

LETHAL AUTONOMOUS WEAPONS SYSTEMS AND THE EXTRATERRITORIAL APPLICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

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ABSTRACT

The development of lethal autonomous weapons systems continues despite growing global opposition. These weapons now have the capability to travel thousands of miles, seek and destroy targets, carry powerful payloads, navigate difficult environments, and communicate with each other to accomplish predetermined missions, all without human intervention. Despite mounting opposition, lethal autonomous weapons systems remain attractive substitutes for their human counterparts as their development costs decrease and their ability to accomplish sophisticated tasks increases. Greater autonomy, however, produces a wider responsibility gap for human rights violations committed abroad. This article therefore examines the extent to which international human rights treaties apply extraterritorially to the targeted harming

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of individuals and property by lethal autonomous weapons systems. It traces the development of both lethally autonomous weapons and international human rights law and discusses how this technology impacts the jurisdictional analysis. It argues that the use of such weapons will complicate the already difficult inquiry of whether State Parties to international human rights treaties exercise jurisdiction when a killing occurs extraterritorially, and this, in turn, ultimately can undermine the very purposes of these treaties.

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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 decides whether it poses a threat. It flies over a predetermined territory, identifies targets on the ground based on measurements compared with parameters in its programming, and drops its missiles killing its intended targets. The drone circles several miles above the scene capturing reconnaissance video, then checks its fuel levels and determines that it needs to refuel with an aerial tanker. After refueling, it 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 and autonomy. 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 international law expert foresees the next

¹ See Jeff Newman, *X-47B Passes Unmanned Refueling Test*, NATIONAL AVIATION NEWS (2015); W. J. Hennigan, *New Drone Has No Pilot Anywhere, So Who's Accountable?*, L.A. TIMES, Jan. 26, 2012.

² United States Air Force, UNMANNED AIRCRAFT SYSTEMS FLIGHT PLAN 2009-47 (May 18, 2009), https://fas.org/irp/program/collect/uas_2009.pdf. 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

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, and the U.S. Navy’s X-47B drone described above is one of the best examples. It flawlessly landed on the deck of an aircraft carrier in Chesapeake Bay, catapulted off the bow again, conducted the same 90-second launch-and-recovery cycle as a piloted plane, and successfully refueled midflight.⁴ These are some of aviation’s most difficult maneuvers and all were performed without human intervention.

The United States is not alone in this technology. As of 2018, 381 partly autonomous weapons and military robotics systems have been, or are being, developed in twelve

make combat decisions and act within legal and policy constraints without necessarily requiring human input.”

³ Oren Gross, *When Machines Kill: Criminal Responsibility for International Crimes Committed by Lethal Autonomous Robots*, 3 (Apr. 14, 2012) Oren Gross, *When Machines Kill: Criminal Responsibility for International Crimes Committed by Lethal Autonomous Robots*, 3 (Apr. 14, 2012).

⁴ Northrup Grumman, *Expansion of Fleet Adds Momentum, Flexibility to Flight Test Program*, NORTHROP GRUMMAN, Nov. 28, 2011 news.northropgrumman.com/news/releases/photo-release-increased-test-productivity-lifts-off-with-first-flight-of-second-northrop-grumman-built-x-47b-unmanned-aircraft. 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.”

countries.⁵ Over forty countries now use drones to gather intelligence and conduct surveillance and reconnaissance.⁶ Some, including the United States, 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.⁷ Ten countries have used armed drones in combat, though as of yet, none of them were fully autonomous. Those countries include the United States, Israel, the United Kingdom, Pakistan, Iraq, Nigeria, Iran, Turkey, Azerbaijan, and the United Arab Emirates.⁸ Given these and related developments, UN Secretary-General Antonio Guterres reiterated in a March 2019 statement that “machines with the

⁵ Mattha Busby, *Use of "Killer Robots" in Wars Would Breach Law*, THE GUARDIAN, Aug. 21, 2018 www.theguardian.com/science/2018/aug/21/use-of-killer-robots-in-wars-would-breach-law-say-campaigners.

“Research by the International Data Corporation has suggested that global spending on robotics will double from \$91.5bn (£71.8bn) in 2016 to \$188bn in 2020 and bring full autonomy closer to realisation.” *Id.*

⁶ PHILIP ALSTON, REPORT OF THE SPECIAL RAPPOREUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS ¶ 27 (May 28, 2010), www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf.

⁷ *Id.*; CHRISTOF HEYNS, REPORT OF THE SPECIAL RAPPOREUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS (Apr. 1, 2014), www.ohchr.org/EN/Issues/Executions/Pages/AnnualReports.aspx; CHRISTOF HEYNS, REPORT OF THE SPECIAL RAPPOREUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS 20–22 (Apr. 9, 2013), www.google.com/search?q=Report+of+the+Special+Rapporteur+on+extrajudicial%2C+summary+or+arbitrary+executions%2C+Christof+Heyns&oq=Report+of+the+Special+Rapporteur+on+extrajudicial%2C+summary+or+arbitrary+executions%2C+Christof+Heyns&aqs=chrome.69i57j0.907j0j4&sourceid=chrome&ie=UTF-8.

⁸ Peter Bergen et al., *International Security in Depth: World of Drones - Who Has What, Countries with Drones Used in Combat*, NEW AMERICA, May 2, 2019 www.newamerica.org/in-depth/world-of-drones/2-who-has-what-countries-drones-used-combat/.

power and discretion to take lives without human involvement are politically unacceptable, morally repugnant and should be prohibited by international law.”⁹

This developing technology raises numerous legal issues under international law. One issue, and the focus of this article,¹⁰ is the extent to which international human rights (IHR) treaties apply extraterritorially¹¹ to the targeted harming

⁹ UN News, *Autonomous Weapons That Kill Must be Banned, Insists UN Chief*, UNITED NATIONS, Mar. 25, 2019 <https://news.un.org/en/story/2019/03/1035381>.

¹⁰ Although the subject of LAWS overlaps both humanitarian law and IHL, a discussion of the former is beyond the scope of this article. For information and analysis regarding LAWS under the law of armed conflict, *see generally*, Agnieszka Szpak, *Legality of Use and Challenges of New Technologies in Warfare—the Use of Autonomous Weapons in Contemporary or Future Wars*, 28 EUR. REV. 118, 119 (2019); Jeffrey S. Thurnher, *Examining Autonomous Weapon Systems from a Law of Armed Conflict Perspective* in Nasu & Mclaughlin (eds), *New Technologies and the Law of Armed Conflict* (2014) 213-27; *Robots That Kill: The Case for Banning Lethal Autonomous Weapon Systems*, HARV. POL. REV., Dec. 2, 2021, <https://harvardpolitics.com/robots-that-kill-the-case-for-banning-lethal-autonomous-weapon-systems/> (last visited May 5, 2023); International Committee of the Red Cross, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects* (Mar. 26-28, 2014); Oren Gross, *The New Way of War: Is There a Duty to Use Drones*, 67 FLA. L. REV. 1 (2015); Andrew Figueroa, *License to Kill: An Analysis of the Legality of Fully Autonomous Drones in the Context of International Use of Force Law*, 31 PACE INT’L L. REV. 145 (2018); Michael N. Schmitt & Jeffrey S. Thurnher, *“Out of the Loop”: Autonomous Weapon Systems and the Law of Armed Conflict*, 4 HARV. NAT’L SEC. J. 231, 237 (2013); for a discussion of the moral and ethical considerations regarding the use of LAWS, *see, e.g.*, *Autonomous Weapon Systems: Is it Morally Acceptable for a Machine to Make Life and Death Decisions?*, INT’L COMM OF THE RED CROSS (Apr. 13, 2015), <https://www.icrc.org/en/document/lethal-autonomous-weapons-systems-LAWS>.

¹¹ Extraterritorial means that the target was not physically located within the territory of the State Party (the geographical area over which it has sovereignty or title) when the violation of IHR occurred. MARKO

of individuals by lethal autonomous weapons systems (LAWS).¹² Section II of this article describes various types of LAWS that are currently being developed and tested. Section III explains how key IHR treaties use the term “jurisdiction” to describe their scope of application. Jurisdiction is generally defined in the case law as a State’s “effective control” over territory¹³ or its agents’ “authority or control” over an individual abroad.¹⁴ Section IV describes the various ways in which these concepts have evolved over time. A brief discussion of the facts and holdings of seven seminal human rights cases help illustrate both the legal issues surrounding LAWS, as well as the confusing ways in which the European Court of Human Rights (ECtHR or the Court) has defined jurisdiction over time. Section V describes how the Court eventually acknowledged this confusion and attempted to rationalize its jurisdiction analysis in these cases through the publication of an explanatory guide. In Section VI, these legal authorities are applied to hypothetical lethal autonomous weapons attacks to illustrate how IHR accountability heavily

MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY 8 (2011).

¹² There is much confusion and debate over the definition of lethal autonomous weapons. In addition to being referred to as lethal autonomous weapon systems, they also are known as lethal autonomous robots, robotic weapons, and killer robots, among other terms. *See generally*, Rebecca Crotof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 CARDOZO L. REV. 1837 (2015). For ease of reference, they are referred to in this article as LAWS.

¹³ *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R. (Dec. 16, 1996).

