

Pilotless drones and the extraterritorial application of international human rights treaties

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Abstract

Determining when and where international human rights treaties apply extraterritorially is a challenge. Textual interpretation of the treaties offers little guidance and case law illustrates multiple jurisdictional scenarios. Attempting to reconcile the court decisions with unmanned drone strikes leads to various outcomes. The unpiloted drone adds yet another layer of complexity to the issue. Case analysis suggests that states that employ unpiloted drones may barely possess sufficient effective control over a territory to trigger international human rights norms. Poor transparency and accountability, along with a high evidentiary standard, however, will make prevailing on international human rights claims involving pilotless drones difficult at best. This paper examines the technological advances in robotic warfare and analyzes how that technology complicates the issue of the extraterritorial application of human rights treaties.

Keywords: pilotless, drone, extraterritorial, human, rights, treaty

INTRODUCTION

A stealth drone takes off from an aircraft carrier with a weapons payload capacity of 4,500 pounds. During its flight, it detects an object in the distance and instantly determines whether it poses a threat. It flies over a predetermined territory, identifies targets based on measurements compared with parameters in its programming, and drops its missiles killing innocent civilians along with the intended targets. The drone circles several miles above the scene capturing reconnaissance video, then checks its fuel levels to determine whether it needs to refuel with an aerial tanker. It finally returns to land on the deck of the aircraft carrier by relying on pinpoint GPS coordinates, advanced avionics, and computers that digitally transmit the carrier's speed, crosswinds and other data to the drone as it approaches from several miles away.¹

What makes this scenario remarkable is not that there is no pilot in the cockpit, but that there is no pilot at all. The trend in military capabilities is toward greater automation. In an 82-page report describing the future use of drones, the U.S. Air Force stated that it is only a matter of time before drones are imbued with the capability to make life or death decisions.² One expert foresees the next generation of drones as having "the decision-making capacity to identify a target, determine whether (or not) to use lethal force against it, and decide what type of weapons (from a selection of payloads it carries) to use should it decide to attack."³ Much of the technology exists today to perform these operations. The U.S. Navy's new X-47B drone already is being tested to land on the deck of an aircraft carrier in Chesapeake Bay, one of aviation's most difficult maneuvers.⁴

The U.S. is not alone in this technology. Over forty countries now use drones to gather intelligence and conduct surveillance and reconnaissance. Some, including Israel, Russia, Turkey, China, India, Iran, the United Kingdom, and France, either have or are seeking drones that also have the capability to shoot laser-guided missiles.⁵ This new technology raises numerous legal issues under international law. One issue, and the focus of this paper, is the extent to which international human rights ("IHR") treaties apply extraterritorially⁶ to the targeted killing of individuals by pilotless drones. The paper first explains how key IHR treaties

¹ W.J. Hennigan, *New Drone Has No Pilot Anywhere, So Who's Accountable?* L.A. TIMES, Jan. 26, 2012.

² The report states that, "Increasingly humans will no longer be 'in the loop' but rather 'on the loop' – monitoring the execution of certain decisions. Simultaneously, advances in [artificial intelligence] will enable systems to make combat decisions and act within legal and policy constraints without necessarily requiring human input." *Unmanned Aircraft Systems Flightplan 2009-2047*, U.S. AIR FORCE, p. 41, available at <http://www.govexec.com/pdfs/072309kp1.pdf>.

³ Oren Gross, *When Machines Kill: Criminal Responsibility for International Crimes Committed By Lethal Autonomous Robots*, p. 3, presented at the WE ROBOT 2012 conference (April 2012).

⁴ According to Northrup Grumman, the X-47B's manufacturer, "The X-47B is a computer-controlled unmanned aircraft system that takes off, flies a preprogrammed mission, and then returns to base – all in response to mouse clicks from a mission operator. The operator actively monitors the X-47B air vehicle's operation using simple situational awareness displays, but does not fly it via remote control, as some unmanned systems are operated." Press release, Northrup Grumman, *Expansion of Fleet Adds Momentum, Flexibility to Flight Test Program* (Nov. 28, 2011), available at http://www.irconnect.com/noc/press/pages/news_releases.html?id=239278.

⁵ G.A. A/HRC/14/24/add.6, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, para. 27 (May 28, 2010) (hereinafter "Special Rapporteur").

