

Transnational Self-Defense:  
Human Rights-Based Transnational Counterterrorism Norms

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*Abstract*

Not all actual or impending transnational terrorist attacks and responsive counterterrorism operations create or occur within the context of an “armed conflict” as defined in contemporary international law. The United States has so far adapted international law regulating state-to-state self-defense as well as international and non-international armed conflict to the threats posed by violent, extraterritorial non-state actors. This approach undoubtedly results from a desire to prevent attacks rather than react to them when they occur. Adopting a broader doctrine of self-defense, and an armed conflict paradigm with its more permissive targeting norms, allows it to better interdict threats that are relatively certain to occur but still indefinite as to time and place. This approach has two negative consequences. First, it potentially distorts the concept of self-defense in Article 51 of the United Nations Charter from what is or should be permissible in the state-to-state context. Second, this approach inappropriately, and dangerously, broadens the concept of non-international armed conflict in international law.

This paper proposes clearly differentiating norms regulating transnational violence that does not rise to the level of an armed conflict from the norms applicable to state-to-state self-defense and armed conflict. It suggests balancing international human rights obligations of the states concerned, and the respect due state sovereignty, to identify the norms regulating both resort to a transnational use of force under Article 51 and the form of, and limits upon, its use. These obligations include, first, the obligation of a state whose population is threatened by transnational violence to respect and ensure human rights within its territory and jurisdiction. This affirmative obligation requires a state to take actions necessary to prevent transnational terrorist threats from materializing. Second, states must respect the basic human rights of all individuals everywhere in the world. This obligation requires threatened states to refrain from unjustifiably infringing upon the human rights of innocent individuals. Importantly, it also requires a state to effectively suppress threats posed by those within its borders to the human rights of individuals outside its territory. This contextual balancing yields “transnational self-defense” norms that are sometimes more permissive than those applicable to state-to-state self-defense and standard domestic law enforcement paradigms, but more restrictive than an armed conflict paradigm. The paper more thoroughly articulates and justifies this approach. It also explains the norms generated by it as well as their legal and policy benefits.

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\* Assistant Professor, Loyola University Chicago School of Law; Senior Fellow, West Point Center for the Rule of Law. The author thanks Michael Schmidt, Gloria Gaggioli . . . as well as participants in the University of Pennsylvania’s “Using Law to Fight Terrorism” Workshop, for their comments on earlier drafts. Thanks also to Andrew Coleman .... for superb research assistance. Any remaining errors are the author’s sole responsibility.