

# Drone Deaths Violate Human Rights: The Applicability of the ICCPR to Civilian Deaths Caused by Drones

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## Abstract

This article argues that the thousands of lethal drone strikes conducted since 2001 violate the International Covenant on Civil and Political Rights (ICCPR), and in particular, the right to life. The analysis provided is also applicable to the right to life enshrined in customary international law and regional human rights treaties. While most legal and academic commentary on deaths caused by drones has focused on an international humanitarian law (IHL) framework—perhaps because the primary weaponised drone user, the United States, insists that this is the appropriate legal context—this article argues that a human rights framework for assessing lethal drone strikes is preferable, useful, and necessary. Not only is it likely that the so-called war on terror is a semantic rather than a legal war, the ICCPR continues to apply during conflict. Moreover, opacity surrounds most lethal drone strikes, which the Trump administration appears likely to increase, while simultaneously reducing Obama-era safeguards. In that context, a human rights assessment, which will be inherently more stringent towards fatalities than an IHL framework, is urgently needed. The article concludes that the right to life attaches to everyone regardless of the territory in which they are targeted; that effective jurisdiction and control is satisfied upon ability to lethally target an individual; that relevant ICCPR rights apply in ungoverned territories as well; and that the threat of terrorism does not displace these rights or the applicability of the ICCPR.

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## Keywords

drone deaths – International Covenant on Civil and Political Rights (ICCPR) – human rights – right to life – civilians – jurisdiction

### 1 Introduction: The ICCPR's Relevance to Civilian Deaths Caused by Drones

In October of 2013, Pakistani primary school teacher Rafiq ur Rehman and his two children—Nabila, nine, and Zubair, thirteen—provided the United States (US) Congress with its first testimony from civilians whose relatives had been killed by lethal drones strikes.<sup>1</sup> Nabila and Zubair were picking okra in a field with their grandmother, sixty-seven-year-old midwife Monima Bibi, when she was fatally shot by a passing drone.<sup>2</sup> Rehman testified that news reports stated four to five militants were killed in that strike, but that the only actual fatality was his mother.<sup>3</sup> In November 2013, Yemeni youth leader Entesar Qadhi spoke poignantly in a US Congressional briefing of the terror her village lives under when American drones hover above, waiting to strike.<sup>4</sup> At the same briefing, Faisal bin Ali Jaber testified to the horror of seeing his family dismembered by drones immediately following his son's wedding.<sup>5</sup> Despite this and similar testimony before the Senate earlier in 2013,<sup>6</sup> civilian deaths caused by drone strikes continued. In December 2013, the fatalities culminated in a strike on a wedding party that killed fourteen innocent Yemeni people.<sup>7</sup> Condemnation of these

1 K McVeigh, 'Drone strikes: Tears in Congress as Pakistani Family Tells of Mother's Death' *The Guardian* (29 October, 2013) <<https://www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress>>.

2 Ibid.

3 Ibid.

4 N Lennard, 'Yemenis Tell Capitol Hill of Drone Terror' *Salon* (20 November 2013) <[http://www.salon.com/2013/11/20/yemenis\\_tell\\_capitol\\_hill\\_of\\_drone\\_terror/](http://www.salon.com/2013/11/20/yemenis_tell_capitol_hill_of_drone_terror/)>.

5 See RF Worth and S Shane, 'Questions on Drone Strikes Find Only Silence' *The New York Times* (New York, 22 November 2013) <<http://www.nytimes.com/2013/11/23/world/middleeast/a-yemenis-long-trip-to-see-answers-about-a-drone-strike.html?pagewanted=all>>.

6 See C Friedersdorf, 'This Yemeni Man Loves America, Hates al-Qaeda, and Says Drone Strikes Make Them Stronger' *The Atlantic* (Washington, DC, 24 April 2013) <<http://www.theatlantic.com/politics/archive/2013/04/this-yemeni-man-loves-america-hates-al-qaeda-and-says-drone-strikes-make-them-stronger/275248/>>.

7 See H Almasmari, 'Yemen Says US Drone Struck a Wedding Convoy, Killing 14' *CNN* (Atlanta, 13 December 2013) <<http://edition.cnn.com/2013/12/12/world/meast/yemen-u-s-drone-wedding/>>.

lethal strikes by multiple United Nations (UN) officials<sup>8</sup> has not stemmed the tide. Published accounts of drone deaths between January 2009 and October 2017 record at least 6,800 and possibly 9,900 persons killed, including hundreds of children.<sup>9</sup> A document leaked in 2014 revealed the Central Intelligence Agency (CIA) opinion that drone strikes increase support for terrorism rather than quell it.<sup>10</sup> Yet the strikes continue,<sup>11</sup> with some commentators saying that ‘America trades torture for drones’ in the name of fighting terrorism.<sup>12</sup>

Today, lethal US drone strikes seem poised to expand. For example, the US military has been seeking permission from Niger to use armed drone strikes in the country.<sup>13</sup> Moreover, the Trump administration is reported to be increasing

8 See e.g. O Bowcott, ‘Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur’ *The Guardian* (Geneva, 21 June 2012) <<https://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un>>; ‘Yemen: UN Experts Condemn Drone Strikes on Mistaken Wedding Processions’ *UN News Centre* (26 December 2013) <<http://www.un.org/apps/news/story.asp?NewsID=46831#.WfehaEzMzeQ>>; ‘UN Condemns Killing of At Least 15 Civilians in US Drone Strike in Afghanistan’ *RT News* (30 September 2016) <<https://www.rt.com/news/361171-us-drone-civilians-afghanistan/>>.

9 See ‘Drone Warfare’ (*The Bureau of Investigative Journalism*, 13 October 2017), <<https://www.thebureauinvestigates.com/projects/drone-war>> accessed 26 October 2017.

10 See e.g. P Dorling, ‘Drone Strikes Counterproductive, says Secret CIA Report’ *Sydney Morning Herald* (Sydney, 19 December 2014) <<http://www.smh.com.au/world/drone-strikes-counterproductive-says-secret-cia-report-20141218-129ynq.html>>.

11 US government figures released in 2016 state that 2,372–2,581 ‘combatants’ and 64–116 non-combatants were killed by lethal US drone strikes between 20 January 2009 and 31 December 2015 across Afghanistan, Iraq, Syria, and certain parts of Libya: see Office of the Director of National Intelligence, *Summary of Information Regarding US Counterterrorism Strikes Outside Areas of Hostility* (2016) <<https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF>>. Third party data suggests a much higher death toll. For example, the Bureau of Investigative Journalism records 2,024–3,318 deaths between January 2009 and December 2014 in Pakistan alone: see ‘Strikes in Pakistan’ <[https://www.thebureauinvestigates.com/projects/drone-war/charts?show\\_casualties=1&show\\_injuries=1&show\\_strikes=1&location=pakistan&from=2009-1-1&to=2015-1-1](https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=pakistan&from=2009-1-1&to=2015-1-1)>. The Bureau also keeps data on Yemen, Somalia, and Afghanistan, recording thousands of more deaths than appear in US government data. See ‘Drone Wars: The Full Data’ (1 January 2017) <<https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data>>.

12 K Gilsinan, ‘America Trades Torture for Drones’ *The Atlantic* (Washington, DC, 9 Dec 2014) <<http://www.theatlantic.com/international/archive/2014/12/the-us-stopped-torturing-terror-suspectsand-started-droning-them/383590/>>.

13 R Brown, ‘US Sought to Arm Drones in Niger Prior to Attack’ *CNN* (26 October 2017), <<http://edition.cnn.com/2017/10/25/politics/us-drones-niger/index.html>>.

who it targets while reducing the vetting needed to conduct such strikes.<sup>14</sup> As of September 2017, the CIA under new director Mike Pompeo was demanding greater powers and autonomy in conducting drone strikes.<sup>15</sup> Indeed, strikes have already been carried out in places that were previously off-limits to the CIA, including Syria, and in increased numbers, such as in Pakistan.<sup>16</sup> In June 2017, a drone strike was undertaken against al-Shabaab in Somalia following Trump's designation of an 'area of active hostilities'. That designation had triggered exclusion of President Obama's Presidential Policy Guidance on Procedures for Approving Direct Action against Terrorist Targets.<sup>17</sup> Separately it was reported in August 2017 that the Trump administration was to review Obama's restrictive drone export policy.<sup>18</sup> Such a step creates concern that the number of nations worldwide with weaponised drones—currently more than a dozen<sup>19</sup>—may soon be on the rise. In this context, the need to review US drone strikes remains an urgent human rights issue.