¹⁴ *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (Jul. 7, 2011). *See generally*, Christof Heyns et al., *The International Law Framework Regulating the Use of Armed Drones*, 65 INT'L AND COMP. L. Q. 791 (2016).

depends on the facts of each case and produces inconsistent outcomes. Given these inconsistencies, Section VII discusses several reasons why the use of LAWS renders the existing jurisdiction analysis even more difficult. They include LAWS' technological limitations, poor transparency and accountability among States regarding LAWS, IHR treaties' narrow geographic scope, gratuitous self-regulation of LAWS, and a high evidentiary threshold for complaining States to prove LAWS' attribution. Thus, as LAWS continue to be developed and eventually deployed, this article argues that States have several avenues to escape IHR accountability for LAWS' extraterritorial harm until this issue is addressed. This, in turn, ultimately thwarts the very purposes and intent of these treaties.

I. EXAMPLES OF LETHAL AUTONOMOUS WEAPONS SYSTEMS

A month before the UN Secretary-General's March 2019 statement condemning LAWS, the U.S. Army coincidentally introduced its Advanced Targeting and Lethality Automated System ("ATLAS") program.¹⁵ Notwithstanding U.S. Department of Defense policy requiring human judgment over the use of force by autonomous and semi-autonomous

¹⁵ U.S. Dep't of the Army, *Industry Day for the Advanced Targeting and Lethality Automated System (ATLAS) Program - Federal Business Opportunities: Opportunities*, U.S. DEP'T OF THE ARMY, Feb. 11, 2019 www.fbo.gov/index.php?s=opportunity&mode=form&id=29a4aed941e7e87b7af89c46b165a091&tab=core&_cview=0.

weapons,¹⁶ ATLAS is described in the Army's literature as a weapons system that leverages recent advances in computer vision and processing, artificial intelligence, machine learning, advanced sensors, and fire control capabilities to equip autonomous ground combat vehicles with the capability to acquire, identify, and engage targets at least three times faster than humans.¹⁷ Russia has been developing similar technology. Though not yet fully autonomous, the Uran-9 robotic unmanned ground combat vehicle entered Russian military service in January 2019 after being tested with mixed results in the Syrian Civil War. It is armed with a 33-millimeter autocannon, a 7.62-millimeter machine gun, and rockets with anti-tank and incendiary warheads.¹⁸

Fully autonomous weapons systems have yet to be deployed on the battlefield. The technology currently is being tested, however, in a variety of trial settings beyond tanks and other ground combat vehicles. These include autonomous weapons-carrying boats, submarines, torpedoes, and aircraft of various sizes.¹⁹ According to General Paul Selva, Vice Chairman of the U.S. Joint Chiefs of Staff who oversees projects on autonomy for the military, "Virtually any military

¹⁶ U.S. Department of Defense, *Department of Defense Directive 3000.09, November 21, 2012, Incorporating Change 1 on May 8, 2017*, DEPARTMENT OF DEFENSE, May 8, 2017 www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/300009p.pdf.

¹⁷ U.S. Dep't of the Army, *supra* note 15.

¹⁸ *Russian Bots: Armed Uran-9 Ground Drones Enter Service*, RUSSIA TODAY, Jan. 24, 2019, www.rt.com/russia/449595-uran-armed-drone-service/.

¹⁹ Harvey Day, *Should We Be Worried About "Killer" AI Robots?*, BBC THREE, Feb. 19, 2019 www.bbc.co.uk/bbcthree/article/f8e9b17f-eeb5-4ba0-baad-a399c0076c43. See also Busby, *supra* note 5.

vehicle has the potential to become autonomous.”²⁰ Some autonomous aircraft, for example, are as tiny as four inches across and capable of gathering together in swarms.²¹ European engineers recently developed the four-inch Crazyflie autonomous nano-drone with an artificial intelligence neural network running on just 1/100th of a watt.²² The U.S. Department of Defense also is working with the Perdix, a small, low-cost micro-drone capable of engaging in advanced swarm behaviors, including adaptive formation flying and collective decision-making.²³ In one 2017 test, 103 Perdix drones were launched from three military aircraft, each drone flying itself.²⁴ Their pre-determined mission was to patrol a three-square mile area, but the drones decided for themselves how to accomplish the task. The Pentagon presently is spending \$3 billion a year on autonomous systems with even greater capabilities than a swarm of Perdix.²⁵

Several countries are designing or testing lethally autonomous watercraft. China is developing a large

²⁰ David Martin, *New Generation of Drones Set to Revolutionize Warfare*, 60 MINUTES, Feb. 4, 2019 www.cbsnews.com/news/60-minutes-autonomous-drones-set-to-revolutionize-military-technology-2/.

²¹ DANIELE PALOSSÌ ET AL., A 64MW DNN-BASED VISUAL NAVIGATION ENGINE FOR AUTONOMOUS NANO-DRONES, Jan. 15, 2019 arxiv.org/pdf/1805.01831v2.

²² Sean Captain, *This Tiny Drone With a Tiny Brain is Smart Enough to Fly Itself*, FASTCOMPANY, www.fastcompany.com/40575392/this-tiny-drone-with-a-tiny-brain-is-smart-enough-to-fly-itself (last visited May 5, 2023).

²³ Martin, *supra* note 20.

²⁴ Tom Demerly, *Watch U.S. F/A-18 Hornets Unleash Swarm of Mini-Drones in First Test*, 2017 <https://theaviationist.com/2017/01/11/watch-u-s-fa-18-hornets-unleash-swarm-of-mini-drones-in-first-test/> (last visited May 5, 2023).

²⁵ Martin, *supra* note 20.

autonomous submarine that can execute missions without human interaction, including “suicide” attacks against enemy vessels.²⁶ The submarine is expected to deploy in the early 2020’s.²⁷ In February 2019, the U.S. Navy awarded a \$43 million contract to the Boeing Company for four Orca Extra Large Unmanned Undersea Vehicles (“XLUUV”) that can operate autonomously for nearly 7,500 miles, handle strike missions, and engage in anti-surface and anti-submarine warfare.²⁸ Russia currently is testing its Poseidon nuclear-powered autonomous torpedo that can travel 6,200 miles and accommodate both a 100-megaton nuclear warhead and conventional payload. It has the capability to combat naval forces and cause widespread radioactive contamination in coastal regions.²⁹ The United States also is testing the Sea Hunter, an autonomous surface watercraft that can travel ten thousand nautical miles for up to three months.³⁰ It can be

²⁶ South China Morning Post, *The AI Has No Soul: China is Working on a Fleet of Drone Submarines to Launch a New Era of Sea Power*, BUSINESS INSIDER (2018), www.businessinsider.com/china-is-unmanned-drone-submarines-to-launch-a-new-era-of-sea-power-2018-7 (last visited May 5, 2023). “The robotic submarines rely heavily on artificial intelligence to deal with the sea's complex environment. They must make decisions constantly on their own: changing course and depth to avoid detection; distinguishing civilian from military vessels; choosing the best approach to reach a designated position.”

²⁷ *Id.*

²⁸ Ben Werner, *Navy Awards Boeing \$43 Million to Build Four Orca XLUUVs*, U.S. NAVAL INST. NEWS, Mar. 4, 2019 news.usni.org/2019/02/13/41119.

²⁹ *Russia Releases First Video Footage of New Canyon/Status-6 Nuclear Torpedo*, NAVAL TODAY, Jul. 19, 2018 navaltoday.com/2018/07/19/russia-releases-first-video-footage-of-new-kanyon-status-6-nuclear-torpedo/.

³⁰ Phil Stewart, *U.S. Military Christens Self-Driving "Sea Hunter" Warship*, REUTERS, Apr. 7, 2016 www.reuters.com/article/us-usa-military-robot-ship-idUSKCN0X42I4.

armed and used for anti-submarine and counter-mine operations.³¹ Thirty-six computers and fifty million lines of software code on board the Sea Hunter take the place of a human pilot.³² These are just some examples of LAWS that are currently being designed, developed, and tested in various parts of the world.

II. JURISDICTION UNDER INTERNATIONAL HUMAN RIGHTS TREATIES

The first credible report of an unmanned 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.³³ The Foreign Minister of Sweden, among others, condemned the killing as a “summary execution that violates human rights.”³⁴ But is this so? Did al-Harithi even have rights vis-à-vis the United States given that the attack occurred extraterritorially on Yemeni soil where the United States 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. Most human rights treaties, especially those that protect civil and

³¹ *Id.*

³² Martin, *supra* note 20.

³³ ALSTON, *supra* note 6, at ¶ 19.

³⁴ Brian Whitaker & Oliver Burkeman, *Killing Probes the Frontiers of Robotics and Legality*, THE GUARDIAN, Nov. 5, 2002 www.theguardian.com/world/2002/nov/06/usa.alqaida (last visited May 5, 2023).

political rights, contain jurisdiction clauses that define their scope of application. Two such influential human rights treaties that contain 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” (emphasis added).³⁵ 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...” (emphasis added).³⁶ Other human rights treaties similarly refer

³⁵ European Convention on Human Rights, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 ¶ 1. The ECHR guarantees certain rights that include the right to life under Article 2, the right not to be tortured or subjected to inhuman or degrading treatment under Article 3, and the right to liberty under Article 5. *Id.* at arts. 2, 3.

³⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ¶ 1. Although the language of the treaty provision states that it applies to individuals who are subject to a State Party’s jurisdiction *and* within its territory, the Human Rights Committee has interpreted this provision, and thus the treaty’s jurisdiction, to nevertheless apply extraterritorially. EXTRA-TERRITORIAL APPLICATION OF THE RIGHT TO LIFE (2018), www.unodc.org/e4j/en/terrorism/module-8/key-issues/extraterritorial-application-of-the-right-to-life.html. “The Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the former European Commission on Human Rights (ECHR), as well as the Inter-American Commission on Human Rights (IACCommHR), have all found their respective instruments to apply extraterritorially, even in situations governed by IHL. These treaty bodies seem to agree that extraterritorial jurisdiction attaches in principle when a State exercises effective control over territory and/or persons.” Robert Kogod Goldman, *Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict* in

to jurisdiction when addressing the scope of their application.³⁷

Jurisdiction is a term that is defined differently depending on the context in which it is used, be it in municipal or international law.³⁸ In IHR treaties, the term has most commonly come to mean the “effective overall control” or power that a State exercises over a territory (territorial jurisdiction),³⁹ or its agents’ “authority or control” over an

RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 104-24, 106 (Robert Kolb & Gloria Gaggioli eds., 2013).

³⁷ Examples of 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. For example, the American Convention on Human Rights, on which the substantive jurisdiction of the Inter-American Court of Human Rights is based, provides in relevant part: ‘The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination...’ (emphasis added). American Convention on Human Rights Part. I, Ch. 1, art. 1 ¶ 1, Nov. 22, 1969, OAS No. 36.

³⁸ Jurisdiction has different meanings in international law, such as with prescriptive, enforcement, adjudicative, and universal jurisdiction; domestic law, where a court exercises authority over property or a person; or, as here, human rights treaties. ‘Jurisdiction’ in the human rights context is the nearly universal term for determining whether a human rights treaty applies extraterritorially. Nicola Wenzel, *Human Rights, Treaties, Extraterritorial Application and Effects*, OXFORD PUB. INT’L L. ¶ 3 (2008).

³⁹ See *Loizidou v. Turkey*, *supra* note 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 11, at 137. Regarding the ICCPR, see also, *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at 57. Regarding the ECHR, see Legal

individual abroad (personal jurisdiction).⁴⁰ Both models have been developed rather incongruously over time by human rights bodies.⁴¹ What is clear is that when a State Party to such treaties attains control over individuals or a territory, it is obliged to ensure the human rights of all persons within that geographic area.⁴² The question of whether a State is exercising control over a territory or an individual is one of fact,⁴³ however, several scenarios remain unclear, including the extent to which human rights treaties apply extraterritorially to the use of LAWS.

III. THE DIFFICULTY WITH DEFINING JURISDICTION IN THE CASE LAW

How then are terms such as control, authority, and territory defined? Put another way, at what point does a State Party

Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (Jul. 9).

⁴⁰ Marko Milanovic, *Foreign Surveillance and Human Rights, Part 3: Models of Extraterritorial Application*, EJIL: TALK!: BLOG OF THE EUR. J. OF INT'L L., Nov. 27, 2013 www.ejiltalk.org/foreign-surveillance-and-human-rights-part-3-models-of-extraterritorial-application/.

⁴¹ Daniel Møgster, *Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR*, EJIL: TALK!: BLOG OF THE EUR. J. OF INT'L L., Nov. 27, 2018 www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/.

⁴² Joanna Buckley, *Top 10 of 2016: More on the Scope of the ECHR*, L. OF NATIONS BLOG, Jan. 13, 2017 <https://lawofnationsblog.com/2017/01/13/case-comment-court-appeal-considers-application-echr-british-forces-abroad/> (last visited March 22, 2019).

⁴³ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 139.

exercise the appropriate level of control or authority over a foreign territory or an individual abroad to justify the imposition of IHR obligations? The European Court of Human Rights is a supranational body that adjudicates individual and State applications alleging violations of the civil and political rights guaranteed under the ECHR.⁴⁴ The Court has rendered over ten thousand judgments and thus is an important actor in the development of IHR law. Several important ECtHR cases help define what this control or authority means, though the law in this area is still developing as the Court is presented with new factual scenarios.

A. The Loizidou Case (1996) and Military Occupation and Governmental Administration

One of the ECtHR's earliest attempts to define effective control over territory is found in *Loizidou v. Turkey*.⁴⁵ Loizidou was a Greek Cypriot who was forced from her home in Northern Cyprus during the 1974 Turkish invasion.⁴⁶ She sought to return home on several occasions following the establishment of the Turkish Republic of Northern Cyprus (TRNC).⁴⁷ The Turkish army, however, repeatedly denied her entry into the occupied territory.⁴⁸ In 1989, Loizidou filed an application with the ECtHR alleging Turkey violated her rights

⁴⁴ See generally EUROPEAN COURT OF HUMAN RIGHTS, available at: www.echr.coe.int/Pages/home.aspx?p=court&c=.

⁴⁵ *Loizidou v. Turkey*, *supra* note 13.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

to liberty and property under Protocol 1, Article 1 of the ECHR.⁴⁹ Turkey claimed it lacked jurisdiction over the occupied territory because the TRNC was an independent State and not itself a party to the Convention.⁵⁰ 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.⁵¹ The Court reasoned that:

The responsibility of a Contracting Party could 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* (emphasis added).⁵²

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 suffice or a particular building within that complex?

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at ¶¶ 56-57.

⁵² *Id.* at ¶ 52.

B. The Bankovic Case (2001) and Aerial Bombardments

In *Bankovic v. Belgium*,⁵³ the ECtHR held that air strikes on a building, and other targets, did not constitute effective control so as to trigger IHR obligations.⁵⁴ In *Bankovic*, six citizens of the Federal Republic of Yugoslavia (FRY) brought an application against Belgium and sixteen other European countries.⁵⁵ The applicants were either victims or relatives of those killed in a NATO bombing mission that destroyed a building that housed several radio and television stations in Belgrade during the 1999 Kosovo crisis.⁵⁶ They alleged violations of the rights to life, effective remedy and freedom of expression under the ECHR.⁵⁷ The applicants admitted that NATO did not have the same level of boots-on-the-ground control over Yugoslavia that Turkey had over Cyprus in *Loizidou*.⁵⁸ Instead, they argued that NATO's deliberate, precision air strikes in which sixteen people were killed, another sixteen were injured, and twenty-four total targets were hit in the FRY over a two-and-a-half month campaign constituted effective control over the diminutive territory, thus triggering its treaty obligations.⁵⁹ The Court unanimously held, however, that NATO armed forces did not exercise effective control over the territory in which the bombing occurred and did not exercise the public powers normally exercised by that

⁵³ *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R., Dec. 12, 2001.

⁵⁴ *Id.* at ¶ 82.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at ¶ 82.

territory's government.⁶⁰ It, therefore, was not within the ECHR's jurisdiction.⁶¹ The Court reasoned that "jurisdiction" under the ECHR is essentially territorial and operates regionally in the legal space, or *espace juridique*, of States Parties.⁶² In doing so, the Court explicitly articulated a narrow interpretation of jurisdiction by rejecting the notion that any adverse act by a State Party, anywhere in the world that it was committed or its consequences felt, came within the ECHR.⁶³

C. The Issa Case (2004) and Physical Control Over Persons

In *Issa v. Turkey*,⁶⁴ the six female applicants were Iraqi

⁶⁰ *Id.*

⁶¹ A more liberal test of territorial control was introduced in *Ilascu and Others v. Moldova & Russia*, App. No. 48787/99, Eur. Ct. H.R., Jul. 8, 2004. Though not precisely applicable to this discussion, the case nevertheless involved yet another shift away from *Bankovic* and toward a more expansive extraterritorial application of human rights norms. The ECtHR declined to apply the effective 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.

Also, in a pre-*Bankovic* case involving the liberal construction of territorial control, the Inter-American Commission held that the 1996 downing of two private US airplanes in international airspace by the Cuban Air Force violated the victims' right to life. *Alejandro v. Cuba*, Case 11.589, Inter-Am. Ct. H.R., No. 86/99 (Sept. 29, 1999).

⁶² *Bankovic v. Belgium*, *supra* note 53, at ¶ 61. See also Tarik Abdel-Monem, *The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey*, 12 HUM. RTS. BRIEF 9, 10 (2005).

⁶³ *Bankovic v. Belgium*, *supra* note 53, at ¶ 75. But see *Alejandro v. Cuba*, *supra* note 61.

⁶⁴ *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R., § 2 (Mar. 30, 2005).

Kurds living close to the border with Turkey in 1995.⁶⁵ They claimed they saw Turkish soldiers who were conducting military exercises in the area abuse and assault their male relatives.⁶⁶ The women claimed the soldiers told them to return home to their village while they led the men away.⁶⁷ 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.⁶⁸ The applicants complained that the Turkish army's alleged unlawful arrest, detention, mistreatment, and killing of their relatives violated the ECHR.⁶⁹ The Turkish government admitted that its forces conducted a six-week cross-border military incursion into northern Iraq, but claimed they were six miles north of where the incident occurred and thus could not have committed the murders.⁷⁰ In adjudicating the jurisdictional issue, the Court relied on *Loizidou* in analyzing whether Turkey had effective control over the part of northern Iraq where the decedents were killed.⁷¹ The Court said it was not necessary for a State to *actually* exercise control over the policies and actions of the authorities in the territory, as long as it had overall control of the area or its agents exercised authority and control over individuals therein.⁷² The Court even went so far as to say that even the temporary exercise of effective control of an area

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at ¶¶ 68–69.

