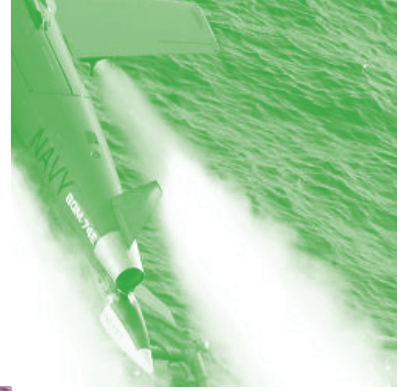


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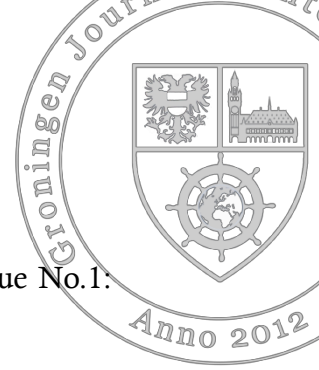


VOLUME 1 / ISSUE 1 / 2013



Drones in International Law





Dear Readers,

The Groningen Journal of International Law (GroJIL) is proud to publish its Issue No.1: Drones in International Law.

GroJIL is a student-led, non-profit organisation which seeks to achieve legal innovation, successfully addressing the challenges which the evolution of the international community poses to the traditional international legal framework. As President and Editor-in-Chief, it has been an extremely rewarding experience to work closely with the GroJIL Editorial Board and Editors to publish our first issue as an official Stichting (Foundation); one of our greatest achievements to date.

The Journal has undergone several structural changes over the last twelve months, and internal developments have made the Journal more efficient and allowed the current issue to progress smoothly. The Editorial Board is currently working towards expanding the size and influence of GroJIL in order to fully achieve the aim of the Journal's founders: to provide real developments in contemporary and unstable areas of international law.

Our Journal believes that the issue of drones is particularly relevant today, posing various challenges to international law, as well as raising moral issues. The use of drones is especially controversial given the overlap in this area between international humanitarian and human rights law. Traditionally, international law did not envisage the use of such weapons, whether as part of an armed conflict or not. Thus, new interpretations of the positive law must be made; an issue of on-going debate, particularly given the context of the 'War on Terror' in the post-9/11 era, and the attendant developments in attitude towards acceptable modes and methods of warfare. In order to fill the current legal lacunae sustainably, the law must be developed in a way which is palatable to the international community, particularly to sovereign States. The current issue of GroJIL seeks to provide proposals both as to how the current law may be applied to the new situation caused by the use of drones, and as to possible developments to address these situations on a permanent basis.

I am extremely grateful to all those who have contributed to the success of the current issue, particularly our authors, whose work and trust in our editorial team are greatly appreciated. The Board and the Editors of the Journal have strived to deliver top-quality editing and support throughout the writing process, and have thoroughly enjoyed working as a team, and in close contact with the authors.

GroJIL is eager to use its past positive experiences in order to expand and develop further in the future. In the coming months, Issue No. 2: Human Trafficking in International Law will be published. This is an area of law which the Editorial Board believes requires more attention, both from academics, and the international legal community in general. I am very much looking forward to completing this edition.

On behalf of GroJIL,

Lottie Lane

President and Editor-in-Chief
Groningen Journal of International Law

Groningen Journal of International Law

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ABOUT

The Groningen Journal of International Law (GroJIL) is a Dutch foundation (Stichting), founded in 2012. The Journal is a not-for-profit, open-access, electronic publication. GroJIL is run entirely by students at the University of Groningen, the Netherlands, with supervision conducted by an Advisory Board of academics. The Journal is edited by volunteering students from several different countries and reflects the broader internationalisation of law.

MISSION

The Groningen Journal of International Law aims to promote knowledge, innovation and development. It seeks to achieve this by serving as a catalyst for author-generated ideas about where international law should or could move in order for it to successfully address the challenges of the 21st century. To this end, each issue of the Journal is focused on a current and relevant topic of international law.

The Journal aims to become a recognised platform for legal innovation and problem-solving with the purpose of developing and promoting the rule of international law through engaging analysis, innovative ideas, academic creativity, and exploratory scholarship.

PUBLISHING PROFILE

The Groningen Journal of International Law is not a traditional journal, which means that the articles we accept are not traditional either. We invite writers to focus on what the law could be or should be, and to apply their creativity in presenting solutions, models and theories that in their view would strengthen the role and effectiveness of international law, however it may come to be defined.

To this end, the Journal requires its authors to submit articles written in an exploratory and non-descriptive style. For general queries or for information regarding submissions, visit www.grojil.org or contact [groningenjil@gmail.com](mailto: groningenjil@gmail.com).

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Groningen Journal of International Law

Drones in International Law

volume 1, issue 1

Table of Contents

Unmanned Military Systems and Extraterritorial Application of Human Rights Law <i>Robert Frau</i>	1–18
Assessing U.S. Targeted Killings Under A International Human Rights Law Framework <i>Michael Ramsden</i>	19–32

Unmanned Military Systems and Extraterritorial Application of Human Rights Law

Robert Frau¹

Keywords

DRONES, HUMAN RIGHTS LAW, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS LAW, JURISDICTION

Abstract

The article addresses human rights issues that arise from the use of unmanned military systems in armed conflict. It is assessed when and to what extent human rights law applies in times of armed conflict. The major focus is the question of whether or not human rights law applies extraterritorially. It is argued that it applies to a greater extent to the use of unmanned military systems than might be expected under the jurisprudence of the European Court of Human Rights. Hence, a new approach to the concept of 'jurisdiction' is submitted. In addition, specific scenarios, in which unmanned military systems are frequently deployed, are measured against the legal framework.

I. Introduction

The world is facing a pandemic of unmanned military systems. Little more than ten years ago, the United States had almost no unmanned aerial vehicles deployed. Today, this number has risen to a five-digit-number.² In addition to aerial vehicles, other unmanned military systems (UMS) are being developed, ranging from naval to ground vehicles, and from weaponised to unweaponised units.³ With the use of such UMS, human rights issues arise. In Pakistan alone, for example, more than 2,500

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² Singer, P., *Wired for War*, Penguin, New York 2009, 61.

³ A good overview is provided in US Department of Defense, *Unmanned Systems Integrated Roadmap: 2009-2034*, 20 April 2009, Washington DC.

persons have been killed by drone strikes.⁴ Human rights issues are especially crucial in times of armed conflict. In public opinion, it is loudly claimed that drone strikes violate human rights law (HRL) or are the devil's handiwork.⁵ But is this true? It is easy to claim that human rights law applies, yet, this is not so easy to establish when drones are remotely controlled from thousands of miles away.

The present article addresses these issues. First, it needs to be established whether or not human rights law applies in times of armed conflict (II). More importantly, it must be assessed where human rights law is applicable; in other words, to what extent it applies extraterritorially (III). It is argued that it applies to a greater extent than might be expected. Hence, a new definition of 'jurisdiction' is submitted. Lastly, the substantive rights at issue during the use of unmanned military systems will be addressed (IV).

The article focuses on unmanned aerial systems (UAVs). Other unmanned military systems may be subject to the same reasoning.⁶ The legal analysis focuses on the United Nations International Covenant on Civil and Political Rights (ICCPR)⁷ and on the Convention for the Protection of Human Rights and Fundamental Freedoms commonly known as the European Convention on Human Rights.⁸

II. Applicability of Human Rights Law

II.1. Personal Scope of Applicability

A State is bound by the human rights instruments it has ratified. Every State organ, whether it belongs to the executive, legislative or judicial branch of government, must—as a minimum—respect human rights. During every use of machinery, whether the device is semi- autonomous or fully-autonomous or not autonomous at all, the State deploying the system remains bound by human rights law as long as the State has jurisdiction over an act⁹—a pivotal term, as will be shown.

To be very clear: no unmanned system enjoys protection under human rights law whatsoever. Regardless of how human-like such systems may become in the future, they will never be human. This is self-evident, but needs to be highlighted because demands are being raised that such systems should be entitled to combatant status. This would, most likely, contain demands regarding human rights. Under the law, as

⁴ International Human Rights and Conflict Resolution Clinic, Global Justice Clinic, *Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, September 2012, available online at <<http://livingunderdrones.org>> (accessed 4 October 2012), 29 *et seq.*

⁵ Cf. only The Guardian Online, Smith, C. S., *Drones: the west's new terror campaign, The CIA's Predator drones are bringing to Pakistan the same horror that Hitler's doodlebugs inflicted on London*, The Guardian Online, 25 September 2012, available online at <<http://www.guardian.co.uk/commentisfree/2012/sep/25/drones-west-terror-weapons-doodlebugs-1>> (accessed 7 October 2012).

⁶ Cf. Frau, R., "Regulatory Approaches to Unmanned Naval Systems in International Law of Peace and War", *Journal of International Law of Peace and Armed Conflict* 2012, 84-91.

⁷ International Covenant on Civil and Political Rights of 19 December 1966, 999 UNTS 171, subsequently referred to as ICCPR. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85, subsequently referred to as CAT, is of lesser importance.

⁸ The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 221, subsequently referred to as ECHR.

⁹ Cf. Art. 1 ECHR, art. 2 ICCPR.

it is, there is no possibility to confer any rights on machines. Thus, only human beings are entitled to protection under human rights law.¹⁰

II.2. The Nature of Human Rights Obligations and the Temporal Scope of Applicability

Under human rights law, a State has the primary duty to refrain from violating the rights under the respective treaties (the “negative” obligation).¹¹ The secondary, “positive”, obligation is the obligation to fulfil the obligations under the respective treaties.¹² Hence, a State must not permit or fail to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm to human rights caused by such acts by private persons or entities.¹³ A human right may be violated by a direct act of a State organ or by a failure to protect an individual from a violation by any other than an act of a State organ. Regarding the jurisdiction *ratione temporis*, human rights law applies at all times as long as a State has jurisdiction.

In times of armed conflict, the law of armed conflict applies. The conflict’s character as international or non-international is of no importance.¹⁴ The law of war or, in other words, international humanitarian law (IHL) also applies in other situations that are not *prima facie* viewed as an ‘armed conflict’ but are, nevertheless, considered an ‘armed conflict’ by law, and thus international humanitarian law applies. Such situations include belligerent occupations and joint military operations.¹⁵

Not until a few years ago the overwhelming majority of courts and legal scholars were of the opinion that human rights law and the law of armed conflict were mutually exclusive.¹⁶ This explains why the extent to which human rights law applies in times of armed conflict remains uncertain, even though human rights law and international humanitarian law are not considered mutually exclusive anymore.¹⁷

¹⁰ Organizations with legal personality may also be entitled to protection, but this is of no relevance for the present purpose.

¹¹ Human Rights Committee, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para. 6.

¹² *Ibid.*, para. 7.

¹³ *Ibid.*, para. 8.

¹⁴ Cf. common art. 2 GC I-IV, art. 1 AP I, art. 1 AP 2.

¹⁵ De Schutter, O., *International Human Rights Law*, Cambridge University Press, Cambridge, 2010, 125; Dinstein, Y., *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, 161-201.

¹⁶ For the historical evolution of the relationship, cf. Kolb, R., “Human Rights and Humanitarian Law”, in: Wolfrum, R., ed., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, online edition, available online at <<http://www.mpepil.com>> (accessed 14 February 2013), paras. 3 *et seq.*; Droege, C., “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, in: *Israel Law Review* 40 (2007), 310 *et seq.*

¹⁷ Cf. Kolb, R., *supra* note 16; Droege, C., *supra* note 16; Sivakumaran, S., “International Humanitarian Law”, in: Moeckli, D., Shah, S., Sivakumaran, S., eds., *International Human Rights Law*, Oxford University Press, Oxford, 2010, 530 *et seq.*; Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Second Edition, Cambridge University Press, Cambridge, 2010, paras. 44 *et seq.*; Dinstein, Y., *The International Law of Belligerent Occupation*, *supra* note 15, paras. 195 *et seq.*; Kleffner, J., “Human Rights and International Humanitarian Law: General Issues”, in: Gill, T. and Fleck, D., eds., *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, para. 4.02; Gillard, E.-C., “International Humanitarian Law and Extraterritorial State Conduct”, in: Coomans, F., and Kamminga, M. eds., *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004, 36 *et seq.*; Orakhelashvili, A., “The Interaction between Human Rights and Humanitarian Law:

Jurisprudence is divided on the legal framework regulating the relationship. Some authors argue for a merging of the regimes,¹⁸ while others describe the relationship with the traditional concepts of *lex specialis* (humanitarian law) and *lex generalis* (human rights law)¹⁹ or with the related concept of *renvoi*, meaning IHL making references to HRL, and vice versa.²⁰ However, for the present purpose this dispute is of little importance, for the practical effects remain the same, regardless of the line of arguments. Therefore, the lawyer is responsible for working out:

“with precision areas and questions where the coordinated application of provisions of both branches of the law leads to satisfactory — if not innovative — solutions, securing progress of the law or filling its gaps. [...] The point is not one of derogation by priority [...] but rather one of complex case-by-case mutual reinforcement and complement always on concrete issues. Thus, rather than stressing mutual exclusiveness, be it specialty or priority, it would be better to focus on two aspects: a) gap filling and development of the law by coordinated application of norms of HRL in order to strengthen IHL and vice versa; b) interpretation allowing an understanding of one branch in the light of the other normative corpus in all situations where this is necessary, i.e. in armed conflict or occupation.”²¹

This is also the view of the International Court of Justice (ICJ).²² It subscribed itself to such a reasoning when it was faced with problems regarding the right to life (art. 4 [1] ICCPR) in armed conflict. The Court held that even if the other criteria required by Art. 4 (1) ICCPR are met, art. 4 (2) ICCPR expressly prohibits a derogation of the right to life.