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- 14 C Savage and E Schmitt, 'Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids', *New York Times*, (21 September 2017) <<https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>>.
- 15 E Schmitt and M Rosenberg, 'CIA Wants Authority to Conduct Drone Strikes in Afghanistan for the First Time' *The New York Times* (New York, 15 September 2017) <[https://www.nytimes.com/2017/09/15/us/politics/cia-drone-strike-authority-afghanistan.html?\\_r=0](https://www.nytimes.com/2017/09/15/us/politics/cia-drone-strike-authority-afghanistan.html?_r=0)>.
- 16 K Dilanian and C Kube, 'Trump Administration Wants to Increase CIA Drone Strikes' *NBC News* (18 September 2017) <<https://www.nbcnews.com/news/military/trump-admin-wants-increase-cia-drone-strikes-n802311>>.
- 17 C Savage, H Cooper and E Schmitt, 'US Strikes Shabab, Likely a First Since Trump Relaxed Rules for Somalia' *The New York Times* (New York, 11 June 2017) <<https://www.nytimes.com/2017/06/11/us/politics/us-airstrike-somalia-trump.html>>. This document (*US Department of Justice*, 22 May 2013) <[http://www.justice.gov/oip/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](http://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download)> (hereinafter 'PPG') introduced a set of parameters for determining whether to conduct a drone strike, including the risk of harming non-combatants and the absence of alternatives. However, it only applies outside 'areas of active hostilities', such that a declaration of active hostilities excludes its operation.
- 18 A Mehta, 'Trump Administration Launches Review of Drone Export Regulations' *Defense News* (2 August 2017) <<https://www.defensenews.com/pentagon/2017/08/03/trump-administration-launches-review-of-drone-export-regulations/>>; M Spetalnick and Mike Stone, 'Game of Drones: US Poised to Boost Unmanned Aircraft Exports' *Reuters* (11 October 2017) <<https://www.reuters.com/article/us-trump-effect-drones-exclusive/exclusive-game-of-drones-u-s-poised-to-boost-unmanned-aircraft-exports-idUSKBN1CGoF4>>.
- 19 Peter Bergen and others, 'World of Drones—3. Who Has What: Countries with Armed Drones' (*New America*, 2017) <<https://www.newamerica.org/in-depth/world-of-drones/3-who-has-what-countries-armed-drones/>>.

To contribute to such an evaluation, this article addresses the applicability of the International Covenant on Civil and Political Rights (the ICCPR or the Covenant) to civilian deaths caused by drone attacks.<sup>20</sup> It considers how the Covenant imposes obligations on States parties that lethally target individuals via drones. It also examines the ICCPR's obligations on States parties in whose territory and/or jurisdiction persons killed by drones are located at the time of their death.<sup>21</sup> The primary focus is on civilian drone deaths caused by US actions, for two reasons: first, because drones owned and operated by the US cause the majority of the world's civilian drone deaths,<sup>22</sup> and secondly, because recent US government action implies an expansion, rather than a reduction, in the use of armed drone strikes. However, the legal analysis presented here applies to all ICCPR States parties.

Since the US is a party to the ICCPR,<sup>23</sup> and because the ICCPR outlaws the arbitrary deprivation of life, the Covenant can be used to hold the US accountable. In 2014, the Human Rights Committee (UNHRC or the Committee) asked the US to explain how its lethal drone strikes complied with its obligations under the Covenant.<sup>24</sup> The US response glossed over the legal issues highlighted in this article,<sup>25</sup> and the final recommendations of the Committee called for a number of legal remedies and safeguards to be put into place.<sup>26</sup> At the time of writing, these recommendations appear not to have been implemented. As the Trump administration seems intent on dismantling the legal safeguards for

20 International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966), 999 UNTS 171. Such an assessment has been used by others, concluding that violations of IHRL have indeed occurred: see e.g. Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, (OUP 2011), 106, 177, 254–255.

21 See *infra*, 13 *et seq.*

22 M Zenko estimates that, between 2004 and 2012, 401 civilians were killed by US drone strikes, accounting for 12% of all persons killed by these strikes: see *Reforming US Drone Strike Policies* (Council on Foreign Relations Press 2013) 13, Table 1 <<http://on.cfr.org/13gavzM>>. See also J Cavallaro, S Sonnenberg and S Knuckey, *Living under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (Stanford School of Law and NYU School of Law 2012) <<http://www.livingunderdrones.org/wp-content/uploads/2013/10/Stanford-NYU-Living-Under-Drones.pdf>>.

23 Since 8 June 1992: see United Nations Treaty Collection, International Covenant on Civil and Political Rights, <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtid\\_sg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtid_sg_no=IV-4&chapter=4&lang=en)>.

24 See UNHRC, 'Replies of the United States of America to the List of Issues' (5 July 2013) UN Doc. CCPR/C/USA/Q/4/Add.1, paras. 34–38.

25 *Ibid.*, paras. 34–38.

26 'Concluding Observations on the Fourth Periodic Report of the United States of America' (23 April 2014) UN Doc. CCPR/C/USA/CO/4, para. 9.

lethal drone strikes put in place by President Obama,<sup>27</sup> a thorough evaluation of US human rights obligations relative to lethal drone strikes is more relevant than ever. Even if the US remains a global outlier in how it uses lethal drone strikes or regards its legal obligations therein, States parties in whose territory the US operates these drone strikes are bound to prevent and investigate these fatalities.<sup>28</sup> Given this, the ICCPR can become a tool for other States wishing to limit lethal drone strikes, and for residents of these States advocating for their rights.

While this article focuses on the ICCPR, the right to life and other human rights protected under the Covenant are enshrined in multiple additional conventional texts, creating global implications for fatal drone strikes. These conventions include the American Convention on Human Rights,<sup>29</sup> the African Charter on Human and Peoples' Rights,<sup>30</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights—ECHR).<sup>31</sup> The text of the articles elaborating the right to life in these three treaties is very similar to that of the ICCPR's right to life, and like the ICCPR these texts declare the right to life non-derogable even in times of emergency. Additionally, the findings of the bodies and courts that develop the content of these treaties conforms closely to the writing of the UNHRC, the body that oversees implementation of the ICCPR.<sup>32</sup> As such, there is considerable global uniformity in the interpretation of the right to life under international human rights law (IHRL).

Furthermore, many of the human rights discussed in this article, including the right to life, comprise the corpus of customary international law applicable to all States.<sup>33</sup> Decades of near-global State practice and *opinio juris*<sup>34</sup> form a portion of the evidence demonstrating the customary, and thus universal, nature of the right to life. The judicial decisions of the International Court of Justice (ICJ)<sup>35</sup> and human rights instruments such as the Universal Declaration

27 That is, the PPG, *supra* n 17.

28 See *infra* 29–32.

29 OAS Treaty Series No. 36, art. 4, (entered into force 18 July 1978).

30 (1982) 21 ILM 58, art. 4, (adopted 27 June 1981, entered into force 21 October 1986).

31 194 CETS (as amended) art. 2 (entered into force 3 September 1953).

32 See e.g. N Melzer, *Targeted Killings in International Law* (OUP 2008) 91–139.

33 *Ibid.*, 177–221.

34 *Ibid.*, 178–221.

35 *Barcelona Traction, Light and Power Company, Limited (Belgium/Spain)* (Merits) [1970] ICJ Rep. 3, para. 34; *United States Diplomatic and Consular Staff in Iran (United States/Iran)* (Judgment) [1980] ICJ Rep. 1, para. 91; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, para. 25 ('Advisory Opinion on Nuclear Weapons');

on Human Rights (UDHR)<sup>36</sup> provide further support. In General Comment No. 24, the UNHRC has also declared that the right to life (protection against arbitrary deprivation of life) is part of CIL.<sup>37</sup> Thus, while the discussion *infra* is focused on the ICCPR, the right to life is protected and articulated through numerous other texts, as well as custom. As such, this article contributes to the development of legal arguments in favour of accountability and increased protection of civilians worldwide.

## 2 War and Peace: Defining the Legal Context in Which Lethal Drone Strikes Take Place

This article argues for the applicability of the ICCPR in both peacetime and conflict. It is important to review the Covenant's relevance in both contexts because US positions on whom it is at war with, and when and where it uses drone strikes continue to shift. Over the past fifteen years, the US has used language justifying its lethal drone strikes that invoke a state of, and the laws of, war. The US has since 2001 claimed to be in a state of war with Al Qaeda, designated as a 'war on terror';<sup>38</sup> and asserts that it is legally justified to do 'whatever is necessary' to find and kill Al Qaeda leaders.<sup>39</sup> In May 2013, President Obama claimed that the US uses lethal drone strikes as part of the decade long war between America and terrorists, and that these lethal drone strikes are necessary, effective, and

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and *Armed Activities on the Territory of the Congo (DRC/Uganda)* (Merits) [2005] 1CJ Rep. 168, paras. 216(f) and 219 ('Congo Case').

36 UNGA Res 217 A(III), UN Doc. A/810 at 71 (adopted 10 December 1948).

37 UNHRC, General Comment No. 24(52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994); UN Doc. HRI/GEN/1/Rev.9, 210, para. 8.

38 Former US government Legal Advisor Harold Koh claimed in May 2013, in an unofficial capacity, that the US had been at war with Al-Qa'ida for 12 years: 'How to End the Forever War?' (Oxford Union, Oxford, 7 May 2013) <<http://opiniojuris.org/wp-content/uploads/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>>. See also George W Bush, 'Statement by the President in Address to the Nation' (Washington, DC, 11 September 2001) <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>>.

39 See e.g. B Woodward, 'CIA Told to Do "Whatever Necessary" to Kill Bin Laden' *Washington Post* (Washington, DC, 21 October 2001) A01 <<http://www.washingtonpost.com/wp-dyn/content/article/2007/11/18/AR2007111800655.html>>.

legal.<sup>40</sup> In 2013, American officials claimed that the US employs lethal drone strikes in response to ‘imminent’ threats posed by senior Al Qaeda members, is exercising its inherent right to self-defence under international law, and conforms to the laws of war when using drones to kill.<sup>41</sup> In 2016, the US placed the use of drones in an IHL context,<sup>42</sup> while the current legal and policy framework on the topic states that attacks on ISIL and several other terrorist groups are founded on the same legal justifications as the war on Al Qaeda.<sup>43</sup>

Despite such assertions, it is possible to challenge the US ‘war on terror’ as semantics rather than a legal basis for the application of IHL. Crucial elements of the international legal definition of armed conflict include that it ‘must remain restricted to armed contentions between organized groups of individuals that are sufficiently identifiable based on objective criteria.’<sup>44</sup> The groups the US says it is fighting do not appear to be ‘organizations’<sup>45</sup> for the purposes of the law of armed conflict.<sup>46</sup> The US security policy of proactive self-defence has been criticised as failing to meet the legal standards of Article 51 of the

40 See Barack Obama, ‘Remarks by the President at the National Defense University’ (Washington, DC, 23 May 2013) <<http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>>.