⁷² *Id.* at ¶¶ 70–71.

could result in ECHR jurisdiction.⁷³ This is especially so if it were shown that Turkey had arrested, abused, or killed the victims because it then would have asserted the type of control that was lacking in the *Bankovic* decision. In this case, however, the Court concluded the applicants failed to meet their burden of proving beyond a reasonable doubt⁷⁴ that Turkish forces were in the same area where the slayings occurred and had actually committed the killings.⁷⁵ Turkey thus lacked jurisdiction in this case.⁷⁶

D. The Solomou Case (2008) and a Killing Involving Multiple Gunshots in a Neutral UN Buffer Zone

In *Solomou v. Turkey*,⁷⁷ a crowd of approximately 700 Greek Cypriots entered the United Nations buffer zone in Cyprus following the funeral of Anastasios Isaak.⁷⁸ Isaak was a Greek Cypriot refugee who had participated in a demonstration in the same area three days earlier.⁷⁹ The demonstrations were against Turkey's military occupation in

⁷³ *Id.* at ¶¶ 73-74.

⁷⁴ Proof beyond a reasonable doubt is the standard of proof the Court customarily applies when ascertaining whether there is a basis in fact for an allegation of unlawful killing, *citing* Orhan v. Turkey, App. No. 25656/94, Eur. Ct. H.R. § 264, (June 18, 2002); Tepe v. Turkey, App. No. 27244/95, Eur. Ct. H.R. § 125, (May 9, 2003); İpek v. Turkey, App. No. 25760/94, Eur. Ct. H.R. § 109, (Feb. 2004).

⁷⁵ *Id.* at ¶¶ 81-82.

⁷⁶ *Id.* at ¶¶ 81-82.

⁷⁷ *Solomou v. Turkey*, App. No. 36832/97, Eur. Ct. H.R. § 4, (Jun. 24, 2008).

⁷⁸ *Id.*

⁷⁹ *Id.*

Northern Cyprus.⁸⁰ In this case, Turkish soldiers shot and killed Isaak's cousin, Solomos Solomou, in the buffer zone as he was attempting to climb a flagpole to remove a Turkish flag.⁸¹ The Court noted that both the flagpole and Solomou were in the TRNC territory, however Turkey argued that it lacked jurisdiction or control over the TRNC because it is an independent State.⁸² One of the issues in this case was whether Solomou came under the "authority and/or effective control," and thus jurisdiction, of Turkey through its soldiers.⁸³ The Court reiterated the exceptions to the territorial principle from *Loizidou* and *Issa*, but in a rather conclusory fashion, held that Solomou was indeed under Turkey's authority and/or effective control through its agents because senior Turkish military personnel had overseen the incident, the Commander-in-Chief of the Turkish Forces in Cyprus had been in charge of the relevant operations, the conduct of those involved in the shooting had been controlled by the Turkish military, and the evidence suggested that Turkish military officers had fired at least some of the shots that struck Solomou from the Turkish side of the cease fire line.⁸⁴ The Court thus concluded that Turkey exercised effective control over the area and jurisdiction attached.⁸⁵ Turkey ultimately was held to have violated Solomou's right to life and failed to conduct an

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at ¶ 49.

⁸⁴ *Id.* at ¶ 39.

⁸⁵ *Id.* at ¶¶ 50-51.

effective inquiry into the circumstances surrounding his death under Article 2 of the ECHR.⁸⁶

E. The Andreou Case (2008) and a Single Gunshot Wound Outside a State's Effectively-Controlled Territory

Andreou v. Turkey was another case that broadened the scope of extraterritorial human rights jurisdiction.⁸⁷ It arose from the same demonstration at the neutral UN buffer zone following the Isaak funeral.⁸⁸ In this case, sometime during the shooting involving Solomou, Turkish armed forces fired indiscriminately and shot and wounded, but did not kill, Georgia Andreou.⁸⁹ Andreou was standing outside the buffer zone on the Cyprus side, just beyond Turkish territory.⁹⁰ Andreou alleged that Turkey endangered her life and used excessive force constituting inhumane treatment, both of which violated her rights under the ECHR.⁹¹ 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.⁹² Nevertheless, the Court unanimously held that Turkish forces exercised territorial control over the area from where the shots were fired and that, opening fire on the crowd, “which was the direct and immediate cause of [Andreou’s] injuries, was such that the

⁸⁶ *Id.* at 31.

⁸⁷ *Andreou v. Turkey*, App. No. 45653/99, Eur. Ct. H.R. § 4, (Jan. 27, 2010).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at ¶ 25.

applicant must be regarded as [within Turkey's jurisdiction]."⁹³ The ECtHR reasoned that, while the effects of Turkey's actions occurred extra-territorially where it lacked effective control, it did have effective control over the territory where the shots were fired.⁹⁴ This case thus marks a notable departure from earlier decisions in that the Court found a basis for jurisdiction even though the defendant State exercised no control over the territory in which the harm occurred.

F. The Al-Skeini Case (2011), a State's Exercise of Public Powers, and the Court's Attempt to Address Bankovic

In *Al-Skeini v. The United Kingdom*,⁹⁵ six Iraqis claimed the United Kingdom failed to properly investigate the deaths of their civilian family members.⁹⁶ Five of them alleged that British soldiers shot and killed their relatives in the field.⁹⁷ The sixth individual was killed while in British custody at a base in Basrah.⁹⁸ The British government conceded jurisdiction under the ECHR in the sixth case because the individual was on a British military base.⁹⁹ The issue thus before the Court was whether the ECHR also extended to the British soldiers' actions patrolling Basrah.¹⁰⁰ In holding that the soldiers' actions fell within the ambit of the ECHR, the Court reasoned

⁹³ *Id.* at ¶ 25.

⁹⁴ *Id.*

⁹⁵ *Al-Skeini and Others v. United Kingdom*, *supra* note 14.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

that the United Kingdom assumed some of the public powers in Iraq that are customarily exercised by a sovereign government, such as in this case, maintaining security in South East Iraq.¹⁰¹ The Court reasoned that the British soldiers exercised “authority and control” over individuals killed during their security operations, thus establishing a jurisdictional link between the deceased and the United Kingdom under the ECHR.¹⁰² While this case expands the Court’s jurisdiction analysis in *Bankovic*, it stops short of expressly overruling it. As one commentator observed:

The Court applied a personal model of jurisdiction to the killing of all six applicants, but it did so only exceptionally, because the UK exercised public powers in Iraq...But, *a contrario*, had the UK not exercised such public powers, the personal model of jurisdiction would not apply. In other words, *Bankovic* is according to the Court still perfectly correct in its result. While the power to kill is “authority and control” over the individual if the state has public powers, killing is not authority and control if the state is merely firing away missiles from an aircraft. Under this reasoning, drone operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Bankovic* (emphasis added).¹⁰³

Thus, while jurisdiction attaches when both a killing occurs and the State is exercising its public powers extraterritorially,

¹⁰¹ *Id.* at ¶ 149.

¹⁰² *Id.*

¹⁰³ Marko Milanovic, *European Court Decides Al-Skeini and Al-Jedda*, EJIL: TALK!: BLOG OF THE EUR. J. OF INT'L L., Jul. 7, 2011 www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/.

the *Al-Skeini* Court suggests that the former without the latter produces no jurisdiction. *Al-Skeini* broadens *Bankovic* by allowing for a personal model of extraterritorial jurisdiction, yet it also preserves the original *Bankovic* reasoning and holding by rejecting extraterritorial jurisdiction when there is no State control over individuals or territory.

*G. The Al-Saadoon Case (2016) and a Possible Retreat
From the Expansion of Extraterritorial Jurisdiction*

Though not an ECtHR Grand Chamber case, the Court of Appeal of England and Wales rendered a unanimous judgment in a decision styled, *Al-Saadoon and Ors v. Secretary of State for Defence*.¹⁰⁴ The court's conclusions are important because both it and the lower court carefully and extensively analyzed the trend of ECtHR jurisprudence regarding the scope of ECHR extraterritorial jurisdiction.¹⁰⁵ *Al-Saadoon* arose from a large number of civil law claims regarding Britain's involvement in Iraq from 2003 to 2009.¹⁰⁶ The alleged human rights violations included allegations of ill-treatment, unlawful detention, and the unlawful killing of Iraqi civilians by British soldiers.¹⁰⁷ The Court of Appeal largely agreed with the lower court's decision, but reversed its "state agent authority and control" conclusion that the United Kingdom exercised physical power and control over the victims.¹⁰⁸ Significantly,

¹⁰⁴*Al-Saadoon and Ors v. United Kingdom*, EWCA C1/2015/1613, C1/2015/1620, & C1/2015/2006 (Civ), (Sep. 9, 2016).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at ¶ 1.

¹⁰⁸ *Id.*

the Court of Appeal rejected the notion that the mere use or potential use of lethal force is sufficient to constitute such authority and control.¹⁰⁹ The lower court considered the use of lethal force to be the ultimate exercise of physical control over an individual thereby triggering jurisdiction.¹¹⁰ In its view, there could be no distinction between killing someone after arresting him, in which jurisdiction would attach, and simply shooting him without arresting him first, in which jurisdiction may not attach.¹¹¹ The Court of Appeal unanimously concluded, however, that this is precisely what the ECtHR intended: That there be some element of control over the individual prior to the use of lethal force in order for extraterritorial jurisdiction to apply.¹¹²

IV. THE EUROPEAN COURT OF HUMAN RIGHTS ATTEMPTS TO EXPLAIN ITS ARTICLE I JURISDICTION ANALYSIS

The above cases are important in understanding if and how IHR law applies extraterritorially to LAWS. Perhaps recognizing that these and related ECtHR cases have been difficult to reconcile in determining when its jurisdictional principles apply, the Court in December 2018 published a guide to understanding jurisdiction and imputability under Article 1 of the ECHR (“Guide”).¹¹³ The Court summarized the

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at ¶ 59.