⁶ Extraterritorial means that the target was not physically located within the territory of the State Party (i.e., the geographical area over which it has sovereignty or title) when the violation of IHR occurred. MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* 8 (2011).

use the term “jurisdiction” to describe their scope of application. Jurisdiction is defined in the case law as “effective control” over territory. A brief discussion of the facts and holdings of four seminal cases illustrates the different ways in which effective control has been defined and the fluidity in this area of law. The paper then analyzes the cases and argues that IHR treaties may apply extraterritorially to drones strikes. It concludes with several observations of how pilotless drones render this analysis all the more difficult.

JURISDICTION UNDER IHR TREATIES

The first credible report of a drone killing occurred on November 3, 2002 when a Predator drone fired a missile at a car in Yemen killing Qaed Senyan al-Harithi, an al-Qaeda leader allegedly responsible for the *USS Cole* bombing.⁷ The Foreign Minister of Sweden among others condemned the killing as a “summary execution that violates human rights.”⁸ But is this so? Did al-Harithi even have rights vis-à-vis the U.S. given that the attack occurred extraterritorially on Yemeni soil where the U.S. lacks sovereignty or title?

IHR treaties, despite their universal aims and global or regional scope, do not explicitly define or even refer to extraterritoriality. Instead, they speak of jurisdiction. The first and arguably most important human rights treaties containing a jurisdiction clause are the European Convention on Human Rights (“ECHR”) and the International Covenant on Civil and Political Rights (“ICCPR”). Article 1 of the ECHR provides that, “The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.”⁹ Article 2 of the ICCPR similarly provides 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....”¹⁰ Several other human rights treaties similarly refer to jurisdiction when addressing the scope of their application.¹¹

Jurisdiction is a term that is defined differently depending on the context.¹² In IHR treaties, the term has most commonly come to mean the “effective overall control” or power that a state exercises over a territory.¹³ When the state attains this effective control over a territory, it

⁷ Jane Perlez, *Yemen Drone Strike: Just the Start?* JANE’S DEFENCE WEEKLY (Nov. 8, 2002).

⁸ Brian Whitaker & Oliver Burkeman, *Killing Probes the Frontiers of Robotics and Legality*, THE GUARDIAN (Nov. 6, 2002), available at <http://www.guardian.co.uk/usa/story/0,12271,834311,00.html>.

⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, para. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (emphasis added).

¹⁰ International Covenant on Civil and Political Rights, art. 2, para. 1, Dec. 19, 1966, 999 U.N.T.S. 171 (emphasis added).

¹¹ Such treaties include the Convention Against Torture, the American Convention on Human Rights, the UN Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Racial Discrimination.

¹² Jurisdiction has different meanings in international law, such as with prescriptive, enforcement, adjudicative, and universal jurisdiction; domestic law, where a *court* exercises authority over a person or property; or, as here, human rights treaties.

¹³ As one human rights expert put it, “[W]hat exactly does it mean that the state’s control needs to be ‘effective’? In the most general terms, the state needs to have enough power over the territory and its inhabitants to broadly do as it pleases. That said, control over territory is a fluid thing, and is not limitless even under the best of conditions. To move from the abstract to the concrete we would need to examine specific cases, and we would then see that the threshold of control required by courts has generally been high.” MILANOVIC, *supra* note 6, at 137.

is obliged to ensure the human rights of all persons within that geographic area. The question of whether a state is exercising effective control over a territory or an individual is one of fact.¹⁴

THE DIFFICULTY OF DEFINING EFFECTIVE CONTROL

How then are effective control and territory defined? Put another way, at what point does a state exercise the appropriate level of control over a foreign territory to justify the imposition of IHR obligations? The European Court of Human Rights (“ECtHR” or “the Court”) is a supranational body that adjudicates individual and state applications alleging violations of the civil and political rights guaranteed under the ECHR. The Court has rendered over 10,000 judgments and thus is an important actor in the development of IHR law. Several landmark ECtHR cases help define what effective control means, though the law in this area is still developing.