41 See e.g. Obama, *ibid* and US Department of Justice, *Lawfulness of Lethal Operation Directed against a US Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force* (White Paper, 2013) <[http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf)> arguing that the US government is authorised to use lethal drone strikes to kill US citizens in foreign territory.

42 *Report on the Legal and Policy Frameworks Guiding The United States’ Use of Military Force and Related National Security Operations* (The White House 2016) 20 <[https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf)>.

43 *Ibid*, 5–7.

44 Melzer, *supra* n 32, 263.

45 See e.g. K Anderson, ‘Targeted Killing in US Counterterrorism Strategy and Law’ (2009) Working Paper of the Series on Counterterrorism and American Statutory Law, 4 and Kelsiana Thynne, ‘Targeting the “Terrorist Enemy”: The Boundaries of and Armed Conflict Against Transnational Terrorists’ (2009) 16 *Australian International Law Journal* 161, 171.

46 Using the definition provided in the ICTY *Tadić* case and adopted by the ICRC and the International Criminal Court, which states that ‘protracted armed violence between governmental authorities and organized armed groups’: *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) para. 70.



UN Charter that would justify resort to force,<sup>47</sup> further rendering the title of war legally inapplicable. Moreover, the US fails to satisfy international legal definitions of war because its 'war on terror' 'is of unpredictable duration and undefined territorial boundaries.'<sup>48</sup> If this is the case, the US response to terrorism requires a law enforcement response as opposed to one grounded in active hostilities during armed conflict.<sup>49</sup>

Official US government statements, which have shifted over time, cast additional doubt on the legal status of the 'war on terror'. The US has rejected both conventional and customary international law defining armed conflict. It has stated that the 'war on terror' is neither an international nor a non-international armed conflict within the meaning of the 1949 Geneva Conventions,<sup>50</sup> while 'any customary rules of international law that apply to armed conflicts do not bind the President or the US armed forces.'<sup>51</sup> However, the US Supreme Court<sup>52</sup> and Justice Department<sup>53</sup> have declared that the US is in a non-international armed conflict with Al Qaeda. This assessment has been highly criticised, for example for failing to demonstrate that Al Qaeda is an organised armed

47 See e.g. J Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP 2012) 752 and H Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2005) 209–12.

48 Melzer, *supra* n 32, 266.

49 Prior to 2001, IHL was not applied to acts of terrorism: see e.g. LC Green, *The Contemporary Law of Armed Conflict* (Manchester UP 2000) 56. See also *Prosecutor v Delalić, Mucic, Delic & Landzo* (Judgment) IT-96-21-T (16 November 1998) para. 184 and S Casey-Maslen, 'Pandora's Box? Drone Strikes under *Jus ad Bellum*, *Jus in Bello*, and International Human Rights Law' (2012) *International Review of the Red Cross* 597, 600, 617–20.

50 A Fleischer, 'Statement by the Press Secretary on the Geneva Convention' (Washington, DC, 7 May 2003) <<http://www.presidency.ucsb.edu/ws/index.php?pid=61088>>. The US Supreme Court noted these declarations but declined to comment on the merits of this argument: see *Hamdan v Rumsfeld*, 542 US 507 (2004) 65–66 <<http://www.supremecourt.gov/opinions/05pdf/05-184.pdf>>.

51 'Memorandum: Application of Treaties and Laws to Al Qaeda and Taliban Detainees' (*US Department of Justice*, 22 January 2002) 37 <<http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf>> ('DoJ Memorandum').

52 *Hamdan v Rumsfeld*, 542 US 507 (2004), declaring the conflict between Al Qaeda and the US to be non-international in nature.

53 US Department of Justice, *supra* n 41, 2; see also, eg, D Kaye, 'International Law Issues in the Department of Justice White Paper on Targeted Killing' (2013) 17 *Insights* 8 <<http://www.asil.org/insights/volume/17/issue/8/international-law-issues-department-justice-white-paper-targeted-killing>>.

group.<sup>54</sup> The US executive has also explicitly rejected the notion that Al Qaeda can be a party to a conflict within the meaning of the Geneva Conventions,<sup>55</sup> although this declaration was modified slightly by the Supreme Court.<sup>56</sup> Thus, in declaring drone strikes legal under the international law allowing self-defence and resort to force, the US is attempting to simultaneously reject international law yet claim that international law shields its actions.

Importantly, even if all of these criticisms fail, the right to life continues to apply during armed conflict.<sup>57</sup> Conflict includes not only active hostilities but also other factual scenarios, such as occupation entailing activity similar to peacetime policing, and detention. Thus, when an armed conflict exists, the ICCPR and other IHRL must be read co-extensively with the IHL governing the conduct of hostilities. This is true despite the fact that IHL is considered *lex specialis* during active hostilities.<sup>58</sup> During combat, what is 'arbitrary' for the purposes of the right to be free from the arbitrary deprivation of life as protected under article 6 of the ICCPR might necessitate reference to the key principles of IHL. These include discrimination, proportionality, and military necessity, which are not principles discussed in the text of the ICCPR but rather located in conventional and customary IHL. In conflict zones when active hostilities are not taking place—for example during occupation or detention—the ICCPR interacts with IHL in a different manner. The definition of 'arbitrary' and stricter constraints against lethal force as articulated in IHRL take primacy. It is possible that IHL still applies in such factual scenarios, such as regulating the treatment of detainees held as prisoners of war. However, in many situations that occur inside conflict areas but outside of active hostilities, lethal force is no longer governed by IHL at all. Rather, '[i]n situations of armed conflict, the law enforcement paradigm continues to govern all exercise

54 See e.g. KJ Heller, 'The DoJ White Paper's Fatal International Law Flaw—Organization' (*Opinio Juris*, 5 February 2013) <<http://opiniojuris.org/2013/02/05/the-doj-white-papers-fatal-international-law-flaw/>>.

55 DoJ Memorandum, *supra* n 51, 9.

56 *Hamdan v Rumsfeld*, 542 US 507 (2004) declaring that at least Common Article 3 of the Geneva Conventions apply in the 'conflict' between the US government and Al Qaeda.

57 See generally C Heyns and others, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 *ICLQ* 791 and Casey-Maslen, *supra* 49, 620–23.

58 Advisory Opinion on Nuclear Weapons (n 35) 26; *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep. 136, paras. 101–106 ('Advisory Opinion on the Wall').

of authority or power over individuals, which does not amount to the conduct of hostilities.<sup>59</sup>

The ICCPR remains particularly relevant during conflict, since it ‘is the only conventional instrument expressly designed to set standards of a global reach and for all situations, regardless of their qualifications as an armed conflict.’<sup>60</sup> On 30 December 2011, the US communicated to the UNHRC that it agrees that the ICCPR and IHRL more generally continue to apply during armed conflict.<sup>61</sup> It reaffirmed this commitment in its 2014 report to the Committee.<sup>62</sup> Articulating how the ICCPR’s right to life applies in armed conflict and interacts with IHL, the UNHRC explained in General Comment No. 31 that ‘the Covenant applies also in situations of armed conflict to which the rules of [IHL] are applicable.’<sup>63</sup> Considering the relationship between IHRL and IHL, they explained that ‘both spheres of law are complementary, not mutually exclusive.’<sup>64</sup> This does not provide a process roadmap for how to apply the two spheres, but it does clearly indicate that engaging or claiming to engage in an armed conflict will not suspend the duty not to arbitrarily deprive someone of life.

The ICJ presented a similar position in its Advisory Opinion on Nuclear Weapons when it stated that ‘the protection of the [ICCPR] does not cease in times of war.’<sup>65</sup> Noting that ‘certain provisions may be derogated from in a time of national emergency,’ the court clarified that ‘[r]espect for the right to

59 Melzer, *supra* n 32, 90. See also D Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’ (2005) 2 *European Journal of International Law* 171, 178. Various UN bodies and officials have argued that IHRL—and thus the law enforcement paradigm—should be applied to targeted killings, even in situations where a State claims self-defence; an analogous argument can be made with respect to US drone attacks. See e.g. UNCHR, ‘Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine—Report of the Human Rights Inquiry Commission’ (16 Mar 2001) UN Doc. E/CN.4/2001/121, para. 61; UNCHR, ‘Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967’ (17 Dec 2002) UN Doc. E/CN.4/2003/30, 10, 35.

60 Melzer, *supra* n 32, 177.

61 See the UNHRC, ‘Fourth Periodic Report: United States of America’ (30 December 2011) UN Doc. CCPR/C/USA/4, paras. 506–507.

62 See UNHRC, *supra* n 24, para. 2.

63 UNHRC, General Comment No. 31 (2004) UN Doc. (2004) UN Doc. HRI/GEN/1/Rev.9, 243, para. 11.

64 Ibid.

65 Advisory Opinion on Nuclear Weapons, *supra* n 35, para. 25.

life is not, however, such a provision.<sup>66</sup> Affirming that '[i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities,'<sup>67</sup> the court ultimately concluded that:

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 only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>68</sup>

Thus, there is no such thing as suspension of the right to life or the ICCPR during armed conflict. While specific factual circumstances regarding a death caused by a drone attack may also require the application of the laws of war, as well as an understanding of the right to life within the context of the legal regime of IHL, article 6 of the ICCPR remains applicable during conflict, including to lethal drone attacks during times of war. IHL and IHRL are complementary and must be applied in tandem.<sup>69</sup>

### 3 Threshold Questions: Jurisdiction and Extraterritorial Applicability of the ICCPR

A threshold question that must be answered before assessing violations under the ICCPR is whether the person(s) experiencing the violation(s) are within the territory, or subject to the jurisdiction, of a State party. Before turning to the specifics of jurisdiction within the ICCPR, it is worth noting that multiple judicial and political bodies have affirmed the application of IHRL to the activities of States acting outside of their own territories.<sup>70</sup> The ICJ made this

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66 Ibid.