¹¹¹ *Id.*

¹¹² *Id.* at ¶ 69.

¹¹³ EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: OBLIGATION TO RESPECT

seminal cases in the Guide, including the seven previously discussed, and began its analysis with the premise that a State Party's jurisdiction under the ECHR is primarily territorial and deemed to be exercised throughout the State's territory ("State's Own Territory Principle").¹¹⁴ A State Party's actions outside its territory can still fall within the ECHR if a Court-recognized exception applies and each case must be decided with regard to its particular facts.¹¹⁵ The Court has thus far recognized several exceptions to the State's Own Territory Principle and they can be grouped into two types of extraterritorial jurisdiction: Personal and territorial jurisdiction.

A. Personal Jurisdiction

The first basis is personal jurisdiction and is described as power exercised over the person (*ratione personae*). It includes four exceptions to the State's Own Territory Principle.

1. Acts of Diplomatic or Consular Agents

This exception applies when a State's diplomatic or consular agents are present on foreign soil and exercise

HUMAN RIGHTS - CONCEPTS OF "JURISDICTION" AND IMPUTABILITY (Dec. 31, 2019), https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf.

¹¹⁴ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 131. *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R., (July 7, 1989).

¹¹⁵ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 132. *Bankovic v. Belgium*, *supra* note 53, at ¶ 67.

“authority and control” over another person.¹¹⁶ In this instance, customary international law and treaties acknowledge the extraterritorial exercise of jurisdiction by the State.¹¹⁷ An example of when a State violates an individual’s rights under this exception to the ECHR is when its consulate takes custody of and then tortures the individual.

a. Acts Committed on Board a Ship or Craft

Another exception involves activities of a State Party’s diplomatic or consular agents on aircraft and ships registered in, or flying the flag of, that State.¹¹⁸

b. The Exercise of Another State’s Sovereign Authority With its Agreement

Jurisdiction also can attach extraterritorially when a State receives the “consent, invitation or acquiescence” of the government of a territory and exercises some or all of the “public powers” over that territory that customarily would be exercised by that government.¹¹⁹ As in the *Al-Skeini* case, a State that enters into a treaty or other agreement with the

¹¹⁶ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 134. *Bankovic v. Belgium*, *supra* note 53, at ¶ 73. *X v. Federal Republic of Germany*, App. No. 1611/62, 1965 Y.B. Eur. Conv. on H.R. vol. 8, 158, 169 (Eur. Comm’n on H.R.); *X v. the United Kingdom*, App. No. 7547/76, Eur. Comm’n on H.R. Dec. & Rep. (Dec. 15, 1977); *WM v. Denmark*, App. No. 17392/90, Eur. Comm’n on H.R. Dec. & Rep. (Oct. 14, 1993).

¹¹⁷ *Bankovic v. Belgium*, *supra* note 53.

¹¹⁸ EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 113, at ¶ 57.

¹¹⁹ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 135. *Bankovic v. Belgium*, *supra* note 53, at ¶ 71.

government of another territory for its agents to perform executive or judicial functions can be liable under the ECHR for extraterritorial human rights violations in that territory.¹²⁰

c. The Use of Force by a State's Agents Outside its Territory

The fourth exception is when a State's agents use force outside its territory against an individual within the agents' control.¹²¹ In *Al-Skeini*, British soldiers engaged in security operations in Basrah and exercised authority and control over individuals killed during those operations.¹²² As the *Al-Saadoon* Court of Appeal opined, the ECtHR intended that there be some control of an individual prior to the use of lethal force in order for extraterritorial jurisdiction to apply.¹²³

Whenever a State exercises extraterritorial authority and control over individuals through its agents, it exercises

¹²⁰ *Drozd and Janousek v. France and Spain*, App. No. 12747/87, Eur. Ct. H.R., (Jun. 26, 1992); *Gentilhomme and Others v. France*, App. Nos. 48205/99, 48207/99 & 48209/99, Eur. Ct. H.R. (May 14, 2002); *X and Y v. Switzerland*, App. Nos. 7289/75 & 7349/76, Eur. Comm'n Dec. on Admissibility, DR 9, 57 (July 14, 1977).

¹²¹ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 136. *See, e.g., Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08, Eur. Ct. H.R. § 4, (Apr. 10, 2010) (two Iraqis detained in British-controlled Iraqi prisons were within United Kingdom's jurisdiction because it exercised control over both the prisons and individuals within them); *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. of H.R. ¶ 91, (May 12, 2005) (applicant in Turkish custody was under Turkish control and within its jurisdiction, even though Turkey exercised its authority outside its territory); *Issa v. Turkey*, *supra* note 64; *Medvedyev and Others v. France*, App. No. 3394/03, Eur. Ct. H.R. ¶ 67 (Mar. 29, 2010).

¹²² *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 149.

¹²³ *Al-Saadoon and Ors v. United Kingdom*, *supra* note 104, at ¶ 69.

jurisdiction under the ECHR and is subject to its obligations.¹²⁴ Jurisdiction in these cases turns on whether a State exercises *physical* power and control over an individual, not whether it controls the buildings, vehicles or other structures in which they were held.¹²⁵

B. Territorial Jurisdiction

The second basis for extraterritorial jurisdiction is power exercised in another territory (*ratione loci*). It includes three exceptions to the territorial principle.

1. One State Party Occupies the Territory of Another (Espace Juridique)

The first exception is when the armed forces of one State Party to the ECHR occupy the territory of another State Party.¹²⁶ The Court reasoned that to hold otherwise would deprive that territory's population of their rights and freedoms and create a vacuum of protection within the Convention legal space, or *espace juridique*.¹²⁷

¹²⁴ Al-Skeini and Others v. United Kingdom, *supra* note 14, at ¶ 137.

¹²⁵ *Id.* at ¶ 136.

¹²⁶ *Id.* at ¶¶ 141–42. The term “occupy” has the same meaning as under Article 42 of the Hague Regulations, *to wit*, “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself.”

¹²⁷ Al-Skeini and Others v. United Kingdom, *supra* note 14, at ¶¶ 141–42. *See also*, Bankovic v. Belgium, *supra* note 53, at ¶ 80.

2. *Active State Exercise Jurisdiction Based on Military Action Outside its Territory (Effective Control)*

A second analogous exception to the general rule that the ECHR applies only to a State's own territory is when it exercises "effective control" over another territory.¹²⁸ One example is the *Loizidou* case in which Turkey exercised effective control over the occupied TRNC territory when its troops continually patrolled the area and the local population was subject to Turkish courts.¹²⁹ While this exception requires some degree of control over an area that enables it to secure the full range of ECHR rights to its occupants,¹³⁰ effective control does not require complete domination over the other territory's administrative policies and actions.¹³¹

The Court has recognized two primary criteria in determining whether a State has gained effective control over another territory. The most persuasive of the two is the strength, such as the number of soldiers, and duration of the State's military presence in the territory.¹³² The second criterion is how much military, economic and political support the State provides the local administration that gives it influence and control over the area.¹³³

The Court has considered two types of cases under this exception. One is cases regarding traditional military occupation as defined in Article 42 of the Hague Convention

¹²⁸ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 138.

¹²⁹ *Loizidou v. Turkey*, *supra* note 13, at ¶¶ 56-57.

¹³⁰ *Al-Saadoon and Ors v. United Kingdom*, *supra* note 104, at ¶ 34.

¹³¹ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 138.

¹³² EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 113, at ¶ 37.

¹³³ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 139; *Ilascu and Others v. Moldova & Russia*, *supra* note 61, at ¶¶ 388-94.

respecting the Laws and Customs of War on Land.¹³⁴ The other is cases concerning the creation of a political entity, within the territory of a State Party, that is not recognized by the international community as a sovereign State, with the military, economic and political support of another State Party.¹³⁵ Examples of the latter include the TRNC cases.

3. Jurisdiction of a State Undergoing Foreign Military (or Separatist) Action Within its Territory

Finally, when a State is undergoing military action within its territory by another State or a local separatist regime, there is a rebuttable presumption that the passive State has jurisdiction over any IHR violation that occurs.¹³⁶ For example, jurisdiction may be limited or overcome by another State's military occupation that gives it effective control over the territory, or by acts of war or rebellion.¹³⁷

V. APPLYING THE CASE LAW TO LETHAL AUTONOMOUS WEAPONS SYSTEMS

Several observations can be made when the legal principles from the above cases and Guide are applied to a hypothetical LAWS example such as a lethal air strike by an autonomous, missile-carrying aerial drone. The legal question under consideration is whether jurisdiction applies under the ECHR

¹³⁴ EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 113, at ¶ 39. See the definition of "occupy" *infra* note 82.

¹³⁵ EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 113, at ¶ 39.

¹³⁶ *Id.* at ¶ 55.

¹³⁷ *Id.*

to a State Party that deployed the autonomous drone that resulted in a killing outside the State's territorial borders. Each of the cited legal authorities moves the IHR pendulum either towards or away from impunity for such an attack depending on the facts of each case. While *Loizidou* initially established a straightforward standard for determining the extraterritorial applicability of human rights norms, the *Bankovic* decision soon 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, in order to trigger effective control.¹³⁸ On the other end of the spectrum, an aerial bombardment of buildings and individuals did not constitute extraterritorial jurisdiction under *Bankovic*.¹³⁹

Distinguishing *Loizidou* and analogizing *Bankovic* would seem to end the autonomous weapons analysis before it begins. Drone killings do not require a military occupation as in *Loizidou* to be effective, yet they do involve the type of geographically limited air strikes as in *Bankovic*. Under the analysis in these cases, limited pilotless drone strikes would not constitute effective control under *Bankovic* and States could seemingly engage in such extraterritorial attacks with IHR impunity. Such a conclusion, however, contravenes the very purposes and intent of human rights treaties. The Court presumably recognized these shortcomings as its later decisions suggest. The cases following *Bankovic* gradually expanded the ECHR's jurisdictional reach, moving beyond a purely territorial model to include instances where a State

¹³⁸ *Loizidou v. Turkey*, *supra* note 13, at ¶¶ 56-57.

