executive Order was signed into effect by President Reagan).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 10-11 (defining also extrajudicial killing as, "[A] deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." However, it does not include any killing that is lawful under IHL).

¹⁶² See *id.*

¹⁶³ See *id.* at 11.

¹⁶⁴ See Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> [hereinafter *Presidential Policy Guidance*].

¹⁶⁵ See *id.* (noting that this is to gather intelligence and stop other terrorist plots).

¹⁶⁶ See *id.* (barring lethal force as a substitute for prosecution in a civilian court or military commission).

¹⁶⁷ See *id.* (clarifying that lethal force may only be used when there is threat of attack and no reasonable alternatives to prevent the attack).

effectively address the threat to U.S. persons¹⁶⁸

If the targeted individual is a U.S. citizen, additional legal analysis will be completed, and the Executive branch will regularly brief Congress on its targeting operations.¹⁶⁹

PART V: ANALYSIS

U.S. forces may legally target U.S. citizens fighting for ISIL under both international and domestic law.¹⁷⁰ Under the *jus ad bellum* self-defense exception, U.S. forces can fight ISIL in Iraq, and under the unwilling and unable test, U.S. forces can fight ISIL in Syria.¹⁷¹ Under domestic law, targeting ISIL members falls within the scope of the 2001 AUMF since ISIL is an associated force of al-Qaeda.¹⁷²

1. *International Law*

To use force and breach the sovereignty of another state, the United States must be acting pursuant to a UN Security Council Resolution, with the consent of the state, or in self-defense.¹⁷³ When striking ISIL in Iraq, the United States is acting under a theory of collective self-defense, as well as a supplementary theory of individual self-defense.¹⁷⁴ ISIL has been fighting the Iraqi government for years, and since U.S. military forces left the area, violence has only intensified.¹⁷⁵ Iraq formally requested help from the United States to fight ISIL on September 20, 2014, and the United States issued a formal justification to the UN for the airstrikes as a form of collective self-defense several days later.¹⁷⁶ Additionally, the United States is using a theory of individual self-defense as supplementary justification for fighting in Iraq.¹⁷⁷ The United States has many personnel working inside Iraq who are at risk for attack, including embassy workers and military advisors.¹⁷⁸

168 See *id.*; Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 54, at 98 n. 87 (stating that the White House has not provided any explanation for the rationale behind such restrictions).

169 See *id.* (explaining that if the individual is a U.S. citizen, the legal analysis conducted against him must be consistent with the Constitution and laws of the United States, and subject to congressional oversight).

170 See generally Jennifer Daskal et al., *Strikes in Syria: The International Law Framework*, JUST SECURITY (Sept. 24, 2014), <http://justsecurity.org/15479/strikes-syria-international-law-framework-daskal-deeks-goodman> (describing the international legal justification for airstrikes against ISIL).

171 See *id.*

172 See Dennis, *supra* note 4 (detailing the Obama Administration's argument as to why ISIL falls under the 2001 AUMF).

173 See Deeks, *supra* note 58.

174 See Daskal et al., *supra* note 170.

175 See Laub & Masters, *supra* note 3.

176 See Daskal et al., *supra* note 170 (asserting that Iraq's request for U.S. assistance supports the claim by the United States that intervention against ISIL may be justified as collective self-defense).

177 See Somini Sengupta & Charlie Savage, *U.S. Invokes Iraq's Defense in Legal Justification of Syria Strikes*, N.Y. TIMES (Sept. 24, 2014), http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html?hp&action=click&pgtype=Homepage&version=HpSum&module=b-lede-package-region®ion=top-news&WT.nav=top-news&_r=0.

178 See *id.*

To use force in Syria, the United States is legally justified by using the unwilling or unable test under the self-defense exception.¹⁷⁹ ISIL is using Syria as a safe haven from which to attack Iraq and threaten American national security interests.¹⁸⁰ While the UN Charter Article 2(4) prohibits the use of force against another state, Article 51 states nothing in the Charter shall infringe upon a state's inherent right to defend itself.¹⁸¹ Since Syria is unable to quash the threat within its borders, U.S. forces are justified in defending itself and Iraq by attacking ISIL within Syria.¹⁸² After justifying the use of force, the United States must determine if it is in an armed conflict with ISIL and al-Qaeda.¹⁸³ The U.S. conflict with ISIL meets the criteria of a NIAC because the non-state actor is well organized, and the fighting in Iraq and Syria is intense.¹⁸⁴ ISIL has a command structure similar to a military force.¹⁸⁵ For example, it is capable of sending a twenty-two vehicle column of one hundred fighters to assist al-Nusra in assaulting a Syrian town.¹⁸⁶ ISIL's leader, al-Baghdadi, is trying to form an Islamic state with a functioning government.¹⁸⁷ He is leading a well-organized armed group with a military council, judicial authority, defense and intelligence council, and public affairs office.¹⁸⁸ Additionally, the conflict meets the intensity requirement because ISIL conducts more than sporadic violence and riots.¹⁸⁹ ISIL captured the Iraqi cities of Mosul and Fallujah, and over 7,000 Iraqi civilians died as a result of terrorism in 2013.¹⁹⁰