67 Ibid.

68 Ibid.

69 This is also the view taken by UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Christof Heyns: see Heyns, *supra* n 57, 794–95, 818–25. See also Casey-Maslen, *supra* n 49, 616–23 and Max Brookman-Byrne, 'Drone Use "Outside Areas of Active Hostilities": An Examination of the Legal Paradigms Governing US Covert Remote Strikes' (2017) 64 *Netherlands International Law Review* 41, 42–43, 77–78.

70 See e.g. T Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 *American Journal of International Law* 78, 78–82, and K da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013).

declaration in its Advisory Opinion on the Wall<sup>71</sup> and the Congo Case.<sup>72</sup> The European Court of Human Rights (ECtHR) has also found that extraterritorial application of human rights exists in specific scenarios, and the Inter-American system of human rights has declared that the content and purpose of human rights not only permit, but also at times require, their extraterritorial application.<sup>73</sup> The reasoning behind these cases is relevant to the question of ICCPR jurisdiction in lethal drone strikes. Even the US, which often denies the extraterritorial application of law,<sup>74</sup> recognises that human rights belong to persons regardless of territory.<sup>75</sup> This fundamental point is the basis for the extraterritorial application of human rights and the requirement that all States refrain from violating these rights, anywhere and everywhere.

The jurisdictional limits of the ICCPR are addressed in Article 2(1) of the Covenant, which states that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The text of this article demonstrates the importance of defining what it means for a person to be subject to a State's jurisdiction. Marko Milanovic has argued that jurisdiction as specific to human rights treaties, and in particular the extraterritorial application of the provisions of human rights treaties, 'refers to a particular kind of factual power, authority, or control that a state has over a territory and consequently over persons in that territory'.<sup>76</sup> However, that is

71 Advisory Opinion on the Wall, *supra* n 58, paras. 107–13.

72 Congo Case, *supra* n 35, 219–20.

73 See cases discussed at Section 3.4 below.

74 The US has repeatedly denied the extraterritorial application of the ICCPR, beginning in 1995 (see its UNHRC, 'First Periodic Report: United States of America' (24 April 1994) UN Doc. CCPR/C/SR.1405, para. 20) and most recently in March 2014 regarding US surveillance activities outside of US territories (see UNHRC, 'Concluding Observations on the Fourth Periodic Report of the United States of America' (23 April 2014) UN Doc. CCPR/C/USA/CO/4, para. 22).

75 See e.g. *Operational Law Handbook* (The Judge Advocate General's Legal Center and School 2015) 47.

76 M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011). Milanović criticises this argument as legally incorrect for many human rights treaties.

only a partial definition. This article contends that a territorially-bounded understanding of jurisdiction defies the text of the ICCPR, undermines the object and purpose of the treaty, and contradicts the commentary of the UNHRC.

### 3.1 *Territorial Jurisdiction*

General international law provides that the jurisdiction of a State is primarily territorial. However, this general understanding must be distinguished from jurisdiction under IHRL, and more specifically the ICCPR.<sup>77</sup> Even within a territorial boundary, IHRL broadens the duties of a State. To clarify the extent of this obligation, the UNHRC has on several occasions articulated that a State has responsibility to all within its jurisdiction, regardless of a person's citizenship.<sup>78</sup> In General Comment No. 31 the Committee clarified that:

[T]he enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, *who may find themselves under the territory or subject to the jurisdiction* of the State party.<sup>79</sup>

In addition to explaining the scope of territorial obligations, these words have important bearing on interpreting the relationship between States parties and non-citizens where States parties exercise jurisdiction over aliens outside their own territory. They express obligations based on jurisdiction, regardless of territory or the citizenship of the person a State has jurisdiction over. This will be important for the discussion that follows.

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77 For example, the European Court of Human Rights ('ECtHR') has taken a more conservative approach than other bodies in this regard, listing extraterritorial jurisdiction as 'exceptional': *Bankovic and Others v Belgium and 16 Other Contracting States*, (App. No. 52207/99), Admissibility Decision, Grand Chamber, 12 December 2001, (2007) 44 EHRR SE5, para. 71 ('*Bankovic*'). The ICCPR has never characterized extraterritorial application of the treaty as exceptional. Perhaps these differences make sense considering the ICCPR is intended to be fully global and the ECtHR is purposively regional. This article disagrees with the reasoning that extraterritoriality for human rights treaty is exceptional and contends that the correct understanding of human rights treaties is that they require extraterritorial application in order to give effect to their object and purpose.

78 See e.g. UNHRC, *Essono Mika Miha v Equatorial Guinea*, Communication No. 414/1990, 8 July 1994 (emphasis added).

79 General Comment No. 31, *supra* n 63, para. 10 (emphasis added).

### 3.2 *Extraterritorial Jurisdiction: Territory or Jurisdiction as Equal Bases for Treaty Obligations*

The manner in which the Committee expressed the equality of rights between citizens and aliens in General Comment 31—by explicitly restating the text of article 2(1) to be substantively interpreted as containing an ‘or’ rather than an ‘and’—has direct implications for the extraterritorial application of the ICCPR discussed *infra*. Additionally, the equality of rights between citizens and aliens explained previously has further impact upon lethal drone strikes against aliens conducted in another State’s territory. The clarifications the Committee has made regarding the nature of a human right as attaching to a person—‘The beneficiaries of the rights recognized by the Covenant are individuals’<sup>80</sup>—must be read together with the obligations of States as attaching when they have control over a person. While the words of the article read ‘within its territory *and* subject to its jurisdiction’ (emphasis added), the UNHRC has interpreted territory and jurisdiction as two separate grounds regarding applicability of obligations for States parties. Thus, a person can be within a State party’s jurisdiction for purposes of the treaty, despite being outside of the State’s territory. General Comment No. 31 clarifies that ‘States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.’<sup>81</sup> It explains that, therefore, ‘a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’. General Comment No. 31 concludes on this point that ‘[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory’.<sup>82</sup>

Numerous commentators have affirmed this position. Theodor Meron argues that reading article 2(1) of the ICCPR to create obligations on the basis of territory *or* jurisdiction is uncontroversial, settled law.<sup>83</sup> He writes that ‘[t]he legislative history of Article 2(1) does not support a narrow territorial construction’ and cites in support a leading study by Professor Buergenthal, now a member of the UNHRC.<sup>84</sup> According to Meron, writing over 20 years ago, ‘[t]his interpretation has almost never been questioned and has long ceased to

80 Ibid, para. 9.

81 Ibid, para. 10.

82 Ibid.

83 Meron, *supra* n 70, 79.

84 Ibid.

be the preserve of scholars; it has obtained the imprimatur of the UNHRC and UN rapporteurs'.<sup>85</sup>

### 3.3 *The ICCPR Binds States Parties Exercising Effective Control Over Territory Outside Their Own*

States employing lethal drone strikes in the territory of another State that they control at the time are still obligated to uphold the right to life. Thus, lethal drone attacks that take place in occupied territories and including during times of armed conflict must apply the right to life as a non-derogable right within the Covenant. The Committee has declared that a State is duty bound to implement the ICCPR and to account for how it has done so even in territories it is occupying or controlling during armed conflict. For example, in Concluding Observations regarding Israel, it rebutted 'the State party's position that the Covenant does not apply beyond its own territory, notably in the West Bank and in Gaza'.<sup>86</sup> The Committee remarked in particular that this rejection was based on the claim that 'there is a situation of armed conflict in these areas'.<sup>87</sup> In an emphatic response leaving no room for doubt, the Committee reiterated the view that 'the applicability of the regime of [IHL] during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation'.<sup>88</sup> The Committee continued, '[n]or does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in Occupied Territories'.<sup>89</sup> The conclusion made clear that:

[T]he provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by [Israel's] authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law.<sup>90</sup>

85 Ibid; see also T Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in L Henkin (ed.), *The International Bill of Human Rights* (Columbia UP 1981) 74.

86 UNHRC, 'Concluding Observations on the Second Periodic Report of Israel' (21 August 2003) UN Doc. CCPR/CO/78/ISR, para. 11 ('Israel—Concluding Observations').

87 Ibid.

88 Ibid.

89 Ibid.

90 Ibid.



In addition to formally recognised occupation, General Comment No. 31 makes clear that occupation for the purposes of jurisdiction and obligations under the ICCPR should be decided on a factual basis: ‘This principle also applies to those within the *power or effective control* of the forces of a State Party acting outside its territory [...]’.<sup>91</sup> Thus, if State agents are operating in another territory, the test is not the extent of occupation of this territory or legal declarations of it. Rather, it is whether or not those authorities are exercising effective control over persons within the territory. This leads into the following section on jurisdiction including a State party exercising control over persons in territory it does not control.