¹³⁹ *Bankovic v. Belgium*, *supra* note 53, at ¶ 82.

Party's agents could exercise extraterritorial authority over other individuals.¹⁴⁰ In no case, however, has the Court expressly overruled *Bankovic*. *Bankovic* also is repeatedly cited as authority in the more recent *Al-Skeini* case so it cannot be regarded as having been impliedly overruled in its entirety either.¹⁴¹ For these reasons, *Bankovic* remains, at least in certain circumstances, good law today.¹⁴²

Issa, Solomou and *Andreou* introduced a more expansive interpretation of extraterritorial jurisdiction than *Loizidou*. *Issa* moved the threshold closer towards extraterritorial IHR accountability in suggesting that physical control of a handful of individuals in a smaller occupied territory could constitute effective control.¹⁴³ Expanding the jurisdictional reach further, the *Solomou* Court found that Turkey exercised effective control over the victim when he was shot and killed extraterritorially at close range.¹⁴⁴ One of the most permissive jurisdiction interpretations is found in the *Andreou* case in which the Court held that simply shooting a bullet from a

¹⁴⁰ Hayley Evans, *Keeping it in Bounds: Why the U.K. Court of Appeal was Correct in its Cabining of the Exceptional Nature of Extraterritorial Jurisdiction in Al-Saadoon*, 59 HARV. INT'L L. J. 38, 40–41 (2017).

¹⁴¹ *Al-Saadoon and Ors v. United Kingdom*, *supra* note 104, at ¶ 68.

¹⁴² This may be due to the respondent governments' position that a contrary practice would be untenable. Some States may argue that conducting a brief air strike should not constitute effective control over a territory because doing so would trigger jurisdiction and oblige 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 overly broad application of the ECHR.

¹⁴³ *Issa v. Turkey*, *supra* note 64, at ¶ 63.

¹⁴⁴ *Solomou v. Turkey*, *supra* note 77, at ¶¶ 50-51.

territory over which the acting State exercised effective control into territory over which it did not, and injuring – not even killing – a single person, can trigger the application of IHR norms.¹⁴⁵ Under this rationale, a simple drone strike at close range with today’s technology could create a jurisdictional link. *Issa* and *Andreou* are difficult cases to reconcile with *Bankovic* in many ways, however. If killing a handful of individuals during a temporary military incursion could be deemed effective control as the *Issa* Court suggested, why not a bombing, such as in *Bankovic*, that harmed thirty-two 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 drone strikes do not involve the kind of personal, hand-to-hand violence or individual control seen in the *Issa* case. Drone air strikes cannot effectively control territory, at least not yet. *Issa* thus leaves in doubt the question of whether drone strikes could constitute effective control over territory. Surely, however, launching a bomb in *Bankovic* is equally as egregious and personal as firing gunshots into a crowd as in *Andreou*. Yet the same Court held that the *Bankovic* bombing triggered no IHR obligations while the *Andreou* gunshots did. Likewise, launching an autonomous missile is both factually analogous and at least equally as egregious and personal as the gunshots in *Andreou* leading one to conclude that IHR obligations should apply to extraterritorial LAWS strikes as well.

Many view the *Al-Skeini* decision as the Court’s attempt to reconcile its prior jurisdiction cases and finally address *Bankovic*. Unfortunately, the Court clarified some questions

¹⁴⁵ *Andreou v. Turkey*, *supra* note 87.

and left others unresolved. British soldiers had personal jurisdiction over the victims in the *Al-Skeini* case because the United Kingdom assumed public powers through its security operations, thus exercising authority and control over them.¹⁴⁶ Had the United Kingdom not exercised these public powers, presumably personal jurisdiction would not have attached and the reasoning and holdings in territorial cases such as *Bankovic* would apply. Absent such exercise of public powers, a State's autonomous attacks and air strikes could fall outside ECHR jurisdiction as the aerial bombardment did in the *Bankovic* case. The confusion lies in the fact that, on the one hand, the *Al-Skeini* Court reaffirmed that both the territorial and personal forms of jurisdiction apply beyond a State's borders, but on the other, it limited the exercise of personal jurisdiction to situations where the State using force exercised these public powers. It therefore is unclear whether an extraterritorial drone strike similar to *Bankovic* would trigger human rights obligations when the military operation involves neither public powers over the targeted area nor effective control over the territory.

Following the *Al-Skeini* case, some scholars maintained that the application of lethal force alone could be sufficient to trigger IHR jurisdiction. For example, in their article, "The International Law Framework Regulating the Use of Armed Drones," authors Heynes, Akande, Hill-Cawthorne, and Chengeta state:

It has been argued that the implication of this broader view of when an individual is within the jurisdiction of a State for the purposes of human

¹⁴⁶ *Al-Skeini and Others v. United Kingdom*, *supra* note 14, at ¶ 149.

rights treaties is that the *deliberate killing of selected individuals* through extraterritorial drone strikes is likely to bring the affected persons within the jurisdiction of the operating State. Pursuing this line of reasoning, where a State targets individuals abroad with lethal force, one can argue that it *intends to exercise ultimate control over the individuals concerned, resulting in those actions being governed by the State's human rights treaty law obligations* (emphasis added, citations omitted).¹⁴⁷

This argument requires more than an accidental killing and hinges on the victim being deliberately selected and targeted by the aggressor State. As the *Al-Saadoon* court opined, the mere application of lethal force is insufficient to trigger jurisdiction and is contrary to the ECtHR's intent.¹⁴⁸ The court pointed out that much of the ECtHR's jurisprudence indicates that *some* kind of exercise of power over the person or territory is required along with the use of force.¹⁴⁹ With LAWS, however, the State may not deliberately select and target anyone, and yet a killing could occur when the autonomous weapon itself determines that doing so is necessary to accomplish its mission. This scenario then is analogous to *Bankovic* and *Andreou* in which a temporary, unintended killing may or may not lead to liability depending on the facts: The operating State through its autonomous weapon may have exercised the requisite control over the individual such as under *Andreou* to trigger its human rights obligations, or perhaps not under a territorial analysis as in *Bankovic*.

¹⁴⁷ Heyns et al., *supra* note 14, at 824.

¹⁴⁸ *Al-Saadoon and Ors v. United Kingdom*, *supra* note 104, at ¶ 69.

¹⁴⁹ *Id.*

If the *Al-Saadoon* court is correct in interpreting the ECtHR's case law that jurisdiction requires some degree of control over individuals or territory, then one question regarding LAWS is whether an autonomous machine can exercise such control when the harm occurs and, if so, what other factors must be considered. Put another way, can autonomous weapons occupy territory and physically control individuals to the extent that jurisdiction attaches? The Perdix drones demonstrated that machines can fly in swarms and think for themselves in executing a simple mission.¹⁵⁰ ATLAS and the Uran-9 have the potential to provide lethal autonomy in ground combat vehicles, and similar capabilities are being developed with respect to watercraft.¹⁵¹ Given that virtually any military vehicle can be made autonomous, it may be a matter of time before the technology allows LAWS to exert the level of control necessary to trigger IHR accountability. Until then, States that employ this technology short of the jurisdictional standard arguably could avoid IHR liability under the Court's jurisprudence.

VI. LETHAL AUTONOMOUS WEAPONS AND JURISDICTION OVER TERRITORY AND INDIVIDUALS: HOW AUTONOMY COMPLICATES THE ANALYSIS

Determining under what circumstances IHR treaties apply extraterritorially when humans are in the loop is challenging enough. Adding lethal autonomous weapons into the scenario

¹⁵⁰ Martin, *supra* note 20.

¹⁵¹ U.S. Dep't of the Army, *supra* note 15. See also RUSSIA TODAY, *supra* note 18.

makes the legal analysis even more so. If *Bankovic* is limited in its application as the progression of IHR case law suggests and aerial attacks can trigger the extraterritorial application of IHR treaties, what difference does it make whether an aircraft or vessel that deploys a missile is piloted? In other words, how does the introduction of *autonomous* weaponry make the analysis of whether human rights treaties apply extraterritorially more difficult than conventional warfare or a diplomat sent abroad who exceeds her authority?

A. States May Fall Outside IHR Treaty Jurisdiction Because LAWS Cannot (Yet) Exercise Control Over Territory or Individuals Due to Technological Limitations

One difference is that an unpiloted vehicle arguably causes the pendulum to swing back towards IHR impunity. With no State providing military, political, or economic support in the targeted territory as in *Ilascu*, and no individual pulling a trigger as in *Issa*, *Solomou* and *Andreou*, there is substantially less support under the case law for control over a territory or an individual. Even with unmanned drones, one can point to an individual pilot who launched the missile, albeit perhaps from half-way around the world, or a military officer who gave the order for when to do so. With a lethal autonomous weapon, such as a pilotless drone that is itself performing the calculations to determine precisely when and where to target a missile attack, the lines of accountability are demonstrably blurred.