The *Loizidou* Case and Military Occupation/Governmental Administration

One of the ECtHR’s earliest attempts to define effective control is found in *Loizidou v. Turkey*, 1996-VI, Eur. Ct. H.R. (ser. A) 2216, (GC) (1996) (Merits). *Loizidou* was a Greek Cypriot who was forced from her home in northern Cyprus during the 1974 Turkish invasion. She sought to return home on several occasions following the establishment of the Turkish Republic of Northern Cyprus (TRNC). The Turkish army, however, repeatedly denied her entry into the occupied territory. In 1989, *Loizidou* filed an application with the ECtHR alleging Turkey violated her rights to liberty and property under the ECHR. Turkey claimed the ECHR lacked jurisdiction over the occupied territory because the TRNC was an independent state and not itself a party to the Convention. The Court disagreed. In holding that Turkey exercised effective control over the occupied territory, the Court relied on the fact that its 30,000 troops continually patrolled the area and they, along with all civilians in the occupied territory, were subject to Turkish courts. Accordingly, the Court held that:

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful - it exercises *effective control of an area outside its national territory*. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, *through its armed forces, or through a subordinate local administration*.¹⁵

The Court thus defined effective control as a state securing an area outside its national territory through its armed forces or governmental administration. In this case, it was relatively easy to define the area over which Turkey exercised control, namely its occupation of one-third of the island of Cyprus. Not all territories, however, are as well-defined. Would a village with undetermined borders be deemed a territory for purposes of the extraterritorial application of IHR? Would a building complex, or a particular building within that complex?

¹⁴ *Id.* at 30-34.

¹⁵ *Loizidou v. Turkey*, App. No. 15318/89, Judgment (preliminary objections), para. 62 (Feb.23 1995) (citations omitted, emphasis added).

The *Bankovic* Case and Aerial Bombardments

In *Bankovic v. Belgium*, App. No. 52207/99 Eur. Ct. H.R. (2001), the ECtHR held that aerial bombardments of a building did not constitute effective control so as to trigger IHR obligations. In *Bankovic*, six citizens of the Federal Republic of Yugoslavia (FRY) brought an application against Belgium and 16 other European countries. The applicants were victims of, or relatives of those killed in, a NATO bombing mission that destroyed a radio and television station in Belgrade during the 1999 Kosovo crisis. They alleged violations of the rights to life, effective remedy and freedom of expression under the ECHR. The applicants admitted that NATO did not have the same level of control over Yugoslavia that Turkey had over Cyprus in *Loizidou*. Instead, they argued that NATO's deliberate, precision air strike constituted effective control over the diminutive territory, thus triggering its treaty obligations.¹⁶ The Court unanimously held, however, that NATO exercised no effective control over the territory in which the bombing occurred and therefore it was not within the ECHR's jurisdiction.¹⁷

The *Issa* Case and Physical Control Over Persons

In *Issa v. Turkey*, App. No. 31921/96 Eur. Ct. H.R. (2004), the six female applicants were Iraqi Kurds living close to the border with Turkey in 1995. They claimed they saw Turkish soldiers, who were conducting military exercises in the area, abuse and assault their male relatives. The women claimed the soldiers told them to return home to their village while they led the men away. When the men never returned, the applicants later found their bullet-ridden and mutilated bodies near the area where the applicants had last seen them alive. The applicants complained that the Turkish army's alleged unlawful arrest, detention, mistreatment, and killing of their relatives violated the ECHR. The Turkish government admitted that its forces conducted a six-week cross-border military incursion into northern Iraq, but claimed they were 10 kilometers north of where the incident occurred and thus could not have committed the murders. In adjudicating the jurisdictional issue, the Court relied on *Loizidou* to hold that Turkey had effective control over the part of northern Iraq where the decedents were killed given its nearby military occupation at the time. Also, by physically abusing and arresting the men at gunpoint, Turkey asserted the type of complete control that was lacking in the *Bankovic* decision. The Court, however, said the applicants failed to meet their burden of proving beyond a reasonable doubt that Turkish forces were in the same area where the slayings occurred and had actually committed the killings.

¹⁶ Tarik Abdel-Monem, *The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey*, 12 No. 2 HUM. RTS. BRIEF 9, 10 (2005).

¹⁷ A more liberal test of territorial control was introduced in *Ilascu v. Moldova & Russia*, App. No. 48787/99 Eur. Ct. H.R. (2004). Though not directly relevant to this discussion, the case nevertheless involved another step away from *Bankovic* and toward the extraterritorial application of human rights norms. The ECtHR declined to apply the effective overall control test and instead held that Russia's provision of military, economic, financial, and political support to a separatist regime in a Moldovan territory constituted "effective authority...or decisive influence" so as to trigger the application of the ECHR.