### 3.4 *Control Over a Person Results in Jurisdiction for the Purposes of the ICCPR*

Many lethal drone strikes occur in factual contexts where the State party applying lethal force is operating outside of its own territory and in territory which it does not occupy nor otherwise exert control over. The standard for finding jurisdiction for the purposes of obligations under the ICCPR has now become the fact-based test of ‘effective control’ over a *person*. This is denoted by the word ‘anyone’ as the operative thing under the State party’s control.<sup>92</sup> This interpretation of article 2(1) is further supported in the Committee’s General Comment No. 15 on the equality of rights between citizens and aliens, and the equal obligation States owe to aliens. Many if not most of the people a State party kills in lethal drone strikes in foreign territory are aliens, not citizens of that State. In General Comment No. 15, the Committee wrote that ‘the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens ...’.<sup>93</sup> Later in this comment, the Committee stressed that ‘[a]liens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life’.<sup>94</sup> The discussion of aliens is related to the Committee’s emphasis on effective control over a person, as opposed to a territory, as a defining characteristic of jurisdiction under the ICCPR.

The European Court of Human Rights (ECtHR) has reached a similar conclusion. While not directly applicable to the ICCPR, given the substantial similarity between the wording of the right to life within the two treaties and

<sup>91</sup> UNHRC, *supra* n 79, (emphasis added).

<sup>92</sup> *Ibid*, esp para. 6.

<sup>93</sup> General Comment No. 15 (1994) UN Doc. HRI/GEN/1/Rev.9, 189 paras. 1–2.

<sup>94</sup> *Ibid*, para. 7. This paragraph also expresses equality of rights between citizens and aliens for many other protections within the Covenant, including those implicated by lethal drone attacks, such as due process rights.

congruity in their object and purpose, these decisions are informative. In *Issa v Turkey*,<sup>95</sup> the ECtHR found that by physically abusing and arresting men at gunpoint, Turkey had asserted effective control and therefore jurisdiction over these men. Notably the men were not citizens of Turkey and the control occurred in a territory that Turkey did not control. In *Andreou v Turkey*,<sup>96</sup> the ECtHR found that a single, non-fatal gunshot wound amounted to jurisdiction in the form of effective control over a *person*. Bryan S Hance summarises the case and holding as follows:

Turkish armed forces shot and wounded Mrs Andreou during tensions at a neutral UN buffer zone in 1996. Andreou was standing outside the buffer zone on the Cyprus side, just beyond Turkish territory. Andreou alleged that Turkey endangered her life and used excessive force constituting inhumane treatment, both of which violated her rights under the ECHR. The Court acknowledged that Turkey did not exercise any physical or governmental control over the territory in which she was injured because it occurred in a neutral zone. Nevertheless, it unanimously held that opening fire on the crowd from close range, ‘which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as [within Turkey’s jurisdiction]’.<sup>97</sup>

These cases must be distinguished from the ECtHR’s decision in *Bankovic*, where an aerial bombardment in the former Yugoslavia by NATO forces that resulted in deaths of civilians was found not to satisfy the jurisdictional threshold. *Bankovic* focused on whether or not the bombing State could be said to have territorial control over the area it bombed, neglecting the consideration of control, and thus jurisdiction, over persons.<sup>98</sup> However, in *Al-Skeini v United Kingdom*,<sup>99</sup> the ECtHR clarified the apparent contradiction between *Issa* and *Bankovic*. The court reiterated that ‘jurisdiction’ remained primarily territorial but went on to set out the principles by which the exceptional case, where a State may have jurisdiction outside its own territory, could be determined. This

95 App. No. 31921/96 (ECtHR, 16 November 2004) (*Issa*).

96 App. No. 45653/99 (ECtHR, 27 October 2009).

97 Bryan S Hance, ‘Pilotless Drones and the Extraterritorial Application of International Human Rights Treaties’ (Academic and Business Research Institute International Conference, Orlando, January 2013) <<http://www.aabri.com/OC2013Manuscripts/OC13066.pdf>>.

98 See *Bankovic*, *supra* n 78, 55–81, focusing extensively on territory and overlooking control over persons as grounds for jurisdiction. Cf *Milanovic*, *supra* n 77, 209–21.

99 (App. 55721/07), 7 July 2011, (2011) 53 EHRR 589 (*Al-Skeini*).

includes where 'effective control' of the relevant area has been established or 'the use of force by a state's agents operating outside its territory may bring the individual thereby brought under the control of the state's authorities into the state's article 1 jurisdiction'.<sup>100</sup> The ECtHR went on to say that '[w]hat is decisive in such cases is the exercise of physical power and control over the person in question'.<sup>101</sup>

The commentary of the Inter-American Commission on Human Rights (IACHR) is also useful in understanding why the object and purpose of human rights treaties can necessitate the extraterritorial application of human rights, particularly regarding deprivation of rights and negative obligations. Its explanation in the 'Brothers to the Rescue Case', which involved Cuba shooting down civilian aircraft and killing the civilians within them, of why extraterritorial application is not only allowed but in some cases required is thorough:

The essential rights of the individual are proclaimed in the Americas on the basis of equality and non-discrimination, 'without distinction as to race, nationality, creed, or sex.' Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.<sup>102</sup>

Thus, similar to official commentary and scholarly writing on the ICCPR, the IACHR has emphasised that individuals are entitled to human rights wherever they may physically be at any given time, and that States are obligated to respect these human rights and not to infringe upon them, wherever a State is

100 Ibid, para. 136. The ECtHR here relied on *Issa*, *supra* n 95, *Ocalan v Turkey*, (App. 46221/99), 12 May 2005, (2005) 41 EHRR 985, and *Al-Saadoon and Mufdhi v United Kingdom*, (App. 61498/08), 2 March 2010, as establishing this principle.

101 *Al-Skeini*, *supra* 99, para. 136.

102 *Alejandro Jr v Republica de Cuba*, Case 11.589, Rep. No. 86/99, IACHR, 29 September 1999, paras. 23–25.

exercising control over persons.<sup>103</sup> This reasoning is directly relevant to lethal drone strikes, as is the factual scenario of this case, which addresses lethal attacks via aerial vehicles.

Additionally, UNHRC statements have implications regarding the location of a violation. Consider the following extract from *Lopez Burgos v Uruguay*, in which the Committee addressed the arrest, detention, and mistreatment of Lopez Burgos, a Uruguayan citizen, at the hands of Uruguayan State agents acting in foreign territory. The Committee expressed the view that '[t]he reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion'. Their reasoning centred on the following fundamental aspect of the extraterritorial applicability of IHRL: 'the reference in that article is not in the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred'.<sup>104</sup> This commentary indicates that the crucial relationship is only between a State party and a person alleging a violation, not between a State party, territory, and the person. Territory can create a relationship between a State party and a person; however, this comment removes territory as a necessary element of a nexus between a State and a person claiming a violation.

### 3.5 *Negative vs Positive Human Rights Obligations*

Of particular importance to lethal drone strikes are negative human rights obligations. In General Comment No. 31 the UNHRC confirmed that 'the legal obligation under article 2, paragraph 1, is both negative and positive in nature'.<sup>105</sup> This means that 'States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant'.<sup>106</sup> Deviations must be explained:

Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights ... In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.<sup>107</sup>

<sup>103</sup> See Heyns, *supra* n 57, 823–24.

<sup>104</sup> *Lopez Burgos v Uruguay*, Communication 52/1979, Views, 29 July 1981, para. 12.2 ('*Lopez Burgos*').

<sup>105</sup> See General Comment No. 31, *supra* n 63, para. 6.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

This means that if a State is attempting to restrict the protections afforded under the ICCPR, it must sufficiently demonstrate the necessity of this restriction. Thus, deprivations of the right to life, including by lethal drone strikes, must be shown to be necessary and proportionate.

The UNHRC has stressed that 'jurisdiction' within the ICCPR must be interpreted in line with the object and purpose of the treaty. Moreover, proper interpretation should to prevent perverse results such as States parties being allowed to violate the rights of their citizens in foreign territories, but not their own. If an act is prohibited under the ICCPR in a State party's territory, the State must refrain from this act in foreign territories as well.<sup>108</sup> Of significance to this interpretation is that article 5(1) of the ICCPR prohibits perverse and overly restrictive readings of any part of the Covenant, including the meaning of 'jurisdiction'. The Committee indicated the universality and global application of a State party's obligations under the ICCPR when it expressed that:

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, *whether with the acquiescence of the Government of that State or in opposition to it...*<sup>109</sup>

These comments are particularly pertinent to present day lethal drone attacks. They assert that if a State party could not lethally target the person, whether alien or citizen, within its own territory without violating the ICCPR, it cannot do so within another State's territory, regardless of whether that State complies. This reasoning leads to the conclusion that an action that violates the duties of a State party in one location is a violation anywhere. The threshold question is therefore not the location of the act but whether the actor is a State party and, if so, whether the action violates the ICCPR. It also strongly implies that with regard to negative obligations, jurisdiction is not required: a negative obligation exists everywhere, all the time. It makes sense that a non-derogable obligation to respect the right to life exists continuously and without interruption based on territory or jurisdiction (as opposed to modification based on, for example, the specific rules governing active hostilities). There is a case to be made that negative obligations under the ICCPR require no jurisdictional threshold.

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108 See *Casariago v Uruguay*, Communication No. 56/1979, Views (1984) UN Doc. C.CPR/C/OP/1 at 92, para. 10.3.

109 *Ibid* (emphasis added).

The concurring opinion of Christian Tomuschat in *Lopez Burgos* articulates an important distinction between positive obligations under the ICCPR and duties to refrain from violating the Covenant. The two should not be confused and they must not be deliberately conflated to argue that since a State party cannot *ensure* rights for individuals located in foreign territory, it is free to *violate* this person's rights. Addressing this dichotomy, Tomuschat expressed that 'a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential';<sup>110</sup> thus distinguishing positive extraterritorial obligations. He continued, 'never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad'.<sup>111</sup> This negative obligation leads to the conclusion that 'despite the wording of article 2(1) the events which took place outside Uruguay come within the purview of the Covenant'.<sup>112</sup>

Tomuschat spoke specifically of citizens of a State given the factual contours of the case before him. However, as previously discussed, States parties must treat citizens and aliens alike in regards to refraining from violations. Thus, States parties are not obligated under the ICCPR to ensure the rights of aliens in foreign territories. Indeed, the principle of territorial sovereignty is a natural impediment to this idea. Yet, States parties are nevertheless duty bound to refrain from interfering with the rights and freedoms of aliens residing in foreign territory, as well as aliens within their own territory, and citizens located abroad.