In war, lives are violently ended. This is more than a matter of fact; it is a matter of law: IHL runs counter to the human right concerning extra-judicial deprivation of life.²³ How can both regulations be brought in conformity? This is the point where the nature of IHL as *lex specialis* comes into play. Consequently, the ICJ stated in the Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons:

“In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can

Fragmentation, Conflict, Parallelism, or Convergence?”, *European Journal of International Law* 19 (2008), 161 *et seq.*

¹⁸ Further reference provided by Kolb, R., *supra* note 16, para. 30; and by Sivakumaran, S., *supra* note 17, 530 *et seq.*

¹⁹ Cf. Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra* note 17, paras. 44 *et seq.*; Dinstein, Y., *The International Law of Belligerent Occupation* *supra* note 15, paras. 195 *et seq.*; Kleffner, J., *supra* note 17, para. 4.02; Gillard, E.-C., *supra* note 17, 25 *et seq.*, 36 *et seq.*

²⁰ Kolb, R., *supra* note 16, paras. 35 *et seq.*

²¹ Kolb, R., *supra* note 16, para. 44. Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra* note 17, para. 60, seems to subscribe to this view.

²² ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. 1996.

²³ Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra* note 17, para. 56.

only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”²⁴

Thus, the present article tries to argue in that line of reasoning.

II.3. Derogations from Human Rights Law in Armed Conflict and other Public Emergencies

Derogating from human rights law is lawful only in exceptional circumstances; such as if a state of public emergency exists. Most prominently, art. 4 ICCPR provides that in:

“time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”²⁵

Case law has identified six prerequisites that need to be fulfilled cumulative before a State may lawfully derogate from its human rights obligations:²⁶ A state of public emergency that threatens the life of the nation;²⁷ the measures derogating from the human rights in question are limited to the extent strictly required by the exigencies of the situation;²⁸ these measures are non-discriminatory and are applied in a non-discriminatory fashion; the State observes its other obligations under international public law;²⁹ and certain procedural safeguards were observed.³⁰ Additionally, some human rights are non-derogable even in a state of emergency.³¹ Hence, an armed

²⁴ ICJ, *supra* note 22, para. 25.

²⁵ Cf. Human Rights Committee, States of Emergency, General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add. 11 of 24 July 2001, para. 2 *et seq.*; De Schutter, O., *supra* note 15, 513 *et seq.* Similar provisions are art. 15 (1) ECHR and art. 27 ACHR.

²⁶ Human Rights Committee, *Ibid.*, paras. 2 *et seq.* Cf. also De Schutter, O., *supra* note 15, 514

²⁷ This will only be the case in exceptional circumstances. Cf. Human Rights Committee, *Ibid.*, para. 3. Under the ECtHR, not every ‘war’ amounts to such an exception. Cf. ECtHR, *Lawless v Ireland* (no. 3), Appl. no. 332/57, 1 July 1961, para. 38, Series A no. 3; ECtHR, *Banković and others v Belgium and 16 Other Contracting States*, Appl. no. 52207/99, 12 December 2001, para. 62. What kind of a factual situation amounts to a public emergency in the meaning of art. 15 ECHR is, first and foremost, an assessment to be made by each government ‘as the guardian of their own people’s safety’, but subject to judicial review by the HRC or the ECtHR. Cf. ECtHR, *A. and others v United Kingdom*, Appl. no. 3455/05, 19 February 2009, para. 180 *et seq.*

²⁸ The limitation to the exigencies of the situation is basically a limitation according to the principle of proportionality and concerns the overall application of human rights, not the single instance in which a right was violated and this violation may be justified for reasons of proportionality.

²⁹ Meaning the respective other instruments of human rights law.

³⁰ In essence this means that the emergency has to be officially proclaimed and notified to the other parties to the respective instrument.

³¹ The ICCPR allows no arbitrary derogation from the right to life (art. 6 ICCPR), no derogation from the prohibition of torture (art. 7 ICCPR) and the prohibition of slavery and servitude (art. 8 [1], [2] ICCPR), imprisonment for failure to fulfil a contractual obligation (art. 11 ICCPR), liberty (art. 12 ICCPR), *nulla poena sine lege* (art. 15 ICCPR), recognition as a person before the law (art. 16 ICCPR) and freedom of thought, conscience and religion (art. 18 ICCPR). The ECHR does not allow to derogate from the prohibition of torture (art. 3 ECHR), the prohibition of slavery and servitude (art.

conflict does not automatically allow derogation. Regardless of whether they are performed in an international or a non-international armed conflict, measures derogating from the Covenant are allowed only if and to the extent that the armed conflict constitutes a threat to the life of the nation.³²

III. Territorial Scope of Applicability

Having established that human rights law applies in times of armed conflict, it is crucial to assess if human rights law applies extraterritorially. If this is not the case, claims that drone attacks regularly violate human rights are unfounded.

State parties to the human rights instruments must provide protection to anyone ‘within’ (art. 1 ECHR) or ‘subject to’ (Art. 2 [1] ICCPR; art. 1 [1] American Convention on Human Rights³³; art. 3 [1] Arab Charter on Human Rights³⁴) their jurisdiction.³⁵ This concept, based on the sovereign equality of States,³⁶ is primarily territorial.³⁷ Everyone on the territory of a State party is entitled to protection according to the respective treaties. However, this territorial approach does not mean that human rights law is only applicable to the national territory of a State party. In the words of the ECtHR:

“The concept of ‘jurisdiction’ under article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.”³⁸

Thus, the term ‘jurisdiction’ is neither equivalent to, nor interchangeable with, ‘attributability’³⁹ or ‘territory’. However, because human rights obligations are primarily territorial, other bases of jurisdiction are exceptional and require a special justification in the particular circumstances of each case.⁴⁰ Case law has identified two exceptions; one definition is guided by a spatial approach and the other by a personal

4 [1] ECHR) and no punishment without law (art. 7 ECHR). The right to life (art. 2 ECHR) may only be violated by lawful acts of war.

³² Human Rights Committee, General Comment 29, *supra* note 25, para. 3.

³³ American Convention on Human Rights (Pact of San José) of 22 November 1969, 1144 UNTS 123, subsequently referred to as ACHR.

³⁴ Arab Charter on Human Rights of 22 May 2004, 12 International Human Rights Report 893 (2005).

³⁵ Cf. ECtHR, *Loizidou v Turkey* (preliminary objections), Appl. no. 15318/89, 23 March 1995, para. 62; Human Rights Committee, General Comment 31, *supra* note 11, para. 10; De Schutter, O., *supra* note 15, 125; Nowak, M., *UN Covenant on Civil and Political Rights – CCPR Commentary*, N. P. Engel Publisher, Kehl am Rhein, 2005, art. 2, para. 29; Wenzel, N., “Human Rights, Treaties, Extraterritorial Application and Effects”, in Wolfrum, R., ed., *supra* note 16, para. 4; Kleffner, J., *supra* note 17, para. 4.01.; Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *European Journal of International Law* 32 (2012), 121 *et seq.* (122). This point is missing in International Human Rights and Conflict Resolution Clinic, Global Justice Clinic, *supra* note 4, 117 *et seq.*

³⁶ ECtHR, *Banković*, *supra* note 27, para. 59.

³⁷ De Schutter, O., *supra* note 15, 124. art. 2 (1) ICCPR, art. 1 ECHR; art. 1 (1) ACHR; art. 26, 34 (5) Arab Charter on Human Rights. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep. 2004, 136 *et seq.*, para. 112.

³⁸ ECtHR, *Loizidou v Turkey*, Appl. no. 15318/89, 18 December 1996, para. 52. Cf. also ECtHR, *Drozd and Janousek v France and Spain*, Appl. no. 12747/87, 26 June 1992, para. 91; ECtHR, *Loizidou* (preliminary objections), *supra* note 35, para. 62.

³⁹ De Schutter, O., *supra* note 15, 123; Milanovic, M., “From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties”, *Human Rights Law Review* 8 (2008), 436 *et seq.*

⁴⁰ ECtHR, *Banković*, *supra* note 27, para. 61.

approach to ‘jurisdiction’, each demanding ‘effective control’ over territory or, respectively, a person.

III.1. Spatial Approach: Criterion of Effective Control over Territory

The spatial approach requires effective control over territory.⁴¹ It does not require detailed control over the policies and actions of the authorities in question.⁴² “Rather, ‘effective overall control’ is sufficient.”⁴³ The ECtHR has held a State responsible:

“when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”⁴⁴

The question of whether or not a State exercises effective overall control is a matter of fact, not a matter of law.⁴⁵ Effective control can be a consequence of military action—whether lawful or unlawful, or as part of a peace operation outside of a State’s national territory. Under the universal human rights instruments, (belligerent) occupation entails effective control,⁴⁶ while the ECtHR decided this question on very formal criteria.⁴⁷ However, bearing in mind the definition,⁴⁸ it becomes evident that a belligerent occupation will in most cases amount to an exercise of effective control.⁴⁹

III.2. Personal Approach: Criterion of Effective Control over an Individual

The ECtHR⁵⁰, the now defunct European Commission of Human Rights⁵¹ and the United Nations Human Rights Committee⁵² have also invoked a second approach.

⁴¹ It used to be important whether or not the territory over which effective control is exercised belongs to the ‘legal space’ of the convention, *cf.* ECtHR, *Banković*, *supra* note 27, para. 80. Recently, the ECtHR denounced this concept (*al-Skeini and others v The United Kingdom*, Appl. no. 55721/07, 7 July 2011, para. 142).

⁴² ECtHR, *Loizidou*, *supra* note 38, para. 56.

⁴³ Kleffner, J., *supra* note 17, para. 4.01.40, with reference to ECtHR, *Loizidou*, *supra* note 38, para. 56; Lawson, R., “Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights”, in Coomans and Kamminga, M., eds., *supra* note 17, 83 *et seq.* and 98.

⁴⁴ ECtHR, *Banković*, *supra* note 27, para. 71.

⁴⁵ Milanovic, M., “From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties”, *supra* note 39, 423.

⁴⁶ Human Rights Committee, Concluding Observations on Israel, UN Doc. CCPR/CO/78/ISR (2003), 21 August 2003, para. 11; Human Rights Committee, Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10; Kleffner, J., *supra* note 17, para. 4.01.39.

⁴⁷ Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 130.

⁴⁸ Benvenisti, E., “Occupation, Belligerent”, in Wolfrum, R., ed., *supra* note 16, para. 1.

⁴⁹ *Cf.* also ECtHR, *Loizidou* (preliminary objections), *supra* note 35, paras. 62 *et seq.*; ECtHR, *Ilaşcu and others v Moldova and Russia*, Appl. no. 48787/99, 8 July 2004, paras. 382 *et seq.*

⁵⁰ ECtHR, *Issa and others v Turkey*, Appl. no. 16 November 2004, para. 71; ECtHR, *Öcalan v Turkey*, Appl. no. 46221/99, 12 May 2005, para. 91.

⁵¹ European Commission of Human Rights, *Cyprus v Turkey*, Decision of 26 May 1975, Appl. nos. 6780/74, 6950/75, paras. 8 *et seq.*

⁵² Human Rights Committee, General Comment 31, *supra* note 11, para. 10; Human Rights Committee, *Lopez Burgos v Uruguay*, Communication no. R.12/52, 29 July 1981, UN Doc. Supp. No. 40 (A/36/40) 1981, 176 *et seq.*

The personal approach determines that a State has jurisdiction whenever it exercises “authority or control over an individual”.⁵³ Its relevance was basically limited to persons in the physical custody of a contracting State.

