US Drone Strikes in Pakistan and Yemen – German Responsibility under Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts

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Abbreviations

9/11	Terrorist attacks of 11 September 2001
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AFRICOM	Africa Command
AJIL	American Journal of International Law
Am J Comp L	American Journal of Comparative Law
AöR	Archiv des öffentlichen Rechts
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II)
APA	Administrative Procedure Act
APJEL	Asia Pacific Journal of Environmental Law
APTH	Draft Articles on Prevention of Transboundary Harm from Hazardous Activities
AQAP	Al-Qaeda in the Arabian Peninsula
AQIM	Al-Qaeda in the Lands of the Islamic Maghreb
AQIS	Al-Qaeda in the Indian Subcontinent
ARIO	Draft Articles on the Responsibility of International Organizations
Ariz St L J	Arizona State Law Journal
ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
AVR	Archiv des Völkerrechts
B U Intl LJ	Boston University International Law Journal
Basic Law	Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany)
BeckRS	Beck Rechtssache
BfV	Bundesamt für Verfassungsschutz (German Federal Office for the Protection of the Constitution)
BGBl	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BIJ	The Bureau of Investigative Journalism
BMVg	Bundesministerium der Verteidigung (German Federal Ministry of Defense)

BND	Bundesnachrichtendienst (German Federal Intelligence Service)
BT-Drs	Drucksache des deutschen Bundestages (German Parliament Document)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerwG	Bundesverwaltungsgericht (German Federal Administrative Court)
BYIL	British Yearbook of International Law
CCLEO	UN Code of Conduct for Law Enforcement Officials
CCPR	UN Human Rights Committee
CDM	Collateral Damage Estimation Methodology
CENTCOM	Central Command
CEP	Counter Extremism Project
CESCR	UN Committee on Economic, Social and Cultural Rights
Chinese JIL	Chinese Journal of International Law
CIA	Central Intelligence Agency
CJICL	Cambridge Journal of International and Comparative Law
Colum Hum Rts L Rev	Columbia Human Rights Law Review
Colum J Transnatl L	Columbia Journal of Transnational Law
Cornell L Rev	Cornell Law Review
CTTA	Counter Terrorist Trends and Analyses
DDoD	Department of Defense Directive
Denver J Intl L & Poly	Denver Journal of International Law and Policy
DGS	Distributed Ground System
DoD	Department of Defense
DoJ	US Department of Justice
DÖV	Die Öffentliche Verwaltung
DRC	Democratic Republic of the Congo
DVBl	Deutsches Verwaltungsblatt
ECCHR	European Center for Constitutional and Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECtHR Rules	Rules of Court of the European Court of Human Rights
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
EKIA	Enemy Killed in Action
EO	Executive Order
Ethics & Intl Aff	Ethics & International Affairs
FARDC	Forces armées de la République démocratique du Congo
FATA	Federally Administered Tribal Areas

FBI	Federal Bureau of Investigation
Geneva Conventions	Geneva Convention I–IV of 12 August 1949
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
Geo LJ	Georgetown Law Journal
German YB Intl L	German Yearbook of International Law
GTD	Global Terrorism Database
GYIL	German Yearbook of International Law
Harv Hum Rts J	Harvard Human Rights Journal
Harv Intl L J	Harvard International Law Journal
Harv Natl Sec J	Harvard National Security Journal
Hum Rts L Rev	Human Rights Law Review
IAC	International armed conflict
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IACtHR Rules	Rules of Procedure of the Inter-American Court of Human Rights
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IED	Improvised explosive device
IEP	Institute for Economics & Peace
IHL	International humanitarian law
IHRL	International human rights law
IHRL Rev	International Human Rights Law Review
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMU	Islamic Movement of Uzbekistan

Intl Aff	International Affairs
Intl Crim L Rev	International Criminal Law Review
Intl J Hum Rts	International Journal of Human Rights
Intl L Assn Rep Conf	International Law Association Reports of Conferences
Intl L F D Intl	International Law FORUM Du Droit International
Intl L Stud	International Law Studies
Intl Pol Socio	International Political Sociology
Intl Rev RC	International Review of the Red Cross
Intl Sec	International Security
IOLR	International Organizations Law Review
IPCC	Intergovernmental Panel on Climate Change
IRGC	Islamic Revolutionary Guard Corps
ISACC	Initiative for the Study of Asymmetric Conflict and Counterterrorism
ISIL	Islamic State in Iraq and the Levant (Da'esh)
IUSCT	Iran-US Claims Tribunal
J Conflict & Sec L	Journal of Conflict and Security Law
J Intl Hum Leg Stud	Journal of International Humanitarian Legal Studies
J Intl Peacekeeping	Journal of International Peacekeeping
J Use of Force & Intl L	Journal on the Use of Force and International Law
JCIJ	Journal of International Criminal Justice
jM	Juris Monatszeitschrift
JPR	Journal of Peace Research
JSOC	Joint Special Operations Command
JuS	Juristische Schulung
JZ	JuristenZeitung
LCIA	London Court of International Arbitration
Leg Issues J	Legal Issues Journal
LJIL	Leiden Journal of International Law
LPICT	Law and Practice of International Courts and Tribunals
MCM	US Manual of Court-Martial
Mich J Intl L	Michigan Journal of International Law
Mich L Rev	Michigan Law Review
Mil L & L War Rev	Military Law and Law of War Review
Minn L Rev	Minnesota Law Review
MMO	Mapping Militant Organizations
MONUC	UN Mission in the Democratic Republic of the Congo
MPIL	Max Planck Encyclopedias of International Law
NATO	North Atlantic Treaty Organization

NATO SOFA	NATO Status of Forces Agreement
NATO SOFA SA	Supplementary Agreement to the NATO Status of Forces Agreement
NESS	Necessary Element of a Sufficient Set
NIAC	Non-international armed conflict
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift
Notre Dame J L Ethics & Pub Poly	Notre Dame Journal of Law, Ethics & Public Policy
NQHR	Netherlands Quarterly of Human Rights
NSA Inquiry Committee	Deutscher Bundestag, 1. Untersuchungsausschuss der 18. Wahlperiode
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NYIL	Netherlands Yearbook of International Law
NYU J Intl L & Pol	New York University Journal of International Law & Politics
NZWehrr	Neue Zeitschrift für Wehrrecht
OJ	Official Journal of the European Union
OVG	Oberverwaltungsgericht (German Administrative Court of Appeal)
PCIJ	Permanent Court of International Justice
PPG	Presidential Policy Guideline
QIL	Questions of International Law
RBDI	Revue Belge de Droit International
RULAC	Rule of Law in Armed Conflicts
SATCOM	Satellite communications
Stud Conflict & Terrorism	Studies in Conflict & Terrorism
Tex Intl L J	Texas International Law Journal
UAV	Unmanned aerial vehicle
UFFLEO	UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
UKTS	UK Treaty Series
UN	United Nations
UN Charter	Charter of the United Nations
UNAMA	UN Assistance Mission in Afghanistan
UNCAT	UN Committee Against Torture
UNGA	UN General Assembly
UNHRC	UN Human Rights Council
UNIDIR	UN Institute for Disarmament Research
UNSC	UN Security Council
UNTS	UN Treaty Series
US	United States (of America)

Utrecht J Intl & Eur L	Utrecht Journal of International and European Law
Va J Intl L	Virginia Journal of International Law
Vanderbilt J Transnatl L	Vanderbilt Journal of Transnational Law
VG	Verwaltungsgericht (German Administrative Court)
Vienna Convention	Vienna Convention on the Law of Treaties
VwGO	Verwaltungsgerichtsordnung (German Code of Administrative Court Procedure)
Yale J Intl L	Yale Journal of International Law
Yale L J	Yale Law Journal
YIHL	Yearbook of International Humanitarian Law
ZEuS	Zeitschrift für Europarechtliche Studien

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United States Code Title 5 – Government Organization and Employees, 5 USC

— — Title 50 – War and National Defense, 50 USC

United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, Executive Order 13,732, 81 FR 44485

§ 1 Introduction

Nek Mohammad probably heard it before it struck.[1] A buzzing noise, *machay* (wasp) or *bangana* (thunderclap), how the native Pashtun use to call it.[2] Maybe he even saw it earlier in the day, a metallic bird circling high over his head in the sky of South Waziristan, Pakistan. In the middle of this inhospitable and barren region, consisting mostly of complex and rugged rock formations that go on for kilometre upon kilometre and where it is hard to find trees, rivers or even rain, it was probably an earlier satellite telephone call that had betrayed his location.[3] That summer evening of 17 July 2004, a United States (US) MQ-1 Predator – an armed unmanned aerial vehicle (UAV), more commonly known as drone –[4] launched an AGM-114 Hellfire missile at the house where Nek Mohammad, a Pakistani Taliban commander who had made himself a name fighting government-led troops in South Waziristan,[5] was having dinner with some of his soldiers.[6] He died in the very first drone strike on Pakistani soil, along with three to four other Taliban, two Uzbeks and two children.[7]

A. Why Drones are Different

Drones, although just the platform, have become synonymous with the policy, one that is targeted killings. Lacking an internationally recognized definition, targeted killings

[1] David Rohde and Mohammed Khan, 'The Reach of War: Militants; Ex-Fighter For Taliban Dies in Strike In Pakistan' *New York Times* (19 June 2004) <www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html> accessed 3 August 2019.

[2] Declan Walsh, 'Obama's enthusiasm for drone strikes takes heavy toll on Pakistan's tribesmen' *The Guardian* (7 October 2010) <www.theguardian.com/world/2010/oct/07/pakistan-drone-missile-obama-increased> accessed 31 July 2019; Avery Plaw, Matthew S Fricker and Carlos R Colon, *The Drone Debate* (Rowman & Littlefield 2016) 22.

[3] Iqbal Khattak, 'Nek killed in missile strike' *The Daily Times* (19 June 2004) <http://archive.is/Vn6tM> accessed 2 August 2019.

[4] For a definition of the term "UAV" see US Air Force, 'Air Force Instruction 16-401: Designating and Naming Defense Military Aerospace Vehicles' (2014) 16 <http://static.e-publishing.af.mil/production/1/af_a8/publication/afi16-401/afi16-401.pdf> accessed 2 August 2019.

[5] Ilyas M Khan, 'Profile of Nek Mohammad' *Dawn* (19 June 2004) <www.webcitation.org/query?url=http%3A%2F%2Fwww.dawn.com%2F2004%2F06%2F19%2Flatest.htm&date=2009-05-16> accessed 3 August 2019.

[6] Khattak, 'Nek' (n 3). An AGM-114 Hellfire is a laser guided anti-tank missile originally designed for combat helicopters. The explosion radius is 15-20 meters plus shrapnel. See Tom Harris, 'How Apache Helicopters Work' *HowStuffWorks* (2 April 2002) <https://science.howstuffworks.com/apache-helicopter2.htm> accessed 2 August 2019.

[7] Khattak, 'Nek' (n 3); BIJ, 'The Bush Years: Pakistan strikes 2004 – 2009: B1 – June 17 2004' <www.thebureauinvestigates.com/drone-war/data/the-bush-years-pakistan-strikes-2004-2009> accessed 2 August 2019.

revolve around the idea of the intentional assassination of an individual without due process.[8] It is by no means a new concept. The US Central Intelligence Agency (CIA) has in its history engaged in various attempts to dispose of political leaders who had lost Washington's trust, most famously Cuban dictator Fidel Castro.[9] Nor are targeted killings unique to the US.[10] In 1999, Russia reportedly deployed "seek and destroy groups" to hunt down certain individuals in Chechenia.[11] And in October 2019, Saudi Arabian dissident Jamal Khashoggi was killed by a 15-men hit squad in the Saudi Consulate in Istanbul, alledgedly with approval from the Saudi Crown Prince himself.[12]

However, drones 'significantly [reduce] many of the inherent political, diplomatic, and military risks of targeted killings'[13] in foreign countries. Compared to a small commando raid in a remote location, drone operations are easier to execute, more likely to escape public scrutiny and do not put any service members in danger.[14] Nor do they raise the same invasionist concerns among the local population as when human soldiers were to be discovered on foreign territory.[15] Moreover, when compared to an air strike by traditional aircraft, their lower flight speed enables them to hover over an area

[8] Various definitions are referenced by Gregory S McNeal, 'Targeted Killing and Accountability' (2014) 102 *Geo LJ* 681, 684 and fn 2.

[9] Steve Coll, 'Remote Control' *The New Yorker* (29 April 2013) <www.newyorker.com/magazine/2013/05/06/remote-control> accessed 2 August 2019. In 2008, the CIA helped Mossad, Israel's foreign intelligence agency, to kill Hezbollah commander Imad Mughniyah by placing and detonating a bomb in his SUV, see Adam Goldman and Ellen Nakashima, 'CIA and Mossad killed senior Hezbollah figure in car bombing' *Washington Post* (30 January 2015) <www.washingtonpost.com/world/national-security/cia-and-mossad-killed-senior-hezbollah-figure-in-car-bombing/2015/01/30/ebb88682-968a-11e4-8005-1924ede3e54a_story.html> accessed 3 August 2019.

[10] Helen Duffy, *The War on Terror and the Framework of International Law* (2nd edn, CUP 2015) 428.

[11] UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Doc A/HRC/14/24/Add.6 para 23 (Alston Report).

[12] idem, 'Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi' (19 June 2019) UN Doc A/HRC/41/CRP.1 paras 89-98.

[13] Micah Zenko, *Reforming U.S. Drone Strike Policies* (Council on Foreign Relations Press 2013) 8.

[14] UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' (13 September 2013) UN Doc A/68/382 para 18 (Heyns Report 2013); Mark Bowden, 'The Killing Machines: How to Think about Drones' *The Atlantic* (September 2013) <www.theatlantic.com/magazine/archive/2013/09/the-killing-machines-how-to-think-about-drones/309434/> accessed 2 August 2019; James DeShaw Rae, *Analyzing the Drone Debates: Targeted Killing, Remote Warfare, and Military Technology* (Palgrave Macmillan 2014) 24 *et seq*, who notes that the 2011 Navy Seal attack on Osama bin Laden's compound in Abbottabad, Pakistan, was trained and prepared for months, but even so a Black Hawk helicopter was lost.

[15] Rosa Brooks, 'The Constitutional and Counterterrorism Implications of Targeted Killing' (Testimony before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, Washington DC, 23 April 2013) 8 <https://scholarship.law.georgetown.edu/cong/114/> accessed 2 August 2019; DeShaw Rae (n 14) 28; Plaw, Fricker and Colon (n 2) 148 *et seq*, 332 *et seq*.

for prolonged areas of time, reaching mission times that are up to ten times longer.[16] And whereas remotely engaging a target by programming and firing a cruise missile from the nearest platform would need hours to arrive, giving the objective plenty of time to move from the designated spot,[17] a drone can take lethal action without meaningful delay.[18]

This does not mean that drones are the proverbial silver bullet of modern warfare.[19] Their relatively low flight speed makes them vulnerable to even the most basic forms of air defence,[20] and their operation requires up to twice as many people as what is needed for regular fighter aircraft.[21] Nevertheless, their undeniable appeal quickly made them the US weapon of choice in its post 9/11 counterterrorism efforts. Following the assassination of Nek Mohammad, the US soon started to target a number of militant organizations all over Africa and Central Asia, including the Tehrik-i-Taliban Pakistan (TTP), Al-Qaeda in the Arabian Peninsula (AQAP) in Yemen, Al-Shabaab in Somalia, Boko Haram in Nigeria, Da'esh, also known as the Islamic State in Iraq and the Levant (ISIL), and Jabhat Fatah al-Sham (formerly the Nusra Front) in Syria.[22] And while the

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[16] In case of the MQ-9 Reaper drone, flight time is up to 42 hours when using two external fuel tanks. See MQ-9 Reaper' (*Global Security*) <www.globalsecurity.org/military/systems/aircraft/mq-9.htm> accessed 3 January 2020; Winslow Wheeler, '2. The MQ-9's Cost and Performance' *TIME* (28 February 2012) <http://nation.time.com/2012/02/28/2-the-mq-9s-cost-and-performance> accessed 3 January 2020, comparing the MQ-9 Reaper to the A-10 "Warthog" fighter jet.

[17] Richard Whittle, *Predator: The Secret Origins of the Drone Revolution* (Henry Holt 2015) 161; Plaw, Fricker and Colon (n 2) 20.

[18] DeShaw Rae (n 14) 23, 32; Severin Löffler, *Militärische und zivile Flugroboter: Ausgewählte strafrechtliche Problemfelder beim Einsatz von Kampf- und Überwachungsdrohnen* (Nomos 2017) 68. For example, the MQ-9 Reaper drone can carry up to four AGM-114 Hellfire missiles alongside other bombs, see US Air Force, 'Fact Sheets: MQ-9 Reaper' (23 September 2015) <www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/> accessed 3 January 2020.

[19] See Michael C Horowitz, Sarah E Kreps and Matthew Fuhrmann, 'Separating Fact from Fiction in the Debate over Drone Proliferation' (2016) 41 *Intl Sec* 7, 17 *et seqq*.

[20] Micah Zenko, '10 Things You Didn't Know About Drones' *Foreign Policy* (27 February 2012) <http://foreignpolicy.com/2012/02/27/10-things-you-didnt-know-about-drones/> accessed 3 January 2020; Fred Kaplan, 'The World as Free-Fire Zone' *MIT Technology Review* (7 June 2013) <www.technologyreview.com/s/515806/the-world-as-free-fire-zone/> accessed 20 September 2019; Plaw, Fricker and Colon (n 2) 18, 25-27.

[21] Zenko, '10 Things' (n 20), comparing the MQ-9 Reaper to an F-16 fighter jet; Kaplan (n 20); Plaw, Fricker and Colon (n 2) 25.

[22] Eric Schmitt and David E Sanger, 'As U.S. Focuses on ISIS and the Taliban, Al Qaeda Re-emerges' *New York Times* (30 December 2015) <www.nytimes.com/2015/12/30/us/politics/as-us-focuses-on-isis-and-the-taliban-al-qaeda-re-emerges.html> accessed 16 September 2018; Adam Entous, 'Obama directs Pentagon to target al-Qaeda affiliate in Syria, one of the most formidable forces fighting Assad' *Washington Post* (10 November 2016) <www.washingtonpost.com/world/national-security/obama-directs-pentagon-to-target-al-qaeda-affiliate-in-syria-one-of-the-most-formidable-forces-fighting-assad/2016/11/10/cf69839a-a51b-11e6-8042-f4d111c862d1_story.html> accessed 2 January 2020; Helen Cooper and Eric Schmitt, 'Niger Approves Armed U.S. Drone Flights, Expanding Pentagon's Role in Africa' *New York Time*s (30 November 2017) <www.nytimes.com/2017/11/30/us/politics/pentagon-niger-

US' targeted killing programme is certainly the most expansive, other States have followed suit. Today, around 40 countries possess, or are in the process of procuring, armed drones, including China, Israel, Turkey, the United Kingdom (UK) and the Federal Republic of Germany.[23] Israel, for example, has used its own Heron drones to strike Palestinian militants in the Gaza Strip for years.[24] Turkey reportedly used drones against the Kurdistan Workers' Party (PKK) domestically and against other Kurdish militants in Syria.[25] Pakistan itself has used drone strikes to combat the TTP within its own borders.[26] In fact, even some non-State actors like the Palestinian group Hamas or the Yemeni al-Huthi seem to be in possession of military-grade UAV.[27] Suffice to say that today, 95 per cent of all State-sponsored targeted killings are carried out by drones, and it is unlikely that this will change anytime soon.[28]

B. Targeted Killings and Complicity

Like most cross-border operations, the war on terror is not an individual effort of the US, but a joint enterprise involving widespread support and cooperation among multiple States. Assistance has ranged from open support in military operations to more secret involvement in the detention, interrogation and prosecution of terrorist suspects, the provision of weapons for counterinsurgency operations, and the participation in massive

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drones.html> accessed 4 June 2021; Joe Penney and others, 'C.I.A. Drone Mission, Curtailed by Obama, Is Expanded in Africa Under Trump' *New York Times* (9 September 2018) <www.nytimes.com/2018/09/09/world/africa/cia-drones-africa-military.html> accessed 13 October 2019.

[23] 'Who Has What: Countries with Armed Drones' (*New America Foundation*) <www.newamerica.org/international-security/reports/world-drones/who-has-what-countries-with-armed-drones/> accessed 20 April 2021.

[24] eg Scott Wilson, 'In Gaza, lives shaped by drones' *Washington Post* (3 December 2011) <www.washingtonpost.com/world/national-security/in-gaza-lives-shaped-by-drones/2011/11/30/gIQAjaP6OO_story.html> accessed 20 April 2021. For a summary of Israeli drone strikes see Plaw, Fricker and Colon (n 2) 307-311.

[25] Dan Sabbagh, 'Killer drones: how many are there and who do they target?' *The Guardian* (18 November 2019) <www.theguardian.com/news/2019/nov/18/killer-drones-how-many-uav-predator-reaper> accessed 4 June 2021.

[26] Usman Ansari, 'Pakistan Surprises Many With First Use of Armed Drone' *Defense News* (8 September 2015) <www.defensenews.com/air/2015/09/08/pakistan-surprises-many-with-first-use-of-armed-drone/> accessed 4 June 2021.

[27] See 'Non-State Actors with Drone Capabilities' (*New America Foundation*) <www.newamerica.org/international-security/reports/world-drones/non-state-actors-with-drone-capabilities/> accessed 20 April 2021; UNHRC, 'Use of armed drones for targeted killings – Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnès Callamard' (15 August 2020) UN Doc A/HRC/44/38 para 9 (Callamard Report).

[28] Zenko, *Reforming* (n 13) 8; DeShaw Rae (n 14) 14.

surveillance programmes and inter-State intelligence sharing.[29] For example, when the US invaded Iraq in 2003, it received widespread support from a coalition of 47 States,[30] including from the Federal Republic of Germany.[31] Another example is the European Court of Human Rights' (ECtHR) famous *El-Masri* case. It revolved around terrorist suspect Khaled el-Masri, who was abducted by the former Yugoslav Republic of Macedonia (today North Macedonia), and, after having been handed over to the CIA and transferred to a so-called black site in Afghanistan, mistreated for months.[32] Finally, and probably most famously, many of the terrorist suspects captured in the aftermath of 9/11 were detained and mistreated at Guantanamo Bay, a naval base located in Cuba and leased to the US by the Cuban government.[33]

Targeted killings are no exception. The US, Israel and China have supplied a wide range of countries that are unable to develop their own military-grade UAV with their drones.[34] For example, Wing Loong drones of Chinese origin are used by Nigeria, Saudi Arabia and Egypt.[35] The US has sold its MQ-1B Predator and MQ-9 Reaper drones to the UK, Italy and France.[36] And in June 2018, the Parliament of the Federal Republic of Germany (*Bundestag*) approved a deal to lease (unarmed) Heron TP drones from Israel.[37] However, where these drones are used to commit an internationally wrongful act, eg by intentionally targeting a civilian, does the US, China or Israel incur responsibility for having furnished the weapon used in the act?

This is the purview of State responsibility for complicity. In fact, questions of complicit responsibility are particularly pressing with US targeted killings, mainly for two reasons. First, the US drone programme 'relies heavily on assistance from many

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[29] Duffy (n 10) 105.

[30] Helmut P Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 1 *et seq*.

[31] German troops had participated in reconnaissance flights for the US and the UK, see BVerwG, Judgement of 21 June 2005 (2 WD 12/04) E 127, 302.

[32] See ECtHR, *El-Masri v Former Yugoslav Republic of Macedonia* [2012] ECHR 2067.

[33] The Cuban government retains 'ultimate sovereignty' over the territory, see Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval stations (concluded 23 February 1903), art 3. See also Scott Packard, 'How Guantanamo Bay Became the Place the U.S. Keeps Detainees' *The Atlantic* (4 September 2013) <www.theatlantic.com/national/archive/2013/09/how-guantanamo-bay-became-the-place-the-us-keeps-detainees/279308/> accessed 4 June 2021.

[34] Dan Gettinger, 'The Drone Databook' (Center for the Study of the Drone at Bard College, 2019) IX *et seq* <https://dronecenter.bard.edu/files/2019/10/CSD-Drone-Databook-Web.pdf> accessed 4 June 2021.

[35] Sabbagh (n 25); 'Who Has What' (*New America Foundation*) (n 23).

[36] ibid.

[37] Christian Thiels, 'Bundeswehr bekommt waffenfähige Drohnen' *Tagesschau* (13 June 2018) <www.tagesschau.de/inland/bundeswehr-drohnen-heron-101.html> accessed 4 June 2021.

States, including European States'.[38] The UK, Italy and the Federal Republic of Germany, in particular, have each provided the US with intelligence and their territory hosts US military bases which allegedly provide critical infrastructure for drone operations.[39] Secondly, although the US government insists that its actions are lawful both under domestic and international law,[40] a host of legal scholars, UN Special Rapporteurs, study groups and international organizations have questioned whether the current practice of US targeted killings inside and outside conventional battlefields complies with the applicable law.[41]

For the longest time, however, international law turned a blind eye to the involvement of other States in the conduct of the one caught red handed.[42] Responsibility for complicity was considered to be a natural element of domestic criminal law, not of international law. To hold a State accountable for its participation in the wrongs of another

[38] Amnesty International, 'Deadly Assistance: The Role of European States in US Drone Strikes' (2018) 2 <www.amnesty.org/download/Documents/ACT3081512018ENGLISH.PDF> accessed 2 August 2019.

[39] Srdjan Cvijic and Lisa Klingenberg, 'Armed Drones Policy in the EU: The Growing Need for Clarity' in ECCHR (ed), *Litigating Drone Strikes: Challenging the Global Network of Remote Killing* (ECCHR 2017) 40-45; Amnesty International, 'Deadly Assistance' (n 38) 36 *et seqq*. In detail see § 2.

[40] See, for example, the public statements made by John O Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy' (Speech at Woodrow Wilson Center, Washington DC, 30 April 2012) <www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> accessed 2 August 2019, and by US President Barack Obama, 'Speech at National Defense University – full text' *The Guardian* (23 May 2013) <www.theguardian.com/world/2013/may/23/obama-drones-guantanamo-speech-text> accessed 2 August 2019. Concurring Kenneth Anderson, 'Predators Over Pakistan' *Washington Examiner* (8 March 2010) <www.washingtonexaminer.com/weekly-standard/predators-over-pakistan> accessed 4 August 2019.

[41] eg Alston Report (n 11) paras 68, 85; Mary E O'Connell, 'Lawful Use of Combat Drones' (Testimony Before the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform on the Legality of Unmanned Targeting, Washington DC, 28 April 2010) 1 <https://fas.org/irp/congress/2010_hr/042810oconnell.pdf> accessed 8 September 2019; James Cavallaro, Stephan Sonnenberg and Sarah Knuckey, 'Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan' (International Human Rights and Conflict Resolution Clinic, Stanford Law School; Global Justice Clinic, NYU School of Law, 2012) 113; Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare* (European Union 2013) 34-36; UNGA, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson' (18 September 2013) UN Doc A/68/389 para 60 (Emmerson Report 2013); CCPR, 'Concluding observations on the fourth periodic report of the United States of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4 para 9. See also Sherwood Ross, 'Obama Drone Campaign "Verges on Genocide", Legal Authority Says' *Global Research* (16 February 2014) <www.globalresearch.ca/obama-drone-campaign-verges-on-genocide-legal-authority-says/5369027> accessed 3 August 2019, quoting Francis Boyle ('[the] murderous drone campaign (…) [is] a crime against humanity that verges on genocide').

[42] Vaughan Lowe, 'Responsibility for the Conduct of Other States' (2002) 101 *Kokusaihō gaikō zasshi (Journal of International Law and Diplomacy)* 1, 13.

State was, as Roberto Ago put it in 1931, 'inconceivable'.[43] As a result, '[S]tates were seemingly able to do virtually anything in their power to facilitate mayhem in another country, yet avoid any responsibility under international law for these actions on the basis that they themselves [did] not actually pull the trigger.'[44]

Thus, when in 1953 the United Nations (UN) mandated the International Law Commission (ILC) to codify the principles of international law governing State responsibility,[45] it was not without surprise that Ago himself, now Special Rapporteur on the topic, proposed to include a provision titled '[c]omplicity of a State in the internationally wrongful act of another State'.[46] For Ago, 'whatever the situation may have been formerly',[47] he now considered that it should be firmly established in international law that a State which helps another State to commit an internationally wrongful act should be held responsible.[48] Although his proposal subsequently underwent significant modifications – rather formally, the term "complicity" was deleted to avoid confusions with domestic criminal law –,[49] the notion that a State which assists another State in the commission of an internationally wrongful act should be held responsible remained firmly anchored in the ILC's work.

In 2001 and after almost 50 years of work, the ILC finally adopted its Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[50]

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[43] Roberto Ago, 'Le délit international' (1939) 68 *Recueil des Cours* 415, 523 (this author's translation). See also Eckart Klein, 'Beihilfe zum Völkerrechtsdelikt' in Ingo von Münch (ed), *Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981* (de Gruyter 1981) 425 *et seq*; Aust, *Complicity* (n 30) 12, but cf p 15.

[44] Mark Gibney, Katarina Tomaševski and Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harv Hum Rts J* 267, 292.

[45] See UNGA, 'Resolution 799(VIII) – Request for the codification of the principles of international law governing State responsibility' (7 December 1953) UN Doc A/RES/799(VIII).

[46] Roberto Ago, 'Seventh report on State responsibility' in ILC, *Yearbook of the International Law Commission 1978*, vol 2 pt 1 (UN 1980) 31, 53-60.

[47] ibid 59 para 74 (footnote omitted).

[48] Then draft article 25 read: 'The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State constitutes an internationally wrongful act of the State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful'.

[49] See Klein (n 43) 434, 436 *et seq* and the discussions in ILC, *Yearbook of the International Law Commission 1978*, vol 1 (UN 1979) 223-241.

[50] For the full text see ILC, 'Report of the Commission to the General Assembly on the work of its fifty-third session' in idem, *Yearbook of the International Law Commission 2001*, vol 2 pt 2 (UN 2007) 26 *et seqq* and the general commentary thereto at ps 31 *et seqq* (ARSIWA General Commentary).

Ago's original proposal had become what is now article 16 of the ARSIWA ('Aid or assistance in the commission of an internationally wrongful act'), which reads as follows:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.

C. Scope of This Study

This study seeks to examine whether the Federal Republic of Germany has incurred international responsibility under article 16 of the ARSIWA for aiding or assisting US targeted killings specifically in Pakistan and Yemen, which, for the longest time, have been the absolute focus of US drone strikes. While the *Bundesregierung* (German Federal Government) asserts that none of its activities incur international complicit responsibility,[51] Andreas Schüller of the Berlin-based European Center for Constitutional and Human Rights (ECCHR) contends that Germany 'knowingly and decisively assists a US practice which violates international law'.[52] Similarly, Hans-Christian Ströbele, a prominent member of the German political party *Bündnis 90/Die Grünen*, notes: 'If German official institutions permit [targeted killings with drones in countries which are not at war with Germany] and do not stop these actions, they become partly responsible'.[53] And Amnesty International cautions that '[g]iven the well-known and serious concerns regarding the US lethal drone programme's compliance with

[51] See OVG NRW, Judgement of 19 March 2019 (4 A 1361/15) NJW 2019, 1898 [34] – juris; Deutscher Bundestag, 'Stenografischer Bericht der 208. Sitzung' (14 December 2016) Plenarprotokoll 18/208, 20808 (Statement of Maria Böhmer); 'Neubau eines US-Drohnenrelais in Sigonella und Abbau der baugleichen Anlage in Ramstein' (24 May 2018) BT-Drs 19/2318, 5. Concurring Deutscher Bundestag (Wissenschaftliche Dienste), 'Zur Rolle des Militärstützpunktes Ramstein im Zusammenhang mit US-amerikanischen Drohneneinsätzen: Rechtsfragen und Entwicklungen' (15 December 2016) WD 2 – 3000 – 149/16, 13.

[52] Markus Bickel, '"Deutschland verstösst gegen das Völkerrecht"' *Amnesty International* (Interview with Andreas Schüller, 5 February 2018) <www.amnesty.de/informieren/amnesty-journal/deutschland-deutschland-verstoesst-gegen-das-voelkerrecht> accessed 4 August 2019 (this author's translation). Similar Jennifer Gibson, 'The US's [sic] Covert Drone War and the Search for Answers: Turning to European Courts for Accountability' in ECCHR (ed), *Litigating Drone Strikes* (n 39) 104.

[53] Quoted by Norman Solomon, 'The Most Important US Air Force Base You've Never Heard Of' *The Nation* (7 July 2016) <www.thenation.com/article/archive/the-most-important-us-air-force-base-youve-never-heard-of/> accessed 21 March 2020.

international law, providing (…) support to US strikes could mean that (…) Germany (…) [is] responsible for assisting in potentially unlawful US drone operations'.[54] However, despite these claims, the question whether the Federal Republic of Germany might have incurred international complicit responsibility has not yet received deeper academic treatment.[55] This study intends to close that gap. It seeks to identify the specific content of the rules on State complicity as enunciated in article 16 and purports to assess whether these requirements are satisfied in the present case.[56]

For that purpose, Chapters § 2 and § 3 shall first lay the factual ground for an application of those rules *in concreto*. They will identify the different ways in which the Federal Republic of Germany has been involved in US targeted killings, and will provide a brief overview of US counterterrorism operations in Pakistan and Yemen, including the political, economic and social context that has allowed extremist militancy to rise and flourish in these countries in the first place. Chapter § 4 will then make some general remarks on the practical significance of article 16 before turning to its specific requirements in Chapters § 5 to § 8. In fact, despite the ILC's "codification" of the international law prohibition on complicity in article 16, much about its specific content remains unclear. For example, it is not immediately apparent what exactly constitutes aid or assistance or what 'knowledge of the circumstances of the internationally wrongful act' is supposed to mean. And even though the ILC adopted a general commentary specifically to help with the application of the ARSIWA, it has sometimes only added to the confusion rather than provided clarity. Hence, the analysis will be effected in two steps. First, this study aims to interpret the law by drawing upon the jurisprudence of international adjudicatory bodies, in particular of the International Court of Justice (ICJ), and scholarly works. Secondly, it purports to apply these rules to the different ways Germany has been involved in the US' counterterrorism efforts. As will be seen throughout this study, the uncertainty surrounding the interpretation of article 16 and the general opacity surrounding US drone strikes makes finding complicit responsibility an

[54] Amnesty International, 'Deadly Assistance' (n 38) 76.

[55] According to an online survey conducted by the international research data and analytics group *YouGov* in April 2015, more than two thirds of those interviewed found it "alarming" that Ramstein Air Base plays an essential role in US drone strikes. See Matthias Schmidt, 'Knappe Mehrheit für deutsche Kampfdrohnen' *YouGov* (29 April 2015) <https://yougov.de/news/2015/04/29/knappe-mehrheit-fur-deutsche-kampfdrohnen/> accessed 23 March 2020.

[56] This study will use the term "complicity" to refer to the act of providing aid or assistance within the meaning of article 16 of the ARSIWA; the term "accomplice" shall be understood accordingly.

extremely complex and challenging task. The main findings of this study shall be then summarized in Chapter § 9.

One final clarification is called for before turning to examine whether the Federal Republic of Germany has incurred international responsibility under article 16. The present author does not dispute that beyond the ARSIWA, international law may provide for other rules which, whether more specific or more general, might allow for holding Germany responsible for its involvement in US counterterrorism activities.[57] This study, however, is about article 16. Accordingly, it will address other rules of international law only to the extent that they are relevant for the application of the general framework of State responsibility for complicity.

§ 2 German Involvement in Targeted Killings

German support for US counterterrorism operations has taken two different forms. First, both the *Bundesamt für Verfassungsschutz* (German Federal Office for the Protection of the Constitution; BfV) and the *Bundesnachrichtendienst* (German Federal Intelligence Service; BND) have provided its US counterparts with tens or possibly even hundreds of thousands of datasets,[58] including on any German citizens who tried to join an armed jihadi militia abroad.[59] Whenever information on a particular individual was shared with the US, his cell phone number had also been included in the dataset.[60] This so-called cell phone metadata has become one of the US' biggest assets in combating terrorism. When hunting for alleged terrorists that were previously placed on a kill list,[61] drones do not look for certain individuals in the way one would look for the familiar face of a friend in

[57] eg Maria Monnheimer and Stefan Schäferling, 'Drohnenangriffe und menschenrechtliche Sorgfaltspflichten – Der Fall Ramstein unter Berücksichtigung von EMRK und IPbpR' (2021) 59 *AVR* 352, who purport to assess German responsibility under an international principle of due diligence. See also the examples provided in § 4.

[58] See Christian Fuchs, John Goetz and Frederik Obermaier, 'Verfassungsschutz beliefert NSA' *Süddeutsche Zeitung* (13 September 2013) <www.sueddeutsche.de/politik/spionage-in-deutschland-verfassungsschutz-beliefert-nsa-1.1770672> accessed 2 May 2021, alleging that in 2012, the BfV alone provided almost 1,000 datasets to the NSA.

[59] See NSA Inquiry Committee, 'Beschlussempfehlung und Bericht' (23 June 2017) BT-Drs 18/12850, 1136-1144, 1145-1150 (NSA Inquiry Committee Report).

[60] NSA Inquiry Committee, 'Stenografisches Protokoll der 100. Sitzung' (2 June 2016) 74-76 (Testimony of Henrik Isselburg) <http://dipbt.bundestag.de/dip21/btd/18/CD12850/D_I_Stenografische_Protokolle/Protokoll_100_I.pdf> accessed 15 December 2021. See also Deutscher Bundestag, 'Gezielte Tötungen durch US-Drohnen und Aktivitäten sowie die Verwicklung deutscher Behörden' (6 May 2013) BT-Drs 17/13381, 6.

[61] How kill lists are made is explained by McNeal (n 8) 701-729.

the mall. Instead, they look for the SIM card he is thought to possess.[62] Equipped with an IMSI-catcher called Gilgamesh,[63] a drone is able to pinpoint the location of a particular handset using its cell phone number alone.[64] Once in sight, the drone uses its cameras to make sure the objective is not lost. And even though the German Federal Government assured that none of the information shared with the US could directly be used for the exact localization of an individual,[65] neither the BfV nor the BND seem to have been aware of Gilgamesh's functionality.[66]

Secondly, in 2015, US whistle-blower blog *The Intercept* alleged that Germany is harbouring nothing less than the 'heart of America's drone program'.[67] Located in the rural area surrounding the city of Kaiserslautern lies Ramstein Air Base, a US military base, headquarter of the US Air Forces in Europe and the largest American community outside of the US.[68] Equipped with '40 communication systems, 553 workstations, 1,500 computers, 1,700 monitors, 22,000 connections, and enough fiber optics to stretch from [Ramstein] to the Louvre in Paris',[69] Ramstein Air Base has publicly been described

[62] Jeremy Scahill and Glenn Greenwald, 'Death by Metadata' in Jeremy Scahill (ed), *The Assassination Complex* (Simon & Schuster 2016) 96 *et seq*.

[63] See 'The Secret Surveillance Catalogue: Gilgamesh' (*The Intercept*) <https://theintercept.com/surveillance-catalogue/gilgamesh/> accessed 2 August 2019; NSA Inquiry Committee, 'Stenografisches Protokoll der 67. Sitzung – Teil 1' (15 October 2015) 38 (Testimony of Brandon Bryant) <https://cdn.netzpolitik.org/wp-upload/2017/09/NSAUA-Abschlussbericht-Dokumente/D_I_Stenografische_Protokolle/Protokoll%2067%20I,%20Teil%201.pdf> accessed 22 January 2020.

[64] The process is explained in detail in the expert report drawn up for the German Parliament, see Hannes Federrath, 'Darstellung der Möglichkeiten, mithilfe von – ggf. auch personenbezogenen – Daten eine Lokalisierung bzw. Ortung von Personen durchzuführen' (19 September 2016) MAT A SV-14/2, 15-17 <http://dipbt.bundestag.de/doc/btd/18/CD12850/D_II_Sachverstaendigengutachten/20%20Gutachten%20Dr.%20Federrath.pdf> accessed 7 September 2019.

[65] Deutscher Bundestag, BT-Drs 17/13381 (n 60) 6.

[66] See the testimonies made before the NSA Inquiry Committee, eg 'Stenografisches Protokoll der 96. Sitzung' (28 April 2016) 121 (Testimony of Klaus Rogner) <http://dipbt.bundestag.de/dip21/btd/18/CD12850/D_I_Stenografische_Protokolle/Protokoll%2096%20I.pdf> accessed 22 January 2020; '100. Sitzung' (n 60) 74 (Testimony of Henrik Isselburg), 146 (Testimony of Dieter Romann) <http://dipbt.bundestag.de/dip21/btd/18/CD12850/D_I_Stenografische_Protokolle/Protokoll%20100%20I.pdf> accessed 21 January 2020. See also the summary in NSA Inquiry Committee Report (n 59) 1122-1126.

[67] Jeremy Scahill, 'Germany Is the Tell-Tale Heart of America's Drone War' *The Intercept* (17 April 2015) <https://theintercept.com/2015/04/17/ramstein/> accessed 2 August 2019.

[68] US Air Force, 'Where is Ramstein?' (27 March 2017) <www.ramstein.af.mil/About/Fact-Sheets/Display/Article/303603/where-is-ramstein/> accessed 21 March 2020.

[69] US Air Force, '603rd opens doors to new AO' (13 October 2011) <www.ramstein.af.mil/News/Article-Display/Article/304313/603rd-opens-doors-to-new-aoc/> accessed 22 March 2020.

as a 'power-projection platform'[70] and serves the transport needs of the US' war efforts in many countries, including in Iraq and in Syria.[71] Reportedly, it has even been used to secretly deliver weapons to Syrian rebel groups in their struggle against Syrian president Baschar al-Assad.[72] And with US drone operations, Ramstein's role is owed primarily to its geostrategic location. In order to connect a US Air Force or CIA drone operator in the US with his drone, the US transmits data through a transatlantic fibre cable to Ramstein Air Base.[73] At Ramstein, a satellite communications (SATCOM) relay station, presumably constructed in late 2013, then bounces the data off a satellite to the drone.[74] What may seem unnecessarily complicated at first is actually an ingenious solution to the geographical and technical limitations of carrying out targeted killings in a country half a world away. Because of the curvature of the earth, there is no single satellite that could directly connect the US with a drone hovering over Pakistan or Yemen. Using a network of several satellites is possible, but the delay in communications caused by signal travel time (latency) would make it practically useless.[75] Ramstein Air Base, however, is located

[70] US Air Force, '86th Airlift Wing' (14 January 2020) <www.ramstein.af.mil/About/Fact-Sheets/Display/Article/303604/86th-airlift-wing/> accessed 21 March 2020.