The *Andreou* Case and a Single Gunshot Wound

In *Andreou v. Turkey*, App. No. 45653/99 Eur. Ct. H.R. (2008), 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].”¹⁸

Applying the Case Law to Drone Warfare

Several observations can be made from the above cases. While *Loizidou* established a straightforward standard for determining the extraterritorial applicability of human rights norms, the *Bankovic* decision thrust a chasm into the analysis. On one end of the spectrum, *Loizidou* requires a boots-on-the-ground military occupation, or at least government administration over a territory. On the other end of the spectrum, an aerial bombardment did not constitute extraterritorial jurisdiction under *Bankovic*.

Distinguishing *Loizidou* and analogizing *Bankovic* would seem to end the pilotless drone analysis before it begins. Drone killings do not require military occupation as in *Loizidou*, yet they do involve the type of geographically limited aerial bombardments as in *Bankovic*. Under this analysis, limited drone strikes would not constitute effective control under *Bankovic* and states seemingly could engage in extraterritorial drone attacks with IHR impunity. Such a conclusion, however, contravenes the very purposes and intent of human rights treaties to which many states are a party. The Court presumably recognized these shortcomings as its later holdings suggest. Nevertheless, *Bankovic* remains good law today.¹⁹

Issa and *Andreou* introduced more relaxed standards than *Loizidou*. *Issa* moved the threshold closer towards extraterritorial IHR accountability in holding that physical force against a handful of individuals in a smaller territory constitutes effective control. The most permissive standard is the *Andreou* case in which the Court held that simply shooting a bullet into neutral territory injuring – not even killing – a single person, can trigger the application of IHR norms.

Issa and *Andreou* are difficult cases to reconcile with *Bankovic* in many ways. If killing a handful of individuals during a military incursion is deemed effective control in *Issa*, why not a bombing, such as in *Bankovic*, that harmed 32 people, destroyed a large building, and was part of a larger military campaign in Kosovo? The answer may lie in the fact that bombings, and thus drone strikes, do not involve the kind of personal, hand-to-hand violence seen in the *Issa* case. Under this reasoning, *Issa* leaves the question open as to whether drone strikes constitute effective control over territory. Surely, however, launching a bomb in *Bankovic* is equally as

¹⁸ *Andreou v. Turkey*, at § 3(c).

¹⁹ This may be due to the respondent governments’ position that a contrary practice would be untenable. Bombing Belgrade, for example, should not constitute effective control, triggering jurisdiction, and thus obliging a state to guarantee all rights under the ECHR, such as the rights to freedom of expression, religion, and assembly, the right to marry, and so forth. Moreover, the Court may have feared that to rule otherwise would conceivably create a slippery slope where any person anywhere in the world could have a claim against a State Party for its harmful acts, resulting in an overlybroad application of the ECHR.

egregious and personal as firing a single gunshot at someone as in *Andreou*. Yet the same Court held that the *Bankovic* bombing triggered no IHR obligations, while the *Andreou* gunshot did. Likewise, launching a drone missile is both factually analogous and at least equally as egregious and personal as the gunshot in *Andreou*, leading one to conclude that IHR obligations should apply to extraterritorial drone strikes as well.

PILOTLESS DRONES AND EFFECTIVE CONTROL

If *Bankovic* then is limited in its application as the progeny of case law suggests and aerial attacks arguably trigger the extraterritorial application of IHR treaties, what difference does it make whether or not the aircraft that deploys the missile is piloted? One difference is that it arguably causes the pendulum to swing back towards IHR impunity. With no state providing military, political or economic support as in *Ilascu*, and no individual pulling a trigger as in *Issa* and *Andreou*, arguably there is substantially less support under the case law for effective control over a territory. Even with unmanned drones, one can point to an individual pilot who launched the missile, albeit from half-way around the world, or a military officer who gave the order for when to do so. With a pilotless drone that is itself performing the calculations to determine precisely when and where to target the missile attack, the lines of accountability are demonstrably blurred.