#### 4 The Right Not to be Arbitrarily Deprived of Life

The right not to be arbitrarily deprived of life is articulated in article 6(1) of the Covenant, which states: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' The right to life is a supreme right and the most fundamental of all human rights.<sup>113</sup> Lethal drone attacks directly implicate the right to life because they deprive a person of her or his life, raising the question of whether this death

<sup>110</sup> See n 106.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> UNHRC, General Comment No. 6 (1982) UN Doc. HRI/GEN/1/Rev.9, 176, para. 1.

was arbitrary and thus in violation of the Covenant. The UNHRC emphasised the fundamental nature of the right to life in the following statement:

The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.<sup>114</sup>

Accordingly, targeting decisions that use lethal force via a drone must satisfy a very high burden of proof. This burden is amplified given that the right not to be arbitrarily deprived of life is non-derogable: in article 4(2) the Covenant expressly provides that the right to life applies even in times of public emergency that threaten the very life of the nation.<sup>115</sup> The Committee took the opportunity to re-emphasise this point.<sup>116</sup> Further magnifying this burden of proof is the Committee's statement that the right to life 'is a right which should not be interpreted narrowly.'<sup>117</sup> Continuing, the Committee stressed that '[t]he deprivation of life by the authorities of the State is a matter of the utmost gravity,' concluding that '[t]herefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.'<sup>118</sup> These instructions indicate that States parties to the ICCPR must apply very strict tests to justify killings by State agents.

In addition to the non-derogable status of the right to life, the Committee has declared it to have customary and *jus cogens* status. In General Comment No. 24, the Committee affirmed that the right to life is so fundamental that without this right there would be no rule of law.<sup>119</sup> Building on this, General Comment No. 29 asserts that the right to life has a 'peremptory nature,' and that the non-derogability provided for in the Covenant is in part a recognition of the *jus cogens* status of this right.<sup>120</sup>

114 Ibid, para. 3.

115 Article 4(2) states that '[n]o derogation from article 6 ... may be made under this provision'.

116 General Comment No. 6, *supra* n 113, para. 1.

117 Ibid.

118 Ibid, para. 3.

119 General Comment No. 24, *supra* n 37, para. 10.

120 UNHRC General Comment No. 29 (2001) UN Doc. HRI/GEN/1/Rev.9, 234, para. 11.

#### 4.1 *UNHRC Commentary on Targeted Killings and the Right to Life*

The Committee directly addressed the question of how targeted killings relate to the right to life when responding to Israel's assassinations of suspected terrorists. This factual scenario is not relevant to all drone strikes. However, the reasoning provided by the Committee regarding the relationship between a State's targeted killing policies and the right to life, including in times of actual or claimed conflict, remains broadly applicable. For example a prohibition on using targeted killings for deterrence purposes is as relevant to drone strikes as to assassination of crime suspects. This is particularly important when distinguishing between the rhetoric claiming an imminent threat in an armed conflict, and the factual reality of a law enforcement scenario in which criminal justice objectives such as deterrence are at play. The following explanation of how such actions violate the right to life is also applicable to lethal drone strikes used by the US and other States parties. In the Committee's Concluding Observations on Israel in 2003, they stated that:

The State party should not use 'targeted killings' as a deterrent or punishment. The State party should ensure that the utmost consideration be given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. All measures to arrest a person suspected of being in the course of committing acts of terror must be exhausted in order to avoid resorting to the use of deadly force.<sup>121</sup>

Moreover, the peremptory status and non-derogability of the right to life, even in times of conflict and public emergency, also indicate that policies justifying pre-emptive lethal drone attacks are inherently suspect. States that keep a list of suspected terrorists and kill them with drone attacks absent any threat to State agents or other individuals in the moment the drone strikes, violate this person's right to life. Such actions are 'arbitrary' within the meaning of the ICCPR, as explained in detail in the section below.

In 2015, the Committee considered a new draft Comment on the right to life in which it addresses 'lethal autonomous robotics'.<sup>122</sup> The Committee found the threat of fully autonomous weapons (which, unlike drones presently, do

<sup>121</sup> Israel—Concluding Observations, *supra* n 86, para. 15.

<sup>122</sup> UNHRC, Draft General Comment No. 36 (2 September 2015) UN Doc. CCPR/C/GC/R.36/Rev.2, para. 13.



not rely at all on human operators) substantial enough to call for a moratorium until a normative framework upholding article 6 could be put into place.<sup>123</sup> The draft Comment notes that such weapons are 'lacking in human compassion and empathy', thereby raising numerous legal and ethical concerns. Given their remote operation—a tactical advantage that nevertheless risks a reduction in the ability of the operator to engage proper safeguards before a lethal attack—current lethal drone strikes could be analysed through a similar framework.

#### 4.2 *Definitions of 'Arbitrary' Under the ICCPR*

The ICCPR does not expressly define the term 'arbitrary'. However, commentary of the UNHRC, as well as authoritative statements on use of force under international law, yield clear definitions applicable in both peacetime and in war outside active hostilities. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted in 1990 at the 8<sup>th</sup> UN Conference on the Prevention of Crimes and Treatment of Offenders, is particularly informative as to the meaning of 'arbitrary' under article 6. While not a binding convention, 127 States and fifty non-governmental organisations participated in developing and adopting these principles, following in the tradition of previous US Congresses since 1955.<sup>124</sup> These principles strictly limit the use of potentially lethal force.

Basic Principle 4 expresses that the normative standards of necessity and proportionality curtail a State agent's ability to use lethal force, requiring non-lethal measures such as capture and arrest whenever possible. The text of Basic Principle 9 is particularly relevant to lethal drone strikes. The missiles or bullets sent from a drone are directly analogous to 'firearms' because the drone strike has the same potential for lethal effect. An armed drone is simply a technological development to deliver the bullet of a gun without a person required to hold the gun and thus risk her or his life when applying lethal force. A new mechanism for delivering lethal force does not change the law applicable to it. Therefore, the following constraints expressed in Basic Principle 9 apply equally to lethal drone strikes undertaken outside of active hostilities:

Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death

<sup>123</sup> Ibid.

<sup>124</sup> See e.g. Roger S Clark, 'The Eighth United Nations Conference on the Prevention of Crimes and Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990' (1990) 1 *Criminal Law Forum* 513.

or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Additionally, a State's unilateral actions to justify killings that qualify as arbitrary under the ICCPR by legalising such killings under its domestic law do not remove the violation.<sup>125</sup> Rather, the result is that the domestic law no longer adequately protects the right to life. The UNHRC made this clear in *de Guerrero v Colombia*:

Inasmuch as the police action was made justifiable as a matter of Colombian law by legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required by article 6(1).<sup>126</sup>

Thus a killing that is deemed lawful under domestic law can still violate article 6 of the ICCPR.

Nils Melzer argues that the General Comment of the UNHRC articulates the prohibition of arbitrary deprivation of life as requiring a 'sufficient legal basis' for each and every killing at the hands of a State agent.<sup>127</sup> To this Melzer adds the additional requirements of necessity, proportionality, and precaution regarding a State's power to deprive a person of life. Other legal scholars have made similar remarks regarding these three elements.<sup>128</sup> If any of these elements are missing, the deprivation of life will be deemed arbitrary. It is highly likely that, at a minimum, the majority of lethal drone attacks fail to meet the legal standard of 'necessity' under international and domestic law, and thus amount to arbitrary deprivations of life and violations of article 6 of the Covenant. Melzer segments necessity into three parts: qualitative (using

125 The UNHRC has reaffirmed this in Draft Comment No. 36, *supra* n 125, para. 18.

126 *Suárez de Guerrero v Colombia*, Merits (CCPR/C/15/D/45/1979) para. 13.2 ('*de Guerrero*').

127 Melzer, *supra* n 32, 100–101, citing UNHRC, General Comment No. 6, *supra* n 116, para. 3; and *de Guerrero*, *ibid.*, para. 13.1–13.3;

128 See e.g. Kretzmer, *supra* n 59, 179. See also G Nolte, 'Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order' (2004) 5 *Theoretical Inquiries in Law* 111; N Rodley, *The Treatment of Prisoners under International Law* (2nd ed., 1999) 181–83; and R Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 *Euro Journal of International Law* 819, 819–20.

potentially lethal force only absent any real alternative), quantitative (using the minimum force required), and temporal. States must undertake careful examination of the contours of necessity, given that States parties that kill via drones often claim necessity based on self-defence as their legal justification for the attack.<sup>129</sup>

Similarly, the requirement upon State parties to prove that their use of lethal force is proportionate to a threat can be examined using Melzer's qualitative, quantitative, and temporal distinctions.<sup>130</sup> The application of lethal force via the drone must be proportional to the actual (as opposed to theoretical) threat, present at exactly the time of the killing. Additionally, lethal force must be the only way to control the threat, rather than proving disproportionate to the situation because other options, such as arrest, were available. These requirements indicate that, at a minimum, most lethal drone strikes in the past decade were disproportionate, thus arbitrary, and contrary to of article 6 and the right to life.

Finally, the requirement of precaution flows from this reasoning and demonstrates how, at a minimum, most lethal drone strikes are likely arbitrary because they forego required precaution in applying lethal force.