[71] Solomon (n 53).

[72] Frederik Obermaier and Paul-Anton Krüger, 'Heikle Fracht aus Ramstein' *Süddeutsche Zeitung* (12 September 2017) <www.sueddeutsche.de/politik/us-waffenlieferungen-heikle-fracht-aus-ramstein-1.3663289-0> accessed 21 March 2020.

[73] Pentagon lawyers feared that firing a missile off a drone that was directly controlled from Ramstein Air Base would require prior German approval, which was considered politically impossible. See Whittle (n 17) 208-212.

[74] Illustrative Scahill, 'Tell-Tale Heart' (n 67); Matthias Bartsch and others, 'Der Krieg via Ramstein' *Der Spiegel* (17 April 2015) <www.spiegel.de/politik/deutschland/ramstein-air-base-us-drohneneinsaetze-aus-deutschland-gesteuert-a-1029264.html> accessed 2 August 2019; NSA Inquiry Committee, '67. Sitzung – Teil 1' (n 63) 96 *et seq*, 111 (Testimony of Brandon Bryant). See also OVG NRW (n 51) [260] – juris. Satellite communications were seemingly conducted via Ramstein even before that date. According to Richard Whittle, in August 2000 a so-called transportable medium earth terminal was dismantled from Langley Air Force Base in south Virginia, US, and secretly set up at Ramstein Air Base to help fly the MQ-1B Predator drones over Afghanistan in search for Osama bin Laden. This provisional installation (later complemented by a new satellite earth terminal from Sicilia) continued in operation until the construction of the permanent SATCOM relay station was completed, see Whittle (n 17) 152, 212, 220 *et seq*. See also Stefan Buchen and others. 'US-Drohnenkrieg läuft über Deutschland' *Panorama* (30 May 2013) <https://daserste.ndr.de/panorama/archiv/2013/US-Drohnenkrieg-laeuft-ueber-Deutschland,ramstein109.html> accessed 2 May 2021.

[75] Relaying a signal from one satellite to another normally requires bouncing it off a satellite relay station on earth. Thus, data does not travel to its destination in an arch, but zigzags across the distance. Given that most satellites hover in geostationary orbit at 36,000 km, even a signal travelling at the speed of light might need some time. Data processing time at each bounce increases latency even further. See Whittle (n 17) 150 *et seq*.

so it can communicate with a drone using only a single satellite to bounce the signal off. That way, the overall latency can be kept to roughly one second.[76]

In addition to the relay of data, Ramstein Air Base is allegedly also involved in the analysis of US counterterrorism intelligence.[77] According to an investigation conducted by the defence attaché of the Federal Republic of Germany in the US in July 2013, the US maintains a total of five so-called Distributed Ground Systems (DGS) worldwide, one of which is located at Ramstein.[78] These systems are mobile technical units where so-called screeners or imagery analysts review the drone's live video feed. Trained in identifying objects of interest like weapons, children or women, their task is to analyse the information gathered by a drone and to inform its crew of any such finding.[79] This was seemingly confirmed in August 2016, when a member of the US Embassy in Berlin told representatives of the German Federal Foreign Office (*Auswärtiges Amt*) that Ramstein Air Base supports several tasks, including the planning, monitoring, and evaluation of certain aerial operations,[80] although no explicit mention of drone strikes and / or a DGS was made.[81]

§ 3 Understanding the Conflicts

Reportedly, the assassination of Nek Mohammad was part of a secret deal struck between the US and the Pakistani government. In exchange for killing Mohammad, who had only recently fooled and humiliated the Pakistani government by breaking a peace agreement

[76] ibid 151, 211-213; NSA Inquiry Committee Report (n 59) 1167-1171, 1353 *et seq*. According to Solomon (n 53), depending on the weather conditions, latency can reach up to six seconds; similar NSA Inquiry Committee, '67. Sitzung – Teil 1' (n 63) 73, 110 (Testimony of Brandon Bryant).

[77] See OVG NRW (n 51) [279]-[292] – juris; dissenting VG Köln, Judgement of 27 April 2016 (4 K 5467/15) [72] *et seqq* – juris.

[78] NSA Inquiry Committee Report (n 59) 1111 *et seq*. This was confirmed by Brandon Bryant, see NSA Inquiry Committee, '67. Sitzung – Teil 1' (n 63) 61, 64 (Testimony of Brandon Bryant). See also 'Air Force Distributed Common Ground System' (*US Air Force*, 13 October 2015) <www.af.mil/About-Us/Fact-Sheets/Display/Article/104525/air-force-distri-buted-common-ground-system/> accessed 17 March 2021.

[79] US Forces, Afghanistan (USFOR), 'Executive Summary for AR 15-6 Investigation, 21 February 2010 CIVACS incident in Uruzgan Province' (2010) 902 *et seq* <https://archive.org/stream/dod_centcom_drone_uruzgan_foia/centcom-10-0218-13_pp01-50> accessed 3 January 2020; NSA Inquiry Committee Report (n 59) 1111-1114.

[80] See Deutscher Bundestag, 'Stenografischer Bericht der 205. Sitzung' (30 November 2016) Plenarprotokoll 18/205, 20453 (Statement of Michael Roth).

[81] See idem, 'Stenografischer Bericht der 208. Sitzung' (n 51) 20808 *et seq* (Statement of Maria Böhmer). cf NSA Inquiry Committee Report (n 59) 1353, which concludes that the exact role of Ramstein could not be determined with final certainty.

shortly after it was concluded,[82] the CIA's drones would be granted access to Pakistani airspace.[83] Mohammad's death thus opened the way to the Federally Administered Tribal Areas (FATA) of north-east Pakistan, which US President Barack Obama once called 'the most dangerous place in the world'.[84] Today, this assessment might no longer hold true. Yemen, ravaged by an ongoing civil war that is about to enter its eighth consecutive year, is not only set to become the world's poorest country by 2022,[85] but might also claim the title of the world's most dangerous one. Against this background, it will be the task of this chapter to explore the reasons why for more than a decade, these two countries have been the absolute focus of US counterterrorism strikes. For that purpose, it is indispensable to provide a concise overview of the social, economic, and political conditions in Pakistan (see A below) and Yemen (see B below) that made them the perfect breeding ground for militant extremism.

A. Pakistan

When the US-led coalition invaded Taliban-ruled Afghanistan in the aftermath of the terrorist attacks of 9/11, many Taliban and jihadists fled the country and sought refuge in the FATA.[86] For the militants, the FATA offered perfect conditions to retreat, recover, regroup and recruit. Consisting of seven tribal areas,[87] the FATA was a lawless region, in the sense that under Pakistan's 1973 constitution, parliamentary legislation and ordinary

[82] Seth G Jones and Christine C Fair, *Counterinsurgency in Pakistan* (RAND Corporation 2010) 52 *et seq*; Daud Khattak, 'Reviewing Pakistan's Peace Deals with the Taliban' (2012) 5(9) *CTC Sentinel* 11, 11 *et seq*.

[83] Mark Mazzetti, 'A Secret Deal on Drones, Sealed in Blood' *New York Times* (6 April 2013) <www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html> accessed 13 October 2019; Steve Coll, 'The Unblinking Stare' *The New Yorker* (17 November 2014) <www.newyorker.com/magazine/2014/11/24/unblinking-stare> accessed 13 October 2019.

[84] Akbar Ahmed, 'With Obama at the World's "Most Dangerous Place"' *Huffington Post* (25 May 2011) <www.huffingtonpost.com/akbar-ahmed/with-obama-at-the-worlds_b_180371.html> accessed 13 October 2019.

[85] Jonathan D Moyer and others, 'Assessing the Impact of War in Yemen on Achieving he Sustainable Development Goals' (UN Development Programme, 2019) 23 <www.ye.undp.org/content/yemen/en/home/library/assesing-the-impact-of--war-on-development-in-yemen-SDGs.html> accessed 4 June 2021.

[86] Brian G Williams, 'The CIA's Covert Predator Drone War in Pakistan, 2004-2010: The History of an Assassination Campaign' (2010) 33 *Stud Conflict & Terrorism* 871, 871-873; MMO, 'The Afghan Taliban' (Stanford University, 2018) <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367> accessed 2 August 2019; CEP, 'Taliban' <www.counterextremism.com/threat/taliban> accessed 21 June 2020.

[87] Bajaur, Mohmand, Khyber, Orakzai, Kurram, North and South Waziristan.

jurisdiction did not extend to the FATA.[88] Instead, it was governed by the so-called Frontier Crimes Regulations (FCR), which allowed the tribes of the FATA to handle their own affairs under the leadership of their elders (*malikan*, singular *malik*) and in accordance with their customs (*Pashtunwali*; the way of the Pashtuns).[89] Inter- and intra-tribal disputes were resolved by tribal *jirgas* (local boards of elders) and tribal *Khassadar* carried out police duties.[90] Maintaining order in the FATA was the prime responsibility of the so-called Political Agents, who represented the ultimate authority in the FATA. Backed by a paramilitary force of their own (*levies*), the Political Agents presided over all *jirgas* and held the power to appoint and remove *malikan* at their discretion; to arrest, to exile, to dispossess or to fine a whole tribe; or, as the case may be, to award monetary allowances.[91] However, for its complete lack of public accountability, the FCR had created a system of corruption, nepotism and arbitrariness that benefitted only the powerful.[92] The majority, on the other hand, was left without political representation, participation, access to impartial justice and in a situation of high economic vulnerability. Income in the FATA was only half of the federal figure of US$ 500 and nearly two thirds lived below the national poverty line.[93] And only 28 per cent of its adult population knew how to read and write, compared to 57 per cent nationally.[94]

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[88] Tayyab Mahmud, 'Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars along the Afghanistan-Pakistan Frontier' (2010) 36 *Brooklyn J Intl L* 1, 56.

[89] In detail on the FCR see Amnesty International, ''As if Hell Fell on Me': The Human Rights Crisis in Northwest Pakistan' (2010) 26-29 <www.amnesty.org/download/Documents/36000/asa330042010en.pdf> accessed 13 October 2019.

[90] See Lutz Rzehak, 'Doing Pashto: Pashtunwali as the ideal of honourable behaviour and tribal life among the Pashtuns' (Afghanistan Analysts Network, 2011) 16-19 <http://afghanistan-analysts.net/uploads/20110321LR-Pashtunwali-FINAL.pdf> accessed 13 October 2019.

[91] ICG, 'Pakistan's Tribal Areas: Appeasing the Militants' (11 December 2006) Asia Report 125, 7-9 <https://d2071andvip0wj.cloudfront.net/125-pakistan-s-tribal-areas-appeasing-the-militants.pdf> accessed 13 October 2019; Mahmud (n 88) 55-58; Benjamin D Hopkins, 'The Frontier Crimes Regulation and Frontier Governmentality' (2015) 74 *J Asian Stud* 369, 375 *et seq*.

[92] Kimberly Marten, Thomas H Johnson and Chris M Mason, 'Misunderstanding Pakistan's Federally Administered Tribal Area?' (2009) 33(3) *Intl Sec* 180, 184; Imtiaz Ali, 'Mainstreaming Pakistan's Federally Administered Tribal Areas – Reform Initiatives and Roadblocks' (2018) US Institute of Peace Special Report 421, 4 *et seq*, 13 <www.usip.org/sites/default/files/2018-03/sr-421-mainstreaming-pakistan-federally-administered-tribal-areas.pdf> accessed 4 June 2021.

[93] ICG, 'Tribal Areas' (n 91) 9; Juan Cole, 'Pakistan and Afghanistan: Beyond the Taliban' (2009) 124 *PSQ* 221, 232 *et seq*; Amnesty International, 'Hell' (n 89) 10.

[94] 2013-14 figure, see FATA Secretariat, 'FATA Development Indicators: Household Survey (FDIHS) 2013-14' (2015) 5 <www.gppfata.gov.pk/images/pcnadoc/Publications/FDHIS%20Survey%20web.pdf> accessed 23 October 2019.

Thus, when the Afghan Taliban and jihadists arrived, they had little trouble to establish themselves among the alienated population.[95] Killing *malikan* who cooperated with the government and replacing local *jirgas* with their sharia tribunals, they quickly seized control in most FATA zones. Smuggling Afghan opiates provided a steady flow of income to support their operations, logistics and recruitment.[96] Within no time, dozens of new al-Qaeda terrorist training camps emerged in North and South Waziristan,[97] which soon began to attack the US and its allies across the border in Afghanistan.[98] The Pakistani government, on the other hand, did not seem particularly eager to interfere. The ongoing militant threat meant that the US kept providing billions of US$ in military aid to help the Pakistani army fight fast paced and mobile counter-insurgency battles in FATA's difficult terrain.[99] Moreover, Pakistani paranoia about a rising influence of India – Pakistan's arch enemy – in Afghanistan had long established the Taliban of the FATA as an important geo-strategic asset.[100] When US pressure on Islamabad mounted, a half-hearted military operation was rushed into the tribal areas, but without noteworthy success.[101]

With the death of Nek Mohammad, the US was finally able to take fighting the militants in its own hands. According to the data compiled by the nongovernmental organizations *The Bureau of Investigative Journalism* (BIJ) and the *Initiative for the Study of Asymmetric Conflict and Counterterrorism* (ISACC),[102] drone strikes were rare at first.[103] Averaging at four per year from 2005 to 2007, they killed a total of 171 people,

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[95] ICG, 'Tribal Areas' (n 91) 27; Amnesty International, 'Hell' (n 89) 10, 15.

[96] UN Office of Drugs and Crime and Sustainable Development Policy Institute, 'Examining the Dimensions, Scale and Dynamics of the Illegal Economy: A Study of Pakistan in the Region' (2011) 39-47 <https://globalinitiative.net/analysis/examining-the-dimensions-scale-and-dynamics-of-the-illegal-economy-a-study-of-pakistan-in-the-region/> accessed 4 June 2021.

[97] Williams (n 86) 874.

[98] ICG, 'Tribal Areas' (n 91) 13; Williams (n 86) 874.

[99] The money mostly went into tanks and jets in preparation for a conventional conflict with India, see 'Billions In US Aid Never Reached Pakistan Army' (*CBS News*, 4 October 2009) <www.cbsnews.com/news/billions-in-us-aid-never-reached-pakistan-army/> accessed 13 October 2019; Seth G Jones and C Christine Fair, *Counterinsurgency in Pakistan* (RAND Corporation 2010) 37, 82.

[100] Matt Waldman, 'Strategic Empathy: The Afghanistan intervention shows why the U.S. must empathize with its adversaries.' (New America Foundation, 2014) 4 *et seq* <https://static.newamerica.org/attachments/4350-strategic-empathy-2/Waldman%20Strategic%20Empathy_2.3caa1c3d706143f1a8cae6a7d2ce70c7.pdf> accessed 13 October 2019. For further explanation see 'A wild frontier' (*The Economist*, 18 September 2008) <www.economist.com/asia/2008/09/18/a-wild-frontier> accessed 23 October 2019.

[101] ICG, 'Tribal Areas' (n 91) 14-17; Jones and Fair (n 99) 76.

[102] Formerly Institute for the Study of Counterterrorism & Unconventional Warfare and Center for the Study of Targeted Killing.

[103] For an explanation of the initial restraint see Coll, 'Unblinking Stare' (n 83).

most of whom were reportedly civilians,[104] and every single one of them had previously been coordinated with the Pakistani government.[105] The Pakistani government also covered up any traces of US involvement or feigned public protest.[106] However, when attacks on the US increased and the Pakistani government still showed no sincere interest in dealing with the Taliban, the US stopped asking the Pakistani government for approval.[107] Drone strikes skyrocketed. 37 strikes in 2008 meant an increase of more than 900 per cent over the last past three years. Casualties almost doubled (318), but maximum reported civilian deaths decreased to one third (107). Attacks continued to increase after US President Barack Obama took office, reaching their peak in 2010. 132 attacks, on average one every three days, meant more than his predecessor US President George W Bush had ordered in all his presidency. Deaths also surged (908), but the rate of maximum reported civilian deaths (163) decreased to less than 20 per cent. Meanwhile, the protests of the Pakistani government had become more and more genuine. In April 2012, the Pakistani Parliament resolved that drone strikes in Pakistan should stop immediately, repealing, *inter alia*, any agreements that might have exited up to that point between the US and the Pakistani government.[108] Nonetheless, the US carried on with its counterterrorism attacks, but at a progressively reduced rate. By the end of 2014, no more than 26 attacks and 149 deaths were reported and almost no civilian casualties.

[104] See the Appendix. These figures have been calculated using the average between the BIJ's and the ISACC's data. UNK are considered civilian causalities. Results have been rounded mathematically.

[105] Emmerson Report 2013 (n 41) para 53.

[106] According to a 2008 confidential cable published by *WikiLeaks*, then Pakistani Prime Minister Yousaf Raza Gilani exclaimed: 'I don,t [sic] care if they do it as long as they get the right people. We,ll [sic] protest in the National Assembly and then ignore it', see WikiLeaks, 'Immunity for Musharraf likely after Zardari's Election as President' (23 August 2008) Cable 08ISLAMABAD2802_a <https://wikileaks.org/plusd/cables/08ISLAMABAD2802_a.html> accessed 13 October 2019. The Pakistani military was even accused of abducting and executing a Pakistani journalist who just days before had published photos of a demolished house where a suspected al-Qaeda commander had died in an explosion, showing fragments of an AGM-114 Hellfire missile. See 'a journalist in the tribal areas' (*Frontline*, 3 October 2006) <www.pbs.org/wgbh/pages/frontline/taliban/tribal/hayatullah.html> accessed 13 October 2019.

[107] Coll, 'Unblinking Stare' (n 83).

[108] Emmerson Report 2013 (n 41) paras 53 *et seq*. In April 2013, the Peshawar High Court ordered the Pakistani government to stop US drone strikes and to defend Pakistani sovereignty, see WP No 1551-P/2012 (11 April 2013) <https://archive.org/stream/698482-peshawar-high-court-judgment/698482-peshawar-high-court-judgment_djvu.txt> accessed 18 May 2021; Peter Becker, 'Neue Erkenntnisse zur Drohnenkriegführung' (2018) 10 *DVBl* 619, 622.

In December 2014, the TTP assaulted an army-run public school in Peshawar, leaving 132 children dead.[109] This bloody attack inspired a previously unknown resolve in the Pakistani government to finally crack down on the militants. A series of military operations were launched into North and South Waziristan, which yielded major success in cleaning out the militants hiding in the FATA.[110] Concurrently, drone strikes in Pakistan had slowed down to a trickle. And when in 2018 Pakistan repealed the FCR and merged the FATA with the adjourning Khyber Pakhtunkhwa province,[111] they had let up almost completely. As of 2019, US drone strikes in Pakistan have reportedly claimed the lives of 3,245 people, among them up to 699 civilians.

B. Yemen

In December 2009, a failed terrorist attack on a US commercial airplane by Umar Farouk Abdulmutallab, commonly known as the "underwear bomber" and named after the set of explosives hidden in his underwear,[112] made the US shift its attention away from Pakistan to the new terrorist threat that had arisen on the southern end of the Arabian Peninsula. Abdulmutallab had been sent by AQAP, al-Qaeda's Yemeni offspring, which had capitalised on the country's difficult economic and political situation to become the new 'most significant risk to the US homeland'.[113]

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[109] Aamer A Khan, 'Pakistan Taliban: Peshawar school attack leaves 141 dead' *BBC* (16 December 2014) <www.bbc.com/news/world-asia-30491435> accessed 2 May 2020; Abdul Sayed and Tore Hamming, 'The Revival of the Pakistani Taliban' (2021) 14(4) *CTC Sentinel* 28, 29.

[110] Asad U Khan, 'Issue Brief on Counter-Terrorism Instruments of 1 June' (Institute of Strategic Studies Islamabad, 2016) 1, 5 <http://issi.org.pk/wp-content/uploads/2016/06/Final-Issue-brief-June-dated-01-6-2016.pdf> accessed 13 October 2019; Zeeshan Salahuddin, 'Is Pakistan's National Action Plan Actually Working?' *The Diplomat* (24 December 2016) <https://thediplomat.com/2016/12/is-pakistans-national-action-plan-actually-working/> accessed 2 May 2020.

[111] Amir Wasim, 'National Assembly green-lights Fata-KP merger by passing "historic" bill' *Dawn* (24 May 2018) <www.dawn.com/news/1409710> accessed 13 October 2019. Critical ICG, 'Shaping a New Peace in Pakistan's Tribal Areas' (2018) Asia Briefing No 150, 11 <https://d2071andvip0wj.cloudfront.net/b150-shaping-a-new-peace-in-pakistans-tribal-areas.pdf> accessed 13 October 2019; Ali, 'Mainstreaming' (n 92).

[112] The chemicals only set his pants on fire and he was overwhelmed by the other passengers, see Scott Shane, 'Inside Al Qaeda's Plot to Blow Up an American Airliner' *New York Times* (22 February 2017) <www.nytimes.com/2017/02/22/us/politics/anwar-awlaki-underwear-bomber-abdulmutallab.html> accessed 2 January 2020.

[113] Jeremy Scahill, 'The Dangerous US Game in Yemen' *The Nation* (30 March 2011) <www.thenation.com/article/dangerous-us-game-yemen/> accessed 18 September 2018, quoting National Counterterrorism Center director Michael Leiter.

Initially composed of those who opposed the US invasion of Iraq and extremists who had fled US drone strikes in the FATA,[114] AQAP had managed to prosper against the backdrop of the humanitarian crisis and political instability created by the so-called al-Huthi insurgency. What started out as a small religious movement, the al-Huthi, named after their leader, preacher Hussein Badraddin al-Huthi, became increasingly politicized in the wake of the US invasion of Iraq.[115] And while the exact origins of the uprising have remained unclear,[116] the conflict between the al-Huthi and the Yemeni government escalated when the Yemeni military killed their namesake.[117] Several rounds of intense fighting in the al-Huthi's home governate of Sadaa ensued,[118] and by the time the so-called Arab Spring reached Yemen in 2011, the al-Huthi, once just a small rebel group, had managed to transition into a heavily armed public movement with its own political agenda that controlled much of Yemen's north.[119] When the young anti-regime protestors of the Arab Spring sided with the al-Huthi, Yemeni President Ali Abdullah Salih finally agreed to step down after almost 34 years.[120] However, unhappy with the transition process from Salih to former Vice President Abdrabbuh Mansour Hadi,[121] the al-Huthi soon also turned against the new government. After a series of battles, they managed to

[114] Victoria Clarke, *Yemen: Dancing on the Heads of Snakes* (Yale UP 2010) 227; ICG, 'Yemen's al-Qaeda: Expanding the Base' (2 February 2017) Middle East Report 174, 3 *et seq* <https://d2071andvip0wj.cloudfront.net/174-yemen-s-al-qaeda-expanding-the-base.pdf> accessed 13 October 2019.

[115] Most al-Huthi adhere to Zaydism, a minor branch of Islam. For an explanation of Zaydism and how it is different to other forms of Islam see Cameron Glenn, 'Iran, Yemen and the Houthis' *The Iran Primer* (16 September 2019) <https://iranprimer.usip.org/blog/2015/apr/29/who-are-yemens-houthis> accessed 2 January 2020.

[116] Various foreign and local explanations are offered by Clarke (n 114) 246-248.

[117] 'Yemen: The Conflict in Saada Governorate – analysis' (*Integrated Regional Information Networks*, 24 July 2008) <www.unhcr.org/refworld/docid/488f180d1e.html> accessed 2 January 2020.

[118] ICG, 'Yemen: Defusing the Saada Time Bomb' (27 May 2009) Middle East Report 86, 3 *et seq* <https://d2071andvip0wj.cloudfront.net/86-yemen-defusing-the-saada-time-bomb.pdf> accessed 2 January 2020.

[119] ICG, 'The Huthis: From Saada to Sanaa' (20 June 2014) Middle East Report 154, i, 2 and fn 10, 5 *et seq*, 11 <https://d2071andvip0wj.cloudfront.net/the-huthis-from-saada-to-sanaa.pdf> accessed 2 January 2020.

[120] Jeb Boone and Sudarsan Raghavan, 'Yemen's President Saleh agrees to step down in return for immunity' *Washington Post* (23 April 2011) <www.washingtonpost.com/world/yemens-president-saleh-agrees-to-step-down-in-return-for-immunity/2011/04/23/AFu59SWE_story.html> accessed 2 January 2020.

[121] ICG, 'Saada to Sanaa' (n 119) 2 *et seq* and fn 11; April L Alley, 'Collapse of the Houthi-Saleh Alliance and the Future of Yemen's War' *Project on Middle East Political Science* (11 January 2018) <www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/collapse-houthi-saleh-alliance-and-future-yemens-war> accessed 2 January 2020.

seize the Yemeni capital Sanaa in September 2014,[122] which ultimately forced Hadi to flee to Saudi-Arabia.[123] This caused Saudi Arabia, which considers the al-Huthi to be a proxy of its regional enemy Iran,[124] to lead a coalition of ten States against the al-Huthi in order to reinstate Hadi.[125] Coalition airstrikes on al-Huthi positions were answered in kind, with missiles being fired at the Saudi capital. A Saudi Arabian near-total sea, air and land blockade on Yemen followed, with devastating effects.[126] Yemen, an arid and mostly mountainous country without permanent rivers and almost no arable land,[127] imports most of its commodities, including fuel, much needed to draw clean drinking water from the ever-deeper wells, and almost 90 per cent of its food.[128] Although food and fuel remained available in Yemeni markets, prices increased dramatically, and most

[122] For that purpose, the al-Huthi had formed an alliance with former Yemeni President Salih, who still possessed considerable influence in the Yemeni military, see Abu Amin, 'Crisis in Yemen and Countering Violence' (2015) 7(7) *CTTA* 18, 19. In 2017, Salih was killed by the al-Huthi in a roadside ambush after he had tried to ally himself with the Saudi-led coalition, see 'Yemen's Houthi: Ali Abdullah Saleh killed for 'treason'' (*Al Jazeera*, 4 December 2017) <www.aljazeera.com/news/2017/12/yemen-houthi-ali-abdulla-saleh-killed-treason-171204165531953.html> accessed 2 January 2020.

[123] ICG, 'Expanding' (n 114) 8.

[124] See Adel bin Ahmed Al-Jubeir, 'Can Iran Change?' *New York Times* (19 January 2016) <www.nytimes.com/2016/01/19/opinion/saudi-arabia-can-iran-change.html> accessed 26 August 2018. The true extent of Iranian influence over the al-Huthi remains unclear. Remnants of missiles fired into Saudi Arabia seem to have been of Iranian origin and the US allegedly intercepted multiple Iranian weapon shipments to the al-Huthi, see Peter Bergen, 'US intercepts multiple shipments of Iranian weapons going to Houthis in Yemen' *CNN* (28 October 2016) <https://edition.cnn.com/2016/10/28/politics/us-intercepts-iranian-weapons/index.html> accessed 2 September 2018; Michelle Nichols, 'Exclusive: Yemen rebel missiles fired at Saudi Arabia appear Iranian – U.N.' *Reuters* (1 December 2017) <www.reuters.com/article/us-yemen-security-un-exclusive/exclusive-yemen-rebel-missiles-fired-at-saudi-arabia-appear-iranian-u-n-idUSKBN1DU36N> accessed 2 January 2020. cf Thomas Juneau, 'Iran's policy towards the Houthis in Yemen: a limited return on a modest investment' (2016) 92 *Intl Aff* 647, who alleges that Tehran's influence in Yemen is marginal.

[125] See Hafez Ghanem, *The Arab Spring five years later: toward greater inclusiveness* (Brookings Institution Press 2015) 25 *et seq*; Juneau (n 124) 647; ICG, 'Expanding' (n 114) 15.

[126] Amanda Erickson, 'Saudi Arabia lifted its blockade of Yemen. It's not nearly enough to prevent a famine.' *Washington Post* (30 November 2017) <www.washingtonpost.com/news/worldviews/wp/2017/11/30/saudi-arabia-lifted-its-blockade-of-yemen-its-not-nearly-enough-to-prevent-a-famine/> accessed 2 January 2020.

[127] See The World Bank, 'The Republic of Yemen – Unlocking the Potential for Economic Growth' (October 2015) Report No 102151-YE 78 <http://documents.worldbank.org/curated/en/673781467997642839/pdf/102151-REVISED-box394829B-PUBLIC-Yemen-CEM-edited.pdf> accessed 2 January 2020; CIA, 'The World Factbook: Yemen" (13 April 2021) <www.cia.gov/the-world-factbook/countries/yemen/> accessed 21 April 2021.

[128] The World Bank, 'Yemen Economic Outlook – Spring 2018' (1 April 2018) Report No 125265, 1 <http://documents.worldbank.org/curated/en/722171523637393846/pdf/125265-replacement.pdf> accessed 2 January 2020. Imports are paid for in foreign currency generated from the international sale of oil and gas, but returns have been diminishing for almost a decade, see The World Bank, 'Unlocking the Potential' (n 127) 7; bp, 'BP Statistical Review of World Energy' (68th edn, 2019) 16 <www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2019-full-report.pdf> accessed 2 January 2020.

Yemenis had been left impoverished by years of ongoing fighting.[129] And without access to clean water, diseases like cholera started to spread.[130]

AQAP, on the other hand, was thriving in failing Yemen. Strong anti-western and pro-jihadist feelings among the Political Security Office, Yemen's security service, and the boiling conflict between the al-Huthi and the Salih administration meant that AQAP had been left unmolested for the longest time.[131] Robbing State banks and smuggling fuel, its war chest had been filled to the brim.[132] Moreover, by providing basic services such as water, food, electricity and employment, it had managed to gain the support of the local population.[133] Counting between 200 and 300 members in 2009,[134] its ranks swelled to an estimated 4,000 in 2015,[135] and by 2018, AQAP was estimated to have up to 7,000 members.[136] Looting Yemeni military camps, it also managed to acquire heavy

[129] Oxfam, 'Millions of Yemenis days away from losing clean running water' (24 November 2017) <https://reliefweb.int/report/yemen/millions-yemenis-days-away-losing-clean-running-water> accessed 5 June 2021; 'Yemen being pushed ever closer to famine: 1,000 days of war and a crippling blockade is starving its people' (19 December 2017) <https://reliefweb.int/report/yemen/yemen-being-pushed-ever-closer-famine-1000-days-war-and-crippling-blockade-starving-its> accessed 5 June 2021; The World Bank, 'Yemen Economic Outlook' (n 128) 1, noting that in 2017, approximately 80 per cent of Yemenis lived in extreme poverty; CIA, 'World Factbook: Yemen' (n 127).

[130] Julian Borger, 'Saudi-led naval blockade leaves 20m Yemenis facing humanitarian disaster' *The Guardian* <www.theguardian.com/world/2015/jun/05/saudi-led-naval-blockade-worsens-yemen-humanitarian-disaster> accessed 5 June 2021.

[131] Clarke (n 114) 170-172; ICG, 'Expanding' (n 114) 3 *et seq*.

[132] ICG, 'Expanding' (n 114) 17.

[133] Robin Simcox, 'Ansar al-Sharia and Governance in Southern Yemen' (2013) 14 *Current Trends in Islamist Ideology* 58, 61-63; Clarke (n 114) 220; ICG, 'Expanding' (n 114) 11 *et seq*, 16 *et seq*, noting that AQAP offered 25 per cent more salary than the military; Yara Bayoumy, Noah Browning and Mohammed Ghobari, 'How Saudi Arabia's war in Yemen has made al Qaeda stronger – and richer' *Reuters* (8 April 2016) <www.reuters.com/investigates/special-report/yemen-aqap/> accessed 2 January 2020.

[134] Benjamin Wittes, 'Gregory Johnsen on Yemen and AQAP' *Lawfare* (16 November 2012) <www.lawfareblog.com/2012/11/gregory-johnsen-on-yemen-and-aqap/> accessed 2 January 2020.

[135] US Department of State, 'Country Reports on Terrorism 2015' (2 June 2016) 395 <https://2009-2017.state.gov/documents/organization/258249.pdf> accessed 2 January 2020. In 2010, AQAP put its own numbers at 12,000, see Bill Roggio, 'Al Qaeda prepares "an army of 12,000 fighters", threatens security forces' *FDD's Long War Journal* (30 July 2010) <www.longwarjournal.org/archives/2010/07/al_qaeda_prepares_an.php> accessed 2 January 2020.

[136] UNSC, 'Twenty-second report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2368 (2017) concerning ISIL (Da'esh), Al-Qaida and associated individuals and entities' (27 July 2018) UN Doc S/2018/705, 9; cf Gregory D Johnsen, 'The Two Faces of Al-Qaeda in the Arabian Peninsula' *War on the Rocks* (11 October 2018) <https://warontherocks.com/2018/10/the-two-faces-of-al-qaeda-in-the-arabian-peninsula/> accessed 2 May 2020, alleging that only AQAP's insurgent side has been growing, while its capability to carry out international terrorist attacks has diminished.

weaponry.[137] And neither the Yemeni government nor the coalition forces seemed to be willing or able to effectively counter AQAP.[138]

Determined to address the militant threat itself, the US obtained Salih's authorization to pursue its drone campaign against AQAP within Yemen.[139] Initially masking its involvement in the same way it had previously done in Pakistan,[140] nongovernmental organizations registered 19 drone strikes in 2011,[141] causing 118 fatalities, including a maximum number of reported civilian deaths of 38. Drone strikes in Yemen reached their preliminary peak the year after, when an attack occurred roughly every six days (62 total), killing 383 people, only ten per cent of whom were reportedly civilians (31). Drone strikes halved in the four years that followed, averaging at 29 per year and claiming 123 lives, including those of up to 13 civilians on average. Even major terrorist activities in Europe whose authorship was later claimed by AQAP did nothing to reignite US vigour.[142] However, they soared once again when US President Donald Trump took office. In 2017, 81 drone strikes – more than one strike every five days – eclipsed all of his predecessor's figures. As of 2019, US drone strikes in Yemen have reportedly claimed the lives of 1,190 people, among them up to 175 civilians.[143]

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[137] ICG, 'Expanding' (n 114) 9, who notes that the Saudi-led coalition supplied AQAP with arms in return for fighting the al-Huthi.

[138] ibid 10-15; Michael Horton, 'Fighting the Long War: The Evolution of al-Qa'ida in the Arabian Peninsula' (2017) 10(1) *CTC Sentinel* 17, 21. Recently, AQAP has come under increased military and financial pressure, but remains 'resilient', see UNSC, 'Twenty-third report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2368 (2017) concerning ISIL (Da'esh), Al-Qaida and associated individuals and entities' (15 January 2019) UN Doc S/2019/50 paras 21 *et seq*.

[139] Scahill, 'Dangerous US Game' (n 113); Human Rights Watch, *A Wedding Attack on Marriage Procession in Yemen* (Human Rights Watch 2014) 6 *et seq*. The Hadi administration continued that stance, see Emmerson Report 2013 (n 41) para 52.

[140] In December 2009, a US cruise missile struck the town of al Ma'jalah, killing 55 people, mostly women and children. Two weeks later, Salih told CENTCOM General David Petraeus: 'We'll continue saying the bombs are ours, not yours', see WikiLeaks, 'General Petraeus' Meeting with Saleh On Security Assistance, AQAP Strikes' (4 January 2010) Cable 10SANAA4_a <https://wikileaks.org/plusd/cables/10SANAA4_a.html> accessed 2 January 2020.

[141] The first drone strike in Yemen had already taken place in November 2002, killing the alleged mastermind behind the terrorist attack against the US battleship USS Cole which had left 17 marines dead. However, a dispute between the US and the Yemeni government in the aftermath of the strike put further activities on hold for more than seven years. See Clarke (n 114) 195 *et seq*; Scahill, 'Dangerous US Game' (n 113).

[142] eg the 2015 Paris terrorist attack on Charlie Hebdo, a satirical magazine which had printed satirical cartoons of the Prophet Mohammed. See Eric Schmitt, Mark Mazzetti and Rukmini Callimachi, 'Disputed Claims Over Qaeda Role in Paris Attacks' *New York Times* (15 January 2015) <www.nytimes.com/2015/01/15/world/europe/al-qaeda-in-the-arabian-peninsula-charlie-hebdo.html> accessed 2 January 2020.

[143] As of 2019, AQAP remains active in many Yemeni provinces, still possesses heavy weaponry and is deeply entrenched in its fight against ISIL and the al-Huthi over terrorist dominance in Yemen, see UNSC,

§ 4 Complicity in International Law

In 2007, the ICJ in its famous *Bosnian Genocide* case on the international responsibility of the Republic of Serbia for its failure to exert its influence over the Bosnian Serb Army to prevent the genocide committed by the in the enclave of Srebrenica in Bosnia and Herzegovina, recognized that article 16 of the ARSIWA reflects a rule of customary international law.[144] But despite the recognition of the prohibition on complicity as a universally applicable rule, so far its overall impact has remained limited. This is mainly for two reasons. First, even in situations where violations of human rights are concerned, only a State may invoke another State's responsibility under the ARSIWA.[145] Although individuals may be the primary beneficiaries of the obligation breached, they enjoy no right to process under the draft articles.[146] Instead, it is for the State of the victims to uphold their rights. However, international law does not know a general obligation of States to take action in the face of an internationally wrongful act of another State,[147] and inter-State cases for human rights violations are only rarely instituted.[148] Moreover, according to what is commonly known as the *Monetary Gold* principle, the ICJ cannot

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'Twenty-fourth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2368 (2017) concerning ISIL (Da'esh), Al-Qaida and associated individuals and entities' (15 July 2019) UN Doc S/2019/570 paras 20 *et seq*. See also Gregory D Johnsen, 'Trump and Counterterrorism in Yemen: The First Two Years' (February 2019) <http://sanaacenter.org/files/Trump_and_Counterterrorism_in_Yemen.pdf> accessed 24 May 2020.

[144] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 [420] (Bosnian Genocide). Srebrenica had forcefully been captured by the Bosnian Serb Army despite a UN Security Council resolution declaring that it was not to be attacked. Women, children, and elderly people were deported and more than 7,000 military aged men who had attempted to flee the area were executed. Concurring ICSID, *Noble Ventures, Inc v Romania* Case ARB/01/11 (12 October 2005) [69] ('While those Draft Articles are not binding, they are widely regarded as a codification of customary international law'); Georg Nolte and Helmut P Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 *ICLQ* 1, 7-10. The German Federal Government disputes the customary character of article 16, see Aust, *Complicity* (n 30) 183-185.

[145] cf ARSIWA, arts 42 and 48; explicitly BGH, Judgement of 2 November 2006 (III ZR 190/05) Z 169, 348 [13]. In detail see Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016) 288 *et seqq*.

[146] ARSIWA General Commentary (n 50) 95 paras 3 *et seq*. See also ARSIWA, art 33(2).

[147] Klein (n 43) 434; Astrid Epiney, 'Nachbarrechtliche Pflichten im internationalen Wasserrecht und Implikationen von Drittstaaten' (2001) 39 *AVR* 1, 37 *et seq*.

[148] Dinah Shelton, 'Remedies and Reparation' in Malcolm Langford and others (eds), *Global justice, state duties: the extraterritorial scope of economic, social and cultural rights in international law* (CUP 2013) 367, 374. See also Nicola Jägers, *Corporate Human Rights Obligations: In Search for Accountability* (Intersentia 2002) 175; Samuel Shepson, 'Jurisdiction in Complicity Cases: Rendition and Refoulement in Domestic and International Courts' (2015) 53 *Colum J Transnatl L* 701, 710, who points out that only few courts have relied on article 16, potentially because they fear that customary international law – as opposed to treaty law and international conventions – lacks democratic legitimacy and acceptance.

decide on the international responsibility of a State if, as a preliminary question, it would first have to decide on the international lawfulness of the act of another State in that certain State's absence and without its consent.[149] This principle may very well also apply to cases under article 16, which requires the finding of an internationally wrongful act of another State that allows for complicit involvement.[150] On that basis, the provision is unlikely to be enforced before an international court or tribunal.[151]

Secondly, and relatedly, article 16 belongs to the order of so-called secondary rules.[152] Other than primary rules, which means rules that create obligations for States, secondary rules presuppose a breach of a primary rule and relate only, on a secondary level, to the consequences of that breach.[153] And there are several primary rules which contain a substantive obligation not to assist another State in the commission of certain wrongful acts or even require a State to actively prevent or repress such acts.[154] For example, according to article 3(f) of the Definition of Aggression,[155] allowing another State to use one's territory for perpetrating an act of aggression against a third State qualifies itself as an act of aggression.[156] Similarly, as will be shown at a later stage of this study, it is also a general rule of customary international law that a State must not allow its territory to be used to cause injury on the territory of another State.[157] Where such *special* prohibitions on complicity exists, responsibility for aiding or assisting in the

[149] ICJ, *Case of the Monetary Gold Removed from Rome in 1943 (Italy v France and others)* (Judgement) [1954] ICJ Rep 19, 32; *East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90 [35].

[150] ARSIWA General Commentary (n 50) 67 para 11. See also Shepson (n 148) 725 *et seq*, on a possible (implicit) adherence to that principle in the ECtHR's *El-Masri* case.

[151] Aust, *Complicity* (n 30) 378, but cf p 421; Miles Jackson, *Complicity in International Law* (OUP 2015) 171.

[152] ARSIWA General Commentary (n 50) 65 para 7; Shepson (n 148) 712, 714. Characterizing article 16 as a primary rule Bernhard Graefrath, 'Complicity in the Law of International Responsibility' (1996) 2 *RBDI* 371, 372; André Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 *AJIL* 760, 797 fn 100; Jackson (n 151) 149 *et seq*. See also ILC, '30th session: Summary record of the 1518th meeting' in idem, *Yearbook … 1978*, vol 1 (n 49) 236 para 32 (Statement of Robert Q Quentin-Baxter) and Aust, *Complicity* (n 30) 188 *et seq*, who emphasise that article 16 bears elements of a primary and a secondary rule.

[153] See ARSIWA General Commentary (n 50) 65 para 7; Roberto Ago, 'Report of the International Law Commission on the work of its twenty-second session, 4 May–10 July 1970' in ILC, *Yearbook of the International Law Commission 1970*, vol 2 (UN 1972) 306 para 66(c).

[154] ARSIWA General Commentary (n 50) 66 para 2. Lanovoy, *Complicity* (n 145) 2, cautions that most practical examples of complicity to date appear to be covered by specific primary rules.

[155] (adopted 14 December 1974) UN Doc A/RES/3314 (XXIX).

[156] See John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 *BYIL* 77, 86; Lanovoy, *Complicity* (n 145) 194-198.