Subsequently, ISIL members are targetable wherever they are fighting or planning attacks.¹⁹¹ ISIL is a transnational non-state armed group with members and supporters worldwide.¹⁹² Limiting where ISIL members are targetable to just Iraq or Syria would give them a distinct advantage over state forces.¹⁹³ While the United States would be restricted by international law, ISIL would be able to take the fight to new territories such as Turkey or Jordan to avoid lethal targeting operations.¹⁹⁴

Using a moderate approach to analyze the geographical scope of the battlefield is the most reasonable.¹⁹⁵ One expert has suggested that the battlefield should follow the combatant to

179 See William M. Welch, U.S. Sending 350 More Troops to Iraq, *USA TODAY* (Sept. 3, 2014), <http://www.usatoday.com/story/news/2014/09/02/more-military-to-iraq/14995793>.

180 See Hagel Testimony, *supra* note 1.

181 United Nations Charter art. 2(4), 51.

182 See generally Daskal et al., *supra* note 170.

183 See generally Schmitt, *NLACs*, *supra* note 82, at 7.

184 See *id.* (stating that to qualify as a NLAC, a conflict must include as a belligerent a well-organized non-state actor, and the fighting must reach a certain level of intensity).

185 Dr. Jacques Neria, *The Structure of the Islamic State (ISIS)*, JERUSALEM CENTER FOR PUBLIC AFFAIRS, Sept. 8, 2014, <http://jcpa.org/structure-of-the-islamic-state>.

186 See Dettmer, *supra* note 49.

187 See Laub and Masters, *supra* note 3.

188 See Neria, *supra* note 185.

189 See Schmitt, *NLACs*, *supra* note 82, at 7.

190 See Laub and Masters, *supra* note 3 (noting that this number has doubled since 2012, and last year was the bloodiest in Iraq since 2008).

191 See Schmitt, *NLACs*, *supra* note 82, at 13.

192 See Laub and Masters, *supra* note 3.

193 See Schmitt, *NLACs*, *supra* note 82, at 13.

194 See generally *id.*

195 See *id.* (describing a model where the battlefield follows the combatant as long as there is some nexus to the

areas outside of hot warzones as long as there is still a nexus to the original fight.¹⁹⁶ If the ISIL combatant continues to fight or plan attacks from a new territory, they would be subject to targeting operations, which would still be restricted by *jus ad bellum*. However, when acting in self-defense, the *jus ad bellum* principles would not be very restrictive if a state is unwilling or unable to combat ISIL.

2. Domestic Law

Under domestic law, all ISIL members, including U.S. citizens, are targetable.¹⁹⁷ Congress has authorized the use of force, and U.S. citizen-terrorists can be targeted under the Constitution.¹⁹⁸ While President Obama has restricted targeted killings as a matter of policy, there is no legal reason for limiting the operations in such a way.¹⁹⁹

a. Targeting U.S. Citizen ISIL Members under Domestic Law

The AUMF authorizes the President to use all necessary and appropriate force to combat al-Qaeda and its associated forces.²⁰⁰ An associated force is interpreted by the United States to mean an organized armed group that enters the fight alongside al-Qaeda against the United States as a co-belligerent.²⁰¹ ISIL is an associated force of al-Qaeda for four reasons.²⁰² First, for over a decade ISIL was known as AQI.²⁰³ ISIL's founder pledged obedience to Osama bin Laden, and it was al-Qaeda's Iraqi fighting arm.²⁰⁴ Second, that long history cannot be ignored because of one public disagreement.²⁰⁵ Despite the power grabs and disagreements between ISIL and al-Qaeda leadership, the organizations as a whole continue to be intricately entwined.²⁰⁶ Some parts of al-Qaeda consider ISIL to be the true inheritor of bin Laden's legacy.²⁰⁷ Third, ISIL's tactics have not changed simply because they rebranded themselves.²⁰⁸ And fourth, al-Qaeda's ultimate goal has always been to establish an Islamic state.²⁰⁹ ISIL is now attempting to accomplish that goal as well.²¹⁰ Even though military action against ISIL is authorized under the 2001 AUMF, President Obama intends to ask Congress for a new authorization specifically for ISIL.²¹¹

original battlefield).

196 *See id.*

197 *See infra* Part V.2.a.

198 *See infra* Part V.2.a-b.

199 *See infra* Part V.2.b.

200 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

201 *See* Jeh Johnson speech, *supra* note 17.

202 *See* Dennis, *supra* note 4.

203 *See id.*

204 *See* Laub and Masters, *supra* note 3.

205 *See* Dennis, *supra* note 4.

206 *See* Laub and Masters, *supra* note 3.

207 *See* Dennis, *supra* note 4.

208 *See id.*

209 *See id.*

210 *See id.*

211 *See* Mark Landler and David E. Sanger, *Obama to Seek Congressional Backing for Military Campaign Against ISIS*, N.Y.