The use of lethal force is arbitrary if it is not preceded by a warning, or if no opportunity is given to surrender, where the circumstances of the case would reasonably permit to do so. Moreover, a deprivation of life is 'arbitrary' when it occurs based on the mere suspicion that the concerned individual may be involved in a crime and, therefore, may constitute a threat. Such action deprives the suspects of the protections of due process of law without justification.<sup>131</sup>

As discussed *infra*, the link between required precaution and deprivation of life at the hands of a State agent relates directly to the due process rights protected

129 Melzer, *supra* n 32, 101, citing *de Guerrero*, *supra* n 126, paras. 13.1 to 13.3 regarding exceeding the minimum force needed to achieve a legitimate purpose. In *McCann v United Kingdom*, (App. No. 18984/91), Judgment of 27 September 1995, (1996) 21 EHRR 97, paras. 205–14, the ECtHR has developed an almost identical test to determine whether targeted killing is arbitrary within the meaning of the ECHR, which shares an almost identical provision on the right to life with the ICCPR.

130 Melzer, *supra* n 32, 101, citing *de Guerrero*, *supra* n 126, paras. 13.1 to 13.3, *Myrna Mack-Chang v Guatemala*, Judgment of November 25, 2003, Series C No. 101, para. 134.6, and cases of the IACHR.

131 Melzer, *ibid*, paras. 13.1 to 13.3.

by the Covenant. When these due process rights are bypassed in favour of a lethal drone strike, without satisfying the requirements of necessity and proportionality, the right to life is also violated.

It is important to note that even unintentional or accidental killing can violate article 6. This may occur when the death is the result of a State party's failure to take effective measures to protect the deceased person's life.<sup>132</sup> As such, drone strikes that may have been legal regarding one person can violate article 6 if they accidentally kill another person. This has applicability to lethal drone strikes in several regards. For example, situations may arise where a drone targets the wrong person; misses and shoots another person instead; or kills another person not targeted via incidental damage, such as by destroying an inhabited structure. In this situation, article 9 protecting the security of the person is also implicated. General Comment No. 35 stresses that the right to be secure in person including from injury applies to all people, even suspected, or known, terrorists:

Security of person concerns freedom from injury to the body, or bodily and mental integrity... Article 9 guarantees these rights to everyone. 'Everyone' includes, among others,... persons convicted of crime, *and persons who have engaged in terrorist activity*.<sup>133</sup>

This means that no special exceptions can be made based on an actual or suspected characteristic of a person, including that person's criminal activity or membership in a group. In the aforementioned UNHRC General Comment, persons killed were mistakenly targeted as criminals or mistakenly treated as prisoners presenting imminent threat necessitating lethal force. States are responsible for violating the right to life even if they claim justification based on mistaken identification, or association with persons to whom it would have been legal to apply lethal force. Additionally, attempted assassination can also violate the right to life. If the State party is not authorised to apply lethal force, it will have violated article 6 even if their attempt to kill did not succeed.<sup>134</sup>

<sup>132</sup> *Burrell v Jamaica*, Communication No. 546/1993, Views (1996) UN Doc. CCPR/C/53/D/546/1993, para. 9.5.

<sup>133</sup> (2014) UN Doc. CCPR/C/GC/35, para. 3, (emphasis added).

<sup>134</sup> *Chongwe v Zambia*, Communication No. 821/1998, Views (2000) UN Doc. CCPR/C/70/D/821/1998; *Jiménez Vaca v Colombia*, Communication No. 859/1999, Views (2002) UN Doc. CCPR/C/74/D/859/1999.

### 4.3 *The Right to Life Applies in Ungoverned Territory*

The right to life must also apply in ungoverned territory, because it attaches to persons regardless of where they are. Thus, the right is not dependent on the level of governance; it is not dependent on anything at all other than the presence of human life. The UDHR reveals a consistent legal meaning of jurisdiction specific to control over individuals regardless of control over territory discussed previously in this article. This covers territory over which no State has control. The UDHR states in Article 2 that

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The UDHR was written during colonial times, which explains the reference to trusts and non-self governing territories. Nonetheless, the factual scenarios in which States conduct lethal drone strikes today call to mind the various states of sovereignty and territorial control at play where these lethal drone attacks take place. Regarding these lethal drone attacks, John C Dehn has argued that ‘in cases of consent ... a territorial state has ceded a part of its sovereignty to an attacking state.’<sup>135</sup> Separately, Dehn points out that there exist in the world areas not effectively governed by any State. He therefore argues that ‘the law of targeted killing in ungoverned spaces may evolve,’ claiming that ‘governments must possess both *de jure* and *de facto* sovereignty in order to fulfil their territorial and extraterritorial human rights obligations.’<sup>136</sup> However, as expressed previously, there is an important distinction between ‘fulfilling’ human rights obligations and refraining from *violating* human rights and freedoms. A State party is obliged to refrain from arbitrarily depriving everyone of life, regardless of one’s location. Whether they are to be found in an area of a State over which the State has lost control; whether they are residing in a contested territory; whether one State has ‘lent’ or ‘shared’ its sovereignty to another by expressly

135 JC Dehn, ‘Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations’ (2012) 54 *Harvard International Law Journal* 84, 88 <<http://www.harvardilj.org/wp-content/uploads/2013/01/Dehn-to-publish11.pdf>>.

136 *Ibid*, 90.

authorising the law enforcement activities of another State upon its territory; whether persons killed by drones are stateless—all of these considerations are irrelevant. Simply stated, no State party to the ICCPR may arbitrarily deprive a person of her or his life, and the test of what is ‘arbitrary’ has nothing to do with territory or sovereignty. Any attempt to excuse the arbitrary deprivation of life based upon the uncertain sovereign or territorial status in which the act takes place or in which the people killed reside must be rejected as contrary to the object and purpose of the ICCPR and a perversion of international law.

## 5 Due Process Concerns Raised by Lethal Drone Strikes

It is highly likely that most lethal drone strikes violate due process rights guaranteed in Articles 6, 9, and 14 of the ICCPR. President Obama acknowledged that criticism of US drone policies implicates violations of due process protections under US law.<sup>137</sup> The US employs lethal drone strikes as pre-emptive killings of suspected terrorists deemed to threaten the nation. These are justified by the US claiming a ‘proactive’ self-defence policy ostensibly permitted under international law.<sup>138</sup> However, all suspected criminals are entitled to be presented with the charges against them and to defend themselves in a court of law save in limited circumstances. Those are first, in cases of immediate self-defence or defence of others justified under strict necessity, and secondly, in cases of lawfully targeting a combatant manifesting an immediate threat during the active hostilities of war. Here it is important to note the distinction between self-defence in law enforcement scenarios and the self-defence of *jus ad bellum* that justifies a State going to war to protect the life of the nation. The US references its right to self-defence in the *jus ad bellum* sense to justify its lethal drone strikes,<sup>139</sup> but it does so in error. This is a conflation of the right to go to war; that the legal standard for the application of lethal force in war requires (amongst other things) military necessity; and that the legal standards controlling the application of lethal force outside of active hostilities require. Finally, like the right to life, due process rights apply equally to citizens and non-citizens.<sup>140</sup>

137 Obama, *supra* n 40.

138 See e.g. Report on the Legal and Policy Frameworks, *supra* n 42, 9–11, 15–18.

139 *Ibid.*

140 UNHRC, General Comment No. 32 Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 9 notes that ‘The right of access to courts and tribunals and equality before them is not limited to citizens of States

In a factual sense, a lethal drone strike is like the imposition of the death penalty, and thereby implicates article 6(2) of the Covenant. This article delineates strict due process required of States parties enacting the death penalty, stating that:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

A lethal drone strike thus circumvents the requirement that decisions to put individuals to death can only be taken in a properly constituted court of law. Lethal drone strikes also bypass the requirements laid out in article 9 protecting persons from the deprivation of liberty except in cases of lawful arrest, detention, and trial. The Covenant requires that States parties provide persons accused of crimes with procedural safeguards at every point of accusation, arrest, detention, trial, sentencing, and punishment. These guarantees should apply, *a fortiori*, where the State action results in the use of lethal force on an individual. A lethal drone strike skips over and thus violates every stage of the process articulated in article 9. Article 9 is comprehensive in explaining the minimum standards a State party must provide to a person accused of crime.

The *de Guerrero* case previously discussed similarly describes the failure of State agents to provide due process rights as resulting in the arbitrary deprivation of life. Thus, the definition of 'arbitrary' under article 6, and the due process rights provided for in articles 9 and 14 are closely linked. The Committee declared:

... it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect

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parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status ...'

the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnaping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant...<sup>141</sup>

Finally, the comprehensive due process rights provided for in article 14 of the Covenant indicate that lethal drone strikes violate these rights States parties employing lethal drone attacks violate the presumption of innocence,<sup>142</sup> every stipulated 'minimum guarantee' of a fair trial<sup>143</sup> and the right to appeal.<sup>144</sup> This means that, '[i]n any given case, endorsing a policy of targeted killing essentially means that a single bullet will be prosecutor, judge, and executioner all at once'.<sup>145</sup> The due process protections of the ICCPR exist not only for procedurally fair arrests and trials, but also to prevent the arbitrary deprivation of life.

## 6 The ICCPR Imposes a Duty to Investigate Deaths at the Hands of State Agents

The ICCPR imposes a duty on States parties to investigate alleged violations of the Covenant in a timely, impartial and effective manner. This obligation arises via article 2(3), which obligates States parties to provide effective remedies to persons 'whose rights or freedoms' recognised by the Covenant have been violated. The UNHRC has on several occasions defined effective remedy to include the duty to investigate.<sup>146</sup> The Committee explained in General Comment No. 6 that:

States parties should also take specific and effective measures to prevent the disappearance of individuals, something that unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures

141 *de Guerrero, supra* n 129, para. 17.2.