III.3. Tailoring of Human Rights

The traditional concept of ‘jurisdiction’ favoured an all-or-nothing-approach, meaning either the human rights instrument was applicable in its entirety, or not at all. A division or tailoring of human rights with regard to the situation of an individual (meaning some human rights may apply while others do not, depending on the extent of effective control), was rejected by the ECtHR.⁵⁴

Recently the Court revised this approach and simply stated that:

“it is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’.”⁵⁵

Although the Court left open how it envisaged such a tailoring, and any prediction remains uncertain, future international jurisprudence will likely opt for the new approach,⁵⁶ especially because the jurisprudence of the ECtHR has been an example for other human rights bodies and its reasoning has been followed throughout the world.⁵⁷

III.4. The Banković and al-Skeini-Approaches in Relation to New Weapons Technology

Hence, it is submitted that, under the ECHR, the extraterritorial use of unmanned aerial vehicles (UAVs) amounts to ‘jurisdiction’ in a variety of cases. It will be shown that this is in line with the jurisprudence of the ECtHR.

In its famous *Banković* judgment, the ECtHR declined to find that an aerial bombardment could constitute effective control.⁵⁸ It based this finding, implicitly, on the fact that there were no troops on the ground.⁵⁹ For the State parties it was thus not possible to effectively exercise control at any other point in time but the actual aerial bombardment. In the light of new jurisprudence it has been suggested that “drone

⁵³ Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 128.

⁵⁴ ECtHR, *Banković*, *supra* note 27, para. 75.

⁵⁵ ECtHR, *al-Skeini*, *supra* note 41, para. 137.

⁵⁶ Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 131 *et seq.*; Thienel, T., *It’s a good day for human rights law 1 and 2*, Invisible College Blog, 7 July 2011, available at <<http://invisiblecollege weblog.leidenuniv.nl>> (accessed 7 October 2012); R. Lawson, *supra* note 43, 120 *et seq.*

⁵⁷ Harris, D. J., O’Boyle, M. Bates, E.P., Buckles, C. M., eds., *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2009, 30.

⁵⁸ ECtHR, *Banković*, *supra* note 27, para. 71 *et seq.* Cf. also Kleffner, J., *supra* note 17, para. 4.01.40 *et seq.*; Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 127 *et seq.* Note that the Inter-American Court and Commission on Human Rights as taken a different standpoint on this issue, cf. IACtHR, *Armando Alejandro Jr. et al. v Cuba*, Report No. 86/99, Case no. 11.589, 29 September 1999, paras. 23 *et seq.*

⁵⁹ ECtHR, *Banković*, *supra* note 27, para. 70. Cf. also ECtHR, *Loizidou*, *supra* note 38, para. 56; ECtHR, *al-Skeini*, *supra* note 41, para. 139.

operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Bankovic*.⁶⁰

The use of UAVs, however, is different from the use of fighter planes. Thus, it is submitted that the ECtHR and other human rights bodies will—and should—in the future consider aerial bombardment by UAVs as the exercise of effective control. The reasons are as follows.

First, UAVs have the technical ability to cruise over an area much longer than planes and at a considerably slower speed. While a plane only flies over the area and spends just a moment above the individual, drones may cruise over individuals for days.⁶¹ Within that time frame, the deploying armed forces may at any moment decide to launch an attack against that individual. Like the sword of Damocles, the drone reminds the individual that he could be killed in an instant, depending only on the will of the operator miles in another part of the world or the autonomous decision of the drone. The use of drones may therefore be regarded as ‘jurisdiction in waiting’.⁶² That the deployment of drones is somehow ‘weak’, in the sense that nobody is at the scene, does not contradict this finding. After all, even tenuous control is sufficient, as long as it is effective.⁶³ In addition, the deploying State is in power to launch an attack on an individual at any moment it pleases. There may not be ground troops, but there are ‘troops in the air’, able to strike at any time.

Second, taking a life can be considered to be the ‘ultimate public power’. The ECtHR took this concept of ‘public powers’, once reserved for the spatial model of jurisdiction, and declared that it recognised the “exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government.”⁶⁴ Thus, as has been critically noticed, “the ability to kill is ‘authority and control’ over the individual if the State has public powers, killing is not authority and control if the State is merely firing away missiles from an aircraft.”⁶⁵

These different assessments of aerial bombardment are, third, arbitrary.⁶⁶ From the individual’s standpoint, this differentiation does not make sense. However, the interpretation of the jurisdiction-requirement in light of the object and purpose of human rights instruments⁶⁷ demands an extensive reading. Ultimately, the inherent dignity of the human person and the equal and inalienable rights of all members of the human family “is the foundation of freedom, justice and peace in the world.”⁶⁸ Thus, in order to establish whether or not human rights law applies, one has to focus on the beneficiary of human rights law, not on the one owing the obligation. Human rights primarily protect the individual against the State as the most powerful entity.

⁶⁰ Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 130.

⁶¹ This is not to say that ‘duration’ constitutes an integral part of jurisdiction. The ECtHR may regard this fact of adding to the effectiveness of control, for ‘public powers’ are not exercised in the blink of an eye, but for hours.

⁶² ‘Jurisdiction’ does not entail a constant violation of human rights, the term only entails the possibility of such a violation at any given moment. Cf. also Milanovic, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011, 170.

⁶³ ECtHR, *al-Skeini*, *supra* note 41, para. 149. Cf. also Milanovic, M., *Ibid.*, 170-173.

⁶⁴ ECtHR, *al-Skeini*, *supra* note 41, para. 135.

⁶⁵ Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 130.

⁶⁶ Lawson, R., *supra* note 43, 123; Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 131.

⁶⁷ Art. 31 (1) Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

⁶⁸ Preambular paragraphs 1 and 2 ICCPR.

Consequently, as soon as a State is in the position to violate human rights, this State is bound by human rights law.⁶⁹

Fourth, under the new jurisprudence of the ECtHR⁷⁰ the rights enshrined in the ECHR may be tailored to fit a situation of mere aerial bombardment.⁷¹ After all, a State may exercise just “some of the public powers”;⁷² consequently, this exercise will be regulated by *some* human rights, namely those that fit the specific exercise, and those rights in the positive or negative dimension.⁷³

One can find support for this view in the ECtHR’s jurisprudence.⁷⁴ The Court has held that Iranian nationals, who were crossing the Turkish–Iranian border illegally and were killed by Turkish helicopters, were under Turkish jurisdiction, regardless of the exact whereabouts of the victims on Turkish or Iranian soil.⁷⁵ Thus, an aerial bombing using drones may be regarded a violation of the right to life (art. 2 ECHR) because the State has jurisdiction based on the spatial and/or personal approach; albeit this jurisdiction is limited, it is not less effective.⁷⁶

Truth be told, this view will not stand uncontested.⁷⁷ The human rights instruments do not require ‘jurisdiction’ without reason. Ultimately, any act of a State outside of its territory capable of violating an individual’s human rights would amount to an exercise of ‘authority or control’ over that individual.⁷⁸ Therefore, ‘jurisdiction’ must limit a State’s obligations in some way. Otherwise, the words ‘within their jurisdiction’ would be superfluous and devoid of any purpose.⁷⁹

It is, therefore, submitted that the use of UAVs and similar UMS amounts to ‘effective control’ and ‘jurisdiction’ if a State exercises ‘jurisdiction in waiting’, meaning an extraterritorial situation in which a State may exercise all or some of the

⁶⁹ A more detailed analysis with further references will be provided in Frau, R., “Entwicklungen bei der gewohnheitsrechtlichen Einbindung nichtstaatlicher Gewaltakteure”, in: Krieger, H., Weingärtner, D., eds.: *Streitkräfte und nicht-staatliche Akteure*, Baden-Baden, forthcoming 2013; Frau, R., *Überlegungen zur Bindung nichtstaatlicher Gewaltakteure an internationale Menschenrechte*, *Humanitäres Völkerrecht-Informationsschriften*, 2013, 13 *et seq.*. Cf. also Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006; Clapham, A., “Human rights obligations of non-State actors in conflict situations”, *International Review of the Red Cross* 88 (2006), 491 *et seq.*; Heintze, H.-J., “Are De Facto Regimes Bound by Human Rights?”, *OSCE Yearbook* 2009, 267 *et seq.*; Tomuschat, C., “The Applicability of Human Rights Law to Insurgents Movements”, in: Fischer, H., Froissart, U., Heintschel von Heinegg, W., Raap, C., eds., *Krisensicherung und humanitärer Schutz – Crisis Management and Humanitarian Protection*, *Festschrift fuer D. Fleck*, Berliner Wissenschaftsverlag, Berlin, 2004, 573 *et seq.*

⁷⁰ ECtHR, *al-Skeini*, *supra* note 41; ECtHR, *al-Jedda v The United Kingdom*, Appl. no. 27021/08, 7 July 2011.

⁷¹ Cf. III.3.

⁷² Cf. *supra* note 44 and accompanying text.

⁷³ Milanovic, M., *Extraterritorial Application of Human Rights Treaties*, *supra* note 62, 209-222. Cf. also *supra* II.2.

⁷⁴ Cf. O’Boyle, M., “The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on ‘Life after Bankovic’”, in Coomans, F., Kamminga, M., eds., *supra* note 17, 125 *et seq.* and 138.

⁷⁵ ECtHR, *Pad and others v Turkey*, Appl. no. 60167/00, 28 June 2007, paras. 53 *et seq.* Cf. Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 124, with further references and case law.

⁷⁶ Cf. Scheinin, M., “Extraterritorial Effect of the International Covenant on Civil and Political Rights”, in Coomans and Kamminga, M., eds., *supra* note 17, 77 *et seq.* See also Human Rights Committee, Concluding Observations on Israel 2003, *supra* note 46, para. 11.

⁷⁷ Milanovic, M., “Al-Skeini and Al-Jedda in Strasbourg”, *supra* note 35, 139: ‘extraterritorial application of the ECHR still rests on shaky ground’.

⁷⁸ Milanovic, M., *Extraterritorial Application of Human Rights Treaties*, *supra* note 62, 187-209.

⁷⁹ ECtHR, *Banković*, *supra* note 27, para. 75.

public powers normally to be exercised by that Government within an instant; this exercise regularly entailing the violation of a human right; while the exercise of public powers depending only on the will of the State and not on any other factor or behaviour, especially not on the individual concerned; and the 'jurisdiction in waiting' being exercised over a not negligible length of time that distinguishes the situation from a mere momentarily presence of 'public power' or 'effective control'.

III.5. Summary: the Applicability of Human Rights Law

In armed conflict, human rights law applies. This is the case, even if the conflict takes place outside of the respective State's territory, albeit with limitations: a State has to fulfil its obligations under human rights law to the extent that it exercises effective control either of territory or over persons. To the extent that effective control may vary, so does the extent of obligations under human rights law.

IV. Possible Scenarios and the Substantive Human Rights at Issue

It is submitted that a tailored approach to human rights law in armed conflict is possible. Drones and other unmanned military systems are deployed in various circumstances. In the following second part of this analysis the submitted approach will be illustrated with several scenarios, highlighting the most common and likely use of UMS. As will be seen, human rights law must be taken into account in these scenarios.

IV.1. Targeted Killing in Armed Conflicts

Scenario: An unmanned weapons system singles out an individual as a target. Subsequently, it takes the decision to attack and kills the targeted individual. In this scenario, the right to life may be violated.

The individual was protected under human rights law against an intentional or arbitrary deprivation of his life (art. 2 [1], 15 [2] ECHR and art. 6 [1] ICCPR). However, this right is not applicable in its entirety in armed conflict. During hostilities, international humanitarian law applies. Additionally, the right to life is not guaranteed against lawful acts of war. Therefore, any deprivation of life in armed conflict that constitutes a lawful act of war, cannot be considered a violation of the right to life.⁸⁰ In other words, if during an international armed conflict a combatant is targeted and killed by an unmanned weapons system, this does not violate his right to life. Similarly, if a person who exercises a 'continuous combat function'⁸¹ during a non-international armed-conflict is targeted and killed by an unmanned weapons system, this also does not violate his right to life. Thus, the lawfulness of the killing depends on the status of the targeted individual. The use of unmanned weapons systems does not pose any new legal challenges.⁸²

⁸⁰ ICJ, *Ibid.*; art. 15 (2) ECHR.

⁸¹ Cf. International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva 2009, rule II.