No LAWS as of yet can provide public powers, or exercise effective control over territory or authority and control over individuals as defined in the case law, due to technological

limitations. Even if autonomous weapons had the capability to effectively control, for example, ingress and egress from a territory as in *Loizidou* or in buffer zones as in *Solomou* and *Andreou*, the effectiveness of such control would be limited and short-lived. That is not to say that the technology cannot accomplish the task in the future, and indeed, the future may not be too far off. Advancements now allow LAWS to operate for months at a time and span thousands of miles as with the Sea Hunter, Poseidon, and XLUUVs.¹⁵² Swarms of inexpensive machines like the Perdix may one day be able to exercise effective control by spreading out over a territory as in *Loizidou* or *Ilascu*.¹⁵³ Until then, the *Issa* and *Loizidou* holdings suggest that a LAWS attack would not fall within the targeting State's jurisdiction and an autonomous air strike would not be justiciable under the *Bankovic* reasoning.

B. The Case Law Expressly Rejects a Broad Interpretation of Jurisdiction That a LAWS Deployed Anywhere in the World Can Trigger an IHR Violation

Even if *Bankovic* is still good law as some have opined, it may nevertheless limit the application of extraterritorial

¹⁵² Martin, *supra* note 20.

¹⁵³ In July 2018, two thousand and sixty-six drones achieved the Guinness World Records title for the "Most Unmanned Aerial Vehicles (UAVs) airborne simultaneously," although that record is being broken nearly every year. Guinness World Records, *Most Unmanned Aerial Vehicles (UAVs) Airborne Simultaneously*, www.guinnessworldrecords.com/world-records/373319-most%C2%A0unmanned-aerial%C2%A0vehicles%C2%A0uavs-airborne%C2%A0simultaneously%C2%A05-kg-or-less (last visited May 5, 2023).

jurisdiction regarding LAWS. The ECtHR has made it clear that the ECHR is regional in scope.¹⁵⁴ The *Bankovic* court explicitly supported a narrower interpretation of jurisdiction by rejecting the notion that any adverse act by a State Party, anywhere in the world that it was committed or its consequences felt, fell within the ECHR.¹⁵⁵ Under this reasoning, deploying a lethally autonomous weapon extraterritorially that itself decides to apply lethal force to a target would fall outside ECHR jurisdiction absent some other means of effective control over the territory. The State would contend that its weapon caused no harm within its territory and so was lawfully deployed. If the weapon decided to harm people or property outside the *espace juridique*, that, too, would not be justiciable under the *Bankovic* reasoning because States are liable for harm occurring within the legal space of the contracting States, not harm that occurs anywhere in the world. Either scenario could result in IHR impunity.

*C. States Deploying LAWS Can Use Case Law
Inconsistencies to Avoid IHR Accountability*

In deciding the jurisdictional question, the *Andreou* Court noted that the shots in that case were fired from the occupied TRNC, although the effects occurred extraterritorially.¹⁵⁶ Even though there was no territorial control in the area where *Andreou* suffered harm, the ECtHR found that Turkey exercised effective control in the area where the shots were

¹⁵⁴ *Bankovic v. Belgium*, *supra* note 53, at ¶ 80.

¹⁵⁵ *Id.* at ¶ 80.

¹⁵⁶ *Andreou v. Turkey*, *supra* note 87, at ¶ 25.

fired.¹⁵⁷ Conversely, the *Solomou* court focused its analysis on where the victim suffered harm, not the area from where the shots were fired.¹⁵⁸ Both cases involved the use of force at close range. A State deploying a lethally autonomous weapon could distinguish the facts and reasoning of both of these cases by arguing that it not only lacked the authority or control over the victim, but it also lacked effective control over both the place of deployment and where the harm occurred. Regarding the former, deploying a LAWS, without more, does not render that State in control of any external territory or individual. Regarding the latter, a LAWS' decision to use lethal force is not one over which a human exercised control. Taken further, a State could argue that an alleged IHR violation by a lethally autonomous weapon is not that State's extraterritorial act at all since no human is in the loop at any point from deployment to when the harm occurs that would allow the State to exercise control or authority over another territory or individual.

The *Issa* holding also is problematic regarding LAWS because it suggests that their use could escape legal review unless the defendant State had ground troops occupying the territory to create *de facto* authority.¹⁵⁹ In *Issa*, the issue was whether Turkish troops conducted operations in the area at the relevant time where the killings occurred.¹⁶⁰ Indeed, the court stated that, "The fate of the applicants' complaints in respect of the killing of their relatives depends on the prior establishment of that premise."¹⁶¹ A core purpose of LAWS,

¹⁵⁷ *Id.*

¹⁵⁸ *Solomou v. Turkey*, *supra* note 77, at ¶¶ 50-51.

¹⁵⁹ *Issa v. Turkey*, *supra* note 64, at ¶ 63.

¹⁶⁰ *Id.* at ¶ 55.

¹⁶¹ *Id.* at ¶ 76.

however, is to remove humans from real or potential combat operations in order to save lives and reduce costs, among other considerations. Under *Issa*, without such a presence, there would be no *de facto* authority and thus no jurisdiction. As one observer put it, “Applied in different circumstances, it could be taken to imply that the United Kingdom’s use of armed drones in Libya in 2011 or in Syria since 2015 would still escape legal review, unless the United Kingdom had ground troops occupying Libyan or Syrian territory such as to enjoy *de facto* authority.”¹⁶²

D. The Case Law’s High Evidentiary Threshold and LAWS’ Attribution Problem Make It More Difficult to Prove an IHR Violation

Another factor that pushes the pendulum towards extraterritorial IHR impunity is the high evidentiary threshold for proving violations.¹⁶³ *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 six miles away, were insufficient for the *Issa* Court to conclude that the men were harmed in Turkish custody. An unpiloted, unmarked stealth LAWS such as an autonomous drone that is capable of flying undetected nearly eight miles

¹⁶² Stuart Casey-Maslen, *Unmanned Weapons Systems and the Right to Life* in DRONES AND OTHER UNMANNED WEAPONS SYSTEMS UNDER INTERNATIONAL LAW 159, 165 (Casey-Maslen, Homayounnejad, Stauffer, Weizmann eds. 2018).

¹⁶³ Abdel-Monem, *supra* note 62, at 11.

high – an even greater distance than in *Issa* - 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 autonomous vehicles, there may be 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. Given the high evidentiary threshold required in *Issa* and the scant evidence a LAWS may leave behind, harmed States may have little or no recourse under the ECHR.

E. The State Attribution Problem: States are Unlikely to Self-Disclose When the Evidence is Inconclusive

It is also 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 lethal force against individuals....A lack of disclosure gives States a virtual and impermissible license to kill.¹⁶⁴

In the case of the United States, it took several years for the Obama administration to acknowledge that it was even operating a drone's program.¹⁶⁵

F. The Individual Accountability Problem: Numerous Individuals in LAWS' Creation and Implementation Chain Create Both Responsibility and Liability Gaps

The difficulty in determining individual accountability for LAWS strikes is yet another factor pushing the pendulum toward IHR impunity. An autonomous weapon is essentially a computer program responding to internal and external data. There is no human involvement during its extraterritorial mission, and more specifically, at the point at which it decides to use lethal force. The question then is who is legally accountable for the unlawful killing? The unmanned drone, at least has a pilot who launched the missile in a control room from afar, but not so with a pilotless autonomous weapon. Possible actors can come from various fields, including technology, military, manufacturing, and government, and these, in turn, can come from multiple States. LAWS can be

¹⁶⁴ Alston, *supra* note 6, at ¶¶ 87-88.

¹⁶⁵ Comments by John Brennan, President Obama's top counter-terrorism advisor, marked the first time a senior White House official spoke 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 Charlie Savage, *Obama's Top Counterterrorism Adviser Defends Drone Strikes*, N.Y. TIMES, Apr. 30, 2012.

designed, assembled, manufactured, and tested in several different countries, with component parts made in several more. As one computer scientist and robotics 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?”¹⁶⁶ If a piloted autonomous weapon attacked the wrong target, responsibility may lie with the pilot, intelligence officer, or sensor operator. However, LAWS are autonomous by definition and decide what is and is not a legitimate target. This creates a responsibility gap in determining who the culpable party is. Absent the imposition of strict liability, it also creates a liability gap since these individuals arguably are no longer in the loop of accountability.¹⁶⁷ As one expert put it:

¹⁶⁶ Hennigan, *supra* note 1.

¹⁶⁷ JOHN FORGE, CLOSING THE GAPS - LETHAL AUTONOMOUS WEAPONS AND DESIGNER RESPONSIBILITY 2 (Apr. 9, 2019), www.moralitymatters.net/on-weapons-research/closing-the-gaps-lethal-autonomous-weapons-and-designer-responsibility/. An instructive analogy is the use of cyberspace to cloak or falsify an attacker's identity during cyber warfare, thus rendering attribution and accountability difficult or impossible under international humanitarian law. This can make cyberspace an attractive combat zone and increase the number of cyber-attacks. *See also* International Committee of the Red Cross, *International Humanitarian Law and Cyber Operations During Conflict: ICRC Position Paper*, International Committee of the Red Cross 1, 8 (Nov. 2019), [icrc_ihl-and-cyber-operations-during-armed-conflicts.pdf](https://www.icrc.org/ihl-and-cyber-operations-during-armed-conflicts.pdf). “If the author of a cyber operation – and thus the link of the operation to an armed conflict – cannot be identified, it may be difficult to determine whether IHL [international humanitarian law] is even applicable to the operation. Attribution of cyber operations is also important to ensure that actors who violate international law, including IHL, can be held accountable. The perception that it will be easier to deny responsibility for such attacks may also weaken the taboo

Another major concern deals with the problem of accountability when autonomous weapons systems are deployed. Ethicist Robert Sparrow (2007) highlights this ethical issue by noting that a fundamental condition of international humanitarian law, or *jus in bello*, requires that someone must be able to be held responsible for civilian deaths. Any weapon or other means of war that makes it impossible to identify responsibility for the casualties it causes does not meet the requirements of *jus in bello*, and therefore should not be employed in war.