[157] See § 6 B. I. 1). Further examples are provided by Aust, *Complicity* (n 30) 379-404; Lanovoy, *Complicity* (n 145) 186-210.

commission of the wrongful act flows directly from the applicable primary rule itself. Recourse to the *general* rule embodied in article 16 is then redundant.[158]

In fact, in many cases, and notwithstanding the *Monetary Gold* principle, it will be easier to hold a State responsible under a specific primary rule than under the general regime on complicity. For example, in the ECtHR's *El-Masri* case, the court not only found that the former Yugoslav Republic of Macedonia had abducted and mistreated el-Masri but concluded that it had also incurred responsibility for handing him over to the US which continued the ordeal. But instead of doing so on the basis of article 16, the court drew upon the principle of *non-refoulment* contained in article 3 of the European Convention on Human Rights (ECHR).[159] This principle engages State responsibility whenever 'the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known'.[160] The advantage of the ECtHR's approach lies in the fact that the requirements for State responsibility to arise were lower under article 3 of the ECHR than under article 16 of the ARSIWA.[161] In particular, whereas finding responsibility under article 16 would have required the court to establish that el-Masri was *actually* tortured by the US, under the principle of *non-refoulment*, it was sufficient to show that there was a *risk* of ill-treatment which the former Yugoslav Republic of Macedonia knew or ought to have known of.[162]

However, these challenges to the practical significance of article 16 do not diminish the importance of establishing responsibility under the general regime on complicity in the first place. After all, a State which aids or assists another State in the

[158] Shepson (n 148) 714. See also Erika de Wet, 'Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments Through Direct Military Assistance on Request' (2018) 67 *ICLQ* 287, 290, arguing that in these cases, the respective treaty provision as *lex specialis* would render article 16 inapplicable.

[159] Under the principle of *non-refoulment*, it is prohibited to return an alien to his home country when he faces a significant risk of abuse, persecution, or torture, see Shepson (n 148) 711 *et seq*.

[160] ECtHR, *El-Masri* (n 32) [198]. See also *Soering v UK* [1989] ECHR 14 [91]; *Shamayev and others v Georgia and Russia* App no 36378/02 (12 April 2005) [355].

[161] See Shepson (n 148) 713 *et seq*; Lanovoy, *Complicity* (n 145) 209 *et seq*; Helen Keller and Reto Walther, 'Evasion of the international law of state responsibility? The ECtHR's jurisprudence on positive and preventive obligations under Article 3' (2020) 24 *Intl J Hum Rts* 957, 962. See also Rosana Garciandia, 'State responsibility and positive obligations in the European Court of Human Rights: The contribution of the ICJ in advancing towards more judicial integration' (2020) 33 *LJIL* 177, 180 *et seq*, 187, arguing that the ECtHR's broad interpretation of several primary obligations might have been motivated by the desire to avoid the difficulties in applying some of the ARSIWA's rules.

[162] See ECtHR, *El-Masri* (n 32) [212], [239]. The *mens rea* element is also broader than under article 16, see § 8 B. II.

commission of an internationally wrongful act commits an internationally wrongful act itself,[163] and finding that such an act has occurred restores legality within the international community.[164] Admittedly, in some cases, it might be easier to hold a State responsible for its complicit involvement under a specific primary rule than under the more demanding standards of article 16. However, such rules are not universally available,[165] and there is no legal rule that would oblige an international court or tribunal to prefer them over the general regime of complicity.[166] Nor do the practical difficulties relating to the admissibility of a claim under article 16 vitiate its purpose. Most importantly, the *Monetary Gold* principle only acts as a bar to enforcing the provision before an international court or tribunal but does not affect ascribing international responsibility itself and does not obstruct the invocation of such responsibility outside judicial proceedings.[167] In fact, the Permanent Court of International Justice (PCIJ) stated as early as 1927 that '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation (…). Reparation therefore is the indispensable complement of a failure to apply a convention (…)'.[168] Reparation is thus not a right of the victim that needs to be enforced but a duty of the perpetrator that arises automatically upon the commission of a wrongful act.[169] This means that even in the absence of a judicial claim, the wrongdoing State will have to restore compliance with international law of its own accord.

[163] Such was the wording of draft article 27 ('Aid or assistance by a State to another State (…) itself constitutes an internationally wrongful act'), see ILC, *Yearbook … 1978*, vol 1 (n 49) 269 para 2. See also James Crawford, *State Responsibility: The General Part* (CUP 2013) 399; Silke Zwijsen, Machiko Kanetake and Cedric Ryngaert, 'State Responsibility for Arms Transfers – The Law of State Responsibility and the Arms Trade Treaty' (2020) *Ars Aequi* 151, 152.

[164] León Castellanos-Jankiewicz, 'Causation and International State Responsibility' (2012) *SHARES Research Paper 07, ACIL 2012-07*, 23.

[165] Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implications of a State in the Act of another State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 287; Aust, *Complicity* (n 30) 51.

[166] Lanovoy, *Complicity* (n 145) 259 *et seq*; Keller and Walther (n 161) 965; cf de Wet, 'Complicity' (n 158) 290.

[167] ARSIWA General Commentary (n 50) 67 para 11; Aust, *Complicity* (n 30) 317 *et seq*; Jackson (n 151) 171.

[168] PCIJ, *Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A no 17, 21. The PCIJ was replaced by the ICJ in 1946. See also ICJ, *Avena and other Mexican Nationals (Mexico v US)* (Judgement) [2004] ICJ Rep 12 [119]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgement) [2005] ICJ Rep 168 [259].

[169] See ARSIWA General Commentary (n 50) 91 para 4; Shelton (n 148) 374; Crawford, *State Responsibility* (n 163) 507.

§ 5 Internationally Wrongful Act

Turning to the specific conditions under which complicit responsibility under article 16 of the ARSIWA arises, four cumulative requirements can be identified:

(i) another State needs to commit an internationally wrongful act;
(ii) the State in question must aid or assist in its commission;
(iii) the assisting State must be aware of the circumstances making the conduct of the other State internationally wrongful; and
(iv) the act would be internationally wrongful had it been committed by the assisting State.[170]

As is evidence by the first of these elements, responsibility under article 16 cannot arise in the absence of an internationally wrongful act committed by another State. Complicit responsibility under the ARSIWA is thus in a sense a derivative form of responsibility.[171] For the purposes of the present case, this means that State responsibility for aiding or assisting US drone strikes only arises if these attacks are internationally wrongful. What exactly constitutes an internationally wrongful act is determined by article 2 of the ARSIWA, which reads as follows:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State.

According to article 2, there is an internationally wrongful act of a State when conduct consisting of an action or omission constitutes a breach of an international obligation of

[170] This latter requirement, which is commonly known as the opposability requirement, is an expression of the customary *pacta tertiis nec nocent nec prosunt* rule ('Treaties neither harm nor benefit third parties'; translation by Aaron Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2009) 212). It purports to protect a State from responsibility for complicity in an act that the State itself could have committed lawfully, and thereby from indirectly incurring obligations to which it did not consent. While criticized by many commentators, this requirement is of no consequence where the rule in question is one of customary international law, binding all States irrespective of whether they have consented to such an obligation. As will be shown in the further progress of this study, both the prohibition not to arbitrarily deprive anyone of his right to life and the principle of distinction are such rules. See Aust, *Complicity* (n 30) 250 *et seq*; Crawford, *State Responsibility* (n 163) 416; Jackson (n 151) 162-167; Lanovoy, *Complicity* (n 145) 240 *et seqq*.

[171] ARSIWA General Commentary (n 50) 31, 65 para 7.

that State. This is the case whenever the act of a State is not in conformity with what is required of it by that obligation, regardless of its origin or character.[172] To answer the question whether US drone strikes are internationally wrongful, it is thus necessary to first identify the international obligations applicable to the US (see A below) before addressing the issue whether the US has failed to comply with them (see B below).

A. Applicable Law

In general, the lawfulness of the use of lethal force including by drones is governed by international human rights law (IHRL). According to most human rights treaties, eg article 6(1) of the International Covenant on Civil and Political Rights (ICCPR),[173] article 2(1) of the ECHR,[174] and article 4(1) of the American Convention on Human Rights (ACHR),[175] a State must never arbitrarily deprive anyone of his right to life. Not only does IHRL continue to apply even in times of armed conflict,[176] but today it is commonly accepted that the prohibition on the arbitrary deprivation of life is also a rule of customary international law that binds States everywhere and at any time.[177]

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[172] ARSIWA, art 12.

[173] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. The US ratified the ICCPR in 1992, Germany in 1973. See *Gesetz zu dem Internationalen Pakt vom 19. Dezember 1966 über bürgerliche und politische Rechte* (entered into force 15 November 1973) BGBl 1973 II, 1533; US, 'Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights' (1992) 31 *ILM* 645. On US reservations to the ICCPR see Cathrine Redgwell, 'US reservations to human rights treaties: all for one and none for all?' in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (CUP 2003) 401-412.

[174] (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

[175] (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. See also Nils Melzer, *Targeted Killing in International Law* (OUP 2008) 91-118, noting that there are no significant discrepancies between the scope of protection afforded by these provisions.

[176] Explicitly ARSIWA General Commentary (n 50) 74 *et seq* paras 3 *et seq*; see also Melzer, *Targeted Killing* (n 175) 51 *et seq*; Marko Milanovic, 'Drones and Targeted Killings: Can Self-Defense Preclude their Wrongfulness?' *EJIL: Talk!* (10 January 2010) <www.ejiltalk.org/drones-and-targeted-killings-can-self-defense-preclude-their-wrongfulness/> accessed 9 August 2019; Alston Report (n 11) paras 42-44; Kevin J Heller, '"One Hell of a Killing Machine": Signature Strikes and International Law' (2013) 11 *JICJ* 89, 91; Christof Heyns and others, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 *ICLQ* 791, 795 *et seq*. Critical Michael J Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *AJIL* 119.

[177] ICJ, *UK v Albania (Corfu Channel)* (Merits) [1949] ICJ Rep 4, 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14 [218]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [25]; IACHR, *Abella v Argentina (La Tablada)* Case 11.137, Report No 55/97 (18 November 1997) [158]; ECtHR, *Hassan v UK* App no 29750/09 (16 September 2014) [77], [104]; CCPR, 'General comment No. 36: Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 para 64 (General Comment No. 36); Michael N Schmitt, 'Targeted Killings and International Law: Law Enforcement, Self-defense, and Armed Conflict' in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law* (Martinus Nijhoff 2008) 531; Melzer, *Targeted Killing* (n 175) 184-189, 212, 223; Emmerson Report 2013 (n 41) para 60. See also Melzer, *Human Rights Implications* (n 41) 18 *et seq*.

Whether a deprivation of life is arbitrary can only be decided by reference to the applicable domestic and international law.[178] On the international level, there are two entirely different legal regimes regulating the use of lethal force, depending on whether the situation is one of armed conflict, the international law equivalent of war,[179] or not. In situations of armed conflict, the lawfulness of the use of lethal force against an individual is governed by international humanitarian law (IHL), the so-called *ius in bello*. This special body of law was designed specifically for wartime and has more permissive rules for the use of force.[180] Outside the conduct of hostilities, including in situations of violent confrontation that do not meet the threshold of an armed conflict, ie, in times of peace, there is no dedicated body of law that explicitly governs the use of lethal force. Instead, the applicable rules will have to be derived from the general prohibition on the arbitrary deprivation of the right to life under customary international law and IHRL, commonly referred to as the law enforcement standard.[181] The importance of correctly distinguishing between both regimes can hardly be overstated. While the use of lethal force will often be permissible under the *ius in bello*, several scholars have claimed out that outside the context of an armed conflict, 'the use of drones for targeted killing is almost never likely to be legal'.[182]

International law knows two different types of armed conflict: international armed conflicts (IAC), which is an armed conflict between two or more States, and non-international armed conflicts (NIAC), ie, hostilities between a State and one or more non-State armed groups or between several non-State armed groups.[183] While a violent

[178] ICJ, *Nuclear Weapons* (n 177) [25]; General Comment No. 36 (n 177) para 12; Melzer, *Human Rights Implications* (n 41) 15.

[179] Express references to war may be found in article 27(1) of the ACHR and article 15(1) of the ECHR.

[180] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [106]; *Armed Activities on the Territory of the Congo* (n 168) [216]; Melzer, *Targeted Killing* (n 175) 175 *et seq*; *Human Rights Implications* (n 41) 19.

[181] Alston Report (n 11) para 31, albeit critical of the term; Melzer, *Human Rights Implications* (n 41) 30.

[182] Alston Report (n 11) para 85. Concurring O'Connell, 'Lawful Use of Combat Drones' (n 41) 1; Emmerson Report 2013 (n 41) para 66; similar Melzer, *Human Rights Implications* (n 41) 32 *et seq*, 36 *et seq*.

[183] See common articles 2 and 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II), the Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III), and the Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva

conflict between a State and a non-State actor, eg a militant organization, can therefore always only be a NIAC,[184] not every such confrontation is a NIAC within the meaning of IHL. According to article 1(2) of the Second Protocol Additional to the Geneva Conventions (AP II),[185]

> [t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[186]

A NIAC thus needs be distinguished from mere international disturbances and tensions, such as riots, banditry and small-scale terrorist activities. It is a rule of customary international law that the more permissive rules of IHL apply only in case of 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[187] At a minimum, a NIAC requires one or more organized armed groups and a level of violence that reaches a certain intensity threshold.[188] Whether these requirements are fulfilled must be determined in the light of the individual circumstances of each case and on a purely factual basis. A NIAC cannot

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Convention IV) (collectively, the Geneva Conventions). See also ICTY, *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (1996) 35 ILM 32 [70]; ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (March 2008) 1-5 <www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> accessed 18 August 2019. On the – universally rejected – argument of the US that its war against terror is neither an IAC nor a NIAC, but a third type of conflict ungoverned by IHRL, IHL or customary international law see Melzer, *Targeted Killing* (n 175) 262-266. This approach seems to have been abandoned by the Obama administration following the decision of the US Supreme Court in *Hamdan v Rumsfeld* 548 US 557 (2006), see Duffy (n 10) 390.

[184] Melzer, *Targeted Killing* (n 175) 267, unless the actions of the non-State actor are attributable to a State. However, this is neither the case for the Taliban nor al-Qaeda, see Duffy (n 10) 78–91, 393 *et seq*. On the question whether a military offense against a non-State actor on foreign territory also triggers an IAC with the territorial State see § 5 A. III.

[185] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

[186] This is generally considered to apply within common article 3 of the Geneva Conventions, see ICRC, '"Armed Conflict"' (n 183) 3; Jelena Pejic, 'Extraterritorial targeting by means of armed drones: Some legal implications' (2014) 96 *Intl Rev RC* 67, 79 and fn 44. The notion of a NIAC in the AP II is generally more restrictive than under the common articles, see ICRC, '"Armed Conflict"' (n 183) 4. See also ICC Statute, art 8(2)(d) and (f).

[187] ICTY, *Tadić* (Defence Motion) (n 183) [70]. See also IACHR, *La Tablada* (n 177) [151]; Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 52 *et seq*; Marko Milanovic, 'The End of Application of International Humanitarian Law' (2014) 96 *Intl Rev RC* 163, 179.

[188] Akande (n 187) 51.

be brought about through a formal and unilateral declaration by one of the parties to the conflict. In particular, the US practice of adding a number of States to a list of "areas of active hostilities" in an attempt to subject any conflict in these countries to the more permissive rules of IHL has no binding effect in international law.[189]

For a non-State group to qualify as an adversary in a NIAC, it must be both organized and armed. Only a group with a certain level of organization and a hierarchical command structure is capable of enforcing the rules imposed by IHL.[190] Whether a non-State actor possesses the necessary degree of organization must be determined with view to the existence of a command structure, disciplinary rules and mechanisms, and a headquarters; the fact that it controls a certain territory; its ability to access military equipment, training and recruits, to plan, to coordinate and to carry out military operations, to define a military strategy, to use military tactics and to negotiate, to conclude and to enforce binding agreements such as ceasefires.[191] In any case, the adversary must be clearly identifiable. "Terrorism" itself as a social phenomenon cannot be a party to an armed conflict.[192] Nor may several independent militant organizations be grouped together and treated as a single organized armed group unless the criteria for such a qualification have been met for the group as a whole. For example, the US considers itself to be at war with al-Qaeda, the Taliban and associated forces in the sense of one big terrorist network constituting a single adversary within the meaning of IHL.[193] However, outside the US, this position has been heavily criticized.[194] Regional al-Qaeda spin-offs like the AQAP in Yemen or al-Shabaab in Somalia may share the same ideology, but are only loosely connected and lack the necessary common command

[189] Paul D Shinkman, '"Areas of Active Hostilities": Trump's Troubling Increases to Obama's Wars' *US News* (16 May 2017) <www.usnews.com/news/world/articles/2017-05-16/areas-of-active-hostilities-trumps-troubling-increases-to-obamas-wars> accessed 20 May 2020; Ryan Goodman, 'Why the Laws of War Apply to Drone Strikes Outside "Areas of Active Hostilities" (A Memo to the Human Rights Community)' *Just Security* (4 October 2017) <www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/> accessed 22 April 2021.

[190] On this argument see Djemila Carron, 'Transnational Armed Conflicts: An Argument for a Single Classification of Non-International Armed Conflicts' (2016) 7 *J Intl Hum Leg Stud* 5, 15.

[191] ICC, *Prosecutor v Thomas Lubanga Dyilo* (Judgement) ICC-01/04-01/06, T Ch I (14 March 2012) [536] *et seq*; ICTY, *Prosecutor v Zejnil Delalić and others* (Judgement) IT-96-21-T, T Ch II (16 November 1998) [184]; *Prosecutor v Fatmir Limaj* (Judgement) IT-03-66-T, T Ch II (30 November 2005) [94]-[134]; ICTR, *Prosecutor v Alfred Musema* (Judgement and Sentence) ICTR-96-13-A, T Ch I (27 January 2000) [248]; Alston Report (n 11) para 52; Akande (n 187) 51 *et seq*; Heyns Report 2013 (n 14) para 56.

[192] Duffy (n 10) 388; Melzer, *Targeted Killing* (n 175) 262 *et seq*.

[193] For an explanation of this position see Duffy (n 10) 390 *et seq*.

[194] Rosa Brooks, 'Drones and the International Rule of Law' (2014) 28 *Ethics & Intl Aff* 83, 95 *et seq*.

structure to be considered a single entity.[195] Although some of these organizations may have pledged formal allegiance to al-Qaeda, such acts have been more symbolic than substantive in nature and are mostly motivated by the desire to capitalise on the "brand" of a specific terrorist organization.[196] Nor is it permissible to join several separate militant organizations into a single organized armed group merely because they might have cooperated from time to time. For example, al-Qaeda, the TTP, the Haqqani Network and the Afghan Taliban have all tried to benefit from each other in the past. However, they are different organizations with different goals and maintain independent command and operational structures.[197] Instead, for the US to be engaged in an armed conflict with any of these organizations, it must be shown that the requirements of a NIAC are met with respect to each one of them separately.[198]

As for the requirement of protracted armed violence, the key element is whether the hostilities have reached a certain level of intensity rather than their duration.[199] This must be determined with view to a variety of factors, including, *inter alia*, the number, duration, and interval of confrontations; their seriousness; the weapons used; the number of civilians killed or displaced; the number of persons partaking in the fighting; the potential increase in armed clashes; their spread over territory and over a period of time; and whether a State is forced to use military force against the insurgents instead of mere

[195] Duffy (n 10) 395-399; Heller (n 176) 110 *et seq*; Noam Lubell, 'The War (?) against Al-Qaeda' in Wilmshurst (ed) (n 187) 424-428, 436; Alston Report (n 11) para 55; International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (International Commission of Jurists 2009) 54. See also Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 116-120, citing a director of the FBI, who divides al-Qaeda into core al-Qaeda, small groups with some ties to al-Qaeda, but which are largely self-directed, and independent homegrown extremist.

[196] IEP, *Global Terrorism Index 2014* (IEP 2014) 76.

[197] See MMO, 'Tehrik-i-Taliban Pakistan' (Stanford University, July 2018) 12 *et seq* <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/tehrik-i-taliban-pakistan> accessed 13 May 2020. On the character of the Afghan Taliban as an organized armed group see RULAC, 'Non-international armed conflicts in Afghanistan' (30 April 2019) <https://web.archive.org/web/20200226045756/https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan> accessed 18 December 2021. cf Kai Ambos and Josef Alkatout, 'Der Gerechtigkeit einen Dienst erwiesen? Zur völkerrechtlichen Zulässigkeit der Tötung Osama bin Ladens' (2011) 15/16 *JZ* 758, 759. On the character of the TTP as an organized armed group see Pak Institute for Peace Studies, 'Pakistan Security Report 2019' (5 January 2020) 68 <www.pakpips.com/web/wp-content/uploads/2020/01/sr2019.pdf> accessed 17 June 2020; MMO, 'Tehrik-i-Taliban Pakistan' (n 197) 3 *et seq*. cf Max Brookman-Byrne, 'Drone Use 'Outside Areas of Active Hostilities': An Examination of the Legal Paradigms Governing US Covert Remote Strikes' (2017) 64 *NILR* 3, 18 *et seq*. See also n 351.

[198] See Lubell, *Extraterritorial Use of Force* (n 195) 120.

[199] Akande (n 187) 52.

law enforcement.[200] For example, in the *Limaj* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded that the hostilities between the Serbian army and the Kosovo Liberation Army in the Kosovo, which had included heavily armed clashes every three to seven days over a period of more than two months and which had left thousands of civilians dead or displaced, were enough to satisfy the intensity requirement.[201] The required threshold may even be met by a single confrontation lasting only a couple of hours if the level of violence and destruction is particularly high,[202] or by mere pin-pricks with few casualties and little destruction provided that they continue over the course of an extended period of time.[203] However, it is important to recall that whenever a State directs its attacks against more than one non-State actor acting in the same theatre, as is commonly the case with US counterterrorism operations, unless those actors share a command structure the attacks may not be considered summarily towards a common intensity threshold but must be strictly separated.[204]

This raises the question whether a situation of protracted armed violence requires that the hostilities be reciprocal.[205] This is particularly important with drone strikes, the targets of which have usually found themselves unable to respond in kind. With *international* armed conflicts, it is generally accepted that such conflicts are triggered the moment one State uses force against another State, regardless of whether the latter is able or willing to respond.[206] Although a *non-international* armed conflict additionally requires that the hostilities be sufficiently intense, it is submitted that this does not

[200] See ICC, *Dyilo*, T Ch I (n 191) [538]; ICTY, *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgement) IT-04-84bis-T, T Ch II (29 November 2012) [394]; *Prosecutor v Mile Mrkšić, Miroslav Radić and Veselin Šlyivančanin* (Judgement) IT-95-13/1-T, T Ch II (27 September 2007) [407]; *Limaj* (n 191) [170]-[172]; ICRC, '"Armed Conflict"' (n 183) 3.

[201] ICTY, *Limaj* (n 191) [135]-[170].

[202] See IACHR, *La Tablada* (n 177) [1], where heavy fighting between the Argentinian military and a dissident group lasted only 30 hours; critical Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 169.

[203] Akande (n 187) 53; Sivakumaran (n 202) 168.

[204] Lubell, 'The War (?)' (n 195) 437.

[205] In the ICTY's *Limaj* case (n 191) [169], the Defence argued that a purely one-sided use of force cannot constitute protracted armed violence within the meaning of common article 3 of the Geneva Conventions. The ICTY did not clarify whether it accepted the Defence's argument. Instead, it concluded that the Kosovo Liberation Army had been able to offer strong resistance through effective guerrilla-type tactics.

[206] Tristan Ferraro and Lindsey Cameron in ICRC, *Commentary on the First Geneva Convention* (CUP 2016) para 223; ICRC, '32nd International Conference of the Red Cross and Red Crescent: International humanitarian law and the challenges of contemporary armed conflicts' (October 2015) 32IC/15/11, 8 <www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf> accessed 27 May 2020.

necessarily mean that situations of unilateral violence, ie, where the hostilities are conducted almost exclusively by one party against the other, cannot constitute a NIAC *per se*.[207] However, a lack of (effective) resistance will have to be taken into account when assessing whether the necessary intensity threshold has been crossed.

Once the requirement of a situation of protracted armed violence with an organized armed group has been fulfilled, IHL will continue to apply 'beyond the cessation of hostilities [until] (…) a peaceful settlement is achieved'.[208] According to the International Committee of the Red Cross (ICRC), the term "peaceful settlement" must be interpreted as a situation of factual and lasting pacification of the NIAC.[209] Whether this requires that one of the parties to the conflict has been defeated – in the sense that it has been weakened to the point of no longer meeting the personal requirements of international law – or whether it is sufficient for the level of the hostilities to fall below the necessary intensity threshold with certain permanence remains unclear.[210] In that regard, the ICRC points out that NIAC are inherently unstable and often characterized by a certain degree of fluctuation in the level of hostilities and the organizational structure of the non-State actor. In order to prevent a premature conclusion of the applicability of IHL, the committee has therefore taken the position that a NIAC should be considered to have ended only once all hostilities have completely ceased without real risk of resumption.[211]

As for the geographical confines of a NIAC, common article 3 of the Geneva Conventions does not exclude conflicts which take place on the territory of more than one State.[212] A NIAC may even take place entirely outside the territory of the State party to the conflict or "spill over" into the territory of another State which is not party to the

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[207] See only Deborah Pearlstein, 'The NIAC Threshold' *Opinio Juris* (4 October 2016) <http://opiniojuris.org/2016/10/04/the-niac-threshold/> accessed 20 May 2020. cf Laurie Blank, 'Symposium: The Interplay Between IAC and NIAC–Questions and Consequences' *Opinio Juris* (16 January 2019) <https://opiniojuris.org/2019/01/16/symposium-the-interplay-between-iac-and-niac-questions-and-consequences/> accessed 21 May 2020.

[208] ICTY, *Haradinaj*, T Ch II (n 200) [396]; *Tadić* (Defence Motion) (n 183) [70].

[209] ICRC, '32nd Conference' (n 206) 10.

[210] See Milanovic, 'End of Application' (n 187) 180; Rogier Bartels, 'Ceasefires and the end of the application of IHL in non-international armed conflicts' *Armed Groups in International Law* (1 November 2012) <https://armedgroups-internationallaw.org/2012/11/01/ceasefires-and-the-end-of-the-application-of-ihl-in-non-international-armed-conflicts/> accessed 27 May 2020.

[211] ICRC, '32nd Conference' (n 206) 10 *et seq*, referencing ICTY, *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgement) IT-04-84-T, T Ch I (3 April 2008) [100].

[212] Melzer, *Targeted Killing* (n 175) 258-261, with multiple examples.

conflict.[213] In the latter case, members of the organized armed group may be pursued into the territory of that certain other State.[214] These hostilities remain part of the original NIAC and the relationship between the parties will continue to be governed by IHL.[215] In that regard, it should be noted that some confusion has been caused by the terms "global NIAC" or "global battlefield", both of which are frequently used in connection with US counterterrorism activities. In general, there seems to be widespread agreement that international law currently does not recognize a type conflict that is not limited to a certain territory but that would allow a State to "follow" its adversaries wherever they go.[216] However, there *is* prominent support for the notion of a "global NIAC" in the sense that a pre-existing NIAC may spill over into a third country, including non-adjacent ones,[217] provided that at least some nexus to the original hostilities remains.[218] For the purposes of the present case, it is submitted that no difference results. Both views concur that a spill-over requires a source NIAC to exist *somewhere*.[219] Moreover, such a spill-over does not eliminate the requirement that a NIAC may only exist with a specific organized armed group and that only members of that group may be targeted.

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[213] ibid 358; Nathalie Weizmann, 'The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations Under the 2001 AUMF' (2016) 47 *Colum Hum Rts L* Rev 204, 215.

[214] Duffy (n 10) 402; Lubell, 'The War (?)' (n 195) 437; Sivakumaran (n 202) 251.

[215] ICRC, '31st International Conference of the Red Cross and Red Crescent: International Humanitarian Law and the challenges of contemporary armed conflicts' (October 2011) 31IC/11/5.1.2, 9 <www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> accessed 27 May 2020; Sivakumaran (n 202) 233.

[216] Duffy (n 10) 400-403; ICRC, '32nd Conference' (n 206) 15; Pejic (n 186) 82; Milanovic, 'End of Application' (n 187) 186; Nico Schrijver and Larissa van den Herik, 'Leiden Policy Recommendations in Counter-Terrorism and International Law' (2010) 57 *NILR* 533 para 63. This has been the position of the US, see DoJ, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force' (8 November 2011) 4 <https://fas.org/irp/eprint/doj-lethal.pdf> accessed 28 May 2020 (DoJ White Paper); 'Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights in Conjunction with the Universal Periodic Review' (August 2010) para 82 <https://2009-2017.state.gov/documents/organization/146379.pdf> accessed 20 May 2020; concurring Michael W Lewis, 'Drones and the Boundaries of the Battlefield' (2012) 47 *Tex Intl L J* 293, 312-314.

[217] cf Weizmann (n 213) 216 *et seq*; ICRC, '32nd Conference' (n 206) 19, insisting that a NIAC may only spill over into neighbouring countries.

[218] eg Duffy (n 10) 402; Milanovic, 'End of Application' (n 187) 186; Heller (n 176) 111; Sivakumaran (n 202) 233 *et seq*, 251, who cautions that the violence against fighters who are far removed from the battlefield should also be limited to the "absolutely necessary".

[219] Schrijver and van den Herik (n 216) para 63; Ambos and Alkatout (n 197) 760; Milanovic, 'End of Application' (n 187) 186.

In sum, a NIAC between the US and a (specific) militant organization in Pakistan or Yemen may be the result of:

(i) protracted armed violence in Pakistan and Yemen itself (see I below);
(ii) protracted armed violence on the territory of a State other than Pakistan or Yemen which has spilled over into these countries (see II below); or
(iii) protracted armed violence between a Pakistani or Yemeni organized armed group and the local government on the latter's territory with the US coming to its aid (see III below).

While the legal framework governing the existence of a NIAC between the US and various Pakistani and Yemeni militant groups has received widespread academic attention, to date there is no detailed analysis of the application of these rules to the situation in Pakistan and Yemen *in concreto*. Hence, to clear the ground for an assessment of the existence of an internationally wrongful act, this study will first need to close that gap.

I. Independent Armed Conflict

The first scenario to be considered is that of an independent NIAC, ie, a conflict between the US and a specific militant organization taking place in Pakistan or in Yemen that is not a spill-over of another separate and geographically removed NIAC. However, before the issue is addressed whether the hostilities between the respective parties have met the required intensity threshold in Pakistan (see 1) below) or in Yemen (see 2) below), a preliminary question needs to be dealt with.

Currently, the US maintains two different and independent targeted killing programmes. The first one is led by the Joint Special Operations Command (JSOC), a special command unit under the responsibility of the US military, whereas the second one takes place under the command of the CIA.[220] Although their activities have become

[220] Attempts of US President Barack Obama to consolidate both programmes under the leadership of the US military failed, see Russel Brandom, 'Why the CIA isn't handing over its drone assassins to the military' *The Verge* (7 November 2013) <www.theverge.com/2013/11/7/5073412/why-activists-want-the-pentagon-to-control-americas-drones-and-why> accessed 8 April 2020; Daniel Klaidman, 'Exclusive: No More Drones For CIA' *The Daily Beast* (12 July 2017) <www.thedailybeast.com/exclusive-no-more-drones-for-cia> accessed 3 January 2020.

increasingly difficult to separate,[221] and despite the fact that there have been reports that the CIA's drones are flown by US Air Force personnel,[222] this raises the question whether drone strikes conducted by the CIA – a civilian agency rather than a military force in the traditional sense – may be counted towards the intensity threshold.

According to the definition put forward by the ICTY in its *Tadić* case, a NIAC is a situation of 'protracted armed violence between *governmental authorities* and organized armed groups or between such groups within a State'.[223] The term "governmental authorities" refers to State armed forces only.[224] Attacks by civilians, on the other hand, who do not "belong" to a party to the conflict do not count towards the intensity threshold.[225] In international law, the term "armed forces" must be understood in the broadest sense and is not limited to the traditional military of a State.[226] Instead, it is a rule of customary international law that the armed forces of a party to a conflict is all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.[227] This includes any national guard, customs, police forces or any other similar force.[228] Moreover, to qualify as a State armed force, it

[221] Both have been reported to share intelligence with one another, to closely coordinate their operations, and to even alternate their strikes when acting in the same theatre, see Naureen Shah and others, 'The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions' (Human Rights Clinic at Columbia Law School and Center for Civilians in Conflict, 2012) 11-18 <https://civiliansinconflict.org/wp-content/uploads/2017/09/The_Civilian_Impact_of_Drones_w_cover.pdf> accessed 4 April 2020.

[222] Chris Woods, 'CIA's Pakistan drone strikes carried out by regular US air force personnel' *The Guardian* (14 April 2014) <www.theguardian.com/world/2014/apr/14/cia-drones-pakistan-us-air-force-documentary> accessed 3 January 2020.

[223] ICTY, *Tadić* (Defence Motion) (n 183) [70] (emphasis added).

[224] See AP II, art 1(1) ('This Protocol (…) shall apply to all armed conflicts (…) which take place in the territory of a High Contracting Party *between its armed forces* and dissident armed forces or other organized armed groups'; emphasis added). Note that the US has signed but not ratified the AP II.

[225] See Lubell, 'The War (?)' (n 195) 448; cf Ian Henderson, 'Civilian Intelligence Agencies and the Use of Armed Drones' (2010) 13 *YIHL* 133, 151-153.

[226] Sylvie S Junod in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August* 1949 (Martinus Nijhoff 1987) para 4462 (Commentary to the Additional Protocols).

[227] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (International Committee of the Red Cross, CUP 2009) 14 (Rule 4), noting that '[f]or the purposes of the principle of distinction, [this rule] may also apply to State armed forces in [NIAC]'. This rule has also been reflected in AP I, art 43(1). According to the Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009) 30 *et seq* (DPH Guidance), there is no reason to assume that States party to both Additional Protocols intended different definitions for IAC and NIAC (which might not apply to the US since it is no party to the AP II). See also Michael Bothe, Karl J Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 627.

[228] cf Héctor Olásolo, *Unlawful Attacks in Combat Situations* (Martinus Nijhoff 2008) 105 *et seq*.

is not necessary that arms are carried openly or that a distinctive emblem is worn.[229] However, as such force, group or unit is inherently bound to respect the laws of armed conflict,[230] the requirement that it is under a command responsible to the State party for the conduct of its subordinates (the so-called requirement of a responsible command) must be interpreted to mean that for the force, unit or group to be considered a State armed force within the meaning of IHL, there needs to be an internal discipline system which ensures and enforces effective compliance with the *ius in bello*.[231]

For example, the US military in its traditional sense is trained in the laws of armed conflict and is expected to comply with its rules, and its members are held accountable for their actions under the Uniform Code for Military Justice.[232] CIA operatives, on the other hand, do not seem to receive such training.[233] This does not mean that the CIA lacks a responsible command straight away. Undisclosed officials have repeatedly leaked statements about the CIA's commitment to prevent excessive civilian casualties,[234] indicating that the CIA might have internal rules, regulations and procedures which effectively require its personnel to abide by the same rules as the US military.[235] However, the agency has a record of systematically disregarding established policies and procedures. In some cases, it has even diverged from statements of the US President

[229] Henckaerts and Doswald-Beck (n 227) 15 (Rule 4); Pilloud and others in Commentary to the Additional Protocols (n 226) para 1672; see also Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (3rd edn, CUP 2016) para 164. Fulfilment of these conditions might still be relevant for entitlement to a prisoner of war-status. A notification pursuant to article 43(3) of the AP I is not constitutive of the status as State armed force, see Henckaerts and Doswald-Beck (n 227) 17 (Rule 4).

[230] Pilloud and others in Commentary to the Additional Protocols (n 226) paras 1672 *et seq*, 1681.

[231] Henckaerts and Doswald-Beck (n 227) 16 (Rule 4) and 495 *et seqq* (Rule 139); Pilloud and others in Commentary to the Additional Protocols (n 226) para 1675. See also AP I, art 43(1) second sentence. cf Henderson, 'Civilian Intelligence Agencies' (n 225) 152 *et seq*, who claims that in a NIAC the government may freely choose who operates on its behalf. However, Henderson does not dispute the requirement of a responsible command.

[232] Ryan J Vogel, 'Drone Warfare and the Law of Armed Conflict' (2010) 39 *Denver J Intl L & Poly* 101, 136.

[233] Mary E O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009' in Simon Bronitt, Miriam Gani and Saskia Hufnagel, *Shooting to Kill Socio-Legal Perspectives on the Use of Lethal Force* (Hart 2012) 270; see also Kathryn Stone, '"All Necessary Means" – Employing CIA Operatives in a Warfighting Role Alongside Special Operations Forces' (7 April 2003) 16 <https://fas.org/irp/eprint/stone.pdf> accessed 24 May 2020.

[234] Philip Alston, 'The CIA and Targeted Killings Beyond Borders' (2011) 2 *Harv Natl Sec J* 283, 367 *et seq*.

[235] Vogel (n 232) 136; critical Shah and others (n 221) 57 *et seq*, alleging that the CIA 'does not have an institutional history of engaging in a process that military lawyers and scholars refer to as "operationalizing" the law'.

himself.[236] Moreover, the covert nature of its operations has traditionally ensured that legal scrutiny is obstructed.[237] In fact, US domestic law only requires that covert operations comply with US constitutional and statutory law,[238] but does not demand respect for international law.[239] Thus, whether or not the CIA is subject to a responsible command beyond mere policy remains unclear. For the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston,

> [i]t can reasonably be inferred that international law is not going to provide any significant constraint upon the [CIA]'s determination to do its job unless (…) the relevant international law standard is clearly and explicitly part of domestic United States law [and] (…) that there is a system of domestic oversight ensuring that such international norms are factored into the overall equation of domestic accountability.[240]

However, US domestic law neither reflects basic notions of IHL nor do domestic oversight mechanisms, although extensive in theory, provide any meaningful restriction upon the agency's actions in practice.[241] As Alston concludes, neither the US' executive nor congressional oversight bodies

> will scrutinize the design or application of vaguely formulated policies and practices that give the intelligence community ever-greater leeway to kill those whom they deem to be terrorists or otherwise deserving of being included on kill/capture lists.[242]

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[236] Alston, 'The CIA' (n 234) 376-378.

[237] On that aspect see Andru E Wall, 'Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action' (2011) 3 *Harv Natl Sec J* 85.

[238] 50 USC § 413b(a)(5).

[239] Stone (n 233) 15 *et seq*; see also Alston Report (n 11) para 73, noting that 'unlike a State's armed forces, [CIA] agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL'.

[240] Alston, 'The CIA' (n 234) 368.

[241] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (Norton & Company 2004) 420 (9/11 Commission Report), criticizing oversight of the CIA as 'dysfunctional'; Alston, 'The CIA' (n 234) 374-390; Wall (n 237) 101-108.

[242] Alston, 'The CIA' (n 234) 384. Although the citation refers to executive oversight bodies only, Alston's assessment of congressional oversight is no less discouraging, see ps 386-390.

For Alston, 'it [thus] seems reasonable to conclude (…) that [although the CIA] seeks to comply with international law, (…) this is not a high priority for the agency'.[243] Beyond mere allegations of undisclosed officials,[244] nothing indicates that the CIA actually possesses an internal discipline system which ensures and enforces *effective* compliance with the *ius in bello*. Hence, it is this author's view that for the purposes of a NIAC, the CIA cannot be considered a State armed force within the meaning of IHL.[245]

It is important to note that this does not mean that the CIA may not participate in the hostilities.[246] However, its agents do so as civilians, not as combatants.[247] The role of the CIA in any (armed) conflict is thus double-faced. As a governmental entity, it is obliged to respect all laws that are binding upon the US, including the laws of armed conflict and customary international law. But where its agents use lethal force, they do so as civilians and not as part of a State armed force. As such, their attacks cannot be counted towards the intensity threshold.

1) Pakistan

In general, reliable information about the origin, target and damage caused by specific drone strikes is extremely difficult to obtain. US targeted killings have, for the most part, been conducted in absolute secrecy. The CIA traditionally neither confirms nor denies any of its operations.[248] The US military is a bit more vocal about its activities, but only if the news is good.[249] And so far, only a handful of documents pertaining to the US drone

[243] ibid 373. See also Alston Report (n 11) para 73; Shah and others (n 221) 55-57.

[244] On the CIA's practice to publicly defend its activities by using "anonymous" leaks to the press see Alston, 'The CIA' (n 234) 367; Shah and others (n 221) 59. See also Tara McKelvey, 'Covering Obama's Secret War' *Columbia Journalism Review* (3 May 2011) <https://archives.cjr.org/feature/covering_obamas_secret_war.php> accessed 2 April 2020.

[245] Concurring, albeit for different reasons, Dinstein, *Conduct of Hostilities* (n 229) para 157, who lists the CIA as 'certain civilians'; Donna R Cline, 'An Analysis of the Legal Status of CIA Officers Involved in Drone Strikes' (2013) 15 *San Diego Intl L J* 51, 110, who bases her view on the CIA's lack of a military apparel; similar Mary E O'Connell, 'Case Study of Pakistan' (n 233) 286, adding that the CIA is not subject to the military chain of command; Alston Report (n 11) paras 70-73; Stone (n 233) 17. cf Generalbundesanwalt beim Bundesgerichtshof, 'Betr: Drohneneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan – Verfügung des Generalbundesanwalts vom 20. Juni 2013 – 3 BJs 7/12-4 –' (23 July 2013) 33 *et seq* <www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf> accessed 24 May 2020 (Report of the Federal Prosecutor General), but without addressing the question of effective compliance with IHL.

[246] Alston Report (n 11) para 71.

[247] For the consequences see § 5 B. I. 1).

[248] Alston, 'The CIA' (n 234) 367; Emmerson Report 2013 (n 41) para 46.

[249] McKelvey (n 244). See also Shah and others (n 221) 62-64, criticizing that secrecy and oversight might be worse with the JSOC than it is with the CIA.

programme have been published. Most notably, in 2016 and 2017, the US released an official five-page summary of US counterterrorism efforts between 2009 and 2016 outside areas of active hostilities, which detailed the overall number of drone strikes as well as combatant and non-combatant deaths.[250] While the publication was generally welcomed as a step towards greater transparency,[251] the numbers have widely been criticized as a gross underestimation.[252] Moreover, the summary does not distinguish between individual attacks, targets or even countries. In fact, specific strikes have publicly been addressed only in a handful of cases where either a high value target had successfully been killed or where a drone had accidently killed foreigners or an excessive number of civilians.[253] To date, the most comprehensive and openly accessible register of individual attacks is probably managed by the ISACC. Based on a comparative analysis of official statements and local and foreign news media reports, its database offers detailed information on the origin, target and damages caused by individual operations.[254] For that reason, it has been chosen as the basis for the present analysis.[255]

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[250] See Director of National Intelligence, 'Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities' (1 July 2016) <www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF> accessed 4 August 2019; 'Summary of 2016 Information Regarding United States Counterterrorism Strikes Outside Areas of Active Hostilities' (19 January 2017) <www.dni.gov/files/documents/Summary%20of%202016%20Information%20Regarding%20United%20States%20Counterterrorism%20Strikes%20Outside%20Areas%20of%20Active%20Hostilities.pdf> accessed 4 August 2019.