⁸² Cf. also Report of the Special Rapporteur on extrajudicial, summary or arbitrary execution, 28 May 2010, UN Doc. A/HRC714/24/Add.6.

IV.2. Investigation of Targeted Killings

Scenario: The individual killed in scenario IV.1 was either an enemy combatant or a civilian. The authorities of the State deploying the unmanned weapons system do not investigate the death of the person. In this scenario, the procedural aspect of the right to life may be violated.

Under human rights law, the individual killed, or rather his or her heirs, have the right to have his/her violent death investigated. The right to life entails a procedural obligation to investigate suspicious deaths,⁸³ regardless of whether the killing was conducted by State agents,⁸⁴ private actors,⁸⁵ or unknown perpetrators.⁸⁶ It is of no importance whether or not the deprivation of life was lawful or not.⁸⁷ It is the failure to investigate a suspicious death that amounts to a violation of the right to life.⁸⁸

In the current scenario, the State has not fulfilled its obligation to investigate. The lawfulness of the killing in question depends on the individual killed: If an enemy combatant was lawfully targeted, the deprivation of life does not amount to a violation of the right to life. Consequently, neither under international humanitarian law nor under human rights law does an obligation to investigate the death of a combatant exist.

If, on the other hand, the killed individual was a civilian, the killing was (most likely) unlawful and (most likely) amounts to murder or homicide unless the civilian was taking a direct part in hostilities, or the civilian must be considered collateral damage. Thus, under human rights law the State must investigate the death of the individual in order to assess its lawfulness. If an investigation is not commenced at all, not commenced promptly or not conducted effectively,⁸⁹ the State may have violated its obligation under human rights to investigate the death. This holds true for acts in occupied territory as well.⁹⁰

IV.3. Extraterritorial Targeted Killings in Armed Conflicts

Scenario: A targeted killing on State A's territory was conducted by State B with an aerial unmanned weapons systems controlled from B's territory without any troops of B on the ground in A.

Legal scholarship is of the opinion that such killings with drones will not amount to an exercise of jurisdiction.⁹¹ However, it was submitted that human rights law can be 'divided and tailored'⁹² and specific human rights can be applied when a State exercises effective control over territory or over an individual. The use of drones amounts to an exercise of effective control. Thus, human rights law applies and the killing may be regarded as a violation of this body of law, depending on the circumstances of the specific case.

⁸³ ECtHR, *Silih v Slovenia*, Appl. no. 71463/01, 9 April 2009, para. 159.

⁸⁴ ECtHR, *McCann and others v United Kingdom*, Appl. no. 18984/91, 27 September 1995.

⁸⁵ ECtHR, *Menson v United Kingdom*, Appl. no. 47916/99, 6 May 2003: "However, the absence of any direct State responsibility for the death of Michael Menson does not exclude the applicability of Article 2."

⁸⁶ ECtHR, *Togcu v Turkey*, Appl. no. 27601/95, 31 May 2005, paras. 106 *et seq.*

⁸⁷ ECtHR, *Ramsahai and others v Netherlands*, Appl. no. 52391/99, 15 May 2007 paras. 342, 289.

⁸⁸ Human Rights Committee, *Amirov v Russia*, Appl. no. 1447/2006, 22 April 2009, para. 11.4. Cf. also ECtHR, *Silih v Slovenia*, Appl. no. 71463/01, 9 April 2009, para. 159.

⁸⁹ ECtHR, *Ceyhan Demirel and others v Turkey*, Appl. No. 34491/97, 13 January 2005, para. 111.

⁹⁰ ECtHR, *al-Skeini*, *supra* note 41.

⁹¹ Cf. Milanovic, M., "Al-Skeini and Al-Jedda in Strasbourg", *supra* note 35, 130.

⁹² ECtHR, *al-Skeini*, *supra* note 41, para. 137.

IV.4. Trailing and Monitoring an Individual

Scenario: An unmanned system singles out an individual, follows the individual and monitors its behaviour over a few days. This scenario may precede scenarios IV.1 and IV.3. The prohibition of inhuman treatment, the right to liberty and security and the right to respect for private life may be violated.

Under human rights law it is prohibited to treat someone inhumanly. The difference between torture and inhuman treatment lays in the degree of suffering caused.⁹³ Even mental mistreatment may amount to a violation.⁹⁴ If the individual notices the unmanned system, or if evoking this threat is the sole purpose of its use, this may cause a great amount of mental suffering and thus amount to inhuman treatment. Any treatment that may “be ‘degrading’ is also forbidden, because it could be such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them.”⁹⁵ A machine cruising over an individual or following him constantly will arouse fear. As with the sword of Damocles, the person must always fear an attack on his life; even if the unmanned system is not weaponised, because the individual may not be able to tell the difference. Thus, in the present scenario the prohibition of inhuman or degrading treatment may be violated. A justification is not possible, unless the act itself does not amount to ‘torture’ or ‘inhuman and/or degrading treatment and/or punishment’. Under art. 1 CAT ‘torture’ does “not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” Thus, if such a treatment is the consequence of a lawful sanction, the prohibition of torture is not applicable.

The right to liberty and security (art. 5 ECHR and art. 9 [1] ICCPR) protects an individual’s physical liberty.⁹⁶ Any confinement in a particular restricted space for a considerable length of time against the will of the individual amounts to a loss of liberty.⁹⁷ Security is not a separate human right, but forms an integral part of liberty.⁹⁸ Even if an individual is followed over the course of days, he will not be confined in a particular restricted space. The mere monitoring does not hinder an individual from moving around freely. Thus, the surveillance does not amount to a violation of the right to liberty and security.

However, it may amount to a violation of the right to respect for private life (art. 8 ECHR and art. 17 ICCPR). For the vast amount of possibilities, it is not possible to list exhaustively the contents of ‘private life’.⁹⁹ In order to keep up with technological and social developments, the human rights bodies approach the issue of private life from the vantage point of which interests are protected by the right to respect for private life. One aspect of private life is the freedom from secret surveillance, even if conducted in a public space.¹⁰⁰ However, if the surveillance equipment does not record the data, it was suggested that this would not amount to a

⁹³ Harris, D. J., O’Boyle, M., Bates, E. P., Buckles, C. M., eds., *supra* note 57, 75; Kretzmer, D., “Torture, Prohibition of”, *in*: Wolfrum, R., ed., *supra* note 16, paras. 8 *et seq.*

⁹⁴ *Ibid.*

⁹⁵ ECtHR, *Kudla v Poland*, Appl. no. 30210/96, 26 October 2000, para. 92.

⁹⁶ ECtHR, *Engel and others v Netherlands*, Appl. no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, para. 57.

⁹⁷ ECtHR, *Storck v Germany*, Appl. no. 61603/00, 16 June 2005, para. 74.

⁹⁸ ECtHR, *Giorgi Nikolaishvili v Georgia*, Appl. No. 37048/04, 13 January 2009, para. 52.

⁹⁹ Harris, D. J., O’Boyle, M., Bates, E. P., Buckles, C. M., eds., *supra* note 57, 368.

¹⁰⁰ *Ibid.*, 361, 365.

violation of the right to respect for private life.¹⁰¹ Thus, if “the data available to a person looking at monitors is identical to that which he or she could have obtained by being on the spot in person”¹⁰², the right to respect for private life is not applicable. If, in contrast, an individual is monitored within his/her home, encompassing private and business premises, it is of no importance of whether or not the monitoring is recorded. His/her interest is to be separated from public life and from interference from the outside world. Within the closed space of home, any surveillance will regularly amount to a violation of the right to privacy.¹⁰³

This is not convincing. It is submitted that even without recording the constant surveillance of a person over the course of days, the surveillance may still violate the right to respect for private life. Two reasons support such an assessment. First, the right in question also protects a:

“right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life’.”¹⁰⁴

Constant surveillance will gather information about an individual’s relationships with other human beings. This may deter an individual from entering or maintaining such relationships. Second, the line of arguments of the ECtHR dismissing a violation pertains to different factual circumstances. The case involved surveillance by stationary equipment that monitored certain premises. The use of drones, however, is fundamentally different. While an individual enters the monitored premises and can leave them again at free will, the unmanned system follows the individual, who has no possibility to exit surveillance. Unmanned systems therefore enable the State to survey an individual much more tightly than with stationary equipment.

Such a violation may be justified if the surveillance is prescribed by law, necessary in a democratic society and in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.¹⁰⁵ Thus it depends on the circumstances of a case. If the individual is suspected of being a threat to human life (if this scenario precedes scenarios IV.1 and IV.3), then a justification would be possible. In any other circumstance, a justification seems unlikely.

In addition, if the monitored individual is a combatant or a member of an organized armed group, this right may be derogated from.

IV.5. Monitoring Demonstrations and Riots

Scenario: A few hundred persons demonstrate against an on-going war (or as the protesters call it, “foreign occupation on our beloved motherland”) in front of a

¹⁰¹ European Commission of Human Rights, *Herbecq and the Association ‘Ligue des droits de l’homme’ v Belgium*, Appl. no. 32200/96 and 32201/96, 14 January 1998, para. 3; ECtHR, *Amann v Switzerland*, Appl. no. 27798/95, 16 February 2000, para. 65; ECtHR, *Rotaru v Romania*, Appl. no. 28341/95, 4 May 2000, paras. 43 ff.; ECtHR, *Peck v United Kingdom*, Appl. no. 44647/98, 28 January 2003, para. 59.

¹⁰² European Commission of Human Rights, *Herbecq*, *supra* note 101, para. 3.

¹⁰³ Cf. also Harris, D. J., O’Boyle, M., Bates, E. P., Buckles, C. M., eds., *supra* note 57, 361.

¹⁰⁴ ECtHR, *Amann v Switzerland*, *supra* note 101, para. 65; ECtHR, *Rotaru v Romania*, *supra* note 101, para. 43; ECtHR, *Peck v United Kingdom*, *supra* note 101, para. 57.

¹⁰⁵ Cf. art. 8 (2) ECHR

military compound. Within the compound, troops forming part of the occupation/peace operation are stationed. The demonstration is monitored by several unmanned aerial systems that cruise in low and high altitudes over the demonstration. Some of the drones are equipped with jamming technology that interrupts every line of communication within the area of demonstration and to/from that area. After a while, some protesters start throwing rocks at the compound and the soldiers guarding it. In this scenario, the right of respect for private life, freedom of expression and the right to peaceful assembly may be violated. No derogation has been declared.

The gathering against the war in this scenario is protected under the right to peacefully assemble. Art. 11 ECHR and art. 21 *et seq.* ICCPR protect the right to peacefully assemble for political, religious, cultural, social or other purposes.¹⁰⁶ The assembly remains peaceful, until some protesters begin to throw rocks at the compound. Because the right to peacefully assemble is one of the foundations of a democratic society, the right “should not be interpreted restrictively.”¹⁰⁷ Only in cases where “organisers and participants have violent intentions which result in public disorder” is the assembly not peaceful in the meaning of art. 11 ECHR.¹⁰⁸

Authorities are under the obligation to make sure that the enjoyment of the right is effective.¹⁰⁹ A monitoring of the demonstration as such may not amount to interference. But a high number of surveillance equipment may create an atmosphere of intimidation, thus hindering individuals from assembling in the first place or from remaining within such an assembly. A “chilling effect on the individuals concerned and on the other participants in the rallies” may amount to interference with the applicants’ right to freedom of assembly.¹¹⁰ The use of drones, as in this scenario, builds an atmosphere of intimidation and certainly has a chilling effect on the protesters. Just three or four drones flying in low altitude will at least unsettle the demonstrators, if not intimidate them. Thus, in the present scenario, surveillance with low-flying drones interferes with the right to peacefully assemble.

This interference may be justified if a measure is prescribed by law, necessary in a democratic society and in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. State authorities enjoy a margin of appreciation in this regard.¹¹¹ However, the “number of exceptions to freedom of expression and assembly, contained in Articles 10 and 11, is exhaustive. The definitions of those exceptions are necessarily restrictive and must be interpreted narrowly.”¹¹² The criterion ‘prescribed by law’ constitutes a problem only in exceptional circumstances.¹¹³

The second requirement, ‘necessary in a democratic society’:

¹⁰⁶ Harris, D. J., O’Boyle, M., Bates, E. P., Buckles, C. M., eds., *supra* note 57, 516.

¹⁰⁷ ECtHR, *G. v Germany*, Appl. no. 13079/87, 6 March 1989, para. 2.

¹⁰⁸ ECtHR, *Ibid.*

¹⁰⁹ Harris, D. J., O’Boyle, M., Bates, E. P., Buckles, C. M., eds., *supra* note 57, 342.