This issue arises because AI-equipped machines make decisions on their own, which makes it difficult to determine whether a flawed decision is due to flaws in the program or in the autonomous deliberations of the AI-equipped (so-called "smart") machines. This problem was highlighted when a driverless car violated the speed limits by moving too slowly on a highway, and it was unclear to whom the ticket should be issued (For more, see Etzioni and Etzioni 2016). In situations where a human being makes the decision to use force against a target, there is a clear chain of accountability, stretching from whoever actually "pulled the trigger" to the commander who gave the orders. In the case of [autonomous weapons systems], no such clarity exists. It is unclear who or what is to blame or bears liability." (emphasis added.)¹⁶⁸

against their use – and may make actors less scrupulous about using them in violation of international law.”

¹⁶⁸ AMITAI ETZIONI, HAPPINESS IS THE WRONG METRIC, 257 (2018). See also Neil Davison, *A Legal Perspective: Autonomous Weapon Systems Under International Humanitarian Law*, 30 UNODA OCCASIONAL PAPERS 5, 7 (Apr. 11, 2016). "The core legal obligations for a commander or operator in the use of weapon systems include the following: to ensure

LAWS exacerbates the individual accountability problem by blurring the lines among actors who create and deploy them. This results in both responsibility and liability gaps that can prevent accountability under IHR treaties.

distinction between military objectives and civilian objects, combatants and civilians, and active combatants and those hors de combat; to determine whether the attack may be expected to cause incidental civilian casualties and damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, as required by the rule of proportionality; and to cancel or suspend an attack if it becomes apparent that the target is not a military objective or is subject to special protection, or that the attack may be expected to violate the rule of proportionality, as required by the rules on precautions in attack. These IHL rules [of distinction, proportionality, and precautions in the attack] create obligations for human combatants in the use of weapons to carry out attacks, and it is combatants who are both responsible for respecting these rules, and who will be held accountable for any violations. *As for all obligations under international law, these legal obligations, and accountability for them, cannot be transferred to a machine, computer program or weapon system.*" (emphasis added.) See also Ted Piccone, *How Can International Law Regulate Autonomous Weapons?* BROOKINGS INST., Apr. 10, 2018 <https://www.brookings.edu/blog/order-from-chaos/2018/04/10/how-can-international-law-regulate-autonomous-weapons/>. "[T]hese highly automated systems *must have "meaningful human control" to comply with humanitarian legal requirements such as distinction, proportionality, and precautions against attacks on civilians.* Where should responsibility for errors of design and use lie in the spectrum between 1) the *software engineers* writing the code that tells a weapons system when and against whom to target an attack, 2) the *operators in the field* who carry out such attacks, and 3) the *commanders who supervise them*? How can testing and verification of increasingly autonomous weapons be handled in a way that will create enough transparency, and some level of confidence, to reach international agreements to avoid worst-case scenarios of mutual destruction?" (emphasis added.)

G. The Individual Accountability Problem is Compounded by LAWS Because Their Independent and Unpredictable Behavior Breaks the Causal Connection Between the Actor and the Act

Even if one contends that surely *someone* should be accountable, such as the LAWS' designer, no one by definition, including the designer, is capable of precisely predicting an autonomous machine's future behavior any more than the designer of a gun can predict how and under what circumstances another person will use it.¹⁶⁹ Victims' lawyers can initiate legal action against all conceivable defendants and let them or a court determine who is accountable. Doing so, however, may unfairly target innocent parties, cause significant political repercussions, and consume substantial resources. The lack of transparency and means for determining both State, and individual accountability for unlawful LAWS strikes, coupled with a high evidentiary bar, undoubtedly will make proving future extraterritorial violations of IHR norms exceedingly difficult.¹⁷⁰

¹⁶⁹ FORGE, *supra* note 167, citing Andreas Matthias, *The Responsibility Gap: Ascribing Responsibility for the Actions of Learning Automata*, 6 ETHICS AND INFO. TECH. 175 (2004).

¹⁷⁰ It may be difficult to hold individuals liable under international humanitarian and criminal law for other reasons: Programmers may lack the requisite intent or knowledge of how the autonomous weapon ultimately will be used, and commanders may not know the time and place of an attack. Davison, *supra* note 168, at 6. "Under IHL and international criminal law, [it may be] difficult to find individuals involved in the programming (development stage) and deployment (activation stage) of the weapon liable for serious violations of IHL Humans that have programmed or activated the weapon systems may not have the knowledge or intent required to be found liable....Programmers might not have knowledge of the concrete situations in which, at a later stage, the weapon system might be deployed

H. States' Commitment to Self-Regulation is Inconsequential Because it is Non-Binding and Fact-Dependent

Some countries, such as the United States, have promised to self-regulate by prohibiting their LAWS to strike and kill without human decision.¹⁷¹ But that is a non-binding and highly fact-sensitive commitment. Will these countries voluntarily stay the course and abide by that promise regardless of the circumstances? Despite a U.S. Defense Department directive against completely autonomous weapons, the United States is moving forward with developing its ATLAS program,

and commanders may not know the exact time and location where an attack would take place." *See also* ETZIONI, *supra* note 168, at 258. "[T]he proliferation of increasingly advanced technical systems based on self-learning and distributed control raises the question of whether the model of individual responsibility found in international criminal law (ICL) might pose conceptual challenges to regulating autonomous weapons systems (AWS) and war algorithms. At a general level, this is not a wholly new concern, as distributed systems have been used in relation to war for a long time. But the design, development, and operation of those systems might be increasingly difficult to square with the foundational tenet of ICL—that '[c]rimes against international law are committed by men, not by abstract entities'—as learning algorithms and architectures advance. In short, individual responsibility for international crimes under international law remains one of the vital accountability avenues in existence today, as do measures of remedy for state responsibility. Yet in practice responsibility along either avenue is unfortunately relatively rare." (emphasis added; citations omitted.)

¹⁷¹ U.S. Dep't of the Army, *supra* note 15. The revised announcement added the following statement: "All development and use of autonomous and semi-autonomous functions in weapon systems, including manned and unmanned platforms, remain subject to the guidelines in the Department of Defense (DoD) Directive 3000.09, which was updated in 2017. Nothing in this notice should be understood to represent a change in DoD policy towards autonomy in weapon systems. All uses of machine learning and artificial intelligence in this program will be evaluated to ensure that they are consistent with DoD legal and ethical standards."

causing considerable alarm, and forcing it once again, to reaffirm in writing its commitment against the application of total autonomy in weapons systems, design by issuing a revised industry day announcement for ATLAS in February 2019.¹⁷² Will those States that initially made this commitment against the use of LAWS remain steadfast if they themselves are attacked? If non-self-regulating States attack self-regulating States with LAWS, will the latter still refuse to use them against the former? And what of those States that do not agree to self-regulate and rogue “bad actor” States that follow no international norms, customs, or treaties? Unlike conventional, nuclear, biological, or chemical weapons, some autonomous systems such as a simple nano-drone can be constructed at low cost with readily available materials making them capable of being hacked and accessible to bad actors.¹⁷³

In summary, there are several ways in which lethally autonomous weapons add a unique twist to the legal analysis of whether a State is acting extraterritorially for purposes of establishing IHR accountability. Issues can arise in applying the reasoning and holdings in the case law to LAWS as in *Bankovic*, *Ilascu*, *Solomou*, *Andreou*, *Loizidou*, and others.

¹⁷² *Id.* The revised announcement added the following statement: “All development and use of autonomous and semi-autonomous functions in weapon systems, including manned and unmanned platforms, remain subject to the guidelines in the Department of Defense (DoD) Directive 3000.09, which was updated in 2017. Nothing in this notice should be understood to represent a change in DoD policy towards autonomy in weapon systems. All uses of machine learning and artificial intelligence in this program will be evaluated to ensure that they are consistent with DoD legal and ethical standards.”

¹⁷³ Future of Life Institute, *Why We Should Ban Lethal Autonomous Weapons* (2019), www.youtube.com/watch?v=LVwD-IZosJE.

Evidentiary issues can arise, first in proving the legal standard as in *Issa*, and second, in factually establishing both State and individual responsibility. The technology itself makes this burden of proof even more burdensome. The mere gratuitous promises of States not to use completely autonomous lethal weapons on the battlefield also means little without a meaningful enforcement mechanism.

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 under current IHR law. Attempting to reconcile these decisions with unmanned weapons attacks leads to various outcomes. Autonomous lethal weapons add yet another layer of complexity to the issue. The foregoing analysis suggests that States that employ unpiloted weapons may barely possess sufficient effective control over a territory to trigger IHR norms given current technological limitations. Poor transparency and accountability, a narrow geographic scope of the IHR treaties, case law inconsistencies, gratuitous but ineffective self-regulation, and a high evidentiary standard will make prevailing on IHR claims involving LAWS difficult at best. One hopes the Court will recognize, as it began to do following the *Bankovic* decision, that impunity for such acts transgresses the very heart of the treaties designed to protect basic human rights of all individuals within their jurisdiction. Doing so will help swing the pendulum back toward extraterritorial accountability for IHR violations in the use of LAWS.