[251] The executive order that provided for the publication of yearly figures has since been repealed by US President Donald Trump, see Exec Order 13862, 84 FR 8789, s 2.

[252] See Scott Shane, 'Drone Strike Statistics Answer Few Questions, and Raise Many' *New York Times* (3 July 2016) <www.nytimes.com/2016/07/04/world/middleeast/drone-strike-statistics-answer-few-questions-and-raise-many.html> accessed 4 August 2019. According to Alex Moorehead, Rahma Hussein and Waleed Alhariri, 'Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Force' (Columbia Law School Human Rights Clinic and Sanaa Center for Strategic Studies, 2017) 3, 6 <www.outoftheshadowsreport.com/s/5764_HRI-Out-of-the-Shadows-WEB.PDF> accessed 6 September 2019, the US has formally acknowledged only 20 per cent of all airstrikes in Pakistan, Yemen and Somalia since 2002.

[253] Moorehead, Hussein and Alhariri (n 252) 68-71.

[254] See 'States Against Nonstate Actor' (*ISACC*) <https://isacc.umassd.edu/operations> accessed 9 June 2020. To consider a report credible, the ISACC generally requires two sources. It then choses one or more primary sources, depending on the variety of sources cited, the level of detail, and the recentness of the report. The casualties as reported in the primary source(s) are then added to its database. See ISACC, 'Cross-border Counterterror Operations Database – Methodology: Inclusion Criteria and Variables' (3 February 2017) <https://s3-us-west-1.amazonaws.com/isacc/methodology/CCOD-Methodology.pdf> accessed 10 June 2020.

[255] In comparison, see the statistics prepared by Peter Bergen, David Sterman and Melissa Salyk-Virk, 'The Drone War in Pakistan' *New America Foundation* (23 March 2021) <www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-drone-war-in-pakistan/#groups-targeted-by-strikes-by-administration> accessed 23 April 2021. See also the summary by

In Pakistan, the ISACC has registered 423 attacks that took place between 2008 and 2018 and which reportedly targeted at least 20 different terrorist organizations, including, *inter alia*, al-Qaeda (54 strikes), militants loyal to Pakistani Taliban commander Hafiz Gul Bahadur (52 strikes),[256] the Haqqani Network (46 strikes),[257] and the TTP (43 strikes). Other reported targets ominously include the Afghan Taliban (19 strikes), the Pakistani Taliban (seven strikes), the Punjabi Taliban (23 strikes), or the Taliban in general (48 strikes). The concrete affiliation of these targets remains mostly in the dark. The term "Punjabi Taliban", for example, might refer to the Tehreek-e-Taliban Punjab or a loose network of militant groups of predominantly Punjabi origin.[258] Similarly, the term "Pakistani Taliban" might indicate membership in the TTP or refer to militants loyal to Hafiz Gul Bahadur or Mullah Maulvi Nazir,[259] who have often maintained an antagonistic relationship with the TTP.[260] According to the Counter Extremism Project (CEP), there are approximately 26 different Pakistani Taliban factions, and only half of them operate under the umbrella organization of the TTP.[261] In some cases, suspected militant casualties have even been reported only by reference to the ethnicity of those killed, describing them as Uzbeks (24 strikes), Arabs (eight strikes), or Turkmen (five strikes). Moreover, almost one fourth of the attacks (97 strikes) have targeted individuals of unknown affiliation, with casualties being reported as "militant" deaths. Excluding these ambiguous cases, US drone strikes in Pakistan may be divided as follows among the different factions:

Bill Roggio, 'Charting the data for US airstrikes in Pakistan, 2004 – 2021' *FDD's Long War Journal* <www.longwarjournal.org/pakistan-strikes> accessed 23 April 2021 ('The majority of the attacks have taken place in the tribal areas administered by four powerful Taliban groups: the Mehsuds [ie, TTP], Mullah Nazir, Hafiz Gul Bahad[u]r, and the Haqqanis'). For Yemen, no similar statistics are available, see Peter Bergen, David Sterman and Melissa Salyk-Virk, 'The War in Yemen' *New America Foundation* (23 March 2021) <www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-war-in-yemen> accessed 23 April 2021.

[256] On Hafiz Gul see Charlie Szrom, 'The Survivalist of North Waziristan: Hafiz Gul Bahadur Biography and Analysis' *Critical Threats* (6 August 2009) <www.criticalthreats.org/analysis/the-survivalist-of-north-waziristan-hafiz-gul-bahadur-biography-and-analysis> accessed 9 June 2020.

[257] For details on the Haqqani Network see MMO, 'Haqqani Network' (Stanford University, July 2018) <https://stanford.box.com/s/n47ctxl03erit5lynhp4non1w5x9yr9r> accessed 9 June 2020.

[258] See MMO, 'Tehrik-i-Taliban Pakistan' (n 197) 2; Hassan Abbas, 'Defining the Punjabi Taliban Network' (2009) 2(4) *CTC Sentinel* 1.

[259] On the latter see Chris Harnisch, 'Question Mark of South Waziristan: Biography and Analysis of Maulvi Nazir Ahmad' *Critical Threats* (17 July 2009) <www.criticalthreats.org/analysis/question-mark-of-south-waziristan-biography-and-analysis-of-maulvi-nazir-ahmad> accessed 9 June 2020.

[260] See MMO, 'Tehrik-i-Taliban Pakistan' (n 197) 1-3; Daud Khattak, 'The Complicated Relationship Between the Afghan and Pakistani Taliban' (2012) 5(2) *CTC Sentinel* 14, 15.

[261] CEP, 'Pakistan: Extremism & Counter-Extremism' <www.counterextremism.com/countries/pakistan> accessed 21 June 2020.

Table 1: US Drone Strikes in Pakistan (2008-2018)

	Affiliation																	
	TTP		Mullah Nazir		Hafiz Gul		Haqqani Network		Al-Qaeda		Afghan Taliban		AQIS		IMU		Other[262]	
2008	4	25	4	24	1	3	-		10	26	-		-	-	-	-	1	1
2009	12	88	2	5	2	29	5	46	11	31	1	25	-	-	-	-	1	4
2010	8	8	5	32	27	121	16	59	9	47	6	21	-	-	3	-	11	70
2011	4	47	7	36	9	71	8	35	5	14	5	38	-	-	-		3	9
2012	2	12	4	23	10	65	5	26	12	52	1	3	-	-	1	12	-	
2013	7	33	-	-	3	12	4	15	4	12	4	18	-		2	7	-	-
2014	1	5	-	-	-	-	4	25	3	16	1	5	1	4	1	5	1	2
2015	2	7	-	-	-	-	1	7	-	-	-	-	2	10	-	-	-	-
2016			-	-	-	-	1	4	-	-	1	4	-	-	-	-	-	-
2017	2	10	-	-	-	-	1	3	-	-	-	-	-	-	-	-	-	-
2018	1	1	-	-	-	-	1	2	-	-	-	-	-	-	-	-	-	-
SUM	43	236	22	120	52	301	46	222	54	198	19	114	3	14	7	24	17	86

The first number in each cell corresponds to the number of strikes, whereas the second number refers to the number of suspected militant casualties. Where an attack was reported to have killed members of several organizations, the casualties have been divided equally among those groups and rounded mathematically, unless the sources cited by the ISACC expressly provided otherwise.[263]

Unfortunately, hardly any of the ISACC's sources provide information on who was responsible for the attack. Only six strikes have explicitly been attributed to the CIA, and the US military has not claimed responsibility for even a single attack in Pakistan. According to reports, the division of responsibility between the CIA and the JSOC was, at least initially, a classical one. Drone strikes in countries such as Afghanistan, Iraq, Somalia, Syria, and lately even Yemen, where the presence of US forces is officially acknowledged, fell within the responsibility of the JSOC.[264] The CIA, on the other hand, seemed to be primarily responsible for countries like Pakistan where the US was not

[262] eg the Eastern Turkestan Movement, the Turkmenistan Islamic Movement, Harkat-ul Jihad al Islami, the Islamic Jihad Union, Tehreek-e-Taliban Punjab, and Lashkar-e-Islam.

[263] In some cases, an ISACC source reported an affiliation with a specific terrorist organization, but the ISACC chose to categorize the victims as "unknown" rather than as "suspected militants". These cases have not been reflected in the above table.

[264] Mark Mazzetti, 'U.S. Is Said to Expand Secret Actions in Mideast' *New York Times* (24 May 2010) <www.nytimes.com/2010/05/25/world/25military.html> accessed 14 April 2020; Idrees Ali, 'Trump grants U.S. military more authority to attack militants in Somalia' *Reuters* (30 March 2017) <www.reuters.com/article/us-usa-defense-somalia/trump-grants-u-s-military-more-authority-to-attack-militants-in-somalia-idUSKBN1712OD> accessed 9 April 2020.

officially involved in any conflict and wanted to keep its activities secret.[265] Although this division might have been increasingly eroded over time,[266] it can reasonably be assumed that the CIA has been responsible for the vast majority of US drone strikes in Pakistan. However, as was established in the previous section, the CIA's attacks may not be counted towards the necessary intensity threshold.[267] With presumably only a handful of attacks left to be attributed to the US military, it also needs to be taken into account that none of those targeted have been able to offer effective resistance. Under these circumstances and distinguishing strictly between the individual militant organizations, it is submitted that none of the hostilities between the US and any of the aforementioned non-State actors have been sufficiently intense to qualify as an independent NIAC.[268]

2) Yemen

For Yemen, the ISACC recorded 318 entries, representing a total of 411 strikes between 2009 and 2019.[269] The overwhelming majority of these attacks had reportedly been directed against AQAP (259 entries and 334 strikes).[270] Occasionally, the US also targeted al-Qaeda (14 entries and strikes), AQAP split-off Ansar al-Sharia (12 entries and 14 strikes) and ISIL (7 entries and 22 strikes). Contrary to Pakistan, only five per cent of all cases listed in the ISACC's database (16 entries and strikes) record a "suspected militant" death without reference to a specific affiliation. Divided by year and target, US drone strikes in Yemen may be summarized as follows:

[265] Greg Miller and Bob Woodward, 'Secret memos reveal explicit nature of U.S., Pakistan agreement on drones' *Washington Post* (24 October 2013) <www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html> accessed 20 June 2020; Jeremy Scahill, 'Find, Fix, Finish' in idem (ed) (n 62) 42 *et seq*, 51.

[266] See Shah and others (n 221) 15, who claim that at least some strikes in Pakistan were carried out by the JSOC. Under US President Donald Trump, the CIA was also granted greater authority to conduct attacks in other countries, see Gordon Lubold and Shane Harris, 'Trump Broadens CIA Powers, Allows Deadly Drone Strikes' *The Wall Street Journal* (13 March 2017) <www.wsj.com/articles/trump-gave-cia-power-to-launch-drone-strikes-1489444374> accessed 3 January 2020.

[267] See § 5 A. I.

[268] Concurring Susan Breau, Marie Aronsson and Rachel Joyce, 'Discussion Paper 2: Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict' (Oxford Research Group, June 2011) 9 <http://reliefweb.int/sites/reliefweb.int/files/resources/F_R_176.pdf> accessed 28 May 2021.

[269] In seven cases an attack allegedly targeted more than one organization. This study records an entry for each of them.

[270] Including 47 "possible US drone strikes", see Table 2 below and the accompanying note.

Table 2: US Drone Strikes in Yemen (2009-2019)[271]

	Affiliation							
	AQAP		Al-Qaeda		Ansar al-Sharia		ISIL	
2009	2	34	-	-	-	-	-	-
2010	1	2	-	-	-	-	-	-
2011	13	123	3	7	1	8	-	-
2012	40	309	5	64	7	31	-	-
2013	30	112	-	-	-		-	-
2014	28	129	-	-	5	15	-	-
2015	23	81	6	23	1	4	-	-
2016	45	208	-	-	-	-	-	-
2017	111	145	-	-	-	-	21	67
2018	30	35	-	-	-	-	1	-
2019	12	15	-	-	-	-	-	-
SUM	335	1193	14	94	14	58	22	67

Responsibility for most attacks apparently lies with the US military. 94 entries (189 strikes) have been attributed to it, 84 of which have officially been acknowledged. In particular, it was responsible for 155 strikes (74 entries) against AQAP, almost all of which took place between 2016 and 2019 and which killed a total of 276 suspected AQAP terrorists.[272] Allegedly, the CIA has been responsible for eight strikes (eight entries), all of which took place before the end of 2015 and which had also been directed against AQAP.[273] The remaining 214 strikes lack (alleged) authorship, with the US military explicitly denying responsibility for four of them.[274]

Looking at the numbers above, the only militant group that might realistically be engaged in an independent NIAC with the US is AQAP. However, even if one were to distribute the 217 ambiguous strikes and their respective casualties evenly among the US

[271] For the methodology see § 5 A. I. 1). In some cases, it has remained unclear whether the attack was carried out by US or by Yemeni forces or the attack was reported only by a single source. Notwithstanding, these "possible US drone strikes" have been included in the above table.

[272] 2012: 1:15; 2014: 1:2; 2015: 2:5; 2016: 32:163; 2017: 92:74, plus 17 civilians and 10 "unknown"; 2018: 20:13; 2019: 7:4. Unless indicated otherwise, the first number in each year refers to the total number of strikes, whereas the second number refers to the total number of suspected militant casualties. Other US military strikes have been directed against al-Qaeda (2011: 1:2) and ISIL (2018: 1:0; 2017: 17:64). Ansar al-Sharia has not officially been targeted. The remaining 15 strikes attributable to the military have either killed only civilians, individuals of "unknown" identity, or did not cause any casualties at all (2019: 1:5 "unknown"; 2018: 14:17 civilians, plus seven "unknown").

[273] 2011: 1:4; 2012: 3:9, plus one civilian; 2014: 3:44, plus four civilians; 2015: 1:3.

[274] All four strikes had been directed against AQAP (2019: 2:6; 2018: 2:11).

military and the CIA,[275] it is doubtful whether the hostilities between the US and AQAP had reached the necessary intensity threshold at any given time.[276] On average and excluding 2016 and 2017, the US has never targeted AQAP more than twice per month.[277] Although 2017 saw a massive surge in strikes over the previous years, this is easily explained by reference to a US Central Command (CENTCOM) press release which stated that more than 80 strikes had been conducted against AQAP between March and April 2017 without providing further details.

Casualties have been relatively low, too. According to the Correlates of War (COW), a cooperative project founded by the University of Michigan and dedicated to the systematic accumulation of scientific knowledge about war, the existence of a NIAC requires at least 1,000 battle-related fatalities per year among all qualified war participants.[278] While this threshold that has most likely been crossed in Afghanistan,[279] it does not appear to have been crossed in Yemen. In fact, even at its peak in 2012, the ISACC reported only 309 AQAP casualties, less than a third of the COW threshold and without any US casualties to add to that number. And while the choice of weapons may be indicative of a NIAC – the US military has mostly relied on drone-borne AGM-114 Hellfire missiles, which is certainly a weapon of the military rather than one of law enforcement –,[280] they have killed their targets in engagements lasting mere seconds without any real chance for a confrontation within the traditional sense of the word.[281]

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[275] A consolidated account of US military drone strikes against AQAP would be as follows: 2009: 1:17; 2010: 1:1; 2011: 6:60; 2012: 19:156; 2013: 15:56; 2014: 13:44; 2015: 12:42; 2016: 39:186; 2017: 102:110; 2018: 24:19; 2019: 9:7.

[276] cf Oona A Hathaway and others, 'Yemen: Is the U.S. Breaking the Law?' (2019) 10 *Harv Natl Sec J* 1, 57, alleging that in Yemen 'there are NIACs between the United States and (…) the Islamic State, Al-Qaeda and AQAP'. However, they do not provide a justification for their view. In particular, al-Qaeda has only been targeted by a handful of attacks and there does not seem to be any spill-over NIAC either, see § 5 A. II.

[277] Drone strikes had mostly been limited to the Abyan governate at first, but soon extended to Shabwah, al-Bayda, Ma'rib, Hadramawt, Lahij, Al Jawf, and Saada to affect more than 50 per cent of Yemen's territory.

[278] Meredeith R Sarkees, 'The COW Typology of War: Defining and Categorizing Wars (Version 4 of the Data)' 15 <https://correlatesofwar.org/data-sets/COW-war/the-cow-typology-of-war-defining-and-categorizing-wars/view> accessed 16 June 2020.

[279] See Plaw, Fricker and Colon (n 2) 135 *et seq*.

[280] O'Connell, 'Case Study of Pakistan' (n 233) 276.

[281] A handful of strikes were allegedly even carried out by manned aircraft or warships, but these have remained singular occurrences. There is only a single case where militants were reported to have returned "anti-aircraft fire", see AFP, 'US targets Al Qaeda in second day of Yemen strikes' *Dawn* (4 March 2017) <www.dawn.com/news/1318251/us-targets-al-qaeda-in-second-day-of-yemen-strikes> accessed 16 June 2020.

In fact, traditional confrontations have remained exceptionally rare. In ten years, only four ground raids involving US Special Forces have been reported. The first one took place on 25 November 2014, when about two dozen US Special Forces and some Yemeni troops conducted a joint raid against AQAP. A quick shootout with small arms left seven suspected militants dead.[282] Only two weeks later, on 6 December 2014, US Special Forces conducted a second operation to rescue US photojournalist Luke Somers. Flying in on a V-22 Osprey aircraft, a fierce gunfight erupted, leaving two suspected AQAP militants and eight civilians, including Somers, dead. The raid lasted no more than five to ten minutes.[283] Ground operations were then put on hold for more than two years. On 29 January 2017, a team of 50 to 60 US Navy Seals attempted to gather intelligence in a midnight raid in central Yemen. Upon discovery, they engaged a group of suspected AQAP militants in a small arms gunfight (including hand grenades) that lasted the whole night until dawn. Six militants, one US Navy Seal, nine civilians and ten individuals of unknown identity were killed.[284] Another three Navy Seals suffered minor injuries. During the raid, US helicopters, warplanes and drones had provided support fire, severely damaging a nearby school, a health facility, and a mosque. Upon arrival, one Osprey aircraft went down in a crash landing and was intentionally destroyed.[285] Four months later, on 23 May 2017, a second ground raid against AQAP involving small fire arms and air strikes from an AC-130 gunship and maybe drones killed seven suspected AQAP militants and five civilians in a firefight that was reported to have lasted about an hour. Two US service members were lightly wounded.[286]

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[282] Eric Schmitt, 'U.S.-Led Raid Frees 8 Qaeda Hostages From a Yemeni Cave' *New York Times* (25 November 2014) <www.nytimes.com/2014/11/26/world/middleeast/us-led-raid-rescues-eight-held-in-yemen.html> accessed 16 June 2020.

[283] Kareem Fahim and Eric Schmitt, '2 Hostages Killed in Yemen as U.S. Rescue Effort Fails' *New York Times* (6 December 2014) <www.nytimes.com/2014/12/07/world/middleeast/hostage-luke-somers-is-killed-in-yemen-during-rescue-attempt-american-official-says.html> accessed 16 June 2020.

[284] CENTCOM, 'U.S. Central Command statement on Yemen raid' (1 February 2017) Release No 17-049 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1068267/us-central-command-statement-on-yemen-raid/> accessed 16 June 2020.

[285] See Namir Shabibi and Nasser al Sane, 'Nine young children killed: The full details of botched US raid in Yemen' *The Bureau of Investigative Journalism* (9 February 2017) <www.thebureauinvestigates.com/stories/2017-02-09/nine-young-children-killed-the-full-details-of-botched-us-raid-in-yemen> accessed 16 June 2020; Eric Schmitt, 'U.S. Commando Killed in Yemen in Trump's First Counterterrorism Operation' *New York Times* (29 January 2017) <www.nytimes.com/2017/01/29/world/middleeast/american-commando-killed-in-yemen-in-trumps-first-counterterror-operation.html> accessed 16 June 2020.

[286] Iona Craig, 'Villagers Say Yemeni Child Was Shot as He Tried to Flee Navy Seal Raid' *The Intercept* (28 May 2017) <https://theintercept.com/2017/05/28/villagers-say-yemeni-child-was-shot-as-he-tried-to-

But even with these confrontations, it is doubtful whether the hostilities reached the necessary intensity. Both 2014 raids, although conducted in quick succession, involved only small arms and lasted mere minutes. And while the 2017 raids involved heavy weaponry and an extended exchange of hostilities with fatalities on both sides, these incidents have remained isolated and are separated by almost three months. In comparison, in the ICTY's *Limaj* case, there had been armed clashes between the Serbian army and the Kosovo Liberation Army with heavy military weaponry, involving helicopters, tanks, machine guns, mortars, mines, rockets and armoured vehicles, every three to seven days over a period of five months, some of which caused 'great devastation (…), continuing heavy police presence and a complete absence of civilian activities'.[287] Although less numerous, less prepared and not as well equipped or trained, the Kosovo Liberation was able to offer strong resistance through effective guerrilla-type tactics,[288] tying the Serbian army in battles that lasted between twenty minutes and four days.[289] Almost 15,000 civilians were left displaced by the fighting.[290] In Yemen, this level of intensity has certainly not been met.

In sum, it is the view of this author that the necessary intensity threshold has neither been crossed in Pakistan nor in Yemen. There is or was no independent NIAC between the US and any of the non-State actors targeted by it in either country.

II. Spill-over Armed Conflict

However, even in the absence of an independent NIAC, the *ius in bello* may also apply if the hostilities between the State and the non-State actor are part of a spill-over NIAC taking place on the territory another State. In the present case, such a spill-over may either result from a NIAC on US territory (see 1) below) or, in the case of Pakistan, from a NIAC in neighbouring Afghanistan (see 2) below). Yemeni militants, on the other hand, have generally stayed out of the Afghan conflict, which makes a spill-over from Afghanistan into Yemen unlikely.[291]

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flee-navy-seal-raid/> accessed 16 June 2020; CENTCOM, 'U.S. forces conduct counter-terrorism raid' (23 May 2017) Release No 17-193 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1190002/us-forces-conduct-counter-terrorism-raid/> accessed 16 June 2020.

[287] ICTY, *Limaj* (n 191) [136]. See also [153].

[288] ibid [169].

[289] ibid [138], [142], [149], [153], [156], [161], [163].

[290] ibid [167].

[291] Lubell, 'The War (?)' (n 195) 438.

1) From US Territory

Attacks on the US homeland have remained exceptional occurrences at best.[292] According to the *New America Foundation*, there have only been 14 lethal jihadist terrorist attacks inside the US since 9/11 and not a single attacker had been directed, trained or supported by a foreign terrorist organization.[293] The Global Terrorism Database lists only 49 incidents of jihadi-inspired / Muslim extremism in the US between 9/11 and 2018 and links only two of them to a recognized terrorist organization,[294] one of them being the failed underwear-bombing of 2009.[295] The second incident happened in 2010, when Pakistani-born US citizen Faisal Shahzad tried – and failed – to detonate an SUV loaded with explosives in New York Times Square after he had received a 40-day training by the TPP.[296] The remaining 47 incidents, on the other hand, are attributed to unaffiliated individuals.[297]

Probably the most detailed survey of Islamist extremist terrorism targeting the US, whether based in the US or abroad, attempted or successful, was compiled by John Mueller. Mueller registered 127 cases between 9/11 and January 2019,[298] 108 of which he attributes to unaffiliated lone wolfs, many with serious mental disorders and who, although inspired by al-Qaeda or ISIL, were not actually connected to any recognized

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[292] As far as a NIAC with the US is concerned, violence by the same group against States other than the US does not count towards the intensity threshold, see Duffy (n 10) 395; Lubell, 'The War (?)' (n 195) 436.

[293] Peter Bergen and others, 'Terrorism in America after 9/11' *New America Foundation* <www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/> accessed 29 April 2020. They define the term "jihadist" to mean everyone who follows Osama bin Laden's global ideology or otherwise provides support to a group that follow a version of that ideology; note that they refer to lethal attacks only and thus exclude the failed 2009 and 2010 plots. See also John Mueller and Mark G Stewart, *Chasing Ghosts: The Policing of Terrorism* (OUP 2015) 67 *et seq*.

[294] cf A Trevor Thrall and Erik Goepner, 'Step Back: Lessons for U.S. Foreign Policy from the Failed War on Terror' (26 June 2017) Cato Institute Policy Analysis 814, 6 <www.cato.org/sites/cato.org/files/pubs/pdf/pa-814.pdf> accessed 30 April 2020, citing eight cases.

[295] See National Consortium for the Study of Terrorism and Responses to Terrorism (START), 'Global Terrorism Database' (2019) <www.start.umd.edu/gtd/> accessed 30 April 2020.

[296] Ben Roggio, 'Times Square bomber Faisal Shahzad seen on video with Pakistani Taliban commander Hakeemullah Mehsud' *FDD's Long War Journal* (23 July 2010) <www.longwarjournal.org/archives/2010/07/times_square_bomber_1.php> accessed 29 April 2020; John Mueller, 'Terrorism Since 9/11 The American Cases' (January 2019) 531 *et seq* <http://politicalscience.osu.edu/faculty/jmueller/SINCE.pdf> accessed 5 May 2020, highlighting the fact that Shahzad was effectively a lone wolf.

[297] cf David Inserra, 'Attack at Ohio State Brings US Terror Plots, Attacks to 93 Since 9/11' *The Daily Signal* (1 October 2016) <www.dailysignal.com/2016/11/30/attack-at-ohio-state-brings-us-terror-plots-attacks-to-93-since-911/> accessed 30 April 2020, who counts 93 Islamist terrorist attacks since 9/11, but attributes them to 'homegrown lone wolves'. Anyway, this number has been considered inflated, see Thrall and Goepner (n 294) fn 37.

[298] Two additional cases involve US residents trying to go abroad to fight US interests there.

terrorist organization.[299] Of the remaining 19 cases, al-Qaeda has claimed responsibility for 11 plots, all of which took place between 9/11 and 2009, whereas AQAP has been held responsible for three plots. Two of them – the failed underwear-bombing and another failed attempt to bring down two cargo planes bound for the US with AQAP-built explosives hidden in printer cartridges – took place at the end of 2009 and 2010, respectively.[300] The third plot came only years later in 2015, when two women, one of them allegedly with ties to AQAP, bought supplies for the construction of a bomb to be used in a yet undefined terrorist attack with the friendly "help" of an undercover agent from the Federal Bureau of Investigation (FBI).[301] The Hizballah, ISIL, the al-Nusrah Front, Lashkar e-Taiba and the TTP have been held responsible for one plot each.[302] Of these 19 plots total, only four were actually executed and none of them managed to cause even a single injury.[303] Three of them — the underwear bomber, the attempted New York Times Square-bombing and the explosives hidden in printer cartridges – all failed because the explosives were either discovered or did not work as intended and probably would never have.[304] The fourth attack happened shortly after 9/11 when an individual who had spent two years in an al-Qaeda training camp tried to take down a plane by detonating a bomb hidden in his shoe. The attacker was subdued by other passengers before he could

[299] In six cases (65, 66, 70, 78, 83, 89) the perpetrator had been encouraged by an ISIL cybercoach. Mueller cites seven cases, see Mueller (n 296) 2 *et seq*. In more than 50 per cent of all ISIL-inspired plots, the perpetrator would probably not have been able to act upon his fantasies if not for the help of the FBI, see Mueller (n 296) 26 *et seq*.

[300] Cases 33 (underwear bomber) and 36 (printer cartridges). In November 2009, Nidal Hasan, a radicalized US soldier, shot 13 US soldiers in the military base Fort Hood, Texas. Prior to the attack he had written 16 mails to former *imam* and AQAP clerk Anwar al-Awlaki, who had responded to two of them. See CEP, 'Nidal Hasan' <www.counterextremism.com/extremists/nidal-hasan> accessed 2 January 2020; Daveed Gartenstein-Ross, 'Nidal Hasan's "Fairly Benign" Correspondence with Anwar al Awlaki' *Foundation for Defense of Democracies* (6 August 2012) <www.defenddemocracy.org/media-hit/nidal-hasans-fairly-benign-correspondence-with-anwar-al-awlaki/> accessed 2 January 2020.

[301] Case 62. See also Stephanie Clifford, 'Two Women in Queens Are Charged With a Bomb Plot' *New York Times* (2 April 2015) <www.nytimes.com/2015/04/03/nyregion/two-queens-women-charged-in-bomb-plot.html> accessed 7 May 2020.

[302] See cases 17a, 34 (New York Times Square-bombing), 60, 77 and 110.

[303] See also Rosa Brooks, 'The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force' (Testimony Before the Committee on Armed Services, Washington DC, 16 May 2013) 14 <https://scholarship.law.georgetown.edu/cong/113/> accessed 9 August 2019, who points out that lightning strikes cause more deaths in the US each year than all recognized terrorist organisations have managed to do in the past 18 years.

[304] Faisal Shazad had constructed his bomb using mostly non-explosive or only inflammable material. Although the bomb used by the underwear bomber had been built better, even a successful explosion would probably not have been enough to down the plane. See Mueller (n 296) 512, 519, 525. See also Mueller and Stewart (n 293) 33.

light the fuse.[305] The remaining 15 "plots" were all disrupted by the authorities before even a concrete plot was devised, before it outgrew the planning stage or when material preparations were made (or thought to be made).[306]

As is evidenced by the foregoing analysis, attacks on US territory have remained isolated incidents, unable to cause even a single injury.[307] This hardly qualifies as a situation of protracted armed violence within the meaning of the ICTY's *Tadić* case but instead as the type of isolated and sporadic acts of violence which article 2(1) of the AP II seeks to exclude from the definition of a NIAC.[308] And while US government officials

[305] Mueller (n 296) 50-59 (case 1).

[306] More recently, in December 2019, a Saudi Arabian cadet who had been training with US forces opened fire at a US military base in Pensacola, Florida, killing three and wounding eight others. The attacker was alleged to have 'significant ties' to AQAP in what went beyond 'simply being inspired to act based on watching YouTube videos or reading extremist propaganda', see DoJ, 'Attorney General William P. Barr and FBI Director Christopher Wray Announce Significant Developments in the Investigation of the Naval Air Station Pensacola Shooting' (18 May 2020) <www.justice.gov/opa/pr/attorney-general-william-p-barr-and-fbi-director-christopher-wray-announce-significant> accessed 20 May 2020; see also Christopher Wray, 'Remarks at Press Conference Regarding Naval Air Station Pensacola Shooting Investigation' (18 May 2020) <www.fbi.gov/news/pressrel/press-releases/fbi-director-christopher-wrays-remarks-at-press-conference-regarding-naval-air-station-pensacola-shooting-investigation> accessed 20 May2020. While AQAP claimed responsibility for the attack, the true degree of its involvement remains doubtful, see Devlin Barrett and Matt Zapotosky, 'Pensacola shooting was an act of terrorism, attorney general says' *The Washington Post* (13 January 2020) <www.washingtonpost.com/national-security/pensacola-shooting-was-an-act-of-terrorism-attorney-general-says/2020/01/13/34dbed8e-3629-11ea-bf30-ad313e4ec754_story.html> accessed 20 May 2020; Thomas Joscelyn, 'AQAP claims "full responsibility" for shooting at Naval Air Station Pensacola' *FDD's Long War Journal* (2 February 2020) <www.longwarjournal.org/archives/2020/02/aqap-claims-full-responsibility-for-shooting-at-naval-air-station-pensacola.php> accessed 20 May 2020.

[307] Concurring Lubell, 'The War (?)' (n 195) 437.

[308] Heller (n 176) 110.

systematically allege that there are many more undisclosed terrorist plots which are disrupted before they are put into motion,[309] there is little to actually support that claim.[310]

2) From Afghanistan

When the coalition led by the US invaded the *de facto* Taliban-led Afghanistan in October 2001, an IAC ensued, involving the coalition forces on the one side and the Afghan Taliban and al-Qaeda on the other side.[311] Following the installation of a new Afghan government, this IAC then transformed into a NIAC, now also involving the Afghan national security forces.[312] Al-Qaeda, the Afghan Taliban and the Haqqani Network, an Afghan extremist organization closely allied but not identical with the Afghan Taliban,[313] which had fled into Pakistan's FATA, now participate in that conflict as non-State actors.[314] Where these organizations continue to actively engage in cross-border

[309] Supporters of a "global NIAC" have argued that it is thanks to US counterterrorism efforts that these numbers have remained as low. The argument is twofold. First, enhanced homeland security has disrupted many terrorist plots before they have come to fruition. And secondly, counterterrorism strikes abroad have weakened terrorist organizations to the point that they have been unable to carry out international attacks, see Thrall and Goepner (n 294) 7 *et seq*. The first argument is not particularly convincing. John Mueller and Mark Stewart, who extensively investigated post-9/11 terrorist plots, have found most "threats" to be wildly exaggerated and disconnected to any particular terrorist organization, see Mueller and Stewart (n 293) 13 *et seqq*. The second argument seems to be supported by at least by some evidence. When the US increased its airstrikes against al-Shabaab in 2017, attacks by the group diminished by 24 per cent (Institute for Economics & Peace (IEP), *Global Terrorism Index 2019* (IEP 2019) 2). Similarly, when a drone strike killed AQAP leader Nasser al-Wuhayshi in June 2015, attacks by the group dropped by 76 per cent when compared to the previous year (see IEP, *Global Terrorism Index 2016* (IEP 2016) 30; *Global Terrorism Index 2015* (IEP 2015) 26). And the death of TTP leader Hakimullah Mehsud in November 2013 triggered fighting within the organization for his succession, contributing to an overall reduction of terrorist activity in Pakistan (IEP, *Terrorism Index 2016* (n 309) 3, 17). Overall trends, however, are less inspiring. Neither in Pakistan nor in Yemen did US counterterrorism efforts manage to stop the spread of terrorist activity. Data from the GTD and the IEP shows that mounting drone activity was accompanied by a steady growth of terrorist attacks. In fact, once drone strikes had let up, terrorist attacks had increased by 700 per cent in Pakistan and by almost 600 per cent in Yemen over the last year without any noticeable drone activity, see Thrall and Goepner (n 294) 10.

[310] eg Mueller (n 296) 283 *et seq*, quoting Dana Priest; Thrall and Goepner (n 294) 7; Mueller and Stewart (n 293) 107 *et seq*.

[311] Françoise J Hampson, 'Afghanistan 2001-2010' in Wilmshurst (ed) (n 187) 249-252. Note that al-Qaeda and the Afghan Taliban are two separate organizations with different goals and ideologies, see MMO, 'Afghan Taliban' (n 86).

[312] On the nature of the Afghan conflict see Ambos and Alkatout (n 197) 760; RULAC, 'United States of America' (22 January 2020) <https://web.archive.org/web/20210426150245/https://www.rulac.org/browse/countries/united-states-of-america> accessed 27 May 2020; UNAMA, 'Afghanistan Protection of Civilians in Armed Conflict – Special Report: Airstrikes on Alleged Drug-Processing Facilities, Farah, 5 May 2019' (October 2019) 12 <www.ohchr.org/Documents/Countries/AF/SpecialReportUSforAirstrikesBakwa.pdf> accessed 21 May 2020; Brookman-Byrne (n 197) 15 *et seq*.

[313] See CEP, 'Haqqani Network' <www.counterextremism.com/threat/haqqani-network> accessed 18 June 2020.

[314] Hampson (n 311) 252 *et seq*; MMO, 'Haqqani' (n 257) 2 *et seq*, 7 *et seq*.

hostilities against US forces from Pakistani territory,[315] the Afghan NIAC spills over into Pakistan, allowing the US to pursue their members into Pakistani territory under the *ius in bello*.[316] And so far, this NIAC has not ended. Although an "Agreement for Bringing Peace to Afghanistan" was concluded between the US, the Afghan Taliban and the Haqqani Network in February 2020, providing, *inter alia*, for a withdrawal of all US troops from Afghanistan,[317] it failed to put a permanent end to the hostilities.[318]

However, while al-Qaeda, the Afghan Taliban and the Haqqani Network have certainly been among the US' most prominent targets, other militant organizations in Pakistan are not party to the original Afghan conflict.[319] For example, although the militants led by Pakistani Taliban commander Hafiz Gul Bahadur officially oppose the US "occupation" of Afghanistan, they seem more concerned with maintaining their position in Pakistan than with actively trying to drive out US forces from their neighbour.[320] Nonetheless, they were targeted almost as much as al-Qaeda. Similarly, the TTP, which was formed many years after the US-Afghan conflict emerged, has carried out only a single suicide bombing against a US military base in Afghanistan in December 2009, allegedly in retaliation for the death of their leader Baitullah Mehsud.[321] Although it shares Hafiz Gul Bahadurs' goal of driving NATO forces out of Afghanistan,[322] it has

[315] Brookman-Byrne (n 197) 17; Report of the Federal Prosecutor General (n 245) 6 *et seq*; Lubell, 'The War (?)' (n 195) 437.

[316] See RULAC, 'Non-international armed conflicts in Afghanistan' (n 197), which lists the Afghan Taliban, the Haqqani Network, and ISIS – Kohrasan chapter as non-State parties to the Afghan NIAC.

[317] Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America (signed on 29 February 2020) <www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> accessed 27 May 2020.

[318] eg Colin Dwyer and David Welna, 'U.S. Launches "Defensive Strike" at Taliban as Fragile Afghan Peace Deal Teeters' *NPR* (4 March 2020) <www.npr.org/2020/03/04/812019977/u-s-launches-defensive-strike-at-taliban-as-fragile-afghan-peace-deal-teeters> accessed 27 May 2020. On the criteria for a NIAC to end see § 5 A.

[319] See only Brookman-Byrne (n 197) 17.

[320] See Szrom (n 256); Sadia Sulaiman and Syed AAS Bukhari, 'Hafiz Gul Bahadur: A Profile of the Leader of the North Waziristan Taliban' (2009) 7(9) *Terrorism Monitor* 4, 5 *et seq*.

[321] The attack killed seven CIA employees, see Associated Press, 'Pakistan Taliban say they carried out CIA attack' *NBC News* (1 January 2010) <www.nbcnews.com/id/34654487/ns/world_news-south_and_central_asia/> accessed 18 June 2020.

[322] Graham Usher, 'The Pakistan Taliban' *Middle East Research and Information Project* (13 February 2007) <https://merip.org/2007/02/the-pakistan-taliban/> accessed 19 April 2021; Hassan Abbas, 'A Profile of Tehrik-i-Taliban Pakistan' (2008) 1(2) *CTC Sentinel* 1, 2.

remained committed to fighting Pakistani security forces.[323] Still, it is the fourth most-targeted group in Pakistan. Nor were any of the militants loyal to Pakistani Taliban commander Mullah Maulvi Nazir involved in the original Afghan NIAC. Although their aim, too, is to expel US forces from Afghanistan,[324] noteworthy hostilities between the two have yet to occur.[325] Any attacks directed against these organizations are thus conducted *outside* the context of a spill-over NIAC.

III. Intervention in a Foreign Armed Conflict

In the absence of an independent NIAC or a spill-over NIAC, the *ius in bello* may still result as the applicable law *if* the hostilities between the State armed forces and the non-State actor form part of a foreign armed conflict in which the State has lawfully intervened. What has been referred to by the ICRC as the so-called support-based approach requires some explanation. In general, it is rule of customary international law that a State may not militarily intervene in a foreign armed conflict on another State's territory.[326] This has also been reflected in article 3(2) of the AP II, which reads:

> Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

This prohibition is a specific expression of the so-called principle of non-intervention or principle of non-interference, which shall be addressed later in this study.[327] At this stage, suffice to say that it seeks to protect the territorial integrity of every State.[328] This means

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[323] See MMO, 'Tehrik-i-Taliban Pakistan' (n 197) 2, 7 *et seq*; Report of the Federal Prosecutor General (n 245) 7. On the TTP's regional agenda see Abbas, 'Tehrik-i-Taliban Pakistan' (n 322) 2; Waldman (n 100) 2 *et seq*.

[324] MMO, 'Nazir Group' (Stanford University, 15 July 2017) <https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/449> accessed 18 June 2020.

[325] ibid, which lists only a single entry for "major attacks" and which had not even targeted the US.

[326] ICJ, *Military and Paramilitary Activities* (n 177) [202]; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) para 233. On the principle of neutrality, the crime of aggression and possible consequences for the Federal Republic of Germany see Dieter Deiseroth, 'Verstrickung der Airbase Ramstein in den globalen US-Drohnenkrieg und die deutsche Mitverantwortung – Zugleich ein Beitrag zur Bestimmung der individuellen Klagebefugnis nach § 42 II VwGO' (2017) *DVBl* 985, 986 *et seq*. For the purposes of this section, "interference" shall mean military intervention, including logistical support of one of the parties to a foreign armed conflict, but excluding mere financial or political assistance.

[327] See § 6 B. II. 3) a) aa).

[328] See ICJ, *Military and Paramilitary Activities* (n 177) [202].

that a violation of the principle of non-interference is precluded if the intervening State joins the conflict on the side of the local government and does so with the valid consent of the territorial State.[329] However, if no valid consent is given, if the intervening State exceeds the limits of the consent, or if the territorial State subsequently revokes its consent,[330] legal consequences are twofold. First, to deploy troops or to execute military operations on the territory of another State without its consent, even if directed exclusively at a non-State actor, constitutes an armed interference in that State's sovereignty and violates the *ius ad bellum* prohibition on the use of inter-State force *and* the principle of non-interference.[331] Secondly, the armed interference automatically gives rise to an IAC between the interfering and the territorial State, allowing the latter to force back the invader with lethal force.[332]

Thus, while valid consent of the territorial State shields the intervening State from incurring international responsibility and possibly even from armed attacks by the territorial State, it offers yet another distinct advantage. Whenever a State decides to challenge a non-State actor on foreign territory, it will usually be faced with one of two different scenarios. In the first one, the local government has allowed the non-State group to operate freely on its territory.[333] This was the situation in pre-2002 Afghanistan, whose

[329] ibid [246]; Dinstein, *NIAC* (n 326) paras 238 *et seq*. See also ARSIWA, art 20 ('Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent'). On the constituent elements of valid consent see Dinstein, *NIAC* (n 326) paras 246-251. On the difficulties of identifying consent see Ferraro and Cameron in ICRC, *First Geneva Convention* (n 206) para 263.