¹¹⁰ ECtHR, *United Macedonian Organisation Ilinden and Ivanov v Bulgaria (No. 2)*, Appl. no. 37586/04, 18 October 2011, para. 127.

¹¹¹ European Commission of Human Rights, *Christians against Racism and Fascism v United Kingdom*, Appl. no. 8440/78, 16 July 1980, 149 *et seq.*

¹¹² ECtHR, *Sidiropoulos and Others v Greece*, Appl. no., 10 July 1998, paras. 38 *et seq.*; ECtHR, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, Appl. no. 29221/95 and 29225/95, 2 October 2001, para. 84.

¹¹³ The ECtHR has identified two requirements for ‘law’ in *Sunday Times v United Kingdom*, Appl. no. 6538/74, 26 April 1979, para. 49: It must be adequately accessible and it must be formulated with sufficient precision to enable the citizen to regulate his conduct. The Court left open the qualification of a Security Council Resolution as ‘law’ in *al-Jedda*, *supra* not e70.

“implies that the interference corresponds to a ‘pressing social need’ and, in particular, that it is proportionate to the legitimate aim pursued. The Contracting States have a certain margin of appreciation in assessing whether such a need exists. (...) The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with the rights protected by the Convention.”¹¹⁴

States may take into consideration the question:

“whether there has been a call for the use of violence, an uprising or any other form of rejection of democratic principles. Where there has been incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.”¹¹⁵

Also, the freedom of expression (art. 10 ECHR and art. 19 ICCPR) may be violated. This right is closely related to the right to peacefully assemble.¹¹⁶ The freedom of expression protects not only the substance of information and ideas, but also a wide range of forms of expression.¹¹⁷ Thus, an assembly to protest against a war is covered by the freedom of expression as well.¹¹⁸ Violations may be justified for the same reasons as violations of the right to peaceful assembly may be justified.

Because of the constant monitoring of the situation on the ground, the right to respect for private life may be violated.¹¹⁹ As seen in scenario IV.4, surveillance with drones may interfere with this right. It may be justified for the same reasons as the right to peaceful assembly.¹²⁰

As stated, deprivations of life are not violating the right to life when the deaths result from the use of force which is no more than absolutely necessary in action lawfully taken for the purpose of quelling a riot or insurrection. The terms ‘riot’ and ‘insurrection’ are not defined in case law. In a case similar to the present scenario, it was held that “an assembly of 150 persons throwing missiles at a patrol of soldiers to the point that they risked serious injury must be considered, by any standard, to constitute riot.”¹²¹ The amount of force used to counter a riot must be ‘absolutely necessary’. Criteria are the proportionality of the use of force to the aim pursued, the degree of force employed in response and the risk that the use of force would result in the deprivation of life.¹²² Thus, in a riot, the throwing of rocks cannot be answered by

¹¹⁴ ECtHR, *Stankov*, *supra* note 112, para. 87.

¹¹⁵ ECtHR, *Ibid.*, para. 90.

¹¹⁶ Harris, D. J., O’Boyle, M., Bates, E. P., Buckles, C. M., eds., *supra* note 57, 516.

¹¹⁷ *Ibid.* 444.

¹¹⁸ In ECtHR case law, if one violation is found, the Court will not assess the violation of any other human right.

¹¹⁹ Cf. *supra* scenario IV.4.

¹²⁰ Art. 8 ECHR on one side and art. 10, 11 ECHR on the other are closely related. The violation of one often amounts to a violation of the other. Cf. ECtHR, *Segerstedt-Wiberg and others v Sweden*, Appl. no. 62332/00, 6 June 2006: ‘Nevertheless, the Court considers that the storage of personal data related to political opinion, affiliations and activities that is deemed unjustified for the purposes of Article 8 § 2 *ipso facto* constitutes an unjustified interference with the rights protected by Articles 10 and 11.’

¹²¹ European Committee of Human Rights, *Stewart v United Kingdom*, Appl. no. 10044/82, 10 July 1984, para. 25. Cf. also ECtHR, *Gülec v Turkey*, Appl. no. 21593/93, 27 July 1998, para. 70.

¹²² European Committee of Human Rights, *Stewart v United Kingdom*, *Ibid.*, para. 26.

lethal force. Only in very exceptional circumstances, when the life of the soldiers is at stake, may lethal force be used. In conclusion, it depends on the acts stemming from the demonstrations whether or not a violation of the right to life is justified.

IV.6. Guarding Military Compounds or Detainment Centres

Scenario: A detention center of State A, which is situated on the territory of State B, is guarded by unmanned aerial and ground systems of State A. An alarm is triggered as soon as the systems detect movement. Thereafter, an unmanned weapons system targets and kills the individual trying to flee the premises. In this scenario, the right to life, the right to liberty and security and the right to respect for private life may be violated.¹²³

Following the above argumentation, State A has jurisdiction. The right to liberty and security protects the physical liberty of a person. Any confinement in a particular restricted space for a considerable length of time against the will of the individual amounts to a loss of liberty.¹²⁴ Justification may be provided if the detention has a basis in, and conforms with, applicable domestic law, and the application of the domestic law is in conformity with the ECHR, especially art. 5 (1) (a)-(f) ECHR.¹²⁵ If, as in the present scenario, the unmanned system monitors a prison where inmates are held, there is no violation of the right to liberty and security.

If the unmanned system targets and injures/kills an escapee, this will in most cases amount to a violation of the right to life or the prohibition of inhuman treatment.¹²⁶ It then depends on the circumstances of each case whether or not the killing is lawful. If the escapee has a known history of violent crimes, his death may be justified. In other circumstances, the justification of a killing seems unlikely. Again, if death is the consequence of a lawful sanction, the prohibition of inhuman treatment does not apply.

Any violation of the right to respect for private life is justified for the guarding of prisons if prescribed by domestic law, necessary in a democratic society and in the interests of national security and public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Likewise, the guarding of military compounds is also possible under the same legal reasoning.¹²⁷

V. Conclusion

The use of unmanned systems, whether or not they are weaponised, raises questions of human rights law. Of utmost importance is the overall question of applicability and extraterritorial application. Due to technical differences between UMS and other military technology, human rights law applies to greater extent extraterritorially to the former than to the latter. It is submitted that the use of UAVs and similar UMS amounts to 'effective control' and 'jurisdiction' if a State exercises 'jurisdiction in waiting', meaning an extraterritorial situation in which a State may exercise all or

¹²³ Within the de-militarized-zone between the Republic of Korea and the Democratic People's Republic of Korea such devices are already being used.

¹²⁴ ECtHR, *Storck*, *supra* note 97, para. 74.

¹²⁵ Harris, D. J., O'Boyle, M., Bates, E. P., Buckles, C. M., eds., *supra* note 57, 133.

¹²⁶ Cf. *supra* scenario IV.1.

¹²⁷ For this scenario cf. also. Kleffner, J., "Operational Detention and the Treatment of Detainees", in Gill, T., van Fleck, D., eds., *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, para. 25.01 *et seq.*

some of the public powers normally to be exercised by that Government within an instant—which regularly entails the violation of a human right— while the exercise of public powers depends only on the will of the State and not on any other factor or behaviour, especially not on the individual concerned. The ‘jurisdiction in waiting’ must be exercised over a considerable length of time that distinguishes the situation from a mere momentary presence of ‘public power’ or ‘effective control’. Consequently, while using drones or other unmanned military systems, a State must comply with its human rights law obligations.

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Assessing U.S. Targeted Killings Under An International Human Rights Law Framework

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Keywords

US TARGETED KILLINGS – APPLICABLE INTERNATIONAL LEGAL FRAMEWORK - INTERNATIONAL HUMAN RIGHTS LAW

Abstract

The US practice of targeted killings provokes difficult questions concerning the appropriate legal framework and the standards that govern such strikes. This article will argue that, in certain cases, it is necessary to examine the legality of targeted killings under international human rights law (IHRL). An explicit IHRL justification for targeted killings is important and, at present, often ignored by the US. IHRL requires any use of lethal force to be proportionate to the legitimate aim of safeguarding life and a necessary measure with no other reasonable means available to address the threat. It is possible, following a survey of human rights decision-makers, that targeted killings in exceptional circumstances are justifiable under IHRL. It is also incumbent on the US to pass domestic legislation that provides a legal basis for strikes disconnected to September 11, and also the provision of administrative and judicial review in order to provide a post-hoc check on targeted killing decisions.

I. Introduction

The use of weaponised drones to target suspected members of al-Qaeda has become a centrepiece of US counter-terrorism strategy. Yet, the intensification of targeted killings provokes difficult questions concerning the appropriate legal framework and the standards that govern such strikes. Targeted killings cut across a variety of international legal frameworks: the international laws regulating resort to force, international humanitarian law (IHL), and IHRL. This article will examine possible justifications for the US practice of targeted killings under IHRL.

It will begin by assessing the three legal frameworks and the need for certain drone strikes, being those that take place outside of active conflict zones, to be justified in accordance with IHRL. The article will then go on to assess the applicable principles under IHRL, drawing upon the pronouncements of human rights decision-makers. This analysis will show that it is conceivable that, in exceptional circumstances, targeted killings are justifiable under IHRL. The article will call for a more

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conscientious assessment of IHRL in US targeted killing decision-making, the introduction of domestic legislation setting out clear standards that govern the practice, and more robust administrative and judicial review.

II. Ascertaining the applicable legal framework

II.1 International Humanitarian Law and International Human Rights Law

Targeted killings can be evaluated under the international law governing resort to force (*jus ad bellum*), IHL and IHRL. The US asserts that it is engaged in an armed conflict with al-Qaeda and associated forces, triggering the rules of IHL.¹²⁹ According to Brennan, this armed conflict is unconstrained geographically: members of al-Qaeda can be targeted wherever they reside, whether in “hot” zones of armed conflict or in territories that are not the site of hostilities.¹³⁰ The rationale for this position is clear. To narrowly confine the ambit of a conflict geographically means that suspected terrorists can locate themselves in safe havens outside of a combat zone where they are free to plan and execute acts of terrorism.

From a US policy perspective IHL is a favourable choice of law: it provides more permissible rules for killing than IHRL and ensures immunity for its agents in such operations.¹³¹ Whilst targeting under IHRL is generally a measure of last resort, under IHL it can be an option of first resort, provided that those targeted are combatants/civilians taking direct part in hostilities who are not *hors de combat*.¹³² Further, IHL is *lex specialis* during armed conflict, displacing IHRL. The strict prohibition on the taking of life under article 6 of the International Covenant on Civil and Political Rights instead has to be read in line with the more permissible rules for the deprivation of life that prevail during armed conflict.¹³³ A further reason why the US prefers the armed conflict characterisation is that it provides stronger normative justification for conferring wide discretion on the executive without the need for independent scrutiny.¹³⁴ As the US executive argued in *Al-Aulaqi v Obama* when resisting a judicial review of its targeted killings programme, it is acting in the interests of national security during wartime—to them a quintessentially non-justiciable

¹²⁹ See Speech by Koh, H. H. Legal Advisor, US Department of State, *The Obama Administration and International Law*, Speech to the Annual Meeting of the American Society of International Law, Washington DC, 25 March 2010, available online at <<http://www.state.gov/s/1/releases/remarks/139119.htm>> (accessed 9 February 2013).

¹³⁰ Remarks of Brennan, J., Assistant to the President for Homeland Security and Counterterrorism Program on Law and Security, Harvard Law School, Cambridge, Massachusetts, *HLS-Brookings Conference*, 16 September 2011, available online at <<http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/>> (accessed 9 February 2013).

¹³¹ United Nations Human Rights Council, Alston P., REPORT: *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 28 May 2010, [UN Doc A/HRC 14/24/Add6], para. 46.

¹³² For recent iteration, see Ambos, K. and Alkatout, J., “Has Justice Been Done? The Legality of Bin Laden’s Killing Under International Law”, *Israeli Law Review*, (2012); cf. Melzer, N., “Targeted Killing or Less Harmful Means? – Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity”, *Yearbook of International Humanitarian Law* 9 2006, 87.

¹³³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 66, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, para. 106; *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v Uganda), 2005 I.C.J. 116, paras. 217-219.

¹³⁴ Indeed comparatively speaking IHL mechanisms for ensuring compliance are weaker than that found under IHRL. See further Alston, P., “The CIA and Targeted Killings Beyond Borders” *Harvard National Security Journal* 2 2011, 283, 305.

question.¹³⁵ By contrast, if IHRL were deemed to be the applicable legal framework, the focus would inevitably shift to the rights of the individual, and the human rights legal method would require the executive to provide an individualised justification for the infringement of these rights.¹³⁶ As a human rights question, in turn there may be more scope for the courts to examine the use of lethal force.