While the United States can target ISIL members generally, U.S. citizen ISIL members have constitutional protections that must be considered before they are lethally targeted outside of hot battlefields.²¹² The Fourth Amendment protects citizens from unreasonable searches and seizures.²¹³ The constitutionality of a seizure is determined by balancing the intrusion on the individual's rights against the governmental interest justifying the intrusion.²¹⁴ While a U.S. citizen ISIL member has an interest in not being seized by the U.S. government, the U.S. government has an interest in protecting American lives.²¹⁵ If a U.S. citizen is fighting with an enemy of the United States and against U.S. forces, the combatant's Fourth Amendment interests are always outweighed by the government's interest in saving lives.

Additionally, a recent court decision found that the Fourth Amendment's protection against seizures does not apply in the targeted killing context.²¹⁶ In *Al-Aulaqi v. Panetta*, the D.C. District Court ruled that UAVs are incapable of "seizing" a target.²¹⁷ Since they are unmanned and are only designed to kill, lethal strikes from a UAV are not considered a seizure under the Fourth Amendment.²¹⁸ This decision is reasonable because Fourth Amendment seizures typically consist of a law enforcement officer arbitrarily infringing upon a citizen's constitutional rights in the United States during peacetime. The application of Fourth Amendment principles during war, under IHL, in a foreign country, and against an enemy of the state looks distinctly different. Special considerations must be made when applying Fourth Amendment protections to unlawful enemy combatants.

The Fifth Amendment protects U.S. citizens from being deprived of life, liberty, or property without due process.²¹⁹ In determining whether there has been a Fifth Amendment due process violation, the Supreme Court uses the balancing test in *Mathews v. Eldridge*.²²⁰ It weighs the private interest affected, the government's interest, and the burdens on providing greater process.²²¹ The private interest affected in the context of lethal targeting would be the U.S. citizen's life.²²² The government's interest would be in protecting American lives, and the "realities of combat" would make providing more process impossible.²²³ The judiciary cannot review lethal targeting operations before they occur because it would infringe on the separation of powers.²²⁴ Commanding the armed

TIMES (Nov. 5, 2014), http://www.nytimes.com/2014/11/06/world/middleeast/obama-to-seek-congressional-backing-for-military-campaign-against-isis.html?ref=world&_r=0 (noting that the Obama administration has been trying to justify ISIL targeting with the 2002 authorization to use force in Iraq).

212 See DOJ White Paper, *supra* note 2, at 3.

213 U.S. CONST. amend. IV.

214 See DOJ White Paper, *supra* note 2, at 9.

215 See *id.*

216 See *Al-Aulaqi v. Panetta*, No. CV 12-1192 (RMC), 2014 WL 1352452, at 11 (D.D.C. Apr. 4, 2014).

217 See *id.*

218 See *id.*

219 U.S. CONST. amend. V.

220 See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

221 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

222 See DOJ White Paper, *supra* note 2, at 6 (noting that no private interest is more substantial).

223 See *id.*

224 See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

forces is an exclusively Executive Branch function of government.²²⁵ While the U.S. citizen's interest in his life is compelling, the government's interest in protecting other Americans from terrorist attacks is greater.

Lastly, targeting a U.S. citizen who is a member of ISIL would not be considered an assassination.²²⁶ Assassinations are committed for political reasons, and lawfully targeting a combatant during wartime is not an assassination.²²⁷ According to Hays Parks, "[W]artime assassination is set apart from lawful killing by the element of treachery."²²⁸ That does not prohibit killing covertly or using the element of surprise.²²⁹

b. Presidential Policy Guidance on Targeted Killing

President Obama's policy guidance further restricts U.S. targeted killing operations.²³⁰ The policy limits operations to targeting senior members of terrorist organizations when capture is not feasible.²³¹ Neither international nor domestic law requires those obligations.²³² Additionally, the policy limits targeting operations to terrorists posing an imminent threat to the United States, and it seems to redefine the definition of imminence.²³³

U.S. citizens who travel to Iraq and Syria to join ISIL pose a unique threat to U.S. national security.²³⁴ They carry U.S. passports and are trained by hardened fighters that specialize in improvised explosive devices.²³⁵ U.S. policy should not restrict targeting operations any more than is legally required.

PART VI: CONCLUSION

In conclusion, lethally targeting U.S. citizens who are members of ISIL is legal under both international and domestic law. The United States is in a NIAC with al-Qaeda and ISIL, and the geography of the battlefield extends beyond hot battlefields. The extraterritorial nature of ISIL's operations justifies targeting its combatants wherever they choose to fight or plan attacks. Even though constitutional protections attach to Americans abroad, U.S. citizenship does not make terrorists immune from attack. If a U.S. citizen chooses to fight for an enemy of the state and harm his fellow Americans, the citizen-terrorist's constitutional protections should never outweigh the government's interest in protecting the nation.

225 *See id.*

226 *See* Elsea, *supra* note 55, at 10.

227 *See id.*

228 *Id.*

229 *See id.*

230 *See* Presidential Policy Guidance, *supra* note 164.

231 *See id.*

232 *See* Elsea, *supra* note 55, at 20.

233 *See id.*

234 *See* Schmidt and Schmitt, *supra* note 9.

235 *See id.*; Laub and Masters, *supra* note 3.