[330] In the latter case, the intervening State must be given sufficient time to withdraw its troops, see Dinstein, *NIAC* (n 326) paras 255 *et seq*.

[331] See ICJ, *Armed Activities on the Territory of the Congo* (n 168) [163], [165]; Dinstein, *NIAC* (n 326) para 266; Akande (n 187) 73 *et seq*. On the first of these two elements see in detail § 5 B. IV.

[332] See UN Charter, art 51. If no consent is given, it is disputed whether the pre-existing NIAC on the territory of the territorial State continues to exist separately and alongside the IAC brought about by the intervention, or whether the NIAC becomes internationalized in the sense that from the intervention onwards there is only one single IAC, encompassing all hostilities between the State armed forces and the organized armed group. See ICC, *Prosecutor v Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the ICC Statute) ICC-01/05-01/08, Pre-T Ch II (15 June 2009) [246]; George H Aldrich, 'The Laws of War on Land' (2000) 94 *AJIL* 42, 62 *et seq*; Marko Milanovic, 'What Exactly Internationalizes an Internal Armed Conflict?' *EJIL: Talk!* (7 May 2010) <www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/> accessed 10 May 2020; Akande (n 187) 77; Felicity Szesnat and Annie R Bird, 'Colombia' in Wilmshurst (ed) (n 187) 236 *et seq*; Carron (n 190) 13 *et seqq;* Ferraro and Cameron in ICRC, *First Geneva Convention* (n 206) paras 223, 237, 261 *et seq*; RULAC, 'Contemporary challenges for classification' (15 September 2021) <www.rulac.org/classification/contemporary-challenges-for-classification> accessed 18 December 2021.

[333] See Akande (n 187) 71.

de facto Taliban-led government had sheltered al-Qaida.[334] In that case, there is no pre-existing NIAC on foreign territory between the non-State actor and the territorial State. While such a NIAC may be brought into effect by the intervention of the intervening State itself, this is only the case if the hostilities between the intervening State and the non-State actor are sufficiently intense. Once the necessary intensity threshold has been crossed, the intervening State and the non-State actor will become parties to a new NIAC, regardless of whether the territorial State has consented to the intervention or not.[335] However, there may be situations where the violence between the two is not sufficiently intense to qualify as a situation of protracted armed violence. As the present study has shown, this is the case in Pakistan and in Yemen, where the hostilities between the US and the different non-State actors have failed to meet the necessary level of intensity.[336] In these situations, no NIAC emerges despite the intervention and all hostilities between the intervening State and the non-State group will be governed by the law enforcement standard.

In the second and probably more common scenario, the territorial State has already engaged the insurgent group, creating a situation of a pre-existing NIAC on its own territory. This, for example, is the situation in Somalia, where the Somali government is engaged in a fierce NIAC with al-Shabaab and the Islamic State in Somalia.[337] If in such a situation the territorial State extends an invitation to another State to join the pre-existing NIAC on its side, then, under the ICRC's support-based approach, the foreign (intervening) State will become a party to that certain (foreign) NIAC *even if* the hostilities between the intervening State and the non-State actor itself are not sufficiently intense to qualify as protracted armed violence.[338] The ICRC's support-based approach

[334] Hampson (n 311) 243, 245 *et seq*; 9/11 Commission Report (n 241) 66.
[335] See Carron (n 190) 16.
[336] See extensively § 5 A. I.
[337] RULAC, 'Non-international armed conflict in Somalia' (30 April 2021) <www.rulac.org/browse/conflicts/non-international-armed-conflict-in-somalia> accessed 7 June 2021.
[338] Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 *Intl Rev RC* 561, 584; 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict' (2015) 97 *Intl Rev RC* 1227, 1231. See also Michael N Schmitt, Charles HB Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict' (International Institute of Humanitarian Law, 2006) 2 <www.fd.unl.pt/docentes_docs/ma/jc_MA_26125.pdf> accessed 27 April 2020; Dinstein, *NIAC* (n 326) paras 270; Cameron and others in ICRC, *First Geneva Convention* (n 206) paras 259, 445.

thus allows for the intervening State to become a party to a foreign pre-existing NIAC and avail itself of IHL without having to engage in sufficiently intense hostilities with the non-State actor itself (but always provided that the hostilities between the *territorial* State and the non-State actor meet the required threshold).[339]

According to the ICRC, four cumulative requirements need to be fulfilled for its support-based approach to apply:

(i) there is a pre-existing NIAC taking place on the territory where the intervening State intervenes;

(ii) the intervening State undertakes actions related to the conduct of hostilities;

(iii) the actions of the intervening State are carried out in support of the territorial State; and

(iv) the actions are undertaken pursuant to an official decision by the intervening State.[340]

For the purposes of the present case, the second and fourth requirement pose little difficulties. The intervening State's actions are undertaken in relation to the conduct of hostilities whenever they directly and repeatedly impact the opposing party's capacity to carry out military operations.[341] Although an indirect contribution to the war effort of the territorial State, eg by providing training, ammunition or finances, is not enough,[342] kinetic operations which directly harm the adversary are 'definitely included in the type of action [covered by the second requirement]'.[343] And the fourth requirement is only meant to exclude actions that are accidental or *ultra vires*, but not those that are secret.[344]

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[339] Raphaël van Steenberghe and Pauline Lesaffre, 'The ICRC's 'Support-Based Approach': A Suitable but Incomplete Theory' (2019) 59 *QIL* 5, 5 *et seq*; Cameron and others in ICRC, *First Geneva Convention* (n 206) para 445.

[340] Ferraro, 'ICRC's Legal Position' (n 338) 1231; see also idem, 'Applicability and Application' (n 338) 584.

[341] Cameron and others in ICRC, *First Geneva Convention* (n 206) para 446; Ferraro, 'Applicability and Application' (n 338) 586, who does not clarify how "directly" and "repeatedly" are to be interpreted; see also van Steenberghe and Lesaffre (n 339) 13-15, arguing that the contribution must be substantial.

[342] Ferraro, 'Applicability and Application' (n 338) 585 *et seq*.

[343] ibid.

[344] ibid 587. For Yemen see Stephen W Preston, 'Authorization for Use of Military Force After Iraq and Afghanistan' (Statement before the Committee on Foreign Relations, Washington DC, 21 May 2014) 9 <www.foreign.senate.gov/imo/media/doc/052114_Transcript_Authorization%20for%20Use%20of%20Military%20Force%20After%20Iraq%20and%20Afghanistan.pdf> accessed 22 June 2020.

Instead, the biggest hurdle of the ICRC's support-based approach probably lies in the third requirement, namely that the action is carried out in support of the territorial State. This does not necessarily mean that the intervening State must pool its military capacities in joint combat operations with the territorial State. An independent military operation may also satisfy the requirement if it is aimed at weakening the common adversary for the benefit of the territorial State.[345] Support of the territorial State need not even be the prime objective of the intervening State. However, it must be reasonably evident from the circumstances that its actions are designed to support the State party to the pre-existing NIAC rather than benefit the intervening State itself.[346] If the military actions are undertaken in response to a formal request for assistance by the local government or if the legal mandate for military action expressly lists support of it as one of the objectives,[347] it can safely be assumed that there is a genuine intent to support the territorial State. However, pursuit of the same goal, namely defeating the common enemy, might not necessarily be enough.[348] More importantly, the mere consent of the territorial State in itself is not sufficient to satisfy the requirement of a genuine intent to support.[349] Although such consent will preclude a violation of the principle of non-interference / the *ius ad bellum* and will prevent an IAC from arising, this must not be confused with the more general question of which law – IHL or IHRL – is applicable to the intervening State's actions. In case of doubt as to the true purpose of an action, it is the position of the ICRC that the intervening State should not be regarded as a party to the pre-existing NIAC.[350] In the following sections, these criteria will first be applied to the situation in Pakistan (see 1) below) and then to the situation in Yemen (see 2) below).

1) Pakistan

In Pakistan, there has been an ongoing and pre-existing NIAC between the Pakistani security forces and various militant organizations who seek to overthrow the Pakistani State since 2009, including the TTP, the Islamic Movement of Uzbekistan (IMU) and Al-

[345] Ferraro, 'ICRC's Legal Position' (n 338) 1234.
[346] idem, 'Applicability and Application' (n 338) 586 *et seq*.
[347] ibid 587; van Steenberghe and Lesaffre (n 339) 15.
[348] Ferraro, 'Applicability and Application' (n 338) 586.
[349] van Steenberghe and Lesaffre (n 339) 15; cf O'Connell, 'Case Study of Pakistan' (n 233) 282, who argues that the intervening State may join a conflict "upon invitation of the territorial State".
[350] Ferraro, 'Applicability and Application' (n 338) 587.

Qaeda in the Indian Subcontinent (AQIS).[351] *Au contraire*, other militant organizations operating on Pakistani territory whose main focus has remained on Afghanistan, in particular the Afghan Taliban, the Haqqani Network, Lashkar-e-Taiba and the militants loyal to Taliban commanders Hafiz Gul Bahadur or Mullah Maulvi Nazir, have been tolerated or even supported by the Pakistani government as part of its wider geostrategic policy.[352] They are not party to a pre-existing NIAC with Pakistan that would allow for an application of the ICRC's support-based approach. And except for the Afghan Taliban and the Haqqani Network,[353] they do not form part of a spill-over conflict from Afghanistan either, let alone of an independent NIAC with the US. This means that any attacks directed against these groups are not subject to the *ius in bello* but to the law enforcement standard.

Regarding those non-State actors currently engaged in an armed conflict with Pakistan – the TTP, IMU and AQIS –, so far there has been no formal request of assistance by Pakistan *vis-à-vis* the US. In fact, after the Pakistani Parliament's resolution calling for an immediate stop of all drone strikes, it is doubtful whether Pakistan could even be said to have validly consented to the use of force on its territory.[354] And although there seemed to have been some cooperation between the US and the Pakistani intelligence community even after April 2012,[355] no joint operations took place. Instead, the US-Pakistani relationship has largely been one of "naming and shaming", where constant US reprimand of insufficient counterterrorism efforts was met with Pakistani criticism of US interference in sovereign matters.[356] Indeed, the US' drone strikes appear to have been

[351] See generally RULAC, 'Pakistan' (11 October 2018) <www.rulac.org/browse/countries/pakistan> accessed 14 May 2020 ('Pakistan is involved in [NIACs] with various armed groups acting throughout its territory'); Brookman-Byrne (n 197) 17-19; Report of the Federal Prosecutor General (n 245) 19; O'Connell, 'Case Study of Pakistan' (n 233) 281; Lubell, 'The War (?)' (n 195) 438. See also Plaw, Fricker and Colon (n 2) 137, who suggest that the intensity threshold had already been crossed in 2007.

[352] See CEP, 'Pakistan' (n 261); MMO, 'Tehrik-i-Taliban Pakistan' (n 197) 12; Roggio, 'Charting the Data: Pakistan' (n 255). See also § 3 A.

[353] See § 5 A. II. 2).

[354] See in detail § 5 B. IV. 1).

[355] See n 681. cf Shah and others (n 221) 15, noting that the degree of Pakistani cooperation, including intelligence and surveillance support, may currently be diminished.

[356] eg Pamela Constable, 'Mattis urges Pakistan to 'redouble' efforts against Islamist militants' *Washington Post* (4 December 2017) <www.washingtonpost.com/world/asia_pacific/mattis-urges-pakistan-to-redouble-efforts-against-islamist-militants/2017/12/04/9d5c6d6c-d8fb-11e7-a241-0848315642d0_story.html> accessed 17 June 2020; Annie Gowen, 'Too many terrorists find a 'safe place' in Pakistan, Rex Tillerson says' *Washington Post* (25 October 2017) <www.washingtonpost.com/world/asia_pacific/tillerson-says-too-many-terrorist-organizations-find-refuge-in-pakistan/2017/10/25/b00fffd4-b90f-11e7-9b93-b97043e57a22_story.html> accessed 17 June

motivated by a genuine frustration with Pakistan's unwillingness to oppose certain militant organizations more than by a sincere intent to support the local government in its struggle against militant extremism. For example, according to the US Department of State's 2019 integrated country strategy for Pakistan, it is an expressed objective of the US that Pakistan ends its 'grassroo[t] support for terrorist organizations' that continues to perpetuate the threat to the US from militants operating from within Pakistan; that Pakistan 'strengthens its capacity *and will* to prevent violent extremism in key areas, end cross-border proxy terrorist attacks, and completely dismantle proxy terrorist groups'; and that '[t]he United States seeks a Pakistan that is not engaged in destabilizing behavior in the region, and that *is willing* and able to address the threats posed by terrorism and violent extremism'.[357] And in 2017, then director of the CIA Mike Pompeo made it clear that if Pakistan does not do so, the US 'will do everything [it] can to ensure that safe havens no longer exist'.[358]

In fact, out of 423 drone strikes registered by the ISACC between 2008 and 2018, only 53 had been directed against the TTP, AQIS or IMU, which is barely more than ten per cent.[359] By contrast, almost three times as many attacks targeted the Haqqani Network and the 'good Taliban'[360] like the Afghan Taliban or the militants loyal to Hafiz Gul Bahadur or Mullah Maulvi Nazir,[361] ie groups which are considered a threat by the US but a useful asset by the Pakistani government.[362] In this author's view, it can therefore safely be assumed that those latter attacks were not motivated by a genuine intent to support the Pakistani government but instead were undertaken in furtherance of the US' own security interests.[363] And it is doubtful whether a sensible distinction can be made

2020; Sikander A Shah, 'US – Pakistan Relations: A Marriage of Inconvenience' *Just Security* (7 May 2018) <www.justsecurity.org/55842/us-pakistan-relations-marriage-inconvenience/> accessed 20 June 2020.

[357] US Department of State, 'Integrated Country Strategy: Pakistan' (12 April 2019) 5 <www.state.gov/wp-content/uploads/2019/04/ICS-Pakistan_UNCLASS_508.pdf> accessed 22 June 2020 (emphasises added).

[358] Anwar Iqbal, 'US will act if Pakistan does not destroy safe havens: CIA' *Dawn* (4 December 2017) <www.dawn.com/news/1374412> accessed 22 April 2021.

[359] See § 5 A. I. 1).

[360] Roggio, 'Charting the Data: Pakistan' (n 255).

[361] 139 strikes total, which is more than 30 per cent.

[362] See § 3 A.

[363] Similar Lubell, 'The War (?)' (n 195) 438. See also O'Connell, 'Case Study of Pakistan' (n 233) 282 *et seq*; Duffy (n 10) 419 fn 395, who considers an intervention on the side of Pakistan to be seriously doubtful; Plaw, Fricker and Colon (n 2) 137 *et seq*.

between those drone strikes that targeted common adversaries like the TTP, IMU or AQIS, and those attacks that were directed against the "good Taliban". Considering that all attacks were carried out as part of one and the same targeted killing programme (whether the CIA's or the US military's), to argue that some attacks were supported by a genuine intent to assist the Pakistani government whereas others were not seems artificial.[364] Thus, even where the US has targeted a non-State actor currently engaged in a (pre-existing) NIAC with the Pakistani government, it is submitted that it has done so without a genuine intent to support and therefore outside the scope of application of the ICRC's support-based approach.

2) Yemen

In Yemen, the situation is different. It is widely accepted that Yemeni government has been engaged in a multi-pronged NIAC with the al-Huthi and AQAP, which still seems to hold true today.[365] And although the Yemeni government has not formally requested assistance against AQAP from the US,[366] it has openly consented to the US' use of force on its territory.[367] Moreover, unlike in Pakistan, the Yemeni security forces and the US have regularly carried out joint combat operations, despite their (occasional) efforts to keep the latter's involvement secret.[368] As of 2016, the US military openly asserts that its counterterrorism operations are carried out in full coordination with the Yemeni

[364] Similar Report of the Federal Prosecutor General (n 245) 20 ('One can safely assume that not even the individual decision-makers responsible for certain aerial drone operations draw a distinction as to whether a given measure is intended to improve the security situation in Afghanistan or that in Pakistan'; translation by Claus Kreß, 'Aerial Drone Deployment on 4 October 2010 in Mir Ali/Pakistan' (2013) 157 *ILR* 722, 744). cf Lubell, 'The War (?)' (n 195) 438, who seems to support an assessment based on the individual target of the strike.

[365] See the detailed analysis undertaken by the OVG NRW (n 51) [438]-[452] – juris; RULAC, 'Yemen' (30 January 2018) <www.rulac.org/browse/countries/yemen> accessed 14 May 2020; Heller (n 176) 111.

[366] Max Byrne, 'Consent and the use of force: an examination of "intervention by invitation" as a basis for US drone strikes in Pakistan, Somalia and Yemen' (2016) 3 *J Use of Force & Intl L* 97, 115. Yemeni President Hadi did ask for military help from other Arab States against the al-Huthi, see UNSC, 'Resolution 2216 (2015)' (14 April 2015) UN Doc S/RES/2216, 1. See also OVG NRW (n 51) [436] *et seq* – juris.

[367] Emmerson Report 2013 (n 41) para 52; Human Rights Watch, *Wedding* (n 139) 6; Byrne (n 366) 108 *et seq*, 119. Despite having fled the country, the Hadi government is still considered to be the legitimate government of Yemen, see UNSC, 'Resolution 2216 (2015)' (n 366) 2; Byrne (n 366) 108 *et seq*.

[368] eg Schmitt, 'U.S.-Led Raid' (n 282); Hakim Almasmari, 'Yemen airstrikes kill dozens of al Qaeda fighters, officials say' *CNN* (3 April 2012) <https://edition.cnn.com/2012/04/03/world/meast/yemen-qaeda-airstrikes/index.html> accessed 21 June 2020; Bill Roggio, 'US airstrikes in southern Yemen kill 30 AQAP fighters: report' *FDD's Long War Journal* (1 September 2011) <www.longwarjournal.org/archives/2011/09/us_airstrikes_in_sou.php> accessed 21 June 2021; cf O'Connell, 'Lawful Use of Combat Drones' (n 41) 2, questioning whether US drone operations were part of the Yemeni military campaigns. See also § 5 A. I. 2).

government.[369] And while there can be little doubt that the actions of the US are also motivated by a desire to confront the terrorist threat before it reaches its own borders,[370] they are, at the same time, aimed at limiting AQAP's ability to challenge the Yemeni authorities.[371] Since the ICRC's support-based approach only requires that the intent of the intervening State to support the territorial State is genuine, not exclusive, this is enough to bring drone strikes against AQAP within the scope of application of the committee's approach and thus of the *ius in bello*.

IV. Interim Conclusion

Lengthy explanations as to the applicable law may seem tedious, but their importance in the present case cannot be overstated. Depending on whether lethal force is used in or outside the context of an armed conflict, two fundamentally different bodies of law apply. And as will be shown in the second part of this chapter, under IHL, a party may lethally target its adversary in any place and at any time, whereas under the law enforcement standard, the rules are such that the use of lethal force is almost never likely to be legal.

The first part of this chapter has addressed the question of the applicable law from the determinative viewpoint of the existence of an armed conflict, and the results have been mixed. Whereas none of the hostilities between the US and the various non-State actors currently targeted by it in Pakistan and Yemen have reached the necessary intensity threshold to qualify as an independent NIAC, the present study has found the *ius in bello* to be the applicable law for attacks directed against al-Qaeda, the Afghan Taliban and the Haqqani Network. These organizations are party to a spill-over NIAC with the US originating in Afghanistan. Moreover, in Yemen, IHL has been identified as the law governing lethal action against AQAP by virtue of the ICRC's support-based approach. This approach allows a State to become a party to a foreign and pre-existing NIAC and

[369] eg CENTCOM, 'Strike Against AQAP and Abu Khattab al Awlaqi in Yemen' (22 June 2017) Release No 17-238 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1225928/strike-against-aqap-and-abu-khattab-al-awlaqi-in-yemen/> accessed 22 June 2020; 'CENTCOM Yemen Strike Summary Jan. 1 – Apr. 1, 2019' (1 April 2019) Release No 19-021 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1801674/centcom-yemen-strike-summary-jan-1-apr-1-2019/> accessed 22 June 2020.

[370] CENTCOM, 'CENTCOM updates counterterrorism strikes in Yemen' (16 May 2018) Release No 18-052 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1523709/centcom-updates-counterterrorism-strikes-in-yemen/> accessed 22 June 2020.

[371] eg CENTCOM, 'Airstrikes kill AQAP militants in Yemen' (8 December 2017) Release No 17-438 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1392401/airstrikes-kill-aqap-militants-in-yemen/> accessed 22 June 2020.

to avail itself of the more permissive rules of IHL *even if* the hostilities between the intervening State and the non-State actor party to the foreign conflict itself are not be sufficiently intense to qualify as a situation of protracted armed violence. However, in Pakistan, drone strikes directed against militant organizations other than al-Qaeda, the Afghan Taliban or the Haqqani Network do not fall within the purview of the support-based approach. In particular, this includes the TTP, IMU, AQIS, and the militants loyal to the Taliban commanders Hafiz Gul Bahadur or Mullah Maulvi Nazir, which account for 30 per cent of all attacks against identified militant organizations in Pakistan. Attacks against those groups are either conducted outside the context of a pre-existing NIAC or are not supported by genuine intent to support the Pakistani government. Their legality must be assessed under the law enforcement standard rather than under the *ius in bello*. In fact, adding to that number those attacks against individuals of unknown or ambiguous affiliation, up to more than 70 per cent of all drone strikes in Pakistan between 2008 and 2018 were conducted outside the context of an armed conflict and are thus subject to the law enforcement standard.[372]

B. International Wrongfulness

Having determined the applicable law, it will be for the present subchapter to identify the specific restrictions on the use of lethal force imposed by the *ius in bello* (see I below) and the law enforcement standard (see II below) and to examine whether the US has complied with them. In addition to that, it will address the issue of the existence of an obligation to conduct an effective investigation into a possible violation of the right to life, which, if omitted, might constitute a separate violation of IHRL and / or customary international law (see III below). Finally, the *ius in bello* and the law enforcement standard are both complimented by the *ius ad bellum*, a separate body of law governing the question *if* force may be used on the territory of another State. Unlike the former, its aim is not to protect the individuals living within a State but to protect the rights of the State itself.[373] Nonetheless, an act which violates the *ius ad bellum* is just as internationally unlawful as if it weren't in compliance with the *ius in bello* or the law enforcement standard (see IV below).

[372] Out of 423 drone strikes registered by the ISACC, only 119 had reportedly been directed against al-Qaeda, the Afghan Taliban, or the Haqqani Network.

[373] Heyns and others (n 176) 797.

I. Ius in Bello

There is general agreement that drones are not a weapon or means of warfare prohibited under the First Protocol Additional to the Geneva Conventions.[374] Their use alone never makes a specific strike unlawful.[375] In fact,

> a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.[376]

It is a core rule of customary international law that all parties to an armed conflict, whether international or non-international in character, must always distinguish between legitimate and non-legitimate targets (so-called principle of distinction).[377] This principle has also been enshrined in the Protocols Additional to the Geneva Conventions. In an IAC, 'constant care shall be taken to spare the civilian population, civilians and civilian objects'[378] and 'those who plan or decide upon an attack shall (…) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects'.[379] Similarly, in a NIAC, '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack'.[380] Thus, even under the laws of war, civilians are never a legitimate target and must never be made the object of the attack. However, this does not mean that every attack which causes civilian casualties is *ipso iure* unlawful. IHL accepts that in wartime civilian deaths are a tragic reality.[381] Instead, the principle of distinction only requires that the attacking party does everything that is feasible in the

[374] See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977 (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 35(2) and (3) (AP I).

[375] Heyns Report 2013 (n 14) para 13; Pejic (n 186) 69 *et seq.*

[376] Alston Report (n 11) para 79. Similar Jessica L Corsi, 'Drone Deaths Violate Human Rights: The Applicability of the ICCPR to Civilian Deaths Caused by Drones' (2017) 6 *IHRL Rev* 205, 229.

[377] Henckaerts and Doswald-Beck (n 227) 3-8 (Rule 1); ICTY, *Prosecutor v Kupreškić* (Judgement) IT-95-16-T, T Ch (14 January 2000) [524]; *Prosecutor v Stanislav Galić* (Judgement) IT-98-29-A, A Ch (30 November 2006) [87]. See also Pejic (n 186) 85.

[378] AP I, art 57(1).

[379] ibid art 57(2)(a)(i).

[380] AP II, art 13(3).

[381] Jean-François Quéguiner, 'Precautions under the law governing the conduct of hostilities' (2006) 88 *Intl Rev RC* 793, 794.

circumstances to ensure that its target is indeed a legitimate one.[382] While the principle of distinction thus leaves some room for honest errors,[383] to deliberately attack a non-legitimate target is never lawful.

The Geneva Conventions do not define the term "civilian". However, in an IAC, it is a rule of customary international law that civilians are negatively defined as all persons who are neither members of State armed forces nor a *levée en masse*.[384] For a NIAC, no similar definition exits.[385] Nonetheless, it follows from the wording and logic of common article 3 of the Geneva Conventions that civilians, State armed forces and members of an organized armed group are mutually exclusive categories.[386] Thus, just like in an IAC, everyone who is not a member of an organized armed group – the NIAC equivalent of an enemy State armed force – must be considered a civilian and as such is protected against direct attack.[387] Thus, in order to determine whether the US has complied with what is required of it under the principle of distinction, this study will first have to address the difficult question what exactly constitutes membership in an organized armed group (see 1) below). As will be shown, the precise content of the concept is highly contested, making a discussion of the different positions indispensable (see 2) below). Finally, the insights obtained in the preceding sections shall be applied to the US' conduct in Pakistan and Yemen (see 3) below).

1) Interpretation by the ICRC

Neither the Geneva Conventions nor customary international law specifies who is a member of an organized armed group. Nor is there any consistent State practice in that regard. The importance of this issue cannot be overstated. In a NIAC, organized armed groups are the prime adversaries of State armed forces. Whoever is a member of an

[382] ibid 797-799, 809-811; Melzer, *Human Rights Implications* (n 41) 23 *et seq*; Pejic (n 186) 87, 92. According to the ICRC, a State must take all 'precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations', see DPH Guidance (n 227) 75.

[383] Melzer, *Human Rights Implications* (n 41) 24; McNeal (n 8) fn 263.

[384] Henckaerts and Doswald-Beck (n 227) 17 *et seq* (Rule 5); see also AP I, art 50(1). The *levée en masse* are all persons who, in the face of an invasion, spontaneously take up arms to resist the approaching force without having time to form themselves into a State armed force.

[385] Henckaerts and Doswald-Beck (n 227) 19 (Rule 5); DPH Guidance (n 227) 27.

[386] DPH Guidance (n 227) 28; see also Henckaerts and Doswald-Beck (n 227) 19 (Rule 5).

[387] This was the common understanding in the expert meetings of the ICRC's DPH Guidance, see William J Fenrick, 'ICRC Guidance on Direct Participation in Hostilities' (2009) 12 *YIHL* 287, 290. See also UNAMA (n 312) 14.

organized armed group constitutes a legitimate military target and may lawfully be attacked anywhere at any time based on his status alone.[388] Little surprisingly, several States have taken different views as to how the term is to be defined, often in response to their own conduct on the battlefield. The most meaningful analysis of what exactly constitutes membership in an organized armed group has probably come from the ICRC, which in 2009 released its "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" (DPH Guidance), a comprehensive manual on the protection of civilians under IHL. Although the DPH Guidance is no legally binding document and reflects neither customary nor treaty international law but the ICRC's own institutional position as to how IHL should be interpreted,[389] it is the result of six years of extensive research involving questionnaires, reports, background papers and several expert meetings.[390] On the question what constitutes membership in an organized armed group, the ICRC took the view that the concept must be interpreted in a strictly functional sense:

> Membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-state party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "continuous combat function").[391]

Thus, according to the ICRC, a member of an organized armed group is whoever exercises a continuous combat function, ie, whose continuous function is to prepare, execute or command an act or operation which amounts to direct participation in

[388] Junod in Commentary to the Additional Protocols (n 226) para 4789; Alston Report (n 11) paras 29 *et seq*; Heller (n 176) 93; Brooks, 'Law of Armed Conflict' (n 303) 11; Heyns and others (n 176) 794. On the question whether the principle of humanity imposes additional restrictions see DPH Guidance (n 227) 79; Melzer, *Human Rights Implications* (n 41) 28 *et seq*; Callamard Report (n 27) paras 42-50.

[389] DPH Guidance (n 227) 9; Fenrick (n 387) 288.

[390] Fenrick (n 387) 288, 300, who expects the DPH Guidance to have substantial persuasive effect outside the ICRC; Deiseroth (n 326) 989.

[391] DPH Guidance (n 227) 33 (footnotes omitted).

hostilities.[392] However, international law does not provide for a definition of the key concept of "direct participation in hostilities" and there is no consistent State practice either.[393] The ICRC, in turn, has interpreted the term to refer only to specific acts.[394] Only such acts which are likely to directly affect the military operations or capacity of a party to an armed conflict (eg by physically attacking soldiers or their equipment but also by interfering with its communications or by clearing its mines) or to directly harm persons or objects protected against direct attack (eg civilians) may be considered direct participation in hostilities.[395] In particular, the term "direct" is to be understood to mean that harm must be brought about in one causal step. An indirect participation, such as providing weapons or finances, does not suffice. However, where such indirect activities are carried out as an integral part of a specific predetermined military operation designed to directly cause the required harm, for example by transmitting tactical targeting information for an attack,[396] they, too, may be considered direct participation in hostilities.[397] In case of doubt whether an individual is a civilian or a legitimate military target, he must be considered to be protected from direct attack.[398]

Once the requirement of a continuous combat function has been satisfied, the individual in question may be considered a member of an organized armed group and as such may be attacked anywhere at any time, even before he first carries out a hostile act.[399] However, it should be borne in mind that not everyone who is publicly labelled a

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[392] ibid 34.

[393] See Henckaerts and Doswald-Beck (n 227) 22 *et seq* (Rule 6); ICC, *Situation in Darfur, Sudan (Prosecutor v Bahar Idriss Abu Garda)* (Decision on the Confirmation of Charges) ICC-02/05-02/09, T Ch I (8 February 2010) [80].

[394] DPH Guidance (n 227) 44 *et seq*.

[395] ibid 47-50; Claude Pilloud and others in Commentary to the Additional Protocols (n 226) para 1944; Melzer, *Targeted Killing* (n 175) 275 *et seq*; Pejic (n 186) 89 *et seq*.

[396] For more examples see DPH Guidance (n 227) 54 *et seq*.

[397] ibid 44, 51-58.

[398] See Junod in Commentary to the Additional Protocols (n 226) para 4789; Nils Melzer, 'Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities' (2005) 44 <www.icrc.org/en/doc/assets/files/other/2005-09-report-dph-2005-icrc.pdf> accessed 20 January 2020; DPH Guidance (n 227) 64, 75 *et seq*. For an IAC, this rule is explicitly set out in article 50(1) of the AP I. Which level of doubt is required for the presumption to apply has remained disputed. The ICRC proposes a standard of slight doubt, whereas others have suggested that the attacker must at least have significant or substantial doubt as to the legitimacy of the target. See Pilloud and others in Commentary to the Additional Protocols (n 226) para 2195; Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff 2009) 164 *et seq*.

[399] DPH Guidance (n 227) 34. Just like a soldier may quit the military and become a civilian again, a member of an organized armed group, too, may discard his continuous combat function and reassume civilian status. However, unlike with State armed forces, where the transition is effected formally, a member

"member" of a non-State actor necessarily fulfils the conditions of membership under IHL. AQAP, for example,

> [has] a distinct division of labor. It has a political leader who provides overall direction, a military chief to plan operational details, a propaganda wing that seeks to draw in recruits, and a religious branch that tries to justify attacks from a theological perspective while offering spiritual guidance.[400]

Neither recruiters, propagandists, financiers, trainers, smugglers, nor intelligence agents exercise a continuous combat function *per se*.[401] Although they might continuously and substantially contribute to the overall success of the group, none of their actions directly harm the adversary. According to the ICRC, unless their actions form an integral part of a predetermined operation destined to inflict the required harm, they do not directly participate in hostilities and are therefore no members of an organized armed group within the meaning of IHL.[402] Even though some States habitually refer to these functions as "operatives" or "militants" in an attempt to assimilate them to the fighting force of the non-State actor, such designations do not change the fact that under IHL, they are civilians and as such must not be made the object of the attack.

It is important to note that under certain circumstances, even civilians may lawfully be attacked. It is a rule of customary international law both in an IAC and in a NIAC that civilians are protected against direct attack '*unless* and *for such time* as they

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of an informal organized armed group may do so only through extended nonparticipation in hostilities or an affirmative act of withdrawal. See Dinstein, *Conduct of Hostilities* (n 229) para 468.

[400] Barak Barfi, 'Yemen on the Brink? The Resurgence of al Qaeda in Yemen' *New America Foundation* (January 2010) 2.

[401] According to Heller (n 176) 96 *et seq*, a training camp is a legitimate military objective. Unless disproportional, any trainer or recruiter killed in the attack would be considered permissible collateral damage. Similar Yoram Dinstein, 'Distinction and Loss of Civilian Protection in International Armed Conflicts' (2008) 84 *Intl L Stud* 183, 191 *et seq*, regarding a civilian driving an ammunition truck. However, to target a trainer outside a training camp would regularly be considered unlawful, see Heller (n 176) 101, 105. See also Emeritus A Barak in Israel High Court of Justice, *Public Committee Against Torture v Government of Israel* (14 December 2006) HCJ 769/02 paras 35, 37, who also excludes propagandists, smugglers, and financers, but seems to consider recruiters a legitimate military target. Note that intelligence agents will often fall under the ICRC's "integral part" exception.

[402] Schmitt, 'Targeted Killings and International Law' (n 177) 545, 551; DPH Guidance (n 227) 34 *et seq*, 53; Alston Report (n 11) paras 60 *et seq*, 64 ('the ICRC's approach is correct, and comports both with human rights law and IHL'); Shah and others (n 221) 76 *et seq*; Heyns and others (n 176) 811 *et seq*; see also OVG NRW (n 51) [383]-[403] – juris.

take a direct part in hostilities'.[403] A civilian may thus lose his protection based on his activity, ie, if he takes a direct part in hostilities, but does so only temporarily ('for such time').[404] Moreover, IHL accepts that sometimes the intentional infliction of civilian harm may be a necessary evil to advance a specific military goal (so-called collateral damage). In these cases, customary international law allows for the intentional targeting of civilians provided that the civilian harm is not excessive in relation to the anticipated military advantage (so-called principle of proportionality).[405]

2) Discussion

The ICRC's interpretation of IHL has not remained unopposed. In particular, critics have argued that the committee's interpretation of the term "direct participation in hostilities" is 'overly narrow'[406] and counterintuitive. After all, the overall military success of a terrorist organization depends heavily on its supportive wing, and military victory is often achieved by disrupting that organization's ability to recruit, train or equip its members.[407] As Daniel Byman puts it:

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[403] Henckaerts and Doswald-Beck (n 227) 19 *et seq* (Rule 6) (emphasis added). See also common article 3(1)(a) of the Geneva Conventions ('active part in hostilities'), article 51(3) of the AP I ('unless and for such time as they take a direct part in hostilities'), and article 13(3) of the AP II ('direct part in hostilities'). "Active" and "direct" have the same meaning, as the French text ('participent directement') shows, see DPH Guidance (n 227) 43. Critical BVerwG, Judgement of 25 November 2020 (6 C 7/19) [74] – juris (*Bin Jaber*); Peter Dreist, 'Anmerkung zu OVG NRW, Urt. v. 19.03.2019 – 4 A 1361/15' (2019) 5 *NZWehrr* 207, 211, 215, both pointing out that the US is no party to the AP II.

[404] DPH Guidance (n 227) 44; Pejic (n 186) 91. The interpretation of the term "for such time" has been the object of substantial debate. According to the DPH Guidance (n 227) 65-68, 70-73, this refers to the preparatory phase of a specific hostile act, its execution, and the attacker's way home. Once home, the attacker reassumes civilian status, becoming attackable only once he leaves his home to directly participate in hostilities again (so-called farmer by day, fighter by night). The continuous loss and resumption of protection ("revolving door") has been criticized where this is foreseeably done on a regular basis. However, an individual whose actions do not amount to a direct participation in hostilities in the first place will never be a fighter by night, no matter how often he repeats his conduct. See Schmitt, 'Targeted Killings and International Law' (n 177) 546; Olásolo (n 228) 114; Ambos and Alkatout (n 197) 762; Dinstein, *Conduct of Hostilities* (n 229) paras 476 *et seq*. On the US position see DoD, 'Law of War Manual' (May 2016) para 5.8.4.2 <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf> accessed 8 January 2021 (Law of War Manual).

[405] This is the case for an IAC and a NIAC, see AP I, art 57(2)(a)(iii), (b); Henckaerts and Doswald-Beck (n 227) 46-50 (Rule 14). According to McNeal (n 8) 754, with drone attacks in Afghanistan, civilian harm was caused primarily by erroneous identification (70 per cent) and weapon malfunction (22 per cent). Only in eight per cent of the time was civilian harm willingly accepted because it was outweighed by the anticipated military advantage. On the principle of proportionality see also Dinstein, *Conduct of Hostilities* (n 229) paras 397 *et seqq*.

[406] Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *NYU J Intl L & Pol* 697, 720.

[407] eg Fenrick (n 387) 293; Dinstein, *Conduct of Hostilities* (n 229) paras 478 *et seq*.

> There may (…) be thousands of people who hate the United States and want to take up arms, but without bomb-makers, passport-forgers, and leaders to direct their actions they are often reduced to menacing bumblers, easier to disrupt and often more a danger to themselves than to their enemies.[408]

Others have pointed out that members of State armed forces are always legitimate military targets, regardless of their function. A military cook, for example, is just as targetable as a fighter.[409] To restrict the legitimacy of military targeting to those members of an organized armed group who exercise a continuous combat function would thus create an unjustified imbalance between the two parties to a NIAC.[410] And while few have gone so far as to argue that all types of indirect participation should be considered direct participation in hostilities,[411] several authors have sought to at least include those activities that are "combat related".[412]

Nevertheless, it is this author's view that the DPH Guidance represents a balanced approach between military necessity and humanity and reflects the correct interpretation of IHL. Most importantly, it does not create some sort of disadvantage for State armed forces. The argument that it would be unfair if some "members" of an organized armed group were protected from direct attack, namely those that do not exercise a continuous

[408] Daniel Byman, 'Denying Terrorist Safe Havens: Homeland Security Efforts to Counter Threats from Pakistan, Yemen and Somalia' *Brookings Institution* (3 June 2011) <www.brookings.edu/testimonies/denying-terrorist-safe-havens-homeland-security-efforts-to-counter-threats-from-pakistan-yemen-and-somalia/> accessed 31 March 2020. A similar point is made by John Hardy and Paul Lushenko, 'The High Value of Targeting: A Conceptual Model for Using HVT against a Networked Enemy' (2012) 12 *Defence Studies* 413, 416 *et seq*.

[409] Schmitt, 'Deconstructing' (n 406) 699; Dinstein, *Conduct of Hostilities* (n 229) para 479.

[410] Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *NYU J Intl L & Pol* 641, 644, 675; William H Boothby, *The Law of Targeting* (OUP 2012) 150 fn 61.

[411] cf Michael N Schmitt, '„Direct Participation in Hostilities" and 21st Century Armed Conflict' in Horst Fischer and Dieter Fleck (eds), *Krisensicherung und humanitärer Schutz: Festschrift für Dieter Fleck* (BWV Berliner-Wissenschaft 2004) 509, who argues that grey areas should be interpreted liberally, which would create an incentive for civilians to stay as far away from the conflict as possible. On that argument see Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *NYU J Intl L & Pol* 831, 875 *et seq*.

[412] eg Watkin (n 410) 691. See also Schmitt, 'Targeted Killings and International Law' (n 177) 545 *et seq*; 'Deconstructing' (n 406) 727-732.

combat function – a cook, for example –, while an equivalent member of a State armed force would enjoy no such protection, is inherently flawed.[413]

First, it seems to rest on the assumption that there needs to be some sort of equilibrium between a State armed force and an organized armed group. However, the status afforded to both under IHL is fundamentally different.[414] In an armed conflict, State armed forces enjoy the privilege of belligerency. As long as they comply with IHL, its members are immune to domestic and international prosecution for whichever acts they commit during wartime.[415] Organized armed groups, on the other hand, enjoy no such privilege.[416] Although they are a party to the conflict, the domestic State is free to prosecute its members for their participation in the hostilities once the group has been defeated.[417] In fact, members of organized armed groups may not lawfully attack anyone, let alone State armed forces.[418]

Secondly, whether or not someone is a legitimate target is not determined by his *function*, but by his *membership* in either a State armed force or in an organized armed group.[419] Whereas membership in a State armed force is constituted formally by integration into a uniformed armed unit in accordance with domestic law,[420] organized armed groups usually do not have a common uniform. In fact, it is practically impossible to distinguish its members from those who merely accompany or support it without taking a direct part in the hostilities (ie civilians).[421] A formal definition of membership as "all those who accompany or support that group" regardless of their individual function would run contrary to customary international law, which only provides for a loss of protection in case of a *direct* but not in case of an *indirect* participation in hostilities.[422] This has

[413] Melzer, 'Keeping the Balance' (n 411) 851 *et seq* points out that even a cook in a State armed force is trained as a regular soldier and would be expected to take up arms in case of enemy contact. The same is probably true for an organized armed group.
[414] See Henderson, 'Civilian Intelligence Agencies' (n 225) 147; OVG NRW (n 51) [387] – juris.
[415] Milanovic, 'Internationalize' (n 332).
[416] Fenrick (n 387) 291.
[417] Carron (n 190) 7 fn 5; Milanovic, 'Internationalize' (n 332); OVG NRW (n 51) [387] – juris.
[418] Henderson, 'Civilian Intelligence Agencies' (n 225) 153.
[419] Melzer, 'Keeping the Balance' (n 411) 851.
[420] ibid 844.
[421] ibid 850.
[422] ibid. Moreover, where civilians directly participate in hostilities, they lose protection only temporarily. As Melzer has rightfully pointed out, it 'would [then] be contradictory to attach an even more serious consequence, [namely] continuous loss of protection, to a function [even] further removed from the conduct of hostilities' (emphasis omitted), see p 846.

been recognized by international tribunals and bodies alike. For example, according to the Inter-American Commission on Human Rights (IACHR), those who support an armed group merely by supplying labour, transporting supplies, serving as messengers, or disseminating propaganda do not pose an immediate threat of actual harm to the adverse party and must not be directly targeted.[423] Similarly, the Special Court for Sierra Leona, a UN criminal tribunal set up to deal with the human rights violations committed during the Sierra Leonean civil war, clarified that '[i]ndirectly supporting or failing to resist an attacking force is insufficient to constitute [direct participation in hostilities]'.[424] However, because an organized armed group is *de facto* an irregularly constituted armed force, membership is best understood *functionally* as those who equal "combatants" in regular State armed forces. Thus, those who exclusively fulfil administrative or other non-combat functions, like the exemplary cook, must be excluded from the definition.[425] In fact, it is important to note that budget cuts and the general downsizing of many States' standing armed forces have led to the outsourcing of various functions formerly carried out within the military itself to the private sector.[426] Even with drones, the US military has shifted many of the tasks involved in the operation of a drone to private contractors, allegedly including the analysis of a drone's video feed or even piloting the drone itself.[427] These contractors are also civilians and must not be made the object of attack unless and for such time as they take a direct part in hostilities, subject to the same criteria applicable to an organized armed group.[428]

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[423] IACHR, 'Third Report on the Human Rights Situation in Colombia' (26 February 1999) OEA/Ser.L/V/II.102 ch IV para 56. See also UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'The Situation in El Salvador' (29 August 1986) UN Doc E/CN.4/Sub.2/RES/1985/18 para 3, on El Salvador's practice of killing peasants it believed to be sympathetic to the revolutionary Farabundo Martí National Liberation Front ('the so-called "masses" do not participate directly in combat, although they may sympathize, accompany, supply food and live in zones under the control of the insurgents, they preserve their civilian character').