However, there is a concern with the legal characterisation of *all* targeted killings as falling under the laws of armed conflict. Common Article 2 of the Geneva Convention defines an armed conflict as one that involves two or more states, commonly known as an international armed conflict.¹³⁷ Given that al Qaeda does not represent a state, it is evident that such conflict is not of an international character.¹³⁸ It has been argued that the US was at least initially engaged in an international armed conflict with al-Qaeda who supported the Taliban as militia, when the Taliban was the functional government of Afghanistan during the 2001 US intervention in Afghanistan. However, the Taliban has now been overthrown and replaced by a new government in January 2004.¹³⁹ Therefore, the US-al-Qaeda conflict is no longer an “international” one.¹⁴⁰

By contrast, Common Article 3 envisages an ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.’¹⁴¹ IHL thus also regulates non-international armed conflicts (NIAC) between governmental authority and groups of persons subordinate to this authority.¹⁴² Characterisation as a NIAC is a better fit, given that parties to the conflict are state and non-state entities respectively. Whether IHL applies to the US-al-Qaeda conflict will depend on whether a narrow or broad approach is adopted.¹⁴³ On a narrow approach, according to *Prosecutor v Tadic*, IHL requires ‘protracted armed violence between governments’ authorities and organized armed groups or between such groups within a State’.¹⁴⁴ An armed conflict thus occurs within defined zones of hostilities where it is established that intense fighting has occurred.¹⁴⁵ Undoubtedly there has been an armed conflict occurring in Afghanistan. It has been argued that a

¹³⁵ *Al-Aulaqi v Obama*, No 10-cv-1469 (US District Court for the District of Columbia, 25 September 2010), Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss, 19-35; *Schneider v Kissinger*, 412 F.3d 190, 194-95 (D.C. Cir. 2005). In defense of this view, see Yoo, J., *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, University of Chicago Press, 2005.

¹³⁶ See generally Fitzpatrick, J., “Speaking Law to Power: The War Against Terrorism and Human Rights” (2003) 14 *European Journal of International Law*, 241.

¹³⁷ Common Article 2, The Geneva Convention Relative to the Protection of Civil Persons in Time of War (Fourth Geneva Convention), 1949, 75 UNTS 287.

¹³⁸ Lubell, N., *Extraterritorial Use of Force Against Non-State Actors*, Oxford University Press, Oxford, 2010, 96.

¹³⁹ US Department of State, Bureau of International Information Programs, “Timeline – Key Events in Afghanistan’s Political and Economic Reconstruction”, 26 January 2006, available online at <<http://www.america.gov/st/pubs-english/2006/January/20060126120012dnpnosmoht0.9750482.html>> accessed 3 January 2013.

¹⁴⁰ Solis, H., *The Law Of Armed Conflict International Humanitarian Law in War*, Cambridge University Press, New York, 2010, 211.

¹⁴¹ Common Article 3, The Geneva Convention Relative to the Protection of Civil Persons in Time of War (Fourth Geneva Convention), 1949, 75 UNTS 287.

¹⁴² Cullen, A., *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, Chapter 2.

¹⁴³ For a discursive look at these approaches, see: Anderson, K., “Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War’”, in: Berkowitz, P., eds., *Future Challenges in National Security and Law*, Hoover Institution Press, Stanford, California, 2011.

¹⁴⁴ *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-T, International Criminal Tribunal for the Former Yugoslavia (2 October 1995) para.70; O’Connell, M. E., “Combatants and the Combat Zone”, *University of Richmond Law Review* 43, 2009, 845, 860-64.

¹⁴⁵ Alston, P., *supra* note 4, para. 54.

state can be engaged in a NIAC with non-state actors if the military intervention is invited by the territorial state that is itself a party to the Geneva Conventions.¹⁴⁶ At the invitation of Afghanistan, the US is a party to the conflict and can conduct counter-terrorism operations in cooperation with Afghan forces.¹⁴⁷ For these reasons, targeted killings within Afghanistan and Iraq have not evoked much controversy, as they arise during the course of a conflict within a definable zone of hostilities. However, the narrow approach is unable to provide a legal basis for all the targeted killing operations that have taken place far from any conventional battlefield, such as those in Somalia and Yemen.¹⁴⁸

In these circumstances the US has to rely on a more expansive interpretation of armed conflict.¹⁴⁹ Provided that an individual is directly participating in acts of hostilities on behalf of al-Qaeda against the US they can legitimately be made the object of an attack wherever they are located.¹⁵⁰ This position suggests that Common Article 3 should be interpreted to apply to any armed conflict that falls outside the scope of inter-state armed conflict under Common Article 2.¹⁵¹ In this case, the US-al-Qaeda conflict can be classified as a NIAC. This view does not withstand scrutiny. For a start, it contradicts the *Tadic* criteria, which is reflective of customary international law.¹⁵² Such an approach undermines a central purpose of IHL, which is to define areas of combat to minimise civilian casualties.¹⁵³

II.2 The Role of Self-Defence and IHRL

The justification for targeted killings would be on stronger ground if the distinct interests affected by a decision to use force were addressed. When a state uses lethal force in the territory of another state, directed at non-state actors, there are two legally recognizable interests engaged: the territorial integrity of the state and the rights of the individual being subjected to force. Accordingly, these interests in turn shape the appropriate legal framework applicable. It would not suffice simply for the US to assert that it is engaged in a global armed conflict with al-Qaeda. In particular, the existence of a global armed conflict with al-Qaeda, which in turn justifies the use of force, omits consideration of the interests of the territorial state whose sovereignty is interfered with by the attacking State. The existence and scope of an armed conflict, forming considerations in the *jus in bello*, cannot provide a justification for inter-state uses of force, governed by the *jus ad bellum*. Pronouncements from US officials appear to recognise this distinction, where it is said that targeted killings occur with the consent of the territorial state concerned, or if in the absence of consent, by invoking the inherent right of self-defence.¹⁵⁴ Pursuant to Article 51 of the UN Charter a state

¹⁴⁶ Lubell, N., *supra* note 11 at 101.

¹⁴⁷ *Ibid.*

¹⁴⁸ See further, Ramsden, M., "Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki", *Journal of Conflict and Security Law*, 16(2), (2011), 385-406.

¹⁴⁹ Dehn, C. J. and Heller, K. L., Debate: "Targeted Killing: The Case of Anwar Al-Aulaqi", *University of Pennsylvania Law Review*, PENNumbra 159 2011, 175, 190.

¹⁵⁰ *Hamdan v Rumsfeld* 126 S. Ct. 2749 (2006).

¹⁵¹ *Ibid.*

¹⁵² Dehn and Heller *supra* note 149, 183; *Prosecutor v Tadić* Trial Chamber Judgment, 7 May 1997, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-AR72; *Prosecutor v Tadić*, (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1-T, (2 October 1995), para.70; see also *Threat or Use of Nuclear Weapons Advisory Opinion* [1996] I.C.J Rep. para. 78.

¹⁵³ It is also necessary to establish that al-Qaeda is an organized armed group which is not addressed in this article in light of space. For an analysis, see: Ambos, K. and Alkatout, J., *supra* note 5.

¹⁵⁴ Brennan, J., *supra* note 3; Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associate', available at <openchannel.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite&preview=true%22> (accessed 13 April 2013). See also John Denh, C.,

can use force in self-defence if an 'armed attack occurs'. Such defensive force must be necessary, proportionate and non-retributive.¹⁵⁵

Yet, whilst on a *jus ad bellum* analysis the doctrine of consent or the right to self-defence provides the appropriate framework with which to judge the legality of any use of force in the territory of another state, this can only provide a partial justification. Particularly, the right to self-defence is part of the *jus ad bellum* and thus is a relevant legal principle governing state relations. It serves to preclude the wrongfulness of using force against another state. In itself, it does not provide a justification for the interference with the legal interests of the individual made the object of attack. The International Law Commission in its authoritative work on state responsibility confirms this view that a *jus ad bellum* justification does not preclude the wrongfulness of any violation under IHRL.¹⁵⁶ This is not to say that any justification under self-defence is going to be irrelevant to the assessment under IHRL; in many respects, the standards constraining the use of lethal force are likely to be the same under both frameworks.¹⁵⁷ Where they do differ, however, is that whilst the law of self-defence operates on an inter-state level, IHRL serves to confer rights on individuals and thus calls for an individualised assessment concerning the need and proportionality of a targeted killing. Indeed, such individualised assessment should be open to scrutiny in the form of administrative and judicial review. This point will be developed more shortly, but the working assumption that this article takes is that at least some of the drone strikes conducted by the US, those taking place outside of armed conflicts, engage IHRL and must be justified as such.

II.3 Application of IHRL

Despite the apparent relevance of IHRL to targeted killings, there has been little said about its applicability by the US executive. There is some indication of the US position in 2006, when it informed the Human Rights Committee that 'it did not consider questions concerning the war on terrorism, and detention and interrogation outside United States territory to fall within the scope of the Covenant.'¹⁵⁸ This view is underpinned by the belief that human rights obligations under the ICCPR do not apply extraterritorially.¹⁵⁹ Space precludes detailed assessment of this claim, although the broad contours of the debate will be mentioned.¹⁶⁰ Article 2(1) of the ICCPR requires states parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. The essential

"Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations", *Harvard International Law Journal Online* 542012, available online at <harvardilj.org/2013/01/online_54_deh/> (accessed 17/04/2013).

¹⁵⁵ See generally, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States) (Merits) [1986] ICJ Rep 14.

¹⁵⁶ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 53 UN GAOR Supp. (No 10), para. 43 stated: 'This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations...As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.'

¹⁵⁷ Chesney, R., "Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force", *Yearbook of International Humanitarian Law*, 132010, 3-60.

¹⁵⁸ Second and Third Periodic Reports of the United States of America, 18 July 2006, [UN Doc. CCPR/C/SR.2380], (2 July 27, 2006), (statement by Mr. Waxman).

¹⁵⁹ Dennis, M. J., "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *American Journal of International Law*, 99 2005, 119.

¹⁶⁰ See generally King, H., "The extraterritorial human rights obligations of states", *Human Rights Law Review* 9(4) 2009, 521.

issues boil down to whether Article 2(1) of the ICCPR is to be read conjunctively (territory and jurisdiction) or disjunctively (to acts that occur either on a State's territory *or* where an individual is under the jurisdiction of the State). If disjunctively, then the key issue is whether an individual is placed under the jurisdiction of the US when being the subject of a targeted drone strike.

Despite US assertions to the contrary, both the ICJ and Human Rights Committee have noted that the ICCPR has extraterritorial effects.¹⁶¹ In any event, it is arguable that the source of obligations to protect human rights extraterritorially need not flow from the ICCPR, but can be derived from customary international law.¹⁶² The key issue thus turns on what is meant by coming within the "jurisdiction" of a state. There is a clear rationale for a jurisdictional clause, as it imposes responsibility on states for territory and inhabitants under their control. The difficulty arises in definition, in particular whether jurisdiction is constituted legally or factually.¹⁶³ The view taken here is that jurisdiction is not an indivisible concept but rather has different meanings for various purposes.¹⁶⁴ As King noted, territorial-based jurisdiction must be distinguished from jurisdiction based on non-territorial factors.¹⁶⁵ Where state agents are acting abroad without territorial control it is necessary to look at the effects of their power.¹⁶⁶ The Human Rights Committee has confirmed this view pronouncing that jurisdiction extends to extraterritorial efforts by a state to abduct a person in another state.¹⁶⁷ Similarly, the Inter-American Commission on Human Rights observed that action by Cuban military planes striking two civilian light aircraft 'placed the civilian pilots...under their authority'.¹⁶⁸ Based on these authoritative interpretations it is arguable that drone strikes come within the jurisdiction of the US and potentially engage its state responsibility.

III. Assessing Targeted Killings Under a Human Rights Framework

If, then, IHRL applies to US targeted killings outside of the battlefield context, do such drone strikes violate human rights, particularly the right to life of the victims? Some commentators take a strict approach, noting that it would be difficult to establish when, if ever, a targeted killing would be justified under IHRL.¹⁶⁹ During armed conflict, the right to life of civilians is robustly protected, but this is not the same for parties to the conflict (either as combatants or civilians taking direct part in hostilities) who can legitimately be made the object of attack without any prior attempt to effectuate an arrest, unless the party is *hors de combat*. During peacetime, however, the right to life can only be deprived in the most exceptional circumstances; to quell a grave threat to life, which is often imminent, concrete, specific, and where no less

¹⁶¹ *Lopez Burgos v Uruguay*, CmN No. 52/1979, (29 July 1981); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 J.C.J. 136, 108-11 July 9); Scheinin, M., "Extraterritorial Effect of the International Covenant on Civil and Political Rights", in Coomans, F., and Kamminga, M. T., eds., *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004, 73.