142 ICCPR art. 14(2).

143 *Ibid.*, art. 14(3)(a)–(f).

144 *Ibid.*, art. 14(5).

145 Vincent-Joël Proulx, 'If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists' (2005) 56 *Hastings LJ* 801, 889–90.

146 General Comment No. 31, *supra* n 63, para. 8.



to investigate *thoroughly* cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.<sup>147</sup>

Thus, alleged or suspected violations of the right to life give rise to a corresponding duty to comprehensively investigate. This duty applies to both the territorial State and the State carrying out the attack, mandating US investigations into drone deaths caused abroad.

A string of cases address the obligations of an attacking State. In *Baboeram et al v Suriname*, the Committee found that a violation of article 6(1) entailed in the arrests and killing of fifteen persons by Surinamese military police gave rise to the duty to investigate these killings.<sup>148</sup> In *Jimenez Vaca v Colombia*,<sup>149</sup> the duty to investigate under article 6(1) was clearly extended to attempted assassinations. In *Herrera Rubio v Colombia*, the Committee declared that Colombia had violated article 6(1) in failing to properly investigate, calling the investigation carried out 'inadequate in light of the State party's obligations under article 2 of the Covenant'.<sup>150</sup> The Committee found that the duty to investigate was breached because the State party took no measures to interview persons accused of mistreatment. The duty to investigate was found to require 'precise information and reports'.<sup>151</sup> Investigations must not be premature to the necessary evidence, and follow-up investigations may be required.<sup>152</sup> Crucially, investigations must be impartial<sup>153</sup> and effective. In *Fuenzalida v Ecuador*,<sup>154</sup> an investigation into allegations of torture and ill-treatment was initiated and subsequently rejected by a criminal court. The UNHRC found this investigation insufficient in light of the specific circumstances of the case, namely that no evidence of the gunshot wound in question were provided. Additionally, '[a] failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant'.<sup>155</sup> Plainly, the duty to investigate has implications for the lack of transparency surrounding drone deaths that currently operates. The discrepancies between official and

147 General Comment No. 6, *supra* n 113, para. 4 (emphasis added).

148 Communication No. 146/1983 and 148 to 154/1983, Views (1985) UN Doc. Supp. No. 40 (A/40/40) at 187 (1985), para. 16.

149 Communication No. 859/1999, Views (2002) UN Doc. CCPR/C/74/D/859/1999, paras. 7.2–7.3.

150 Communication No. 161/1983, Views (1990) UN Doc. CCPR/C/OP/2 at 192, para. 10.3.

151 *Ibid.*, para. 10.5.

152 *Ibid.*, para. 10.4.

153 *Ibid.*, para. 10.3.

154 Communication No. 480/1991, Views (1996) UN Doc. CCPR/C/57/D/480/1991.

155 General Comment No. 31, *supra* n 63, para. 15.

unofficial estimates of individuals killed by US drone strikes strongly suggest that the US's is in violation of this aspect of the right to life.<sup>156</sup>

The duty to investigate also extends to acts done to those within a State party's jurisdiction by those other than the State party. For example, the obligation to investigate extends to acts of a prior regime. By analogy, the duty to investigate extends to the actions of other States, such as when the US conducts a lethal drone strike in another State's territory. In General Comment No. 20 on Article 7, the UNHRC stated that '[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future'.<sup>157</sup> They continued that 'States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible'.<sup>158</sup> This was clearly demonstrated in *Rodríguez v Uruguay*. There, the State's failure to investigate allegations of torture conducted by secret police of the former military regime resulted in a violation of Article 7 read together with Article 2(3) of the Covenant, despite a law granting amnesty. Furthermore, notwithstanding the viability of other avenues of redress, the UNHRC found in *Zelaya v Nicaragua* that 'responsibility for investigations falls under the State party's obligation to grant an effective remedy'.<sup>159</sup> Again, the opacity with which drone strikes are carried out by the US raises questions around the adequacy of redress which may be obtained by victims.

Additionally, the Committee has explained that a State party also has positive obligations regarding violations committed by private persons. This should by analogy extend to the actions of other States, because it provides a general articulation of the breadth of a State's positive obligations to protect and ensure the rights within the Covenant. The language used includes the broad 'other entities,' which could easily include other States. General Comment No. 31 asserts that:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the

<sup>156</sup> See sources cited in n 11 above.

<sup>157</sup> UNHRC General Comment No. 20 (1992) UN Doc. HRI/GEN/1/Rev.9, 200, para. 15.

<sup>158</sup> *Ibid.*, para. 15.

<sup>159</sup> Communication No. 328/1988, Views (1994) UN Doc. CCPR/C/51/D/328/1988.

enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.<sup>160</sup>

Finally, '[t]here may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights ...'.<sup>161</sup> Such a violation could be triggered by 'States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'.<sup>162</sup>

## 7 The ICCPR Binds States Parties in which a Lethal Drone Strike Takes Place

The foregoing discussion demonstrates that, based on jurisdiction (article 2 (1)) and the non-derogability of the right to life (article 4 (2), article 6(1)), a State party in which drone strikes occur is obliged to protect the right to life and due process rights of citizens and aliens alike within its territory. As Dehn points out, the precise application of the right to life under the ICCPR in such a situation will depend on factual scenarios. For example, it will be relevant if the State in which the strike occurs is actively engaged in an armed conflict and if the person killed by the drone strike was a combatant actively engaging in hostilities.<sup>163</sup>

As discussed earlier, the ICCPR's right to life will apply even in active hostilities taking place in armed conflict, concurrently with applicable IHL. Additionally, in some of the examples Dehn offers, such as of combatants that the territorial State has difficulty arresting, the restraint on the use of lethal force is governed by IHRL and standards of imminence, necessity, proportionality, and precaution. IHRL standards for such issues are more stringent than their IHL counterparts, offering more protection to individuals under threat.<sup>164</sup>

Some governments and jurists claim that situations of insecurity, loss of control, and/or ineffective governance—such as in parts of Pakistan, Yemen,

160 General Comment No. 31, *supra* n 63, para. 8.

161 *Ibid.*

162 *Ibid.*; see also UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (16 June 2015) UN Doc. A/HRC/29/51, para. 168.

163 Dehn, *supra* n 135, 87–88.

164 See Heyns, *supra* n 57, 819–20, 827.

or Somalia—justify the lethal drone attack of one State in another State's territory. This is an incorrect application of international law and specifically of the ICCPR. A State's inability to control parts of its territory, or to provide for arrests and trials that meet the standards of the ICCPR, in no way justifies a resort to a lethal drone attack by another State.

Rather, if the drone attack fails the strict standards applicable to a State party's use of lethal force, it then becomes another violation on top of the existing failure of the territorial State to provide for the due process and security rights of those within its jurisdiction. Sovereign barriers to making arrests and providing law enforcement responses to terrorism that conform to the ICCPR's due process standards at no point justify resort to lethal force. Rather, as previously addressed in detail, any such resort to force must be constrained by necessity, proportionality, and precaution in peacetime, and by discrimination, proportionality, and military necessity in times of war. All of the ICCPR's obligations articulated earlier in this article apply equally to States parties in which the lethal drone attack takes place. Thus, States parties must refuse rather than consent to lethal drone attacks carried out by other States within their territory if these attacks cannot meet the very strict criteria that constrain the use of lethal force. The violation of the host State does not remove the violation of the State using the drone if one has been made. If the territorial State would be prohibited under the ICCPR from lethally targeting the person via drones, the non-territorial State is equally prohibited, resulting in the duty to refuse the attack.

## 8 Conclusion

Much existing commentary on lethal drone strikes focuses on an IHL framework<sup>165</sup> or questions what legal framework is appropriate.<sup>166</sup> In contrast, the need for a human rights assessment of deaths caused by drones remains urgent. Several academics and experts have engaged with the applicability of

165 See e.g. Brookman-Byrne, *supra* n 69; MW Lewis and E Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones' (2013) 44 *Georgetown Journal of International Law* 1127; and MN Schmitt, 'Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the "Fog of Law"' (2010) 13 *Yearbook of International Humanitarian Law* 311.

166 See e.g. UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (28 February 2014) UN Doc. A/HRC/25/59, paras. 70–74.

the IHRL framework,<sup>167</sup> yet references to IHL remain dominant in State rhetoric. In an era where the US seems intent upon not only expanding lethal drone strikes but in withdrawing from international law obligations,<sup>168</sup> the ICCPR remains a useful tool for holding not only the US but other armed drone users accountable. Further, the ICCPR facilitates accountability measures for States in which lethal strikes take place.

Legal experts such as Philip Alston have previously argued that ‘outside of the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal’.<sup>169</sup> Yet, the US’s insistence to date that their lethal drone strikes take place during armed conflict have seemed to operate as a legal shield to such conclusions. This article has attempted to make the case that, not only is this assertion legally dubious, the ICCPR’s right to life should be considered even in such instances. The end result of such a consideration could lead to more transparency regarding lethal drone strikes, stricter regulations for such activities, and greater protection for those caught in the crosshairs, whether intentionally or as ‘collateral’.

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167 See e.g. Heyns, *supra* n 57; Casey-Maslen, *supra* n 49.

168 For example, the Trump administration has, to date, announced withdrawal from the Trans-Pacific Partnership, the Paris Climate Agreement and UNESCO, as well as having threatened to pull out of NATO and NAFTA.

169 Casey-Maslen, *supra* n 49, 619.