[424] Special Court for Sierra Leone, *Prosecutor v Moinina Fofana and Allieu Kondewa* (Judgement) SCSL-04-14-T, T Ch I (2 August 2007) [135].

[425] Melzer, 'Keeping the Balance' (n 411) 850; Alston Report (n 11) para 65; OVG NRW (n 51) [385] – juris.

[426] Fenrick (n 387) 291.

[427] David S Cloud, 'Civilian contractors playing key roles in U.S. drone operations' *Los Angeles Times* (29 December 2011) <http://articles.latimes.com/2011/dec/29/world/la-fg-drones-civilians-20111230> accessed 3 January 2020; Michael S Schmidt, 'Air Force, Running Low on Drone Pilots, Turns to Contractors in Terror Fight' *New York Times* (5 September 2016) <www.nytimes.com/2016/09/06/us/air-force-drones-terrorism-isis.html> accessed 31 December 2020.

[428] Fenrick (n 387) 291 *et seq*; Watkin (n 410) 692.

Similarly, the critique that the ICRC's interpretation of a *direct* participation in hostilities is overly narrow because it excludes indirect activities such as the assembly of an improvised explosive device (IED) or a suicide vest,[429] the purchase / smuggling of its components or the recruitment of suicide bombers,[430] fails to recognize that with State armed forces, similar activities (ie the production / assembly of weapons or the recruitment / training of specialist personnel) are frequently carried out by civilian contractors, too.[431] Moreover, the DPH Guidance does not exclude these functions from being targeted *per se*. Where someone who assembles an IED or who recruits a suicide bomber does so as an integral part of a predetermined operation designed to directly cause the required harm, he exercises a continuous combat function and may lawfully be attacked.[432] Understandably enough, much of the criticism of the ICRC's approach seems to be driven by a concern 'over the ability of State armed forces to operate effectively against an elusive enemy who can hardly be distinguished from the civilian population and whose means and methods are often indiscriminate, perfidious, or otherwise contrary to IHL'.[433] However, to generally consider those a legitimate target whose actions are further removed from the actual causation of harm would invite 'excessively broad targeting policies prone to error, arbitrariness, and abuse'[434] and would run contrary to the customary international law distinction between direct and indirect participation in hostilities.

3) Application to the Present Case

Although sound in theory, applying these standards to the present case is extremely difficult. As previously noted, US drone strikes have for the most part been conducted in absolute secrecy and except for a few selected cases, there are no official records of

[429] See DPH Guidance (n 227) 53 *et seq*. The experts had remained divided over whether the construction of an IED could be considered an integral preparatory measure of a specific military operation, see ibid fn 123. According to Heller (n 176) 95 *et seq*, the place where an IED is made or stored would be a legitimate military objective and that in an attack against that facility, the bomb-maker would regularly be considered collateral damage. See also Olásolo (n 228) 109.

[430] Schmitt, 'Deconstructing' (n 406) 727, 730, 739.

[431] Melzer, 'Keeping the Balance' (n 411) 865 *et seq*.

[432] DPH Guidance (n 227) 53. The element of predetermination does not seem to require that someone who assembles an IED knows exactly when or where it will be used or that a trainer for a specific type of mission knows exactly when or where the operation will be carried out, see Melzer, 'Keeping the Balance' (n 411) 867.

[433] Melzer, 'Keeping the Balance' (n 411) 913. See also Brooks, 'Rule of Law' (n 194) 98 *et seq*.

[434] Melzer, 'Keeping the Balance' (n 411) 868.

individual attacks. Several nongovernmental organizations like the *New America Foundation*, the BIJ and the ISACC have compiled extensive databases about alleged US drone strikes and their apparent casualties,[435] but in doing so they have had to rely almost exclusively on the reports of local news media for information.[436] These, in turn, are usually informed by local witnesses,[437] whose accounts will invariably be shaped by whom they consider to be a terrorist, a militant, or a civilian, and are almost certain not to reflect the decisive criterion of whether the target exercised a continuous combat function.[438] In fact, counting civilian deaths in relation to militant deaths might even create the false impression that the intended target was no civilian and was therefore deprived of his life legitimately, which need not necessarily be the case.[439]

Thus, while the fact that no civilian casualties were reported does not necessarily mean that no civilians were killed and that the specific strike had been lawful, the opposite is equally true. As previously mentioned, international law accepts that in times of armed conflict the occurrence of civilian harm is a tragic reality and that under certain circumstances, it might even be necessary (and lawful) to intentionally deprive a civilian of his right to life. Therefore, an assessment of the legality of an attack cannot stop at the mere identification of civilian harm but must also take into consideration a myriad of other factors, including, *inter alia*, the notion of collateral damage, the principle of proportionality and the concept of honest error. However, those factors are inherently fact-specific, and without access to the operational information which was available to the targeting commander at the time of an attack and on the basis of which his decision

[435] See 'Drone Warfare' (*The Bureau of Investigative Journalism*) <www.thebureauinvestigates.com/projects/drone-war> accessed 23 April 2021; Peter Bergen, David Sterman and Melissa Salyk-Virk, 'America's Counterterrorism Wars' *New America Foundation* (23 March 2021) <www.newamerica.org/international-security/reports/americas-counterterrorism-wars/> accessed 23 April 2021. The BIJ discontinued its work in 2020, but for Yemen, Airwars took over, see 'US Forces in Yemen: Trump' (*Airwars*) <https://airwars.org/conflict/us-forces-in-yemen/> accessed 23 April 2021. See also the summary in Plaw, Fricker and Colon (n 2) 28-34.

[436] In some highly exceptional cases, field studies were conducted, eg Cavallaro, Sonnenberg and Knuckey (n 41); Amnesty International, '"Will I Be Next?" US Drone Strikes in Pakistan' (October 2013) <www.amnestyusa.org/sites/default/files/asa330132013en.pdf> accessed 23 April 2021, which conducted a field research into nine of 45 reported drone strikes between January 2012 and August 2013.

[437] McKelvey (n 244). See also Farhat Taj, 'Drone attacks: challenging some fabrications' *Daily Times* (1 January 2010) <https://dailytimes.com.pk/112589/drone-attacks-challenging-some-fabrications/> accessed 20 September 2019, who doubts that even Pakistani locals know who was killed in an attack.

[438] See Corsi (n 376) 206. Hereafter, reference to IHL or the *ius in bello* shall mean "as interpreted by the ICRC in the DPH Guidance", unless the context determines otherwise.

[439] Callamard Report (n 27) 6 fn 31. See also UK High Court of Justice, *Campaign Against Arms Trade v Secretary of State for International Trade* [2017] EWHC 1726 (QB) [182].

to carry out the attack was made, it will be impossible to reach a reliable view on a breach of IHL.[440]

Notwithstanding those difficulties, the present analysis will be effected in two steps. First, it will try to outline the general policy underlying US targeted killings (see a) below). Although individual attacks do not become unlawful just because the US might be willing to use lethal force in situations that would not be covered by the *ius in bello*, knowledge of the general policy of US targeted killings might allow for a number of other conclusions to be drawn, especially in cases where it is unclear whether civilian harm was inflicted intentionally or accidentally.[441] Secondly, this subchapter aims to provide several examples of individual operations in which a civilian had presumably been made the object of the attack (see b) below). These cases do not only carry a strong presumption of illegality, but an exemplification of individual attacks might help to establish a pattern of wrongfulness which might allow, at a later stage of the study, for some tentative conclusions to be drawn regarding the future conduct of the US.

a) General US Policy

When speaking publicly on the use of drones against suspected terrorists, US officials have repeatedly emphasized that their use complies with all applicable rules of general international law, including the principle of distinction.[442] For example, former counterterrorism advisor to the US President John O Brennan stressed in a speech at the Woodrow Wilson Center:

> Targeted strikes conform to the principles of distinction, the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral

[440] Brooks, 'Counterterrorism Implications' (n 15) 15.

[441] See also BVerwG, *Bin Jaber* (n 403) [63] – juris.

[442] eg Harold H Koh, 'The Obama Administration and International Law' (Speech at the Annual Meeting of the American Society of International Law, Washington DC, 25 March 2010) <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> accessed 3 August 2019 ('U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war'; emphasis omitted); Jeh C Johnson, 'National security law, lawyers and lawyering in the Obama Administration' (Speech at the Dean's Lecture at Yale Law School, Yale, 22 February 2012) <www.lawfareblog.com/jeh-johnson-speech-yale-law-school> accessed 15 April 2020; Brennan, 'Ethics and Efficacy' (n 40) ('First, these targeted strikes are legal').

> damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaida terrorist and innocent civilians.[443]

This seems to be consistent with the broader approach of the US military's technical framework governing the use of force in pre-planned operations. According to the so-called Collateral Damage Estimation Methodology (CDM), five steps, each aimed at preventing or minimizing unintended or incidental civilian casualties, must be fulfilled before a target can be engaged.[444] Allegedly, the CIA employs a similar process, although shorter and less formalized to allow for faster decision making.[445] According to the first step of the CDM, a commander must positively identify the object of attack with reasonable certainty as a legitimate military target under the laws of armed conflict.[446] Where this is not possible, no action must be taken.[447] While this sounds certainly good on paper, civilian protection is only relevant if and where the US decides to treat a particular target as a civilian. However, the US has done little to clarify who it considers

[443] Brennan, 'Ethics and Efficacy' (n 40); see also Koh (n 442) ('the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously').

[444] See Chairman of the Joint Chiefs of Staff Instruction, 'No-Strike and the Collateral Damage Estimation Methodology' (13 February 2009) CJCSI 3160.01, D-A-1–D-A-35 <www.aclu.org/sites/default/files/field_document/drone_dod_3160_01.pdf> accessed 7 April 2020 (CDM Instruction). In a briefing presentation for the US military on targeted killings, these steps have been summarized as follows: '1. Can I [positively identify] the object I want to affect? 2. Are there protected or collateral objects, civilian or noncombatant personnel, involuntary human shields, or significant environmental concerns within the effects range of the weapon I would like to use to attack the target? 3. Can I mitigate damage to those collateral concerns by attacking the target with a different weapon or with a different method of engagement, yet still accomplish the mission? 4. If not, how many civilians and noncombatants do I think will be injured or killed by the attack? 5. Are the collateral effects of my attack excessive in relation to the expected military advantage gained and do I need to elevate this decision to the next level of command to attack the target based on the [rules of engagement] in effect?' See General Counsel to the Chairman of the Joint Chiefs of Staff, 'Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM)' (10 November 2009) in *Al-Aulaqi v Obama* (Declaration of Jonathan Manes) 10-cv-1469 (JDB 2010) Exhibit A, 16 (emphasis omitted) (CDM Briefing). For details on the usual process see McNeal (n 8) 736 *et seqq*.

[445] McNeal (n 8) 741; Brandom (n 220).

[446] See CDM Instruction (n 444) A-6; CDM Briefing (n 444) 26; Dana Priest, 'Inside the CIA's "Kill List"' *Frontline* (6 September 2011) <www.pbs.org/wgbh/frontline/article/inside-the-cias-kill-list/> accessed 8 April 2020.

[447] CDM Instruction (n 444) C-1; CDM Briefing (n 444) 19. See also Shah and others (n 221) 27 *et seq*, 62 *et seq*, fearing that the JSOC might operate outside the rules applicable to regular troops; Jo Becker and Scott Shane, 'Secret 'Kill List' Proves a Test of Obama's Principles and Will' *New York Times* (29 May 2012) <www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> accessed 21 January 2020.

to be such and who it deems to be a legitimate targets.[448] While it has occasionally equated the former with "non-combatant",[449] the latter have been referred to in various terms, including as "militants", "terrorists", "combatants", "operatives", "associates", "adherents" or "belligerents",[450] and none of which have ever been defined.[451] In fact, under international law, such categories are strictly irrelevant.[452] Whether or not someone is a legitimate target is determined by his status as a member of an organized armed group or as a civilian directly participating in hostilities, not by his designation in terms that are not reflected in IHL.

According to the so-called US Presidential Policy Guideline (PPG), a formerly secret document that was reluctantly published in 2016 and which outlines the circumstances in which the US considers the use of lethal force to be permissible against a suspected terrorist outside of areas of active hostilities,[453] 'non-combatants are understood to be individuals who may not be made the object of the attack under the law of armed conflict'.[454] The PPG then goes on to state that this does not include 'an individual who is targetable as part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense'.[455] However, it neither defines the term "direct

[448] On the US' reluctance to fully disclose the legal framework underlying its targeted killing programme see Andris Banka and Adam Quinn, 'Killing Norms Softly: US Targeted Killing, Quasi-secrecy and the Assassination Ban' (2018) 27 *Security Studies* 665.

[449] eg George Stephanapoulos, ''This Week' Transcript: John Brennan, Economic Panel' *ABC News* (Interview with John O Brennan, 27 April 2012) <https://abcnews.go.com/Politics/week-transcript-john-brennan/story?id=16228333> accessed 6 April 2020.

[450] eg Brennan, 'Ethics and Efficacy' (n 40); Obama, 'Speech at National Defense University' (n 40); DoJ, 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities' (22 May 2013) 1 <www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download> accessed 28 May 2020 (PPG). See also § 5 B. I. 3) b).

[451] Brooks, 'Rule of Law' (n 194) 90. In *Hamdi v Rumsfeld* 542 US 507 (2004), the US Supreme Court criticized that the US government 'has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants]'.

[452] Melzer, *Human Rights Implications* (n 41) 23.

[453] See Moorehead, Hussein and Alhariri (n 252) 113, who caution that the term "area of active hostilities" might not be identical with the international law concept of an armed conflict.

[454] PPG (n 450) 1. Similar Director of National Intelligence, 'Summary' (n 250) and 'Summary 2016' (n 250).

[455] PPG (n 450) 1.

participation in hostilities" nor does it explain when someone is "part of a belligerent party".[456]

Further insight into who the US considers to be a legitimate target is provided by the US Department of Defense (DoD) Law of War Manual.[457] Strictly avoiding the term "member of an organized armed group", the Law of War Manual stipulates that all 'persons belonging to non-State armed groups'[458] may be made the object of the attack. Like the PPG, it does not offer an explicit definition of who belongs to a non-State armed group but makes it clear that those individuals 'who are formally or functionally part of a non-State armed group (…) may be made the object of attack'.[459] Again, neither category is defined. Instead, the Law of War Manual exemplifies formal membership as wearing the group's uniform or having sworn an oath of loyalty to it.[460] And those whom it considers to be a functional part of a non-State actor (as opposed to formally being a member of it) are described only generally as 'individual[s] who [are] integrated into the group such that the group's hostile intent may be imputed to [them]'.[461]

Thus, although the Law of War Manual fails to offer a comprehensive and cohesive definition of who belongs to a non-State armed group, it is evident that its concept of who may legally be targeted goes beyond what is permissible under IHL. According to the manual,

> [s]ome States may choose to characterize persons who belong to hostile, non-State armed groups that do not qualify for status as lawful combatants as "civilians"

[456] Brooks, 'Counterterrorism Implications' (n 15) 13; Moorehead, Hussein and Alhariri (n 252) 119 *et seq*, noting that 'national self-defense' can only justify a violation of the *ius ad bellum*, not of the *ius in bello* or IHRL. On that aspect see § 5 B. IV. 2). In 2017, the PPG was purportedly revised and the requirements for targeting suspected terrorists abroad were lowered, but no details have been made public. See Charlie Savage, 'Will Congress Ever Limit the Forever-Expanding 9/11 War?' *New York Times* (28 October 2017) <www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html> accessed 4 January 2021; Rita Siemion, 'Trump Should Release His New Lethal Force Policy' *Just Security* (30 October 2017) <www.justsecurity.org/46437/trump-release-lethal-force-policy/> accessed 25 August 2019. See also Michael J Adams and Ryan Goodman, '"Reasonable Certainty" vs "Near Certainty" in Military Targeting – What the Law Requires' *Just Security* (15 February 2018) <www.justsecurity.org/52343/reasonable-certainty-vs-near-certainty-military-targeting-what-law-requires/> accessed 4 September 2019.

[457] Law of War Manual (n 404) para 5.7.3.

[458] ibid para 5.7.2.

[459] ibid.

[460] ibid para 5.7.3.1.

[461] ibid para 5.7.3.2. Factors to consider include whether an individual follows orders issued by that group or performs tasks on behalf of it.

> who may not be attacked unless they are taking a direct part in hostilities. (…) The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities.[462]

Moreover, it explicitly rejects the ICRC's DPH Guidance and its interpretation of a direct participation in hostilities as not 'accurately reflecting customary international law',[463] but does not provide its own definition of what it considers to amount to such.[464] For Philip Alston, this 'failure (…) to disclose [its] criteria for [direct participation in hostilities] is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing'.[465] In fact, several reports allege that the US has considered individuals to be a legitimate target merely because they were carrying a gun, which, in Yemen and in Pakistan's tribal areas, is a cultural norm;[466] their proximity to another identified target;[467] because of their age and gender;[468] or because they were present at the site of the impact after a strike had occurred.[469] For Alston,

> although the US has not made public its definition of [direct participation in hostilities], *it is clear that it is more expansive than that set out by the ICRC*; in

[462] ibid para 5.8.2.1. See also para 5.7.2.

[463] ibid para 5.8.1.2.

[464] ibid paras 5.8.3 *et seqq*, provides a short and non-exhaustive list of actions may or may not amount to direct participation in hostilities and sets out various factors which might be considered when determining whether a civilian directly participates in hostilities. See also McKelvey (n 244); Emmerson Report 2013 (n 41) para 71 ('It is unclear whether or to what extent United States targeting rules incorporate [the standards of the ICRC] or observe them as a matter of policy').

[465] Alston Report (n 11) para 68.

[466] Yemen has been rumoured to have thrice as many weapons as people and among Yemeni tribesmen, firearms are a sign of virility and wealth, see Clarke (n 114) 182, 187 *et seq*; Hammad A Abbasi, 'Trading bullets in a gun-friendly nation' *Dawn* (30 April 2012) <www.dawn.com/news/714618/trading-bullets-in-a-gun-friendly-nation> accessed 14 April 2020.

[467] Kate Clark, 'The Takhar attack: Targeted killings and the parallel worlds of US intelligence and Afghanistan' (10 May 2011) Afghanistan Analysts Network Thematic Report 5/2011, 29 *et seq* <www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20110511KClark_Takhar-attack_final.pdf> accessed 14 April 2020.

[468] On so-called military aged males see § 5 B. III. 3) a).

[469] The practice of attacking the same spot twice in quick succession in order to kill any militants who have rushed to the strike site to tend to the wounded is commonly known as "double tapping", see Chris Woods, 'Get the Data: Obama's terror drones' *The Bureau of Investigative Journalism* (4 February 2012) <www.thebureauinvestigates.com/stories/2012-02-04/get-the-data-obamas-terror-drones> accessed 6 April 2020; Cavallaro, Sonnenberg and Knuckey (n 41) 74-76. See also Heller (n 176) 97-100, who notes that none of the aforementioned practices are permissible under IHL.

> Afghanistan, the US has said that drug traffickers on the "battlefield" who have links to the insurgency may be targeted and killed.[470]

Alston's assessment seems to be corroborated by several public statements made by high-ranking US government officials.[471] For example, in 2013, mounting criticism of US drone strikes in non-conventional battlefields had compelled the US to publicly explain some of the policies surrounding its counterterrorism operations. In a rare speech on drone warfare delivered at the National Defense University, US President Barack Obama stressed:

> To begin with, our [lethal, targeted] actions [against al Qaeda and its associated forces] are effective. (…) Dozens of highly skilled al Qaeda commanders, trainers, bomb makers, and operatives have been taken off the battlefield.[472]

However, neither trainers nor bomb makers are legitimate military targets *per* se. In fact, as their actions do not *directly* harm the enemy, they do not exercise a continuous combat function. Unless their actions from an integral part of a predetermined military operation designed to directly cause harm, they are no members of an organized armed group but civilians and as such must not be made the object of the attack. Similar concerns had

[470] Alston Report (n 11) para 68 (emphasis added). See also Byman, 'Denying' (n 408); CCPR, 'Fourth Periodic Report of the US' (n 41) para 9; Heller (n 176) 105, doubts that the US 'even *attempts* to [distinguish between members of an organized armed group and civilians which directly participate in hostilities]' (emphasis in the original). Since 2017, the US has intentionally targeted various (primitive) drug production facilities allegedly used by the Afghan Taliban to fund their insurgency. However, most appear to have been operated by criminal organizations rather than by the Taliban. In any case, the mere involvement in the manufacturing and processing of drugs would not amount to direct participation in hostilities since the revenue contributes only indirectly to the group's war effort. The US, on the other hand, 'does not consider it necessary to prove that individuals are directly participating in hostilities in order to consider them to be legitimate targets, nor do they need to have a combat function to be targetable according to US policy', see UNAMA (n 312) 4-15. See also Glenn A Fine, 'Operation Freedom's Sentinel Lead Inspector General Report to the United States Congress (July 1, 2019 – September 30, 2019)' 16 <www.dodig.mil/Reports/Lead-Inspector-General-Reports/Article/2021382/lead-inspector-general-for-operation-freedoms-sentinel-i-quarterly-report-to-th/> accessed 23 April 2021, stating that 'the individuals killed in the strikes – chemists, logisticians, and armed guards – were combatants because they "followed Taliban leaders' order[s] and performed combat service support roles for the Taliban"' (footnotes omitted).

[471] Some scholars have suggested that the US does not even know who it is killing, see Micah Zenko, 'The United States Does Not Know Who It's Killing' *Foreign Policy* (23 April 2015) <https://foreignpolicy.com/2015/04/23/the-united-states-does-not-know-who-its-killing-drone-strike-deaths-pakistan/> accessed 13 April 2020.

[472] Obama, 'Speech at National Defense University' (n 40) (emphasis added).

already been raised in 2012, when O Brennan remarked in his speech at the Woodrow Wilson Center:

> Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn't necessarily mean we should. *There are, after all, literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces, thousands upon thousands*. Even if it were possible, going after every single one of these individuals with lethal force would neither be wise nor an effective use of our intelligence and counterterrorism resources. As a result, we have to be strategic. Even if it is *lawful* to pursue a specific member of al-Qaida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security.[473]

According to O Brennan, the US believes 'thousands upon thousands' to be members of al-Qaida, the Taliban, or associated forces, a number easily exceeding their actual fighting force. Nonetheless, the US considers it lawful to lethally target all of them. And although it may decide not to, it does so as a matter of policy, not as matter of law.

Other statements and policy arguments cast further doubt on whether the US' policy of targeting killings is compatible with the restrictions imposed by IHL. In particular, the US has repeatedly emphasised that it considers itself to be in an armed conflict with al-Qaeda, the Taliban, and their associated forces. What has formerly been described as the "global war on terror" is based on an idea of a worldwide NIAC between the US and its adversaries.[474] This concept does not distinguish between geographically separate armed conflicts or between its different actors, which, more often than not, act

[473] Brennan, 'Ethics and Efficacy' (n 40) (emphasis added). See also McNeal (n 8) 707, 711.

[474] See the remarks by John O Brennan, 'Strengthening our Security by Adhering to our Values and Laws' (Remarks at Harvard Law School, Cambridge, Massachusetts, 16 September 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> accessed 3 April 2020, the position held by the DoJ in *Al-Aulaqi v Obama* (Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss) 727 F Supp 2d I (2010) 32-34, and by The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (2016) 11 *et seq* <www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf> accessed 1 March 2020. Although this rhetoric is no longer used, the underlying concept has never been questioned, see OVG NRW (n 51) [488] – juris.

independently from each other.[475] For example, in its 2017 National Security Strategy, the US affirmed that '[t]he U.S. military and other operating agencies will take direct action against terrorist networks and pursue terrorists who threaten the homeland and U.S. citizens regardless of where they are'[476] and is resolved to 'deter, disrupt, and defeat potential threats before they reach the United States'.[477] Thus, under US policy, it does not seem to matter whether a particular conflict is sufficiently intense to qualify as a NIAC, whether a certain non-State actor may be considered an organized armed group within the meaning of IHL, or whether a specific target fulfils a continuous combat function.[478] Instead, as highlighted by O Brennan, the US seems to target all those whom it considers to be 'a threat to the United States, [and] whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qa'ida and its associated forces'.[479] Compliance with IHL, on the other hand, does not seem to be a decisive factor.

b) Individual Attacks

Beyond mere policy documents, the US military has published several summaries of its counterterrorism strikes in Yemen between 2016 and 2019. While those press releases offer only the most cursory insight into the US military's counterterrorism activities, they make no secret of the fact that it has deliberately targeted the supportive wings of several militant organizations.

For example, in 2017, the CENTCOM claimed that its ongoing antiterrorist operations in Yemen have 'degraded AQAP's propaganda production, reducing one of the methods for the terror group to recruit and inspire lone wolf attacks across the

[475] See Brooks, 'Counterterrorism Implications' (n 15) 3; Melzer, *Human Rights Implications* (n 41) 20. See also§ 5 A.

[476] The White House, 'National Security Strategy of the United States of America' (December 2017) 11 <www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> accessed 3 January 2021.

[477] ibid 7.

[478] CCPR, 'Fourth Periodic Report of the US' (n 41) para 9; OVG NRW (n 51) [456] *et seq*, [461], [481], [499] – juris. See also [497] ('The assumption of a global war against al-Qaeda, the Taliban, and "associated" forces *entails* (…) *a substantial structural risk* of violations of the principle of distinction and of the general prohibition on direct attacks against civilians'; this author's translation and emphasis added). See also Shah and others (n 221) 76 *et seq*, who caution that the US might judge who may be targeted for lethal action by reference to the broader standards governing the detention of terrorist suspects. Similar Brooks, 'Law of Armed Conflict' (n 303) 8 *et seq*.

[479] Brennan, 'Strengthening' (n 474).

globe'.[480] In particular, it prided itself on having killed Ubaydah al-Lawdari in October 2017, who 'had been known to provide equipment and money in support of AQAP attacks against Coalition forces, posing an increased threat to [US] interests'.[481] Two more strikes in November 2017 had killed Ruwahah al-Sanaani and Abu Layth al-Sanaani, both 'AQAP facilitator[s]'.[482] The same month, Umar al-Sana'ani, a member of AQAP's *dawah* (preaching) committee, had died in another US airstrike.[483] And in December 2017, two separate attacks had killed Miqdad al Sana'ani, an 'AQAP external operations facilitator' and Habib al-Sana'ani, who had been responsible for 'facilitating the movement of weapons, explosives and finances into Yemen'.[484] Official reports of targeted strikes against al-Qaeda's supportive wing continued throughout 2018. In March, the US Africa Command (AFRICOM) confirmed the death of Musa Abu Dawud, a trainer of al-Qaeda in the Lands of the Islamic Maghreb (AQIM) who had 'provided critical logistics support, funding and weapons to AQIM'.[485] In April, the US military struck a training camp and an 'AQAP checkpoint for asserting regional control and raising illegal revenue in [the] al Bayda governorate'.[486] And in Syria, the US has carried out thousands

[480] CENTCOM, 'Update on recent counterterrorism strikes in Yemen' (20 December 2017) Release No 17-446 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1401383/update-on-recent-counterterrorism-strikes-in-yemen/> accessed 30 March 2020.

[481] ibid.

[482] ibid. Heller (n 176) 102 *et seq*, remarks that a number of activities could be described as "facilitation", eg providing ammunition to fighters during hostilities, propagandizing, recruiting, financing, hiding weapons, or supplying fighters with food or lodging. However, only the former would amount to a direct participation in hostilities, leading Heller to conclude that 'it is highly likely that at least some of [the strikes targeting facilitators] are unlawful'.

[483] CENTCOM, 'U.S. air strikes kill senior AQAP militants' (10 January 2018) Release No 18-008 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1412642/us-air-strikes-kill-senior-aqap-militants/> accessed 31 March 2020.

[484] idem, 'CENTCOM updates counterterrorism strikes in Yemen' (6 February 2018) Release No 18-017 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1433499/centcom-updates-counterterrorism-strikes-in-yemen/> accessed 31 March 2020.

[485] AFRICOM, 'U.S. confirms strike against al-Qa'ida's Musa Abu Dawud' (28 March 2018) <www.africom.mil/media-room/pressrelease/30524/u-s-confirms-strike-against-al-qaidas-musa-abu-dawud> accessed 5 April 2020; see also Eric Schmitt, 'American Drone Strike in Libya Kills Top Qaeda Recruiter' *New York Times* (28 March 2020) <www.nytimes.com/2018/03/28/world/africa/us-drone-strike-libya-qaeda.html> accessed 5 April 2020, quoting AFRICOM's chief spokesman Colonel Mark Cheadle who alleged that Dawud was a 'significant "fixer"' for al-Qaeda.

[486] CENTCOM, Release No 18-052 (n 370).

of airstrikes against ISIL, targeting 'financial facilitator[s]',[487] recruiters,[488] 'weapon engineer[s]'[489] and propagandists,[490] all of whom would probably have been considered civilians under IHL.

In some cases, international and local news media were able to provide similar accounts of individual drone strikes which, for the most part, had not been officially reported. For example, the assassination of AQAP clerk Anwar al-Awlaki in September 2011 seems to have been motivated primarily by his role as a chief recruiter, whose radical sermons attracted English-speaking Islamist militants.[491] The same strike that killed al-Awlaki also killed Samir Khan, another US citizen who had joined the organization in 2009 to become the editor of its propaganda magazine *Inspire*.[492] In May 2015, a US drone targeted Ibrahim al-Rubaish, a senior AQAP cleric whose responsibility as *mufti* had been to provide the theological justification for the organization's terror

[487] idem, 'Coalition forces kill ISIS financial facilitator' (23 June 2017) Release No 17-240 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1227152/coalition-forces-kill-isis-financial-facilitator/> accessed 3 April 2021. See also idem, 'Coalition kills Daesh criminal leader, followers' (19 June 2018) Release No 18-063 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1554296/coalition-kills-daesh-criminal-leader-followers/> accessed 4 April 2021.

[488] eg idem, 'Coalition removes ISIS leaders from battlefield' (26 May 2017) Release No 17-200 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1195294/coalition-removes-isis-leaders-from-battlefield/> accessed 3 April 2021.

[489] idem, 'Coalition removes ISIS leaders from battlefield' (7 September 2017) Release No 17-352 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1301684/coalition-removes-isis-leaders-from-battlefield/> accessed 4 April 2021. See also idem, 'Coalition airstrikes kill three ISIS drone experts' (29 September 2017) Release No 17-382 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1329177/coalition-airstrikes-kill-three-isis-drone-experts/> accessed 4 April 2021.

[490] eg idem, 'Statement from Pentagon Press Secretary Peter Cook on airstrike against ISIL Senior Leader' (16 September 2016) Release No 16-071 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/947146/statement-from-pentagon-press-secretary-peter-cook-on-airstrike-against-isil-se/> accessed 4 April 2021.

[491] See Barack Obama, 'Remarks at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony' (30 September 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony> accessed 26 March 2020; Human Rights Watch, 'Q&A: US Targeted Killings and International Law' (19 December 2011) <www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law - 11. Was the targeted killing of Anwar al-Awlaki in Yemen lawful?> accessed 26 March 2020; Mark Mazzetti, 'Drone Strike in Yemen Was Aimed at Awalaki' *New York Times* (6 May 2011) <www.nytimes.com/2011/05/07/world/middleeast/07yemen.html> accessed 26 March 2020. cf McNeal (n 8) fn 129 for evidence to the contrary. On al-Awlaki in general see 'Anwar al-Awlaki' (*CEP*) <www.counterextremism.com/extremists/anwar-al-awlaki> accessed 2 January 2020.

[492] Robbie Brown and Kim Severson, '2nd American in Strike Waged Qaeda Media War' *New York Times* (30 September 2011) <www.nytimes.com/2011/10/01/world/middleeast/samir-khan-killed-by-drone-spun-out-of-the-american-middle-class.html> accessed 2 April 2020.

acts.[493] A year later, a drone killed Hossam al-Zanjibari, AQAP's chief financial officer.[494] In December 2017, a kinetic strike killed Abu Hajar al-Makki, an AQAP propaganda official.[495] And in June 2018, yet another attack killed Sheikh Abu Bishr Muhammad Darama, AQAP propagandist and religious judge.[496]

These examples represent only a tiny fraction of all US drone strikes carried out since 2008. Most importantly, they relate only to Yemen. For Pakistan, which presumably falls within the area of responsibility of the CIA's covert operations, no similar reports are available. However, according to the ISACC's database, approximately 25 per cent of all drone strikes in Pakistan were directed against individuals of unknown affiliation who were described only generally as "militants".[497] And in Yemen, the US military reported several airstrikes which killed a number of unspecified 'AQAP operatives'[498] or 'AQAP terrorists'.[499] In view of the US' general policy of targeted killings, the lawfulness of these attacks is almost inherently doubtful.[500]

II. Law Enforcement Standard

Outside the context of an armed conflict or in cases where IHL is applicable, but force is used against a non-legitimate target,[501] the legality of the use of lethal force must be

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[493] Polly Mosendz, 'Ibrahim Al-Rubaish, Top Al-Qaeda Leader in Yemen, Killed in Drone Strike' *Newsweek* (14 April 2015) <www.newsweek.com/ibrahim-al-rubaish-top-al-qaeda-leader-yemen-killed-drone-strike-322277> accessed 30 March 2020; Murad B Al-Shishani, 'Ibrahim al-Rubaish: New Religious Ideologue of al-Qaeda in Saudi Arabia Calls for Revival of Assassination Tactic' (2009) 7(36) *Terrorism Monitor* 3.

[494] Ahmend Alwly, 'Despite Arab, US attacks, AQAP still holding out in Yemen' *Al-Monitor* (13 May 2016) <www.al-monitor.com/pulse/originals/2016/05/yemen-al-qaeda-us-terrorism-hadi-mukalla-drones.html> accessed 2 April 2020.

[495] Thomas Joscelyn, 'AQAP propaganda official reportedly killed in US drone strike' (22 December 2017) <www.longwarjournal.org/archives/2017/12/aqap-propaganda-official-reportedly-killed-in-us-drone-strike.php> accessed 30 March 2020.

[496] See CEP, 'AQAP (Al-Qaeda in the Arabian Peninsula)' <www.counterextremism.com/threat/aqap-al-qaeda-arabian-peninsula> accessed 21 June 2020, referencing 'Jihadists Report Death of AQAP Judge in U.S. Airstrike in Yemen' (*SITE Intelligence Group*, 28 June 2018) <https://news.siteintelgroup.com/Jihadist-News/jihadists-report-death-of-aqap-judge-in-us-airstrike-in-yemen.html> accessed 31 March 2020.

[497] See § 5 A. I. 1).

[498] eg CENTCOM, 'U.S. Central Command announces recent strikes in Yemen' (12 January 2017) Release No 17-021 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1048880/us-central-command-announces-recent-strikes-in-yemen/> accessed 3 April 2021.

[499] eg idem, 'Terrorists killed in U.S. Strike' (21 October 2016) Release No 16-122 <www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/982509/terrorists-killed-in-us-strike/> accessed 4 April 2021.

[500] Melzer, *Human Rights Implications* (n 41) 40.

[501] idem, *Targeted Killing* (n 175) 224 *et seq*; *Human Rights Implications* (n 41) 23.

judged by reference to the law enforcement standard. Although international law does not provide for any explicit rules governing the use of lethal force in this context, it is commonly accepted that customary international law and IHRL condition its use upon the fulfilment of four cumulative requirements: legality, precaution, necessity, and proportionality.

Under the principle of *legality*, the use of lethal force must be allowed for by a provision of domestic law which meets the requirements for the use of lethal force under international law,[502] whereas the requirement of *precaution* applies to the preparatory, organizational, and operational phase of a specific operation. Any operation ultimately leading to a use of lethal force must be planned, organized, and controlled in a way that ensures that lethal force is used as little as possible. In particular, special precautions must be taken to ensure that the (erroneous) use of lethal force is not based on incomplete intelligence and mere hypotheses.[503]

The principle of *necessity*, on the other hand, deals with question when lethal force may be used.[504] It may be subdivided into three separate qualifiers: qualitative necessity, quantitative necessity and temporal necessity. To be internationally lawful, any use of lethal force needs to comply with all three of them. First, to be qualitatively necessary, other than forceful measures must not be available or must be unlikely to achieve the desired result.[505] Secondly, to be quantitatively necessary, damage and injury to human life must be restricted to what is absolutely necessary.[506] Thirdly, and most importantly,

[502] Failure to do so is in itself a violation of the right to life, regardless of whether the use of force *in concreto* complies with international standards, see Melzer, *Targeted Killing* (n 175) 225-227; *Human Rights Implications* (n 41) 34.

[503] See UN Code of Conduct for Law Enforcement Officials (adopted 17 December 1979) UN Doc A/Res/34/169, art 3 (CCLEO) and lit c of the commentary thereto; ECtHR, *Nachova v Bulgaria* [2005] ECHR 465 [93]; *McCann v UK* [1995] ECHR 31 [150], [194], [205]; Melzer, *Targeted Killing* (n 175) 235 *et seq*; *Human Rights Implications* (n 41) 34; Alston Report (n 11) para 74.

[504] See CCLEO, art 3 and lit a of the commentary thereto; CCPR, *de Guerrero v Colombia* (Views concerning Communication No R11/45) (31 March 1982) UN Doc CCPR/C/15/D/45/1979 paras 13.1-13.3; ECtHR, *McCann* (n 503) [148] *et seq*, [200].

[505] Schmitt, 'Targeted Killings and International Law' (n 177) 529, 534; Melzer, *Targeted Killing* (n 175) 228 ('strictly unavoidable'). While capturing a suspected militant is certainly a less forceful measure, in Pakistan or Yemen this will almost never be possible, see Schmitt, 'Targeted Killings and International Law' (n 177) 530. See also McNeal (n 8) 738, who points out that one cannot surrender to a drone or be arrested by it; cf Lewis (n 216) 300, who argues that this is why their use is never legal under IHRL.

[506] Melzer, *Targeted Killing* (n 175) 228 and fn 33, noting that this facet of necessity must not be confused with the principle of proportionality. cf Schmitt, 'Targeted Killings and International Law' (n 177) 529, 535, who considers to be a part of the proportionality assessment.

under the element of temporal necessity lethal force may not be used where it is not yet or no longer necessary to achieve the desired result.[507]

The final principle of *proportionality* is traditionally concerned with how much force may be used.[508] However, with targeted killings, framing proportionality in that way would not be very useful, given that the level of force will always be extreme, namely killing the target.[509] Instead, in these cases the principle of proportionality must be interpreted to determine which *kind* of threat is needed to justify the use of lethal force. And if the degree of force must always be proportional to the gravity of the threat,[510] then

> potentially lethal force [may only be used] to: (1) defend any person against an imminent threat of death or serious injury, (2) prevent the perpetration of a particularly serious crime involving grave threat to life, or (3) arrest a person presenting such a danger and resisting arrest, or to prevent his or her escape.[511]

With drone-supported targeted killings, this means that lethal force may only be used to prevent an individual from killing or seriously injuring another person.[512] This strict relationship between the use of lethal force and a specific purpose is one of the main differences between the law enforcement standard and the *ius in bello*. Under the laws of armed conflict, a member of an organized armed group may be targeted anywhere and at any time because of his status alone. By contrast, under the law enforcement standard, the use of lethal force must always be aimed at preventing a serious threat to life. The status of an individual as a "terrorist operative" alone – to use the language of the US – can never justify the use of lethal force.[513]

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[507] Melzer, *Targeted Killing* (n 175) 228; UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' (1 April 2014) UN Doc A/HRC/26/36 para 60 (Heyns Report 2014).

[508] ECtHR, *Nachova* (n 503) [94] *et seq*; *McCann* (n 503) [192]-[194]; IACHR, 'Report on Terrorism and Human Rights' (22 October 2002) OEA/Ser.L/V/II.116 ch III.A.1 paras 87, 92.

[509] Schmitt, 'Targeted Killings and International Law' (n 177) 535.

[510] Melzer, *Targeted Killing* (n 175) 232; General Comment No. 36 (n 177) para 12.

[511] Melzer, *Targeted Killing* (n 175) 232 (emphasis omitted).

[512] See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted 27 August to 7 September 1990) <www.ohchr.org/Documents/ProfessionalInterest/firearms.pdf> accessed 23 September 2019, s 9 (UFFLEO); Alston Report (n 11) para 32; Robert Chesney, 'Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force' (2010) 13 *YIHL* 3, 53; Melzer, *Human Rights Implications* (n 41) 32; Heyns Report 2014 (n 507) paras 58, 65-73; General Comment No. 36 (n 177) para 12.

[513] Alston Report (n 11) para 33; Melzer, *Human Rights Implications* (n 41) 36.