¹⁶² Kretzmer, D., "Targeted Killing of Suspected Terrorists: Extrajudicial Executions or Legitimate Means of Defence?" *European Journal of International Law* 16 2005 171-212, 183-85.

¹⁶³ See generally Milanovic, M., *Extraterritorial Application of Human Rights Treaties*, Oxford University Press, Oxford, 2011.

¹⁶⁴ King, H., *supra* note 160, 556.

¹⁶⁵ *Ibid.*

¹⁶⁶ Ambos, K. and Alkatout, K., *supra* note 5.

¹⁶⁷ *Lopez v. Uruguay*, *Communication* No. 52/1979, CCPR/C/OP/1 (1984), 88, 12.1- 12.3

¹⁶⁸ Inter-American Commission on Human Rights, *Alejandro, A., Costa, C. et al*, REPORT No.86/99 CASE 11.589, September 29 1999, para. 25.

¹⁶⁹ See Alston, P., *supra* note 4.

harmful means are available.¹⁷⁰ Without this exceptional factual predicate, the state is limited to standard law enforcement measures and is required to afford suspects a fair trial before any finding on criminal responsibility.

The following section will show, however, that the right to life admits of a variable standard depending on the circumstances. This section will consider whether targeted killings can be justified under IHRL, assessing the approaches taken by international and regional decision-makers on the right to life and the use of lethal force. It notes that whether the use of lethal force was necessary and proportionate has accommodated the particular context in which force was used, including the degree of control that the law enforcement authorities were able to exert over the suspect.

III.1 Proportionality

As a starting point, Article 6 of the ICCPR prohibits the ‘arbitrary’ deprivation of life. The arbitrariness standard was inserted into Article 6 so as not to pre-empt every case when the use of lethal force would be justified, instead evaluating the proportionality and necessity of such force on a case-by-case basis.¹⁷¹ To satisfy the proportionality requirement under IHRL, any use of lethal force must be commensurate to the taking of life. Proportionality under IHRL differs markedly from that under IHL. Under IHL the sole objective of an operation can be to kill enemy combatants where it serves a military advantage, yet under IHRL there is a need to establish objectively that each operation served the purpose of averting a threat to life.¹⁷² The targeting of a suspected terrorist may thus amount to a proportionate measure if it pursues the legitimate aim of saving life. The human rights communities have noted in particular the threat posed by terrorism to human rights. As UN Special Rapporteur, Chris Heyns, observed after the death of Bin Laden, ‘[a]cts of terrorism are the antithesis of human rights, in particular the right to life.’¹⁷³ Indeed states are under a positive obligation to exercise due diligence to protect the lives of individuals from threats of terrorism.¹⁷⁴ As the Inter-American Commission on Human Rights noted in its *Report on Terrorism and Human Rights*, ‘in situations where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations.’ There are a number of proportionality related issues with targeted killings that require consideration.

The first concerns the extent to which the US actually engages in an individualised risk assessment of its targets. Brennan, Legal Advisor to the US Administration, noted that it was unnecessary for the US to assess the threat posed by each target. To be sure, if a targeted killing must arise as a response to a threat to life, then it is of course necessary for the state to establish a causal link between the target and the potential

¹⁷⁰ Eighth UN Congress on Prevention of Crime and Treatment of Offenders, ‘Basic Principles on the Use of Force and Firearms’, Havana, Cuba 1990, UN Doc A/CONF 144/28/Rev 1, 112, para. 9.

¹⁷¹ United Nations, General Assembly, REPORT: *Report of the Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights*, 1955 [UN Doc A/2929], Chapter VI, para. 3

¹⁷² Alston, P., “The CIA and Targeted Killings Beyond Borders”, *Harvard National Security Journal* 2 2011 283, 304.

¹⁷³ Heyns, C., and Scheinin, M., “Osama bin Laden: statement by the UN Special Rapporteurs on summary executions and on human rights and counter-terrorism”, 6 May 2011 Office of the High Commissioner for Human Rights, available online at <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E>>(accessed 3 January 2013).

¹⁷⁴ Council of Europe, Committee of Ministers, “Guidelines on Human Rights and the Fight Against Terrorism”, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies, point 1; *Isayeva v Russia* (2005) 41 EHRR 791, para. 70; Inter-American Commission on Human Rights, “Reports on Terrorism and Human Rights”, 22 October 2002, [OEA/SerL/V/II.116, Doc 5 rev 1 corr], para. 87.

threat posed. Transnational terrorist groups such as al-Qaeda are loosely structured and based around shared ideas rather than a necessarily strict command structure. Merely being a member of al-Qaeda or indeed subscribing to the beliefs of the group does not in itself necessarily pose a threat to life. This would tend to suggest that the US practice of signature targeting of those who are seen in the ‘wrong place’ is unlikely to be lawful under IHRL. The analysis would potentially be different for personality strikes of operational leaders where presumably there would be stronger evidence of their involvement in future threats.¹⁷⁵

A further contentious issue concerns the incidental loss of life arising from targeted killing operations. Collateral loss is often an unavoidable feature of armed conflicts and this is recognized in IHL. But assuming that IHL does not apply the degree to which collateral damage is permitted remains an open question. On a strict view, any death other than the intended target would amount to a violation of the right to life. Philip Alston, the former Special Rapporteur for Extrajudicial Killings, observed that ‘...drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability’.¹⁷⁶ A broader view, one that finds support from the European Court of Human Rights in *Isaveya v Russia*, would permit collateral loss, provided that the operation was planned and controlled by the authorities so as to minimise the risk to life; authorities had to take all feasible precautions in the choice of means and methods with a view to avoiding and, in any event, minimising incidental loss of civilian life.¹⁷⁷

The legality of collateral deaths under IHRL will turn on whether the narrow or broad approach is taken. The rationale for the narrow approach is clear: the authorities must follow a stricter standard of proportionality for law enforcement operations than those which occur during armed conflict, where there is greater scope to factor in the military advantage into any proportionality exercise. However what may be an unacceptable consequence of lethal force in a domestic law enforcement setting is inevitably different in an environment where the state exercises little operational control over a suspected terrorist. In the final analysis it is submitted that whether collateral damage is permitted will turn upon a host of considerations, foremost being the threat to life posed had the intended target been able to carry out a future terrorist attack. The degree of control over an operation that pursues a legitimate aim of protecting life should also be factored into the legality assessment.

III.2 Necessity

The legality of a targeted killing operation will also turn on whether it was necessary.¹⁷⁸ This requirement embodies two main enquiries. First, an examination of whether there was any alternative non-lethal means to contain the threat. Second, whether the threat was an imminent one. Each will be dealt with in turn.

¹⁷⁵ See further, Lotrionte, C., “When to Target Leaders”, *The Washington Quarterly* 26(3) 2003, 80-81. For an excellent analysis, see: Heller, K., “‘One Hell of a Killing Machine’: Signature Strikes and International Law”, *Journal of International Criminal Justice* 2012, forthcoming.

¹⁷⁶ Alston, P., *supra* note 4, para. 86.

¹⁷⁷ *Supra* note 174. The ECtHR has also found the incidental killing of innocents could be proportionate: *Andronicou v Cyprus*, 1997-VI Eur. Ct. H.R. 2059, 2107.

¹⁷⁸ See UN Human Rights Committee, CCPR *General Comment No. 6*, (30 April 1982) para. 3; UN Human Rights Committee, *Guerrero v Colombia* Communication No. 45/1979, UN Doc. **Supp. No. 40 (A/37/40), 137**; UN General Assembly, ‘Code of Conduct for Law Enforcement Officials’, UN General Assembly Res 34/169, 17 December 1979; *Isayeva, supra* note 174, para. 175; *McCann v UK* (1996) 21 EHRR 97, para. 212.

In assessing the alternatives to non-lethal force, human rights law requires that lethal force may only be used as a ‘last resort’ if there are ‘no other means’ of preventing a threat to life.¹⁷⁹ Most directly on point, the Human Rights Committee in responding to Israel’s practice of targeted killings noted that ‘before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terrorist must be exhausted.’¹⁸⁰ In *McCann v UK*, for example, the European Court of Human Rights, in finding that the UK had breached Article 2 of the ECHR, observed that the state had others means at its disposal (i.e. arresting the terrorist suspect before arriving at the place targeted for the terrorist attack), that its failure to assert authority at an earlier stage of the operation therefore negated the legality of its later killing of the terrorist suspect. There is undoubtedly good reason for this standard. It places an onus on the state to establish that alternative means were not available. It can minimize unnecessary deaths by emphasizing the need for non-lethal alternatives. It also addresses a growing concern in the US targeted killings context that such a lethal method now represents a general policy without proper individualised assessment of the feasibility of non-lethal alternatives in each case.

The Human Rights Committee recognizes that the degree of control that the state exercises over suspects will have a bearing on the feasibility of non-lethal alternatives.¹⁸¹ In the 2011 decision in *Finogenov v Russia*, the European Court of Human Rights acknowledged that the rigorous standard of absolute necessity might not always be appropriate, given that the state may have had ‘to act under tremendous time pressure and where their control of the situation was minimal’.¹⁸² The strictness of the standard will inevitably vary taking into account all relevant considerations relating to control and the imperative to avert a grave threat to life.¹⁸³ The extent to which the US is able to exercise law enforcement control over suspected terrorists thus forms a relevant factor. Clearly the US can exercise such authority within its own jurisdiction. Likewise the US can work with many states with strong governing capacities to address terrorist threats within its territory according to strict law enforcement standards. However, so-called terrorist ‘safe havens’ pose a myriad of difficulties, often because the territorial state has weak governing capacity or is unwilling to assist.¹⁸⁴ It is in these circumstances that the strict law enforcement standard would require modification to take into account the absence of the means to address a threat to life through conventional policing.

A survey of human rights jurisprudence also shows that the nature of the adversary and safety of security forces is also relevant. In *Bubbins v United Kingdom*, the European Court of Human Rights noted that officers do not need to put their life in danger in effectuating an arrest. To hold otherwise would ‘impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others’.¹⁸⁵ A similar point was made in *Isayeva v*

¹⁷⁹ *Montero Aranguren v Venezuela*, Preliminary Objection, Judgment, IACtHR (ser. C) No. 150, July 5, 2006, at 67; Alston, P., *supra* note 4, para. 32.

¹⁸⁰ UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, para.15, UN Doc. CCPR/CO/78/ISR, 21 August 2003, available online at <www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.78.ISR.En> (accessed 3 January 2013).

¹⁸¹ *Guerrero supra* note 178. Alston in his report on targeted killings acknowledged that the degree of force permitted will vary depending on the degree to which a state controls a particular area: *supra* note 4, para. 77.

¹⁸² *Finogenov v Russia* ECtHR, App. No. 18299, 2011, para. 210.

¹⁸³ See, e.g., *Erdogan v Turkey*, App. No. 57049/00, para.99 (ECtHR, May 15, 2007); *Andronicou v Cyprus*, 1997–VI ECtHR 2059, 2102.

¹⁸⁴ See Paust, J. J., “Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan” *Journal of Transnational Law and Policy* 19 2010 237, 251.

¹⁸⁵ (2005) 41 EHRR 24, 483.

Russia concerning an armed insurgency in Chechnya. The court accepted that the presence of a ‘very large group of armed fighters’ and the ‘active resistance’ may have ‘justified use of lethal force’.¹⁸⁶ Special considerations therefore factor into the assessment of the feasibility of alternatives to targeted killing.¹⁸⁷ Whilst deploying ground personnel to arrest a suspected terrorist may in theory be a preferable course of action, from a right to life perspective this may actually lead to greater loss of life than would arise with a surgical air strike directed at its intended target. Previous attempts have been made to arrest al-Qaeda members in the terrorist strongholds in Yemen. For example, in December 2001, 18 Yemeni soldiers died in a failed attempt to capture Al-Harithi, the al-Qaeda leader alleged to have planned the USS Cole bombings.¹⁸⁸ Thus, where there are substantial grounds to believe that the threat to the life of the law enforcement officials is a grave one, out of proportion (from a right to life perspective) to the advantage of using non-lethal means, then it is arguable that there would be no need to first attempt to effectuate an arrest.¹⁸⁹

The second major factor in evaluating whether a targeted killing was necessary turns upon the use of imminence.¹⁹⁰ The need for an imminent threat is often used to mean that the threat is visible, literally in the process of being carried out. According to this view, the requirement of imminence safeguards against abuse; an imminent threat is concrete and observable, whereas a future threat still in the planning stages may never materialise.¹⁹¹ On a strict imminence standard, it is hard to see how any targeted killing would be justified. The most direct source of any imminent threat is inevitably the ‘triggerman’ literally in the process of carrying out the attack. By contrast, it seems that the purpose of targeted killings, according to US executive pronouncements, is to disrupt terrorist planning and remove operational leaders.¹⁹² Whilst such suspected terrorists may be in the process of planning a future act that constitutes a threat to life, this threat is by no means imminent in the conventional sense.