Another factor that pushes the pendulum towards extraterritorial IHR impunity is the high evidentiary threshold for proving violations.²⁰ *Issa* suggests that the evidence required to establish a state's effective control over a territory includes thorough factual descriptions and independent witness testimony. It is rather startling that all of the survivors' testimony, coupled with Turkey's admission that its forces were a mere 10 kilometers away, were insufficient for the *Issa* Court to conclude that the men were harmed in Turkish custody. An unpiloted, unmarked stealth drone capable of flying undetected nearly 8 miles high at subsonic speeds will make it very difficult to prove that another state was in effective control of the territory in which a human rights violation occurred. With pilotless drones especially, there is virtually no evidence of who committed the attack. There are no captured or killed pilots, immigration papers, fingerprints, confessions, or other personal artifacts to aid in this determination.

It also is unlikely that the state violator will volunteer that its drone conducted the strike. The difficulty in determining state accountability renders human rights impunity even more probable. As the UN's Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions concluded:

The failure of States to comply with their human rights law and IHL obligations to provide transparency and accountability for targeted killings is a matter of deep concern. To date, no State has disclosed the full legal basis for targeted killings, including its interpretation of the legal issues discussed [in this report]. Nor has any State disclosed the procedural and other safeguards in place to ensure that killings are lawful and justified, and the accountability mechanisms that ensure wrongful killings are investigated, prosecuted and punished. The refusal by States who conduct targeted killings to provide transparency about their policies violates the international legal framework that limits the unlawful use of

²⁰ Abdel-Monem, *supra* note 16, at 11 (2005).

lethal force against individuals....A lack of disclosure gives States a virtual and impermissible license to kill.²¹

In the case of the U.S., President Obama only recently acknowledged that it even operated a drones program.²²

The difficulty in determining individual accountability for extraterritorial pilotless drone strikes is yet another factor pushing the pendulum toward IHR impunity. The pilotless drone is essentially a computer program responding to internal and external data. There is no human involved at the point of its extraterritorial mission. The question, then, is who is legally and politically accountable for an unlawful killing? The unmanned drone at least has a pilot who launched the missile from afar, but not so with a pilotless drone. Possible actors can come from various fields, including technology, military, manufacturing, and government. As one expert put it, "Lethal actions should have a clear chain of accountability. This is difficult with a robot weapon. The robot cannot be held accountable. So is it the commander who used it? The politician who authorized it? The military's acquisition process? The manufacturer for faulty equipment?"²³ Most lawyers would complain against all conceivable defendants and let them or the Court determine who is accountable. Doing so, however, may unfairly target innocent parties, consume substantial resources and cause strong political repercussions. The lack of transparency and means for determining both state and individual accountability for unlawful unpiloted drone strikes, coupled with a high evidentiary bar, undoubtedly will make proving future extraterritorial violations of IHR norms exceedingly difficult.

CONCLUSION

Determining when and where IHR treaties apply extraterritorially is challenging enough. Textual interpretation of the treaties offers little guidance and case law illustrates multiple jurisdictional scenarios. Attempting to reconcile these decisions with unmanned drone strikes leads to various outcomes. The unpiloted drone adds yet another layer of complexity to the issue. The foregoing case analysis suggests that states that employ unpiloted drones may barely possess sufficient effective control over a territory to trigger IHR norms. Poor transparency and accountability, along with a high evidentiary standard, however, will make prevailing on IHR claims involving pilotless drones difficult at best. One hopes the Court will recognize, as it did following the *Bankovic* decision, that IHR impunity for such acts transgresses the very heart of the treaties designed to protect basic human rights and that it will keep the pendulum swinging towards their extraterritorial application in the context of pilotless drones.

²¹ Special Rapporteur, *supra* note 5, at paras. 87-88.

²² Comments by John Brennan, President Obama's top counter-terrorism advisor, marks the first time a senior White House official has spoken at length in public about widely reported, but officially secret, drone operations. Previously, on January 30, 2012, President Obama acknowledged the drone program's existence. See Brian Bennett & David S. Cloud, *Obama's Counter-Terrorism Advisor Defends Drone Strikes*, L.A. TIMES (Apr. 30, 2012).

²³ According to Noel Sharkey, a computer scientist and robotics expert, "Lethal actions should have a clear chain of accountability....This is difficult with a robot weapon. The robot cannot be held accountable. So is it the commander who used it? The politician who authorized it? The military's acquisition process? The manufacturer, for faulty equipment?" Hennigan, *supra* note 1.

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