Moreover, lethal force may not be used in the face of just any distant, remote, or even potential threat which has not yet materialized but might merely do so at some unspecified point in time in the future.[514] Instead, the threat to human life must be concrete, specific and, most importantly, imminent.[515] This last element is critical. Only if there is reliable and substantial evidence that the individual in question will be involved in a future attack which is almost certain to occur, and only if State authorities are able to reasonably conclude that this is the last possible opportunity to prevent that otherwise inevitable attack, may lethal force be used.[516] This means that under the law enforcement standard, "retaliatory" killings in the sense that an individual is targeted merely because he was involved in the planning, organization and execution of a *past* terrorist attack, can never be lawful. Unless there is reliable and substantial evidence that said individual will also participate in another attack threating to cause death or serious injury, lethal force must not be used.[517]

It is important to note that neither necessity nor proportionality are absolute standards. The ECtHR, for example, has recognized that '[it] may occasionally depart from [the] rigorous standard of "absolute necessity" [in situations where] the authorities had to act under tremendous time pressure and where their control of the situation was minimal'.[518] However, they set an extremely high bar, one which has led several scholars to rigidly conclude that outside the context of an armed conflict, targeted killings can never be legal.[519]

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[514] Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (October 2005) 9 <www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-self-defence-wilmshurst.pdf> accessed 24 June 2020; Melzer, *Human Rights Implications* (n 41) 31; Callamard Report (n 27) Annex para 50.

[515] Melzer, *Targeted Killing* (n 175) 235; *Human Rights Implications* (n 41) 31; General Comment No. 36 (n 177) para 12. On the distinction between imminence under the law enforcement standard and under article 51 of the UN Charter see Heyns Report 2013 (n 14) para 92.

[516] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 *EJIL* 171, 203; Wilmshurst, 'Principles' (n 514) 9*;* Chesney (n 512) 54 *et seq*, noting that knowledge of plot-specific details is not required; Melzer, *Human Rights Implications* (n 41) 31. See also Heyns Report 2014 (n 507) para 59, noting that imminence is generally 'a matter of seconds, not hours'.

[517] Melzer, *Targeted Killing* (n 175) 234; Benjamin Wittes, 'Clarification from Tom Malinowski' *Lawfare* (4 November 2010) <www.lawfareblog.com/clarification-tom-malinowski> accessed 3 January 2020.

[518] ECtHR, *Finogenov and others v Russia* App nos 18299/03 and 27311/03 (20 December 2011) [211]. See also *Makaratzis v Greece* App no 50385/99 (20 December 2004) [69] *et seq*.

[519] O'Connell, 'Lawful Use of Combat Drones' (n 41) 1; Alston Report (n 11) para 85; Emmerson Report 2013 (n 41) para 66; similar Melzer, *Human Rights Implications* (n 41) 32 *et seq*, 36 *et seq*; Corsi (n 376) 230 *et seq*, who argues that 'at a minimum', most drone strikes failed to meet the standard of necessity and proportionality.

In order to determine whether the US' use of force "outside areas of active hostilities" has complied with these requirements, the following analysis shall – as in the previous subchapter on the *ius in bello* – be effected in two steps. First, this study will try to outline the general US policy on the use of lethal force outside the context of an armed conflict (see 1) below). In a second step, these insights shall then be used to examine the lawfulness of US drone strikes under the law enforcement standard *in concreto* (see 2) below).

1) General US Policy

As is the case with the IHL notions of "membership in an organized armed group" and "direct participation in hostilities", so far the US has not publicly explained in which circumstances it considers the use of lethal force to be lawful outside the context of an armed conflict. According to the PPG, outside the conduct of hostilities lethal force may be used against a target if it poses a 'continuing, imminent threat to U.S. persons'.[520] However, the PPG neither defines the term "imminent" nor does it explain how a threat can be both imminent and continuing at the same time.[521]

Strong doubts as to whether the US' understanding of imminence is consistent with the standards derived from customary international law and IHRL are raised by a leaked 2011 white paper of the US Department of Justice (DoJ). This paper explores 'the circumstances [in which the US government] could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force'.[522] Examining whether the use of such force would violate an individual's constitutional right of due process, the DoJ considers that this would not be the case if that individual 'poses an imminent threat of violent attack against the United States'.[523] The DoJ then goes on to clarify that

> the condition that an operational leader present an "imminent" threat of violent attack against the United States *does not require* the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future. (…) [T]his definition of imminence, which would require the

[520] PPG (n 450) paras 3.A, 4.A.
[521] Moorehead, Hussein and Alhariri (n 252) 116.
[522] DoJ White Paper (n 216) 1.
[523] ibid 6.

> United States to refrain from action until preparations for an attack are concluded, would not allow the United States sufficient time to defend itself. [Instead,] a decision maker (…) must take into account that certain members of al Qa'ida (…) are *continually* plotting attacks against the United States; that al-Qa'ida *would* engage in such attacks regularly *to the extent it were able to do so*; that the U.S. government may not be aware of all al-Qa'ida plots as they are developing and thus *cannot be confident that none is about to occur* (…).[524]

Although made in the area of domestic constitutional law, these statements may very well also be instructive for the question how the US defines imminence in the context of the law enforcement standard. And as Rosa Brooks pointedly summarizes, the DoJ's understanding of imminence 'turns the traditional international law interpretation of the concept on its head'.[525] To assess imminence on the grounds that an individual may continually be plotting attacks against the US and that the lack of knowledge of a concrete plot does not mean that no attack is about to occur is fundamentally incompatible with the international law requirement that lethal force may only be used in the face of reliable and substantial evidence of a specific future attack. In fact, the DoJ's concept of an imminent threat seems to conflate imminence with status.[526] If a member of a militant organization is considered an imminent threat solely because he *would* engage in an attack against the US if he were able to do so, then he could always be targeted. This collapses the law enforcement regime, which never allows for the use of lethal force based on a person's status alone, into the *ius in bello*, which does.[527]

These doubts are further corroborated by a formerly top-secret DoD report explaining the 'legal and policy considerations (…) used in determining whether an individual or group of individuals could be the target of a lethal (…) operation (…) outside the United States and outside of Afghanistan'[528] which was released to the *American Civil Liberties Union* in 2016. According to the report, a determination whether

[524] ibid 7 *et seq* (emphasis added).
[525] Brooks, 'Rule of Law' (n 194) 94. Similar Moorehead, Hussein and Alhariri (n 252) 116 ('elastic and inconsistent with [IHRL]').
[526] Brooks, 'Counterterrorism Implications' (n 15) 12 *et seq*; 'Rule of Law' (n 194) 94 fn 46.
[527] idem, 'Rule of Law' (n 194) 94 fn 46.
[528] DoD, 'Report on Process for Determining Targets of Lethal or Capture Operations' (6 March 2014) 1 <www.aclu.org/foia-document/report-process-determining-targets-lethal-or-capture-operations-0?redirect=dod-report-process-determining-targets-lethal-or-capture-operations> accessed 8 June 2021.

a threat is imminent must incorporate a consideration of 'the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States'.[529] However, all of these considerations are all 'highly speculative future judgements'[530] that seem unrelated to an understanding of imminence that requires *reliable* and *substantial* evidence of a *specific* future attack that is *almost certain* to occur.

2) US Targeting Practice

In light of the foregoing, it is reasonable to assume that the US does not feel constrained by the international law requirement of imminence.[531] To date, it has not produced a single piece of evidence that any of its targets posed an imminent threat to the life or physical integrity of US citizen for which the use of lethal force would have been necessary and justified under the law enforcement standard.[532] If anything, the available evidence suggest that none of the Pakistani militant organizations currently targeted by the US outside the context of an armed conflict were planning to launch an attack against the US even in the remote future. For example, the TTP has attacked the US only twice, last in mid-2010, and there have not been any reports of planned and / or disrupted plots since.[533] And neither the militants loyal to Hafiz Gul Bahadur nor those to Mullah Maulvi Nazir have been involved in even a single terrorist attack against the US which would have at least *indicated* the existence of an imminent threat. Although it might be the aim of these organizations to expel US forces from neighbouring Afghanistan, so far they have not acted on this goal. Instead, according to the 2018 Worldwide Threat Assessment of the US Intelligence Community, '[a]l-Qa'ida's affiliates probably will continue to dedicate most of their resources to local activity, including participating in ongoing conflicts in Afghanistan, Somalia, Syria, and Yemen, as well as attacking regional actors

[529] ibid 3.

[530] Moorehead, Hussein and Alhariri (n 252) 116.

[531] Concurring ibid ('It appears that the U.S. government is applying and invoking [the term of a "continuing, imminent threat'] exclusively as a policy standard').

[532] Concurring Plaw, Fricker and Colon (n 2) 137 *et seq*. Note that someone who mistakenly but honestly believes that the requirements for the use of lethal force have been met does not act unlawfully. Whether or not this is the case must be determined not only based on his subjective conviction, but also with regards to the objective reasonableness of that conviction in view of the concrete circumstances at the time, see Melzer, *Targeted Killing* (n 175) 236. See also ECtHR, *McCann* (n 503) [200]; *Andronicou and Constantinou v Cyprus* App no 25052/94 (9 October 1997) [192]; *Giuliani and Gaggio v Italy* [2011] ECHR 513 [178]; *Armani Da Silva v UK* App no 5878/08 (30 March 2016) [248].

[533] See § 5 A. II.

and populations in other parts of Africa, Asia, and the Middle East'.[534] Attacks against the US, on the other hand, do not seem to be a part of their agenda.

III. Post-Strike Investigations

It is the settled jurisprudence of all major IHRL bodies that it follows from the right to life itself that whenever lethal force is used, whether in the law enforcement context or in times of armed conflict,[535] the perpetrating State may be under a duty to conduct an investigation in order to determine whether the deprivation of life was arbitrary.[536] Such an obligation not only ensures that the family of the deceased has access to an effective remedy, but by identifying and punishing those who are responsible for the victim's arbitrary death it also seeks to prevent future violations and thus to protect the right to life itself.[537] In fact, without any mechanism to review the legality of the use of force, the prohibition on the arbitrary deprivation of life would probably be useless.[538] A failure to comply with the duty to investigate is therefore in itself a violation of the right to life, regardless of whether IHRL or IHL is the applicable law.[539]

In the following, this study shall first identify the different sources of an international duty to conduct an investigation (see 1) below) before exploring the specific

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[534] Daniel R Coats, 'Worldwide Threat Assessment of the US Intelligence Community' (13 February 2018) 10 <www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA---Unclassified-SSCI.pdf> accessed 31 May 2021.

[535] See ECtHR, *McCann* (n 503) [161] *et seqq*; *Gül v Turkey* App no 22676/93 (14 December 2000) [88] *et seqq*; Henckaerts and Doswald-Beck (n 227) 314 (Rule 89). Regarding the twin obligation under article 2 of the ECHR see ECtHR, *Al-Skeini and others v UK* [2011] ECHR 1093 [164].

[536] eg ECtHR, *McCann* (n 503) [161]; *Yaşa v Turkey* [1998] ECHR 83 [98]; IACtHR, *Velásquez Rodríguez v Honduras* (Merits) IACHR Series C No 4 (29 July 1988) [176]; IACHR, *La Tablada* (n 177) [244]; *Alejandre and others v Cuba* Case 11.589, Report No 86/99 (29 September 1999) [47]; ACHPR, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (Merits) Communication No 74/92 (11 October 1995) [22]; General Comment No. 36 (n 177) para 27. The investigation must be carried out on the State's own initiative, not upon initiative of the victim. See IACtHR, *Velásquez Rodríguez* (n 536) [177]; *Humberto Sánchez v Honduras* (Preliminary objections, merits, reparations and costs) IACHR Series C No 99 (7 June 2003) [144].

[537] See ECtHR, *Assenov and others v Bulgaria* App no 90/1997/874/1086 (28 October 1998) [102], regarding the prohibition on torture; UN Economic and Social Council, 'Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories – Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Bare Waly Ndiaye' (25 January 1996) UN Doc E/CN.4/1996/4 paras 559, 570; Corsi (n 376) 236.

[538] OVG NRW (n 51) [422] – juris.

[539] UN, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (UN 2017) para 8. For article 6(1) of the ICCPR in particular see CCPR, 'General Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 15.

requirements regarding the form of the investigation flowing from them (see 2) below). Finally, it will try to determine whether the US was under a duty to conduct post-drone strike investigations and, if so, whether it has complie with what is required of it under international law (see 3) below).

1) Source of the Duty

In general, there are two different investigatory duties that may be relevant for the present case: first, a customary international law duty to investigate a possible commission of a war crime (see a) below); and secondly, a more general obligation to investigate a possible arbitrary deprivation of the right to life under IHRL (see b) below).

a) Customary International Law

It is a rule of customary international law in an IAC and in a NIAC that all States must investigate war crimes allegedly committed by their nationals or armed forces on their territory or on the territory over which they have jurisdiction.[540] This obligation arises whenever there are reasonable grounds to suspect that a war crime has been committed, regardless of whether such suspicion has arisen of the perpetrating State's own accord or due to credible allegations made by other States, private individuals or even nongovernmental organizations.[541]

However, what exactly constitutes a war crime remains unclear. While there is general agreement that a war crime is a violation of the *ius in bello*, not every violation of IHL is a war crime.[542] Only if the violation is sufficiently serious may it be considered such.[543] To date, the most detailed list of war crimes is probably contained in article 8(2)

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[540] Henckaerts and Doswald-Beck (n 227) 607-610 (Rule 158); The Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission), 'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (2013) paras 25, 27 <www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_b1-474_0.pdf> accessed 16 September 2019 (2nd Turkel Report). Extensively on the customary nature of the rule in NIAC see Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harv Natl Sec J* 31, 47 *et seq*.

[541] ECtHR, *İlhan v Turkey* [2000] ECHR 354 [97]; *Cyprus v Turkey* [2001] ECHR 331 [132]; Schmitt, 'Investigating' (n 540) 39; 2nd Turkel Report (n 540) paras 46, 48; UN, *Minnesota Protocol* (n 539) para 21. See also Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2011) 14 *YIHL* 37, 51 *et seq*, who advocate a lower threshold than reasonable suspicion where targeted killings are concerned.

[542] Dinstein, *Conduct of Hostilities* (n 229) paras 824 *et seq*.

[543] This is a rule of customary international law, see Henckaerts and Doswald-Beck (n 227) 568 (Rule 156); see also 2nd Turkel Report (n 540) paras 39-45; Dinstein, *Conduct of Hostilities* (n 229) para 824; Oona A Hathaway and others, 'What is a War Crime?' (2019) 44 *Yale J Intl L* 54, 82-91. If there

of the Rome Statute of the International Criminal Court (ICC Statute).[544] Although these crimes are war crimes 'for the purpose of the [ICC Statute]' only, it is generally accepted that the offenses contained in article 8(2) are war crimes also under customary international law and as such may trigger a State's customary duty to investigate.[545] In particular, under the ICC Statute, it is a war crime in a NIAC to intentionally direct attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities.[546] Thus, whenever the attacking State has reasonable grounds to believe that the principle of distinction has intentionally been violated, it will have to conduct an investigation to confirm its suspicions.[547]

In fact, even in situations where the threshold of reasonable suspicion has not been met, a State may be under an obligation to conduct a preliminary fact-finding assessment to further ascertain the circumstances. This was the view taken by the so-called Turkel Commission, an independent public commission tasked by the Israeli government with investigating whether Israeli mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict complied with international law. According to the commission, such an obligation to conduct a preliminary fact-finding assessment exists especially in situations where 'exceptional or unexpected events and

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is another customary duty to investigate a violation of IHL which falls short of this threshold remains unclear. The 2nd Turkel Report (n 540) para 22, considers there to be 'a general duty to broadly examine all suspected violations of international humanitarian law', one that is different from the 'additional duty to investigate certain types of alleged violations known as "war crimes"'; concurring UN, *Minnesota Protocol* (n 539) para 21 ('further inquiry').

[544] (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[545] 2nd Turkel Report (n 540) para 42; Schmitt, 'Investigating' (n 540) 37 fn 21; Heller (n 176) 107 fn 109; cf Dinstein, *Conduct of Hostilities* (n 229) para 829.

[546] ICC Statute, art 8(2)(e)(i). See also AP I, art 85(3)(a), and ICC, *Prosecutor v Germain Katanga* (Judgement) ICC-01/04-01/07, T Ch II (7 March 2014) [796]-[808].

[547] An interesting point has been raised by Heller (n 176) 107-109. Under article 32 of the ICC Statute, a mistake of fact or law that negates the mental element always excludes criminal responsibility. According to Heller, it can reasonably be assumed that the US briefs its drone crews in accordance with its own interpretation of IHL (ie, who constitutes a legitimate military target in armed conflict, whatever these criteria might be). This leads Heller to conclude that even if one were to subscribe to the ICRC's interpretation of IHL, US drone crews would have a mistaken but – and this point is crucial – honest misunderstanding of the definition of a civilian in NIAC. In Heller's view, this will exclude the criminal liability of a drone operator in all but a few exceptional cases. See also Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) 392 *et seq*; Olásolo (n 228) 115. However, it is submitted that does not impact the duty to carry out an investigation. The investigatory obligation arises *immediately* upon the emergence of reasonable suspicion of the intentional infliction of civilian harm. It will then be for the investigator to determine whether the drone operator acted with the necessary *mens rea* or not (eg "Which briefings did the operator receive?"; "Which facts had presumably been established by the screeners or imagery analysts?").

incidents [occurred] such as civilian casualties that were not anticipated when the attack was planned'.[548] If the fact-finding assessment leads to reasonable suspicion of a war crime, a proper investigation must ensue.[549]

b) Article 6(1) of the ICCPR

In addition to the duty to investigate a possible commission of a war crime, there is also a more general obligation to investigate a possible violation of the right to life under IHRL, including under article 6(1) of the ICCPR.[550] Compared to the former, this duty is significantly broader, applying to all deprivations of life, ie, *all* possible violations of the applicable domestic and international law.[551] This obligation arises whenever the respondent State knows or should have known of an unlawful deprivation of life.[552] According to the Human Rights Committee (CCPR), the use of firearms or of other lethal means outside the context of an armed conflict in itself is sufficient to require an investigation under article 6(1).[553] This opinion is also shared by the Turkel Commission, which concludes:

> [T]he Commission is of the view that the killing of an individual (or the causing of serious injury) by security forces during law enforcement incidents, gives rise *in itself* to an investigatory obligation. (…) [A] law enforcement operation in which security forces cause the death or serious injury of an, [sic] individual automatically gives rise to a requirement to investigate.[554]

Moreover, if the deprivation of life has occurred in unnatural circumstances, it is presumed to be arbitrary and this presumption may only be rebutted on the basis of a

[548] 2nd Turkel Report (n 540) para 49.

[549] ibid.

[550] The US and Germany are both parties to the covenant, see n 173.

[551] See General Comment No. 36 (n 177) paras 27, 64. cf Dreist (n 403) 213, whose stance that a duty to investigate may only be derived from domestic criminal law is difficult to sustain.

[552] UN, *Minnesota Protocol* (n 539) para 15; General Comment No. 36 (n 177) para 27.

[553] CCPR, *Umetaliev and Tashtanbekova v Kyrgyzstan* (Views concerning Communication No 1275/2004) (30 October 2008) UN Doc CCPR/C/94/D/1275/2004 para 9.4; 'Concluding observations on the second periodic report of Kyrgyzstan' (23 April 2014) UN Doc CCPR/C/KGZ/CO/2 para 13; General Comment No. 36 (n 177) para 29.

[554] 2nd Turkel Report (n 540) para 51 (emphasis in the original). Concurring Kretzmer (n 516) 204 ('every case of targeted killings must be subjected to (…) [an] investigation'); see also UN, *Minnesota Protocol* (n 539) para 16, emphasising that this duty exists regardless of whether the killing is suspected or alleged to have been unlawful.

proper investigation.[555] This applies not only to cases where the victim has died in the custody of State authorities, but also to counterterrorism operations conducted outside the context of an armed conflict.[556]

However, the superior protection offered by IHRL (in comparison to the minimal consensus often embodied in customary international law) is conditional upon its applicability, which is commonly restricted to certain situations and / or places.[557] In particular, article 2(1) of the ICCPR obliges a contracting State to respect and ensure the rights recognized in the covenant only 'to all individuals *within its territory* and *subject to its jurisdiction*'.[558] A similar clause may be found in the ECHR, whose article 1 provides that the contracting parties shall secure 'to everyone *within their jurisdiction* the rights and freedoms defined (…) in the Convention'.[559] These clauses are of particular importance in cases where States act outside of their traditional borders. In fact, whether or not the ICCPR may be applied extraterritorially has been disputed for years. The US and Israel have traditionally interpreted the phrase "within its territory *and* subject to its jurisdiction" literally to mean that the covenant cannot be applied extraterritorially even if the contracting State has jurisdiction over the individual in question. However, both the ICJ and the CCPR have made it clear that the key notion of article 2(1) is "jurisdiction" rather than "territory", and that a contracting State will have to respect and ensure the rights of the ICCPR to all individuals subject to its jurisdiction, including those who are located outside of its borders.[560]

The ECtHR, in particular, has dedicated a great deal of attention to the interpretation of the notion of jurisdiction under the ECHR and has tried to clarify its meaning in a well-developed, albeit often conflicting body of case law. The CCPR has

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[555] General Comment No. 36 (n 177) para 29.

[556] Duffy (n 10) 495, referring to the ECtHR's *McCann* case; General Comment No. 36 (n 177) para 29.

[557] See OVG NRW (n 51) [407] *et seq*, [513] – juris. For a general overview see also Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 *Chinese JIL* 639, 656-658.

[558] Emphasis added. cf Corsi (n 376) 224 *et seq*, who argues that the negative obligation not to violate the right to life under article 6(1) of the ICCPR is applicable everywhere regardless of jurisdiction.

[559] Emphasis added.

[560] ICJ, *Wall* (n 180) [109]-[111]; Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009) 231-243; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 222-226; Karen da Costa, *Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013) 89-92; Corsi (n 376) 216 *et seq*.

also produced some jurisprudence on the matter, but it is less developed and varied than the ECtHR's.[561] In fact, both the ICJ and the CCPR have substantially mirrored the jurisprudence of the ECtHR, employing the same concepts to determine whether the covenant may be applied extraterritorially. Therefore, the ECtHR's interpretation of the notion of jurisdiction, although specific to the ECHR, may be transferred, *mutatis mutandis*, to other human rights treaties, including the ICCPR.[562]

Today, jurisdiction within the meaning of article 2(1) of the ICCPR and article 1 of the ECHR is commonly classified as either territorial or personal (see aa) below). While both categories have traditionally been interpreted narrowly, in recent times there have been cautious signs of an expansion (see bb) below). And in September 2018, the CCPR published its General Comment No. 36 on the right to life under article 6(1) of the ICCPR, which brought about a watershed change for the interpretation of jurisdiction under the covenant (see cc) below).

aa) Territorial and Personal Jurisdiction

Territorial jurisdiction was first established by the ECtHR in its *Loizidou* case on the Turkish occupation of Northern Cyprus.[563] The court held that a contracting State is responsible under the ECHR even outside of its national territory whenever, as a consequence of lawful or unlawful military action, it exercises effective control over a foreign area.[564] Likewise, the CCPR found the ICCPR to be applicable when Israel occupied Palestine territories,[565] as did the ICJ in its *Wall* advisory opinion.[566]

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[561] Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 *Harv Intl L J* 81, 111, noting that the CCPR has generally been more generous with the extraterritorial application of the ICCPR than the ECtHR with the ECHR.

[562] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *LJIL* 857, 860; da Costa (n 560) 92; Wilde (n 557) 665. See also Corsi (n 376) 221 *et seq*, who considers the jurisprudence of the ECtHR to be 'informative' for the ICCPR.

[563] ECtHR, *Loizidou v Turkey* [1995] ECHR 10.

[564] ibid [62]. See also Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' *ESIL Reflection* (28 April 2020) <https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/> accessed 11 April 2021, who suggests that the recent jurisprudence of the ECtHR might have introduced a category of procedural effective control.

[565] CCPR, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' (18 August 1998) UN Doc CCPR/C/79/Add.93 para 10.

[566] ICJ, *Wall* (n 180) [109] ('the jurisdiction of States is primarily territorial'), [107]-[111]; *Armed Activities on the Territory of the Congo* (n 168) [216].

The ECtHR further clarified the circumstances under which extraterritorial jurisdiction could arise in its 2001 *Banković* decision.[567] The case revolved around a North Atlantic Treaty Organization (NATO) air strike, which had been carried out as part of a three-month aerial campaign against the former Federal Republic of Yugoslavia in the Kosovo conflict and which had hit a radio and television station, killing several civilians. To determine whether the bombing had violated the rights of the victims under the ECHR, the court first had to address the question of the convention's extraterritorial applicablility. Exploring whether the victims had, at the time of the attack, been subject to the jurisdiction of the respondent States, the court found that extraterritorial jurisdiction may only exist in exceptional circumstances, namely whenever a State,

> through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[568]

Moreover, the court rejected what is commonly known as a "cause and effect" notion of jurisdiction, ie, that an individual is placed within a contracting State's jurisdiction merely because he was negatively affected by an extraterritorial act of that certain State.[569] On the facts of *Banković* itself, the ECtHR concluded that control of the airspace alone – the disputed existence of which it had left unresolved – without boots on the ground was not enough to establish effective control of the territory and its inhabitants and dismissed the claim for responsibility under the ECHR.[570]

It was not until ten years later in the *Al-Skeini* case that *Banković*'s rigorous territorial approach to jurisdiction was softened.[571] In 2003 and following the invasion of

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[567] ECtHR, *Banković and others v Belgium and others* [2001] ECHR 890.

[568] ibid [71]. Critical Michał Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 *NILR* 349, 357-360.

[569] ECtHR, *Banković* (n 567) [74] *et seq*. This was recently confirmed by the court in *Hanan v Germany* App no 4871/16 (16 February 2021) [106] *et seq*, regarding a 2009 NATO airstrike in the Afghan Kunduz region, which had killed up to more than a hundred civilians.

[570] ibid [76].

[571] Even before that time, the ECtHR had (silently) refused to apply *Banković* on several occasions, eg in *Pad and others v Turkey* App no 60167/00 (28 June 2007) and *Andreou v Turkey* App no 45653/99 (27 October 2009), see Marko Milanovic, '*Al-Skeini* and *al-Jedda* in Strasbourg' (2012) 23 *EJIL* 121, 124. However, these decisions have been considered isolated, see Besson; 'Extraterritoriality' (n 562) fn 67.

Iraq, six Iraqi nationals had been killed on separate occasions and under varying circumstances by British troops in the Iraqi province of Al-Basrah. In two instances, the victims had died following their arrest by British soldiers. Another one had been forced into a river and drowned. And yet another one had died while held in a British military detention facility.[572] Although the UK admitted to its jurisdiction under *Banković* regarding the latter,[573] it rejected the existence of a jurisdictional link in all other cases. Reiterating its previous decision in *Banković*, the ECtHR went on to state the following:

> In addition, the Court's case-law demonstrates that, in certain circumstances, *the use of force by a State's agents operating outside its territory* may bring the individual thereby brought [sic] under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied *where an individual is taken into the custody of State agents abroad*. (…)
>
> It is clear that, *whenever the State through its agents exercises control and authority over an individual*, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.[574]

Thus, although the court upheld *Banković*'s concept of a primarily territorial jurisdiction, it added to it a personal dimension. Whenever a State through its agents exercises authority and control over an individual, that individual is brought within the State's jurisdiction. While the ECtHR's approach in *Al-Skeini* received broad approval, is has remained unclear whether the reference to authority and control over an individual is meant to be limited to the case exemplified by the ECtHR, ie, where an individual is taken into the custody of State agents abroad, or whether it also extends to those cases where (lethal) force is used without prior arrest.[575]

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[572] ECtHR, *Al-Skeini* (n 535) [56], [65] *et seq*.

[573] ibid [101], [118].

[574] ibid [136] *et seq* (emphasis added). See also CCPR, *Lopez Burgos v Uruguay* (Views concerning Communication No 52/1979) (29 July 1981) UN Doc CCPR/C/13/D/52/1979 para 12.3.

[575] *Al-Skeini* itself seems to suggest the opposite. Instead of distinguishing the deaths of those victims who had not died in British custody, the ECtHR pointed out that all six killings had occurred during the military occupation of Iraq. Recalling *Banković*'s public powers-formula, the court concluded that the UK, which had officially been given responsibility for the restoration and maintenance of security in the Al-Basrah province, had exercised jurisdiction over all six applicants. *A contrario*, had the court considered

In the case of drone strikes, the concept of territorial jurisdiction as established in *Banković* does little to suggest that an individual could become subject to US jurisdiction under the ICCPR upon being targeted. Even if the presence of several drones in Pakistan and in Yemen were enough to establish control over the airspace, *Banković* has made it clear that effective control of the territory and its inhabitants cannot exist without the presence of physical troops on the ground.[576] By contrast, Frederik Rosén has attempted to distinguish the classic aerial bombardment in *Banković* from modern day counterterrorism operation, pointing out that drones combine increasingly sophisticated lethal capabilities with the ability to provide uninterrupted surveillance of a target in a way previously unknown to traditional aircraft.[577] However, even Rosén admits that this may not be enough to deviate from *Banković*'s persisting rule.[578] *Al-Skeini*'s authority and control-formula, on the other hand, leaves greater leeway for interpretation. In fact, in *Al-Saadoon and others v Secretary of State for Defense*, the England and Wales High Court argued that 'it [is] impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is (…) the ultimate exercise of physical control over another human being'.[579] However, *Al-Skeini*'s archetypical case seems to remain that of a person previously taken into custody, which does not apply to drone strikes.[580]

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that the use of force alone were an exercise of authority and control over an individual, then there would have been no need for a recourse to *Banković*. See Milanovic, '*Al-Skeini* and *al-Jedda*' (n 571) 129 *et seq*; 'Privacy in the Digital Age' (n 561) 117 *et seq*; Corsi (n 376) 221-224.

[576] ECtHR, *Hanan* (n 569) [104] *et seq*, comparing ISAF's troop strength in the Afghan Kunduz region to that of the Taliban; *Sargsyan v Azerbaijan* App no 40167/06 (16 June 2015) [144]; Milanovic, '*Al-Skeini* and *al-Jedda*' (n 571) 123 *et seq*, 130.

[577] Frederik Rosén, 'Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility' (2014) 19 *J Conflict & Sec L* 113, 118, 120; concurring Deutscher Bundestag (Wissenschaftliche Dienste), 'Völkerrechtliche Grundlagen für Drohneneinsätze unter Berücksichtigung der Rechtsauffassungen Deutschlands, der USA und Israels' (30 January 2014) WD 2 – 3000 – 002/14, 15. See also Melzer, *Human Rights Implications* (n 41) 18.

[578] Rosén (n 577) 121 ('The question is how much drone surveillance combined with precision weapons would be needed to equal the amount of control exercised by 30 000 ground troops').

[579] England and Wales High Court, *Al-Saadoon and others v Secretary of State for Defense* [2015] EWHC 715 (Admin) (QB) [95]. Concurring Milanovic, '*Al-Skeini* and *al-Jedda*' (n 571) 129; Heyns Report 2013 (n 14) para 49; Callamard Report (n 27) Annex paras 42 *et seq*; Monnheimer and Schäferling (n 57) 365 *et seq*.

[580] Milanovic, '*Al-Skeini* and *al-Jedda*' (n 571) 130; 'Privacy in the Digital Age' (n 561) 118; Lea Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* should be read as Game Changers' (2016) 2 *EHRLR* 161, 163. Critical Deutscher Bundestag (Wissenschaftliche Dienste), 'Völkerrechtliche Grundlagen für Drohneneinsätze' (n 577) 15 *et seq*; Monnheimer and Schäferling (n 57) 365 *et seq*.

The applicability of the ICCPR to US counterterrorism operations had also been at issue in the so-called *Bin Jaber* case, a German domestic lawsuit brought by three Yemeni plaintiffs against the Federal Republic of Germany.[581] While this case shall be examined in greater detail at a later stage of this study,[582] suffice to say here that the court of second instance – the *Oberverwaltungsgericht für das Land Nordrhein-Westfalen* (Administrative Court of Appeal for the State of North Rhine-Westphalia; OVG NRW) – held the opinion that '[b]y using armed force in Yemen with the consent of the Yemeni government, the US exercises public powers which are usually exercised by the government under the State's monopoly on the use of force'.[583] According to the OVG NRW, the use of armed force on the territory of another State with the consent of the local government encroaches upon the territorial State's monopoly on the use of force, which the court considered to be sufficient to satisfy *Banković*'s public powers-test and render the ICCPR applicable.

On closer inspection, however, there are only few similarities between the facts presented by the ECtHR's case law and US targeted killings in Africa and Central Asia.[584] In *Al-Skeini*, the application of *Banković*'s public powers-formula had been justified by the fact that the UK had been a part of Iraq's post-invasion caretaker administration, the so-called Coalition Provisional Authority. As such, it had assumed responsibility for the provision and maintenance of security including in the Al-Basrah province, a duty that traditionally lies with the local government. The US, on the other hand, has taken it upon itself to combat foreign militancy and terrorism in Pakistan and Yemen. Although this is equally a domestic task,[585] there is a vast difference between hunting down militants and the provision and maintenance of security. And unlike the UK in South Iraq, the US does

[581] Two other cases on US targeted killings that had previously come before German courts were declared inadmissible, see BVerwG, Judgement of 5 April 2016 (1 C 3/15) E 154, 328 [16] *et seqq* – juris; VG Köln, 4 K 5467/15 (n 77) [44] *et seqq* – juris.

[582] See § 6 B. II.

[583] OVG NRW (n 51) [513] – juris (this author's translation; emphasis added). The court did not address General Comment No. 36, see § 5 B. III. 1) b) cc).

[584] Critical also Leander Beinlich, 'Drones, Discretion, and the Duty to Protect the Right to Life: Germany and its Role in the US Drone Programme Before the Higher Administrative Court of Münster' (2021) 62 *GYIL* 557 (forthcoming) MPIL Research Paper 2019-22, 9 and fn 32 <https://ssrn.com/abstract=3506602> accessed 26 March 2021.

[585] Rosén (n 577) 121.

not exercise any other public powers in Pakistan or in Yemen and is not entitled to do so either.[586]

Moreover, the OVG NRW seems to disregard that that public powers must be exercised 'through the *effective control* of the relevant territory and its inhabitants abroad'.[587] Effective control of the relevant territory is a decisive precondition for the existence of jurisdiction under the ECHR and the ICCPR.[588] However, such control requires State-like and exclusive power over a foreign area and, by extension, over its inhabitants.[589] For example, in *Al-Skeini*, the Coalition Provisional Authority had formally replaced Iraq's former Ba'ath regime and was temporarily exercising all executive, administrative and legislative government powers.[590] In the ECtHR's *Loizidou* case, the presence of 30,000 Turkish soldiers in Northern Cyprus gave Turkey effective overall control over the territory of the self-proclaimed separatist Turkish Republic of Northern Cyprus.[591] And in its *Ilaşcu* case, the Russian Federation was found to have effective control over the territory of the separatist and self-proclaimed Moldavian Republic of Transdniestria, a puppet regime which survived only by virtue of Russia's military, economic, financial and political support.[592] The US' involvement in Pakistan and Yemen, on the other hand, is limited exclusively to counterterrorism operations. It is neither formally nor informally vested with any executive, administrative or legislative powers in any given region. And although drone strikes in conflict-ridden territories may encroach upon the local government's monopoly on the legitimate use of force, US power in these areas is far from exclusive.

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[586] See ECtHR, *Chagos Islanders v UK* App no 35622/04 (11 December 2012) [70]; Cedric Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights' (2012) 28(74) *Utrecht J Intl & Eur L* 57, 60; Rosén (n 577) 122.

[587] ECtHR, *Banković* (n 567) [71] (emphasis added).

[588] See CCPR, 'Consideration of Reports (1998)' (n 565) para 10; ICJ, *Wall* (n 180) [110]. See also Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 *Mich J Intl L* 129, 150, who notes that *Al-Skeini* might have lowered the standards of effective control but did not abandon it.

[589] See ECtHR, *Medvedyev and others v France* [2010] ECHR 384 [67] ('full and exclusive control over [a ship]'); Erik Roxstrom, Mark Gibney and Terje Einarsen, 'The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection' (2005) 23 *B U Intl LJ* 55, 91; Gondek, 'Extraterritorial Application' (n 568) 371-373.

[590] See Coalition Provisional Authority Regulation No 1 (adopted 16 May 2003), s 1(2).

[591] ECtHR, *Loizidou* (n 563) [56].

[592] idem, *Ilaşcu and others v Moldova and Russia* [2004] ECHR 318 [392]-[394]; *Kyriacou Tsiakkourmas and others v Turkey* App no 13320/02 (2 June 2015) [150].

bb) Checkpoint-Test

Recently, two grand chamber decisions of the ECtHR – *Jaloud v Netherlands* and *Pisari v the Republic of Moldova and Russia* –[593] have seemed to suggest a cautious expansion of the traditional models of jurisdiction.[594] In the *Jaloud* case, Dutch soldiers had shot an Iraqi national at a vehicle checkpoint run by the Iraqi Civil Defense Corps in South-East Iraq who had tried to pass through the checkpoint without stopping. Examining whether the Netherlands had violated its obligation under article 2 of the ECHR to sufficiently investigate the incident, the ECtHR once again had to decide on the extraterritorial applicability of the convention. Neither *Banković* nor *Al-Skeini* seemed to suggest an exercise of jurisdiction over the victim since the Dutch soldiers had neither exercised overall effective control over foreign territory nor had the individual previously been arrested.[595] However, the ECtHR emphasised that the checkpoint had had been set up by foreign forces to restore security and stability in the area and that at the time of the incident, it had been under (temporary) Dutch command.[596] Thus, the court was satisfied that the Netherlands had 'exercised its "jurisdiction" within the limits of its [stabilisation] mission [in Iraq] and *for the purpose of asserting authority and control over persons passing through the checkpoint*'.[597]

Similar facts had arisen in *Pisari*. Following an armed conflict between the Republic of Moldova and secessionist forces from the Transdniestrian region, the Russian Federation, which had supported the secessionist movement, the self-proclaimed Moldavian Republic of Transdniestria, and the Republic of Moldova jointly set up and manned various peacekeeping security checkpoints on the territory of the latter. When a car tried to pass through one of those checkpoints without stopping, a Russian soldier who had been patrolling the checkpoint at the time, opened fire. The Moldovan driver was hit and later died in the hospital. When the victim's relatives brought proceedings

[593] idem, *Jaloud v Netherlands* [2014] ECHR 1403; *Pisari v the Republic of Moldova and Russia* [2015] ECHR 403.

[594] See Friederycke Haijer and Cedric Ryngaert, 'Reflections on Jaloud v. the Netherlands: Jurisdictional Consequences and Resonance in Dutch Society' (2015) 19 *J Intl Peacekeeping* 174, 180; Stefanos Xenofontos, 'Case Comment: Recent Developments in the Extraterritorial Scope of Application of the ECHR in the Aftermath of Jaloud v The Netherlands [2014]' (2016) 4 *Leg Issues J* 119, 123. cf Auriel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?' (2014) 53 *Mil L & L War Rev* 287, 300.

[595] Xenofontos (n 594) 122 *et seq*.

[596] ECtHR, *Jaloud* (n 593) [152].

[597] ibid (emphasis added).

against Russia for having violated its duty to carry out an effective investigation into his death, the ECtHR found the ECHR to be applicable. As in *Jaloud*, the court pointed out that the checkpoint had been set up to put an end to the Transdniestrian conflict and that at the time of the incident, it had been manned and commanded by Russian troops. Thus, it was satisfied that Russia had exercised its jurisdiction over the Moldovan driver.[598]

Both *Jaloud* and *Pisari* have sparked hopes that the ECtHR's new checkpoint-test might be broad enough to encompass drone strikes. In both cases, the checkpoints had been temporary in nature and limited both in space and in personnel. And because a checkpoint may be established at sea or in the air just as well as on land,[599] Stefanos Xenofontos argues that the ECtHR's reasoning 'leaves the door open for establishing the ECHR States' jurisdiction in (…) targeted killings by drones in future operations'.[600] Auriel Sari takes a similar poosition:

> *Jaloud* suggest [sic] that a Contracting Party's jurisdiction may be engaged when it deploys military assets to contribute to security and stability in a third country and brings individuals within its sphere of control, even without exercising direct control either over those individuals or their geographical surroundings.[601]

However, Xenofontos and Sari may be taking the ECtHR's recent jurisprudence too far. First, a drone and a manned checkpoint on the ground differ fundamentally in the specific purpose they serve. A checkpoint is set up to assert authority and control over all persons trying to pass through it, deciding in each individual case who may do so and who shall be subjected to further investigation, possibly even detention. Thus, a hint of *Al-Skeini* remains. A drone's purpose, on the other hand, is only to find, track and eliminate its target, at best without being noticed. And while it is true that the victims in *Jaloud* and *Pisari* were neither arrested nor investigated, both had been shot in an attempt to stop their vehicles and establish (temporary) authority over them.[602]

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[598] idem, *Pisari* (n 593) [33].
[599] Sari (n 594)301; Xenofontos (n 594) 125.
[600] Xenofontos (n 594) 123. See also p 125 ('one could argue that *Jaloud's* "checkpoint" test for jurisdiction may also be established in situations of aerial patrols, (…) engaging states' responsibility, under the ECHR, when individuals are injured by drone attacks').
[601] Sari (n 594) 301 (emphasis in the original).
[602] See ECtHR, *Jaloud* (n 593) [24]-[26], [35]-[38]; *Pisari* (n 593) [13].

Lea Raible has tried to differentiate *Jaloud* and *Pisari* from *Banković* on the grounds that in the latter, the radio and television station had been hit accidentally, whereas in *Jaloud* and *Pisari* both cars had intentionally been shot at. This leads Raible to conclude that jurisdiction may only be established in cases where the State's *aim* is to subject the affected individual to its rules.[603] Indeed, Raible's view seems to draw at least some support from the language of the ECtHR. In *Jaloud*, the court placed significant emphasis on the fact that the Netherlands had 'exercised its "jurisdiction" (…) *for the purpose of* asserting authority and control over persons passing through the checkpoint'.[604] And even though such a reference is missing in *Pisari*, this may be explained by the relative ease with which the ECtHR was able to establish the jurisdiction of Russia, which had not even tried to dispute it.[605]

Finally, it is important not to confuse the factual question whether a drone may be likened to a checkpoint on the ground with the legal issue of jurisdiction. Both Xenofontos and Sari have interpreted the ECtHR's recent case law to be 'inching closer to a "cause and effect" notion of jurisdiction'.[606] However, neither *Jaloud* nor *Pisari* has explicitly overruled *Banković* and its explicit rejection of such a notion. In fact, it is this author's view these recent cases might best be viewed within the framework of the more traditional models of jurisdiction.[607] Even before *Jaloud* and *Pisari*, the ECtHR had already made it clear that territorial and personal jurisdiction may also be engaged in situations where a State exercises authority and control over an individual in a mere place, such as a prison, a ship or an aircraft.[608] And it is difficult to see why the case should be any different with a security checkpoint under the effective, albeit temporary control the respondent State.[609]

cc) ICCPR: General Comment No. 36

While the ECtHR's restrictive interpretation of the notion of jurisdiction has made it difficult to argue that the ICCPR may be applied extraterritorially to drone strikes, a landmark change was brought about in September 2018, when the CCPR after a four-year

[603] Raible (n 580) 167 *et seq*.
[604] ECtHR, *Jaloud* (n 593) [152] (emphasis added).
[605] See idem, *Pisari* (n 593) [33].
[606] Sari (n 594) 301. See also Xenofontos (n 594) 124 *et seq*.
[607] Concurring Haijer and Ryngaert (n 594) 180 *et seq*.
[608] See ECtHR, *Al-Saadoon and Mufdhi v UK* App no 61498/08 (2 March 2010); *Hirsi Jamaa and others v Italy* App no 27765/09 (23 February 2012); cf *Al-Skeini* (n 535) [136].
[609] cf Raible (n 580) 164.

process of deliberation and collecting feedback from States, the UN, national human rights institutions, legal scholars and civil society, published its General Comment No. 36 on the interpretation of the right to life under article 6 of the ICCPR.