The strict approach of imminence is (and ought to be) the standard applicable to almost all operations to quell a threat to life. Yet, the unique threat posed by terrorist safe havens abroad, which may present only a limited window of opportunity to disrupt the on-going planning of known terrorist leaders who intend to launch an attack at an undefined time, may justify a departure from this strict standard. In these cases there should not be a need to delay action until some “theoretical end stage”, which would create an “unacceptably high risk that the action would fail”.¹⁹³ Indeed, it would appear that some flexibility is permitted in human rights law to adapt imminence to the particular circumstances, where a future substantiated threat poses a grave threat to life. For example, principle 9 of the UN Basic Principles for the Use of Force and Firearms by Law Enforcement Officials provides that lethal force can be used, aside where there is an imminent threat, in order to ‘prevent the perpetration of a particularly serious crime involving grave threat to life’.¹⁹⁴ This point is echoed by

¹⁸⁶ *Isayeva v Russia*, *supra* note 174.

¹⁸⁷ Kretzmer, D., *supra* note 162, 179.

¹⁸⁸ Whitaker, B., “Al-Qaida suspect killed in Yemen car blast”, *The Guardian*, London, 5 November 2002, available online at <www.guardian.co.uk/world/2002/nov/05/alqaida.terrorism> (accessed 3 January 2013).

¹⁸⁹ *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel 2005, H CJ 769/ 02, para. 40.

¹⁹⁰ UN Human Rights Committee, ‘Concluding Observations of the Human Rights Committee: Israel’ (21/08/2003), UN Doc. CCPR/CO/78/ISR.

¹⁹¹ Alston, P., *supra* note 4, para. 86. Kretzmer, D., *supra* note 162, 182.

¹⁹² Brennan, J., *supra* note 3.

¹⁹³ DOJ memo *supra* note 28.

¹⁹⁴ Eighth UN Congress on Prevention of Crime and Treatment of Offenders, *supra* note 170, para 112.

the Inter-American Commission on Human Rights, who noted that in ‘peacetime situations, state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life, and persons who do not present such a threat, and use force only against the former’. The European Court of Human Rights may think likewise. In *Isayeva v Russia*, the court seemed to accept that lethal force could be used to quell a rebellion, even where there is no indication that there was an immediate threat posed to life.¹⁹⁵ If there is such an exception to the imminence requirement, then it should be narrowly circumscribed.¹⁹⁶ The exceptional factual predicate of a terrorist safe haven that limits a state’s ability to address the source of the threat through non-lethal means inevitably factors into this assessment.

III.3 Domestic legal basis

IHRL requires there to be a domestic legal basis for any operation using lethal force.¹⁹⁷ According to the OLC memo, targeted killings are covered by the Authorization for Use of Military Force (AUMF) statute, passed by the US Congress after 9/11.¹⁹⁸ 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 harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons’.

The extent to which targeted killing operations are mandated under the AUMF will turn upon a number of factors. First, the scope of AUMF is unclear, in that it does not specify whether its applicability is solely limited to the circumstances of an armed conflict.¹⁹⁹ The scope of AUMF potentially matters, as there are domestic law prohibitions against assassinations and killing of Americans abroad, which apply during times of peace.²⁰⁰ The Fifth Amendment also guarantees that a person shall not be deprived of life without due process of law. Thus, if AUMF is limited solely to armed conflict, then any targeted killing operation outside of defined zones of hostilities would be without a legal basis. But the AUMF need not necessarily be drawn so narrowly to circumstances of armed conflict and would seem to permit force of both high and low intensity.²⁰¹ Second, more problematically, based on a literal interpretation of AUMF, a connection must be established between the perpetrators of the terrorist attacks on 9/11 and those subject to a targeted killing operation. In US case law it was noted that the AUMF does not include terrorist organizations that merely share an abstract philosophy or even a common purpose with al Qaeda – there must be an actual association in the current conflict with al Qaeda or the Taliban.²⁰² This is problematic, because some al Qaeda groups, such as the AQAP did not exist during 9/11. The AUMF is thus circumscribed quite narrowly in this regard

¹⁹⁵ *Isayeva v Russia*, *supra* note 174. See also *Kelly v United Kingdom*, (1993) 16 EHRR 20, but see criticism of *Kelly*: Joseph, S., “Denouncement of the Deaths on the Rock: The Right to Life of Terrorists”, *Netherlands Quarterly of Human Rights* 1996 14(1) 5-22, 9.

¹⁹⁶ See further, Kretzmer, D., *supra* note 162, 203.

¹⁹⁷ Melzer, N., *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, 225.

¹⁹⁸ See also *al-Aulaqi v Obama* (D.D.C. 25 September 2010) (Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss), 4.

¹⁹⁹ See *Hamdi v Rumsfeld*, 542 U.S. 507, 535 (2004); *Boumediene v Bush*, 553 US 723, (2008); *Parhat v Gates*, 532 F.3d 834 (D.D.C. 2008).

²⁰⁰ 18 USC s.1119, Foreign Murder of United States Nationals Act.

²⁰¹ Chesney, R., *supra* note 157, 51.

²⁰² *Hamliily v Obama* (US District Court for the District of Columbia), 19 May 2010, 16–17.

and would seem to envisage the organisational hierarchy that comprised Al-Qaeda in 2001. In short, it would appear that the AUMF does not provide a sufficient domestic legal basis for the variety of targeted killing operations undertaken by the US.

III.4 The Role for Judicial and Administrative Oversight

A further requirement is that any use of lethal force must be subject to review. Article 6 of the ICCPR does not provide explicitly that there must be an investigation. The Human Rights Committee in General Comment No. 6 noted that the law must 'strictly control and limit the circumstances in which a person may be deprived of their life by the authorities', and to take 'measures...to prevent and punish deprivation of life'.²⁰³ In subsequent cases, the Committee has noted that the state is subject to a duty to 'take effective steps to investigate' the deprivation of life.²⁰⁴ This requires a 'proper' and 'independent' investigation to be carried out.²⁰⁵ The Committee has not been prescriptive of any particular form of oversight, presumably according discretion to states as to how it investigates deprivations of life.

Similar pronouncements can be found in Strasbourg, where the European Court of Human Rights has frequently observed that protection of the right to life required some form of official investigation when state agents have killed individuals as a result of the use of force. The purpose of this investigatory obligation was to ensure accountability for deaths occurring under their responsibility. In order to meet this investigatory obligation, the state had to initiate a prompt and independent investigation capable of determining whether lethal force was justified. There must also be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.²⁰⁶ Some exercises of executive power that interfere with human rights also require judicial oversight. For example in *Klass v Germany* the court noted in the context of covert surveillance laws that 'an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.'²⁰⁷ The court also noted that 'in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.'²⁰⁸ Likewise, the Israeli Supreme Court underscored the importance of judicial review of targeted killings when reviewing the executive's practice.²⁰⁹

The US executive has resisted calls for the introduction of external checks on its decisions to target suspect terrorists. Recently Brennan has noted, 'a state that is engaged in an armed conflict or in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force.'²¹⁰ Furthermore,

²⁰³ United Nations Human Rights Committee, *General Comment 6*, UN Doc HRI/GEN/1/Rev.6 (1983), para 3.

²⁰⁴ *Baboeram et al v Suriname*, Human Rights Committee, Communication Nos. 146/1983 and 148-54/1983.

²⁰⁵ *Laureano v Peru*, Human Rights Committee, Communication No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993.

²⁰⁶ *McKerr v. United Kingdom* (2002) 34 EHRR 20 paras. 111-115; *Kaya v. Turkey*: (1999) 28 EHRR 1, para 86; *Jordan v United Kingdom* (2003) 37 EHRR 2 at paras. 105-109; App. No.56413/00.

²⁰⁷ *Klass v Federal Republic of Germany*(1978) 2 EHRR 214, para. 55.

²⁰⁸ *Ibid.*, para. 56.

²⁰⁹ Committee Against Torture, *supra* note 189, paras. 61 *et seq.*

²¹⁰ Thomas, J. in his dissent in *Hamdi v Rumsfeld*, *supra* note 199; Koh, H. H., 'The Obama Administration and International Law' (Annual Meeting of the American Society of International Law, Washington, DC, 25

Brennan also noted that adequate process was also unnecessary, as the ‘procedures and practices for identifying lawful targets are extremely robust...They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with applicable law.’²¹¹ Despite assurance that the US practice of targeted killings accords with applicable law in the planning and execution stages, there are a number of concerns from an IHRL perspective. First, the characterisation of ‘applicable law’ is essentially one that is defined unilaterally by the US executive alone without any judicial challenge. The US District Court in *Al-Aulai v Obama* did not allay these concerns in finding that the issues raised non-justiciable political questions. Accordingly the US executive may be applying standards that fall short of IHRL, especially given that it primarily characterises the applicable law as IHL. Second, the failure to provide any form of independent mechanism violates basic procedural requirements under IHRL. The reasons presented by US officials to resist independent oversight are unconvincing. In particular, as analysed above, the procedural minimum standard under IHRL does not require *audial te rampartem* to be respected in the sense that the target has an opportunity of notice and reply prior to the commencement of any drone strike. Rather, the need for an independent investigation requires at a minimum a post-hoc examination of all the circumstances. Such oversight should be capable, it is submitted, of identifying, amongst other matters, whether the individual was a member of a terrorist organization; the evidence that establishes he was engaged in acts of terrorism; whether he was arbitrarily deprived of his life. Third, the suggestion that independent oversight is unjustified or unnecessary reflects a worrying trend by US administrations to insulate counter-terrorism decisions from public accountability. Indeed, the reported human rights abuses at Guantanamo Bay provide a poignant example of the dangers of unchecked power.²¹²

IV. Conclusion

It has been argued in this article that the US justification for targeted killings, resting on self-defence and the existence of an armed conflict with al-Qaeda, is unduly narrow and does not provide an adequate justification for all targeted killings to date. Outside of a defined zone of conflict, the US must justify any targeted killings as consistent with the international law of self-defence and IHRL. The international law of self-defence serves to preclude the wrongfulness of any use of force on another state’s territory, whereas IHRL provides the appropriate framework to assess the legality of depriving an individual of their life.

Whilst IHRL imposes stringent requirements for the use of lethal force, it is to be noted that some pronouncements from human rights decision-makers recognise that the standards of necessity and proportionality are adaptable, taking into account the gravity of the threat posed to life and the extent to which the authorities are able to assert control over the suspected terrorists. Indeed, if an expanded definition of jurisdiction is given so that the ICCPR enjoys wide extra-territorial effects, it necessarily follows that the standards that qualify the right to life will also take into

March 2010) available online at <<http://www.state.gov/s/l/releases/remarks/139119.htm>> (accessed 15 February 2013).

²¹¹ Johnson, J. C., “Deans Lecture: National Security, Lawyers and Lawyering in the Obama Administration”, February 2012. See Koh, H. H., ‘The Obama Administration and International Law’ (Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010) available online at <<http://www.state.gov/s/l/releases/remarks/139119.htm>> (accessed 15 February 2013).

²¹² See further Murphy, R. and Radsan, A. J., “Due Process and Targeted Killing of Terrorists”, 31 *Cardozo Law Review* 31 2009 405, 438.

account a range of factors unique to any extra-territorial use of force. To assert otherwise would be to impose a domestic law enforcement paradigm on the quite different context and challenges arising from the extra-territorial uses of force.

Yet, IHRL is also relevant in another important way; in requiring the US to take measures domestically to provide a legal basis for the killings and an effective means of investigating each killing. In order to enhance the legitimacy of targeted killings and to safeguard from abuse, the US should take steps to provide a legislative standard governing the use of lethal force against suspect terrorists. Effective mechanisms of administrative and judicial review should also be put in place to protect against abuse and ensure that targeted killings only occur in accordance with law.

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