General Comment No. 36 is the result of what at first must have seemed a Herculean task. The last general comments on the right to life, General Comment No 6 and General Comment No 14, had been adopted more than 35 years ago.[610] Since then, the challenges to right to life have moved far beyond the death penalty, nuclear weapons, wars and other acts of mass violence which had been the main focus of these documents. As member of the committee Olivier de Frouville noted right at the start of the work on General Comment No. 36:

> [T]he twenty-first century ha[s] been marked by a global terrorism that ha[s] made the violation of the right to life its operating principle. The international community ha[s] responded not through enhanced multilateral action that sought to strengthen the human rights framework but through unilateral measures that ha[s] resulted in yet further loss of life and created a climate of permanent fear in which the preservation of national security ha[s] taken precedence over respect for rights.[611]

In these circumstances, de Frouville considered that it was for the committee 'to reaffirm the right to life as a basic human right and to take a clear position on the many controversial issues'[612] surrounding its application. Thus, when the CCPR finally adopted General Comment No. 36, the document had grown to a considerable 15 pages, making it five times the size of its predecessors combined. The committee had also addressed a much wider range of topics, reaching from women's right to access to legal and effective abortion and the right to assisted suicide (euthanasia) to environmental degradation and climate change. Special attention had also been paid to arbitrary deprivations of life, the duty to investigate, and the applicability of article 6(1) of the ICCPR in general, including

[610] See CCPR, 'General Comment 6: Article 6 (Sixteenth session, 1982)' (30 April 1982) UN Doc HRI/GEN/1/Rev.1, 6; 'General Comment 14: Article 6 (Twenty-third session, 1984)' (9 November 1984) UN Doc HRI/GEN/1/Rev.1, 18.

[611] CCPR, '115th session: Summary record (partial) of the 3213th meeting' (29 October 2015) UN Doc CCPR/C/SR.3213 para 7 (Statement of Olivier de Frouville).

[612] ibid.

its difficult notion of jurisdiction. On the latter, paragraph sixty-three of the General Comment states:

> In light of article 2(1) of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.[613]

What at first glance seems to be yet another reiteration of the traditional concepts of jurisdiction is swayed by CCPR's decision to omit the term "authority and control", using the word "power" instead. While the ECtHR from time to time has also swapped authority for power,[614] it has never omitted the "and control"-part. Arguably, to exercise power *or* effective control over an individual is something entirely different than to exercise power *and* control over him. While this might have raised first doubts about the CCPR's willingness to continue to adhere to the ECtHR's restrictive approach to jurisdiction, they should be confirmed by the following sentence:

> This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner (…).[615]

General Comment No. 36 thus marks a clear departure from the traditional models of jurisdiction.[616] Under *Banković*, territorial jurisdiction always required some form of effective control over the relevant territory and its inhabitants abroad. And under *Al-Skeini* (and to an extent also under *Jaloud* and *Pisari*), personal jurisdiction could only be engaged in situations where a State exercises authority and control over an individual. If

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[613] General Comment No. 36 (n 177) para 63.

[614] eg ECtHR, *Al-Skeini* (n 535) [136] *et seq*.

[615] General Comment No. 36 (n 177) para 63. See also Heyns Report 2013 (n 14) para 46; African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (Pretoria UP 2015) para 14; IACtHR, 'The Environment and Human Rights' (Advisory Opinion) OC-23/17 (15 November 2017) para 104h ('The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation').

[616] See CCPR, '(Part Two) General Comment – 3547th Meeting 124th Session of Human Rights Committee' *UN Web TV* (19 October 2018) at 55:00 and 1:02:48 (Statement of Yuval Shany) <https://media.un.org/en/asset/k1y/k1y5tilezc> accessed 18 December 2021.

this is supposed to include cases in which an individual is harmed without having previously been arrested remains unclear. General Comment No. 36, on the other hand, expressly provides that for the purpose of article 2(1) of the ICCPR, jurisdiction neither requires effective control over foreign territory and its inhabitants nor an exercise of authority and control in the form of a previous arrest. Instead, whenever a State affects the right to life of an individual – as opposed to all of his rights –[617] in a direct and reasonably foreseeable manner, it is exercising its jurisdiction over him.[618] In fact, the CCPR's approach falls nothing short of a "cause and effect" notion of jurisdiction. And even though such a concept has traditionally been rejected by the ECtHR and most contracting States, only a handful of them decided to raise objections to the committee's position.[619]

Unfortunately, the General Comment does not provide any guidance on how to interpret the threshold criterions of directness and reasonably foreseeability.[620] However, the same criteria are also used in connection with the obligation of contracting States to prevent their territory from being used to cause a transboundary violation the right to life, which will analysed in detail later in this study.[621] Suffice to say at this stage that during

[617] See the statements made in CCPR, '124th session: Summary record of the 3547th meeting' (29 October 2018) UN Doc CCPR/C/SR.3547 paras 38 *et seq*.

[618] See also Sarah Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 *Hum Rts L Rev* 347, 349; Shaheed Fatima, 'Targeted Killing and the Right to Life: A Structural Framework' *Just Security* (6 February 2019) <www.justsecurity.org/62485/targeted-killing-life-structural-framework/> accessed 17 January 2021. In recent times, see CCPR, *A.S. and others v Italy* (Views concerning Communication No 3042/2017) (27 January 2021) UN Doc CCPR/C/130/D/3042/2017 paras 7.5-7.8, regarding Italy's failure to rescue more than 200 migrants on board of a vessel that had shipwrecked in the Mediterranean Sea. Although the shipwreck had taken place outside Italian territory and the *de jure* responsibility for search and rescue operations in that area lay primarily with Malta, the majority opined that the initial contact made between the Italian authorities and the distressed vessel had created a 'special relationship of dependency'. This was considered sufficent to engage Italian jurisdiction under General Comment No. 36.

[619] Of 172 States, only 23 submitted written comments on the draft General Comment. While 16 of them did not comment on the jurisdictional aspect at all, seven States, including the Federal Republic of Germany and the US, expressed concerns that the CCPR's notion of jurisdiction was too broad. See, eg, The Federal Government of Germany, 'Submission from Germany on the draft General Comment on Article 6 of the International Convenant [sic] on Civil and Political Rights – Right to life' (6 October 2017) para 21 <www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Germany.docx> accessed 15 January 2020.

[620] See Daniel Møgster, 'Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR' *EJIL: Talk!* (27 November 2018) <www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/> accessed 15 January 2020.

[621] See § 6 B. I. 2). During the drafting process, special attention was paid to using the same language in both parts of the comment so as not to formulate two different standards, see CCPR, '(Part Two) General Comment on Article 6 – 3397th Meeting 120th Session of Human Rights Committee' *UN Web TV* (19 July 2017) at 40:00 (Statement of Yuval Shany) <https://media.un.org/en/asset/k1g/k1gcfgrd34> accessed

the drafting process of the paragraph on jurisdiction, changes were made to it explicitly for the purpose of clarifying that the covenant would also apply extraterritorial in case of targeted killings by drones.[622] Indeed, there can be no doubt that such attacks directly affect the right to life of their victims in a reasonably foreseeable manner and thus amount to an exercise of jurisdiction, rendering the ICCPR applicable extraterritorially.[623]

Before concluding this section on the different sources of a duty to investigate, it should be noted that several States, including the US, have questioned the CCPR's authority to deliver binding opinions on the application of the ICCPR and to create "new" obligations thereunder.[624] They posit that where a gap is believed to have been identified in the covenant, that certain gap may only be filled in through a formal amendment. It is then for each sovereign State to decide whether it wishes to be bound by such an amendment or not.[625] The CCPR, on the other hand, has traditionally rejected those arguments. It emphasises that it does not create new obligations under the ICCPR, but instead interprets existing obligations in the light of the object and the purpose of the covenant.[626] Although the committee accepts that General Comment No. 36 as a document does not have binding force itself, it has made it very clear that it considers its interpretation of the ICCPR to be binding upon all States which have ratified the

18 December 2021. However, it must be kept in mind that they are based on different sources of law. Whereas one is concerned with an exclusively treaty-based notion of jurisdiction, the other one roots in the so-called no-harm rule, which is part of customary international law. In detail see § 6 B. I. 1).

[622] CCPR, '120th session: Summary record of the 3397th meeting' (25 July 2017) UN Doc CCPR/C/SR.3397 paras 18, 21; '(Part Four) General Comment on Article 6 – 3400th Meeting 120th Session of Human Rights Committee' *UN Web TV* (21 July 2017) at 07:27 (Statement of Christof Heyns) and 17:54 (Statement of Yuval Shany) <https://media.un.org/en/asset/k1q/k1q5fg52vq> accessed 18 December 2021 Despite its misleading title, this was actually the 3401st meeting, see idem, '120th session: Summary record (partial) of the 3401st meeting' (27 July 2017) UN Doc CCPR/C/SR.3401.

[623] Concurring Callamard Report (n 27) 26; Monnheimer and Schäferling (n 57) 364.

[624] eg US, 'Observations on the Human Rights Committee's Draft General Comment No. 36 on Article 6 – Right to Life' (6 October 2017) paras 5, 12 <www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx> accessed 22 January 2021. See also US, 'Comments on the Human Rights Committee's "Draft General Comment 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant Civil and Political Rights"' (17 October 2008) 1-6 <www.ohchr.org/Documents/HRBodies/CCPR/GC33/USA.doc> accessed 26 January 2021.

[625] US, 'Observations on Draft General Comment No. 36' (n 624) para 6.

[626] CCPR, '(Part Four) General Comment – 3521st Meeting 123rd Session of Human Rights Committee' *UN Web TV* (24 July 2018) at 2:05:43 (Statement of Yuval Shany) <https://media.un.org/en/asset/k1o/k1of94ebbb> accessed 18 December 2021. On the notion of a human rights treaty being a "living instrument" see ECtHR, *Tyrer v UK* [1978] ECHR 2 [31]; IACtHR, *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and reparations) IACHR Series C No 245 (27 June 2012) [161].

covenant.[627] Support for this narrative has also come from the ICJ. While the court does not consider itself bound by the CCPR's interpretation of the ICCPR, it nonetheless 'believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty'.[628]

2) Form of the Investigation

Once a State has or ought to have reasonable grounds to suspect that a war crime has been committed or that an individual has arbitrarily been deprived of his right to life, the duty to investigate may only be discharged by an *effective* investigation. Although some of the details of what exactly amounts to such under customary international law and under IHRL have remained disputed, there seems to be general agreement that in an armed conflict *and* in the law enforcement context, an effective investigation (in the broad sense) must be effective (in the narrow sense), independent, impartial, prompt and thorough.[629] Regarding any potential differences between these standards under customary international law and under IHRL, the Turkel Commission made it clear that

> from the moment a duty to carry out an "effective investigation" arises, there is no *fundamental* difference, nor should there be, between the principles for conducting an "effective investigation" in a situation of an armed conflict and the

[627] CCPR, 'Start of the second reading of General Comment no. 36 on the Right to Life' *CCPR Centre* (8 November 2017) <http://ccprcentre.org/ccprpages/start-of-the-second-reading-of-general-comment-no-36-on-the-right-to-life> accessed 26 January 2021.

[628] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Judgement) [2010] ICJ Rep 639 [66].

[629] See Geneva Convention III, art 84; UFFLEO, s 22; UN Economic and Social Council, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (adopted 24 May 1989) UN Doc E/RES/1989/65, 52 s 9; UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted 16 December 2005) UN Doc A/RES/60/147, s 2(3)(b); ECtHR, *McCann* (n 503) [161]; *Yaşa* (n 536) [98] *et seqq*; *McKerr and Creaney v UK* [2001] ECHR 329 [111]-[115]; *Orhan v Turkey* App no 25656/94 (18 June 2002) [335]; *Isayeva v Russia* App no 57947/00 (24 February 2005) [211]-[213]; *Al-Skeini* (n 535) [163]; IACtHR, *Velásquez Rodríguez* (n 536) [177]; *Humberto Sánchez* (n 536) [143] *et seq*; IACHR, *La Tablada* (n 177) [412]; ICTY, *Prosecutor v Boškoski and Tarčulovski* (Judgement) IT-04-82-T, T Ch II (10 July 2008) [418]; UNHRC, 'Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48 para 1814 ('universal principles'); 2nd Turkel Report (n 540) para 63.

principles for conducting an "effective investigation" in a situation of law enforcement.[630]

For an investigation to be *effective* (in the narrow sense), the investigator must have the necessary operational and technical expertise.[631] The requirement of *independence* demands that the investigator is different from those under investigation. This means that in general, there must not be a hierarchical or institutional connection between the investigator and the perpetrator.[632] The ECtHR has also challenged the independence of an investigation on the grounds that a public prosecutor had relied heavily on the information provided by those involved in the incident.[633] However, in an armed conflict a military investigation may be carried within the military justice system itself, provided that the investigator is not subject to the same chain of command.[634] *Impartiality* must be guaranteed with respect to the investigative authorities and the evidence.[635] To be *prompt*, the investigation must start immediately upon the emergence of reasonable suspicion and must not be unduly delayed.[636] Although the existence of ongoing hostilities might allow for a reasonable delay, it must still be conducted as soon as possible and the reasons for

[630] 2nd Turkel Report (n 540) para 63 (emphasis in the original; footnotes omitted). See also UNHRC, 'Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards' (23 September 2010) UN Doc A/HRC/15/50 para 30 (Tomuschat Report), which concludes that 'the gap between the expansive standards under IHRL and the less defined standards for investigations under IHL is not so significant'.

[631] Schmitt, 'Investigating' (n 540) 84.

[632] ECtHR, *McKerr* (n 629) [112]; *Ramsahai and others v Netherlands* [2007] ECHR 393 [294]-[296], [323]-[325]; *Kolevi v Bulgaria* App no 1108/02 (5 November 2009) [208], [211] *et seq*.

[633] idem, *Ergi v Turkey* App no 23818/94 (28 July 1998) [82]-[85].

[634] idem, *Cooper v UK* App no 48843/99 (16 December 2003) [115]; 2nd Turkel Report (n 540) paras 73, 98.

[635] UNGA, 'Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in UN, *Human Rights: A Compilation of International Instruments*, vol 1 pt 1 (UN 2002) 342, s 5(a); ECtHR, *Kolevi* (n 632) [211]; ICC (The Office of the Prosecutor), 'Draft Policy Paper on Preliminary Examinations' (2013) paras 54, 66 <www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 28 August 2019.

[636] ECtHR, *Bazorkina v Russia* App no 69481/01 (27 July 2006) [121]; *Al-Skeini* (n 535) [164]; IACHR, *Aisalla Molina (Ecuador v Colombia)* Inter-State Petition IP-02 (Admissibility), Report No 112/10 (21 October 2010) [154], [157].

the delay need to be explained.[637] Finally, the element of *thoroughness* requires that all relevant evidence is collected and thoroughly analysed.[638]

In addition to those requirements, under IHRL an investigation also needs to be *transparent*.[639] This means that the investigating State must inform the family of the victim that an investigation is being conducted and of its results, which will also have be published to allow for public scrutiny.[640] Whether a similar requirement also exists under customary international law has remained disputed. According to the Turkel Commission, a requirement of transparency currently lacks explicit recognition in customary international law.[641] The same conclusion was also reached by the so-called Tomuschat Report, an expert report prepared by a committee of independent experts in IHL and IHRL and headed by Christian Tomuschat on the conformity of certain Israeli and Palestinian investigations with international standards.[642] In particular, the Turkel Commission and the Tomuschat Report agree that customary international law does not require that the

[637] IACHR, *Aisalla Molina* (n 636) [157].

[638] This is not a question of results, but of means, see ECtHR, *Gül* (n 535) [89]-[95]; *Avşar v Turkey* App no 25657/94 (10 July 2001) [394]; *Musayev and others v Russia* App no 8979/02 (23 October 2008) [80], [120]; *Al-Skeini* (n 535) [166]. The IACtHR has even adopted a non-exhaustive list of requirements that an investigation needs to fulfil, see IACtHR, *Humberto Sánchez* (n 536) [126]-[128]; *"Mapiripán Massacre" v Colombia* (Merits, reparations and costs) IACHR Series C No 134 (15 September 2005) [223] *et seq*.

[639] UNHRC, 'Fact-Finding Mission on the Gaza Conflict' (n 629) para 861; 2nd Turkel Report (n 540) para 63.

[640] UN Committee against Torture, *Danilo Dimitrijevic v Serbia and Montenegro* (Decision concerning Communication No 172/2000) (16 November 2005) UN Doc CAT/C/35/D/172/2000 para 7.3; ECtHR, *McKerr* (n 629) [115], [141]; *Kolevi* (n 632) [194]; IACtHR, *"Mapiripán Massacre"* (n 638) [219]; *Gomes Lund and others ("Guerrilha Do Araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACHR Series C No 219 (24 November 2010) [257]; 2nd Turkel Report (n 540) paras 91-93.

[641] 2nd Turkel Report (n 540) para 106, stating that such would be 'desirable'. Concurring UNHRC, 'Fact-Finding Mission on the Gaza Conflict' (n 629) para 121, which does not mention transparency as a relevant standard; explicitly Schmitt, 'Investigating' (n 540) 81 and fn 210. cf Emmerson Report 2013 (n 41) para 44 *et seq*, who even proposes to extend the requirement of transparency to the preliminary fact-finding assessment. See also UNHRC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson' (28 February 2014) UN Doc A/HRC/25/59 para 32 ('Having regard to the duty of States to protect civilians in armed conflict, (…) the State (…) is under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and *to provide a detailed public explanation of the results*'; emphasis added) (Emmerson Report 2014); UN, *Minnesota Protocol* (n 539) para 20 ('The duty to investigate a potentially unlawful death – promptly, effectively and thoroughly, with independence, impartiality and *transparency* – applies generally during peacetime, situations of internal disturbances and tensions, *and armed conflict*'; emphasis added).

[642] Tomuschat Report (n 630) para 33. Absent explicit recognition, one might be tempted to import a standard of transparency into IHL via IHRL, which continues to apply even in times of armed conflict. However, in situations of armed conflict, IHL attains the rank of *lex specialis* and its standards take precedence over those under IHRL. See ibid para 29; Schmitt, 'Investigating' (n 540) 53-55; Cohen and Shany (n 541) 59.

victim or his family be involved in the investigation.[643] The Tomuschat Report, however, acknowledges that 'in the light of the Basic Principles and Guidelines on the Right to a Remedy and Reparations, victims' access to justice is increasingly being accepted as a relevant criterion applicable to investigations into alleged war crimes'.[644]

A final issue that needs to be addressed is the concrete degree to which the principles governing an effective investigation (in the broad sense) will be applied in the individual case. Although there is no fundamental difference between customary international law and IHRL, it is important to note that in situations of armed conflict it will often be impossible to apply those principles in the same manner as in times of peace. For example, the site of an attack might be under enemy control, evidence might have been destroyed, and witnesses might have been displaced or might be hard to locate.[645] Investigations undertaken in response to law enforcement operations carried out during armed conflict will often encounter the same difficulties.[646] In these situations, the degree to which a State will have to observe the requirements of effectiveness (in the narrow sense), independence, impartiality, promptness, and thoroughness will vary depending on the particular circumstances of each individual case.[647] However, even in armed conflict the investigation must still be conducted in a way that allows for conclusive and reliable findings.[648] And whatever the degree of application of the aforementioned principles might be in the individual case, a State is never relieved entirely of its duty to conduct an effective (in the broad sense) investigation.[649]

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[643] Tomuschat Report (n 630) paras 32 *et seq*; 2nd Turkel Report (n 540) paras 91, 106. It should be noted that neither report seems to preclude a requirement of transparency under customary international law *per se*. For example, the Turkel Commission explicitly distinguishes between the "victim's rights" and "public scrutiny" aspect of transparency, but then goes on to state that under IHL, investigators need not comply with the former, leaving to interpretation whether the "public scrutiny" aspect is also meant to be excluded. Similarly, the Tomuschat Report states that 'the level of transparency expected of human rights investigations is not always achievable in situations of armed conflict' and that 'some human rights standards, such as the involvement of victims in investigations (…) are not requisite for evaluating the inquiries into alleged IHL violations'. Both statements leave the reader wondering whether there might be a minimum level of transparency that must be observed even in situations of armed conflict.

[644] Tomuschat Report (n 630) para 33.

[645] ibid para 32; Schmitt, 'Investigating' (n 540) 54; 2nd Turkel Report (n 540) para 101.

[646] 2nd Turkel Report (n 540) para 96.

[647] ECtHR, *Yaşa* (n 536) [104]; *Ergi* (n 633) [85]; *Avşar* (n 638) [393]; *Ayhan and Ayhan v Turkey* App no 41964/98 (27 June 2006) [86]; *Al-Skeini* (n 535) [163]-[165]; Schmitt, 'Investigating' (n 540) 80; 2nd Turkel Report (n 540) paras 96 *et seq*.

[648] 2nd Turkel Report (n 540) para 101, referencing ECtHR, *Al-Skeini* (n 535) [166].

[649] Explicitly UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (8 March 2006) UN Doc E/CN.4/2006/53 para 36; Melzer, *Human Rights Implications* (n 41) 40.

3) Application to the Present Case

In the following, this study first will examine whether the US was indeed under a duty to conduct an effective (in the broad sense) investigation (see a) below) before addressing the difficult question whether it has actually complied with that obligation (see b) below).

a) Duty to Investigate

At the outset, the question whether the US is under a duty to conduct an effective (in the broad sense) investigation depends on the context in which lethal force is used. For example, in Pakistan only 30 per cent of all drone strikes were shown to have been undertaken in the context of a spill-over NIAC from Afghanistan, whereas the rest had either targeted individuals of unknown or ambiguous affiliation, or militant organizations currently not engaged in an armed conflict with the US. And as will be recalled, the CCPR and the Turkel Commission hold the opinion that the use of lethal force outside the context of an armed conlict *in itself* is sufficient to warrant an effective (in the broad sense) investigation. By contrast, in Yemen, where the US' actions have been directed almost exclusively against AQAP in the context of a (lawful) intervention in a foreign NIAC, the obligation to conduct an investigation will emerge only in situations where the US has reasonable grounds to suspect that the principle of distinction was intentionally violated.[650] Where lethal force was used against an undisputed military target, there will usually be no grounds to believe that this has been the case. A full-scale investigation into those incidents is neither required under IHL nor under IHRL.[651] However, an investigation would surely have to be carried out in the number of cases exemplified earlier in this subchapter, where lethal force was directed against individuals who would be considered civilians under IHL.[652] Moreover, for Nils Melzer, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,

> the lawfulness of attacks directed against persons merely suspected of being "terrorists", "militants" or "jihadists" is almost inherently doubtful. In view of the general presumption of civilian status and protection in situations of doubt, an

[650] In that regard, no difference results between the duty to investigate a possible commission of a war crime under customary international law and the more general obligation to investigate what is possibly an arbitrary deprivation of life under article 6(1) of the ICCPR.

[651] Melzer, *Human Rights Implications* (n 41) 40.

[652] See § 5 B. I. 3) b).

> investigation would be required in each such case. (…) *In sum, States are obliged to conduct an independent and effective investigation into the lawfulness of each case of targeted killing except those that are directed against undisputed legitimate military targets and do not otherwise give rise to legal concern* (…).[653]

This means that the US must also investigate the handful of cases identified earlier, where it had publicly described the victims of its attacks only generally as "militants", "operatives", or "terrorists".[654] In addition to that, the ISACC's database for Yemen lists a total of 36 cases (49 strikes) between 2009 and 2019 where at least two different sources reported that either civilians had been killed (25 cases and 39 strikes) or in which the identity of the victims had remained unknown (11 cases and 12 strikes).[655] Since reasonable suspicion of a war crime may also arise as a result of third party reports, an investigation or at least a preliminary fact finding assessment would also have to be conducted into those cases.

b) US Investigative Practice

However, it has remained unclear if, how and in relation to which allegations investigations have actually been carried out.[656] So far and except for two individual cases,[657] the US has not provided any public information on investigations conducted into

[653] Melzer, *Human Rights Implications* (n 41) 41 (emphasis added).

[654] See § 5 B. I. 3) b). This is also the case for attacks directed against al-Qaeda, the Afghan Taliban, and the Haqqani Network in Pakistan, although no official reports making such designation exist.

[655] A further five cases (five strikes) were only reported by one source. See also Emmerson Report 2014 (n 641) paras 33, 39-69, who analysed a sample of 37 attacks (allegedly) carried out by the US and UK between 2006 and 2013 including in Afghanistan, Pakistan, and Yemen. Emmerson concluded that there was a plausible indication of civilian harm in 30 of them. On the difficulties of counting civilian harm see § 5 B. I. 3).

[656] OVG NRW (n 51) [512] – juris. cf Director of National Intelligence, 'Summary' (n 250) 1 and 'Summary of 2016' (n 250) 1, which state that the US carefully reviews all strikes after they are conducted; similar Dreist (n 403) 213, who alleges that the US is carrying out investigations but does so in secret. cf DeShaw Rae (n 14) 38, claiming that virtually no post-strike investigations are conducted; Corsi (n 376) 237 *et seq*; Callamard Report (n 27) para 22 ('the evidence continues to suggest that drone operations are also characterized by violations of the international obligation to investigate').

[657] The first one is the failed January 2017 ground raid into Yemen, which had left one US Navy Seal and several Yemeni civilians dead, see § 5 A. I. 2). The second case happened in January 2015, when a US drone strike in Pakistan accidentally killed a US and an Italian citizen. US President Barack Obama publicly declared that he had ordered a full review of the incident, but its results have never been published. See The White House, 'Statement by the President on the Deaths of Warren Weinstein and Giovanni Lo Porto' (23 April 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/04/23/statement-president-deaths-warren-weinstein-and-giovanni-lo-porto> accessed 7 January 2021; CENTCOM, Release No 17-049 (n 284); US Senate Committee on Armed Services, 'Hearing to Receive Testimony on United States

specific strikes in Pakistan or in Yemen.[658] If the US' silence in all other cases means that no investigations were conducted or simply that their results have not been disclosed is anyone's guess. For example, the DoD and the US military have adopted a highly technical framework governing the question which events must be reported through the chain of command and under which circumstances a further preliminary inquiry and / or a formal investigation into these events must be carried out.[659] However, while the results of such an investigation must be made available to the US Secretary of Defense,[660] a public release is not required.[661] Transparency is even worse with the CIA. Apart from a few 'cursory *ad hoc* references by officials',[662] there is no public information on the investigative process applied by the agency, and it remains unclear whether the CIA follows the same or similar rules as the US military.[663]

To alleviate some of the concerns resulting from the opacity of the US' operations, in 2016, President Barack Obama passed Executive Order 13,732 which sets out the official US policy on pre- and post-strike measures to address civilian casualties in operations involving the use of force. According to this Executive Order, the 'relevant agencies' shall

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Central Command and United States Africa Command' (9 March 2017) 89 *et seq* (Testimony of Joseph L Votel) <www.armed-services.senate.gov/imo/media/doc/17-18_03-09-17.pdf> accessed 7 January 2021.

[658] Moorehead, Hussein and Alhariri (n 252) 19, 74.

[659] See the summary by Schmitt, 'Investigating' (n 540) 69 *et seqq*; Moorehead, Hussein and Alhariri (n 252) 92 *et seq*. In particular, reportable incidents include the possible commission of a war crime or other violations of the law of war, see DoD Law of War Program, Department of Defense Directive 2311.01 (2 July 2020), G2. Possible civilian harm is commonly identified in the context of post-strike battle damage assessments, see Law of War Manual (n 404) para 5.11.1.3.

[660] DoDD 2311.01, s 4.3.b.3.

[661] Moorehead, Hussein and Alhariri (n 252) 94. Mainly for deterrence purposes, the US military services release monthly summaries of court martial convictions. These usually only state the offender's name, his offense, and his sentence. See, for example, 'Monthly Court Martial Reports' (*US Marine Corps*) <www.hqmc.marines.mil/sja/Court-Martial-Reports/> accessed 10 January 2021; 'Freedom of Information Act Library' (*US Army*) <www.rmda.army.mil/readingroom/> accessed 10 January 2021. For the CIA, no similar information is available, see Moorehead, Hussein and Alhariri (n 252) 95 *et seq*.

[662] Moorehead, Hussein and Alhariri (n 252) 92 (emphasis in the original), referencing Stephen W Preston, 'The CIA and the Rule of Law' (Speech at Harvard Law School, Cambridge, Massachusetts, 10 April 2012) <www.lawfareblog.com/remarks-cia-general-counsel-stephen-preston-harvard-law-school> accessed 9 June 2021 ('the CIA is required to report all possible violations of federal criminal laws by employees, agents, liaison, or anyone else [to the DoJ]'). See also Moorehead, Hussein and Alhariri (n 252) fn 564.

[663] Moorehead, Hussein and Alhariri (n 252) 90, 93 *et seq*, who caution that special units such as the JSOC might not adhere to the US military's rules.

> review or investigate incidents involving civilian casualties, including by considering relevant and credible information from all available sources, such as other agencies, partner governments, and nongovernmental organizations, and take measures to mitigate the likelihood of future incidents of civilian casualties (…).[664]

A similar duty to investigate is provided for by the PPG, which stipulates that '[any] department or agency that conducted [a lethal operation] shall provide (…) to the [National Security Staff] within 48 after taking direct action (…) [a] description of any collateral damage that resulted from the operation'.[665] These obligations must be observed by all agencies, which seemingly also includes the CIA.[666]

On closer inspection, however, neither Executive Order 13,732 nor the PPG are much of a help. For one thing, they do not specify the applicable investigation protocols.[667] Moreover, the Executive Order applies only 'as appropriate and consistent with mission objectives',[668] which raises doubts as to whether, and if so how, it is actually observed in practice.[669] And even if the CIA were investigating incidents involving civilian casualties in accordance with its provisions, the US' opinion of who is to be considered a civilian is not reflected in international law.[670] In fact, a CENTCOM investigation into the so-called Uruzgan incident, a 2010 airstrike in the Afghan Uruzgan province that had left up to 23 civilians dead after a US combat helicopter and a drone had targeted three vehicles which they mistakenly believed to be carrying insurgents, revealed that it was common practice among the military to label all military age males within a strike zone as "combatants" or "enemies" rather than as civilians.[671] According to the investigators, "military age male" meant any boy from the age of 12.[672] And

[664] EO 13,732, 81 FR 44485, s 2(b)(i).
[665] PPG (n 450) para 6.A.
[666] Moorehead, Hussein and Alhariri (n 252) fn 554.
[667] ibid 93.
[668] EO 13732, 81 FR 44485, s 2(b).
[669] Moorehead, Hussein and Alhariri (n 252) 93, who also note that it is unclear which information will be considered 'relevant and credible'.
[670] OVG NRW (n 51) [523]-[525] – juris.
[671] See USFOR (n 79) 49 <https://archive.org/stream/dod_centcom_drone_uruzgan_foia/centcom-10-0218-01> accessed 20 January 2020.
[672] The relevant age could even be as low as ten years, see Jamie Allinson, 'The Necropolitics of Drones' (2015) 9 *Intl Pol Socio* 113, 122. See also DeShaw Rae (n 14) 37 *et seq*.

although use of the term was banned shortly after,[673] it still seems to be a prevailing mindset.[674] This further reduces the scope and practical relevance of Executive Order 13,732, the PPG, and of the rules governing investigations of civilian harm by the US military.

IV. Ius ad Bellum

According to article 2(4) of the Charter of the United Nations (UN Charter),[675] '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'. To use of force on the territory of another State constitutes a violation of article 2(4) and is thus always internationally wrongful. This is the case even when the force is not directed against the territorial State itself, but against a non-State actor residing on that State's territory.[676] However, there are three exceptions to this general rule. First, because article 2(4) is aimed at protecting the sovereignty of the territorial State, consent given by the legitimate government of the territorial State will preclude a violation (see 1) below).[677] Secondly, a State may lawfully use force on the territory of another State where it is acting in self-defence under article 51 of the UN Charter (see 2) below). The third and final exception, which is not relevant for the present study, is an authorization of the use of force by the UN Security Council.

1) Consent

For a State to be able to rely on the first exception to the general prohibition of article 2(4) of the UN Charter, the consent of the territorial State must be clearly established.[678] Consent needs to be unequivocal, but not necessarily express or even public.[679]

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[673] David S Cloud, 'Anatomy of an Afghan war tragedy' *Los Angeles Times* (10 April 2011) <www.latimes.com/archives/la-xpm-2011-apr-10-la-fg-afghanistan-drone-20110410-story.html> accessed 20 January 2020.

[674] Becker and Shane (n 447); Shah and others (n 221) 32; Jeremy Scahill, 'The Drone Legacy' in idem (ed) (n 62) 156 *et seq*.

[675] (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[676] Akande (n 187) 32, 72 *et seq*.

[677] Byrne (n 366) 99 *et seq*; see also ARSIWA, art 20 and the ARSIWA General Commentary (n 50) 72 para 1 ('basic international law principle').

[678] eg ARSIWA General Commentary (n 50) 73 para 6.

[679] Roberto Ago, 'Eighth report on State responsibility' in ILC, *Yearbook of the International Law Commission 1979*, vol 2 pt 1 (UN 1981) para 69; International Law Association (ILA), 'Final Report on Aggression and the Use of Force (Sydney Conference 2018)' 19 <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=11391&StorageFileGuid=6a499340-

In Pakistan, there is significant uncertainty surrounding the question whether US counterterrorism operations have been carried out with the consent of the local government. Although the Pakistani government had protested some drone strikes especially in the early years of the US' engagement in Pakistan, this public display of disaffection appears to have been more part of domestic politics than sincere disapproval.[680] Moreover, some scholars reason that since both the Pakistani military and the Pakistani intelligence service have assisted the US in the selection of targets and its decision to release weapons, there must have been some sort of consent.[681] However, consent on the governmental level – the only entity responsible for expressing the will of the State –[682] has remained nebulous.[683] In any case, even if valid consent had been granted at some point in time, it now seems to have been withdrawn. The Pakistani Parliament not only called for an immediate halt of all drone strikes in April 2012, but in May 2013, the Pakistani government informed the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, that it is its established position that US drone strikes violate Pakistani sovereignty and should cease immediately.[684]

In Yemen, the situation is less ambiguous. Consent to US counterterrorism operations against AQAP was initially granted by Yemeni President Ali Abdullah Salih

074d-4d4b-851b-7a56871175d6> accessed 21 June 2020; Byrne (n 366) 105; Heyns Report 2013 (n 14) para 83; cf O'Connell, 'Case Study of Pakistan' (n 233) 282 ('express, public consent').

[680] eg McNeal (n 8) 698; Lubell, 'The War (?)' (n 195) 433, 438; Shah and others (n 221) 14 *et seq*. Similar Emmerson Report 2013 (n 41) para 53.

[681] Byrne (n 366) 106; McNeal (n 8) 696-698; Report of the Federal Prosecutor General (n 245) 11-13, 21; Lubell, 'The War (?)' (n 195) 433 *et seq*, 438; Peter Bergen and Katherine Tiedemann, 'The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010' (New America Foundation, 24 February 2010) 3 <http://vcnv.org/files/NAF_YearOfTheDrone.pdf> accessed 24 May 2020.

[682] ILA, 'Final Report on Aggression' (n 679) 19 ('Requests or approvals (…) from the military/intelligence services not authorised to speak on behalf of the State (…) will not suffice'); Heyns Report 2013 (n 14) para 82; Emmerson Report 2013 (n 41) para 54; Byrne (n 366) 100, 118 *et seq*.

[683] Byrne (n 366) 118 *et seq* ('highly problematic'); Brooks, 'Rule of Law' (n 194) 90 *et seq* ('consent is ambiguous'). On the Pakistani government's authority to consent to drone strikes in the former FATA see Byrne (n 366) 110-112.

[684] Emmerson Report 2013 (n 41) paras 53 *et seq*. See also O'Connell, 'Case Study of Pakistan' (n 233) 282, who considers that consent might already have been withdrawn implicitly by earlier protest; Byrne (n 366) 106 *et seq*. On the high probative value of reports prepared by UN Special Rapporteurs see ICJ, *Bosnian Genocide* (n 144) [328]; Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer 2010) 572.

and was upheld by the Hadi administration.[685] In fact, UN Special Rapporteur Emmerson was informed by the Yemeni government that the US 'routinely seeks prior consent, on a case-by-case basis, for lethal remotely piloted aircraft operations on its territory through recognized channels'.[686] If consent is withheld, the attack will not be carried out.[687] And even though the Yemeni government might have withdrawn consent for US ground operations following the failed January 2017 ground raid which had left several civilians dead, it seems to persist for air strikes.[688]

2) Self-defence

In cases where the territorial State has not consented to the use of force on its territory, the State using armed force will usually try to rely on the right to self-defence to justify its actions. According to article 51 of the UN Charter,

> [n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Article 51 was originally intended to allow for self-defence only in case of an armed attack by another State.[689] However, following 9/11 it now seems to be generally accepted that the right to self-defence may also be invoked *vis-à-vis* an armed attack by a non-State actor, even if its actions are not attributable to the territorial State.[690] Beyond that, significant uncertainty about the exact modalities of the right to defend oneself remains. For example, several scholars have suggested that the right of self-defence may only be

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[685] Human Rights Watch, *Wedding* (n 139) 6 *et seq*; ICG, 'Expanding' (n 114) 7; Byrne (n 366) 119. On the Yemeni government's authority to consent despite having lost significant territory to the al-Huthi see Byrne (n 366) 113 *et seq*.

[686] Emmerson Report 2013 (n 41) para 52.

[687] ibid; see also The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (2018) 6 <www.state.gov/wp-content/uploads/2019/10/Report-to-Congress-on-legal-and-policy-frameworks-guiding-use-of-military-force-.pdf> accessed 4 April 2020.

[688] Hathaway and others, 'Breaking the Law' (n 276) 60. See also OVG NRW (n 51) [428]-[433] – juris.

[689] See ICJ, *Wall* (n 180) [194].

[690] Erika de Wet, 'The invocation of the right to self-defence in response to armed attacks conducted by armed groups: Implications for attribution' (2019) 32 *LJIL* 91, 102 *et seq*; Heyns and others (n 176) 802 *et seq*. See also BVerfG, Judgement of 17 September 2019 (2 BvE 2/16) E 152, 8 [46]-[50] – juris (*Anti-IS-Einsatz*).

relied upon in the face of a large scale attack (or a series of attacks) by a non-State actor,[691] whereas the ICJ appears to require at least a significant amount of force.[692] Isolated or sporadic incidents, on the other hand, do not seem to allow for self-defence.[693] Moreover, it is equally unclear if a State may only defend itself where it is attacked on its own territory, or if the right to self-defence is also triggered by attacks against that State's armed forces or embassies abroad.[694]

Be that as it may, it is important to clarify that a legitimate exercise of self-defence under article 51 only justifies a violation of the *ius ad bellum*. It is neither a defence against a violation of IHRL nor against a violation of the *ius in bello*.[695] Where an individual is deprived of his right to life, justification may only be provided by recourse to the law enforcement standard (if the violation took place outside an armed conflict) or IHL (if the violation took place within an armed conflict).[696] And additional constraints on the right to self-defence are imposed by the requirements of necessity and proportionality, which, as customary international law, must also be observed in the context of article 51.[697] According to the principle of necessity, self-defence may only be exercised so long as it is necessary to halt or repel an attack.[698] While this implies that article 51 may be invoked even before an armed attack actually occurs (so-called anticipatory or pre-emptive self-defence),[699] there is significant debate as to whether such a right protects only against an *imminent* attack or whether it extends to even earlier stages

[691] Wilmshurst, 'Principles' (n 514) 11; Duffy (n 10) 259 *et seq*. In case of a series of attacks, they must all emanate from the same source. cf Tom Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108 *AJIL* 159.

[692] ICJ, *Oil Platforms (Iran v US)* (Judgement) [2003] ICJ Rep 61 [51], [64]; *Military and Paramilitary Activities* (n 177) [191], [195].

[693] O'Connell, 'Case Study of Pakistan' (n 233) 277; see also ICJ, *Military and Paramilitary Activities* (n 177) [195].

[694] Wilmshurst; 'Principles' (n 514) 6; Duffy (n 10) 254.

[695] ARSIWA General Commentary (n 50) 74 *et seq* paras 3 *et seq*; Milanovic, 'Drones and Targeted Killings' (n 176); Heller (n 176) 91; Heyns and others (n 176) 795; Callamard Report (n 27) para 31. cf Kenneth Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law' (Working Paper of the Series on Counterterrorism and American Statutory Law, 11 May 2009) 18-21 <www.brookings.edu/wp-content/uploads/2016/06/0511_counterterrorism_anderson.pdf> accessed 17 April 2020.

[696] Heller (n 176) 91.

[697] eg ICJ, *Military and Paramilitary Activities* (n 177) [194]; *Nuclear Weapons* (n 177) [41]; *Oil Platforms* (n 692) [74]; Kimberly N Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 *ICLQ* 141, 146; Heyns and others (n 176) 800.

[698] Heyns and others (n 176) 801.

[699] UNGA, 'A more secure world: our shared responsibility – Report of the High-level Panel on Threats, Challenges and Change' (2 December 2004) UN Doc A/59/565, 54 para 188; Heyns and others (n 176) 801.

of the threat.[700] Suffice to say that to date, a right to pre-emptive self-defence has received international recognition only insofar as the necessity to use force is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[701] Beyond that and despite US insistence to the contrary, no right to pre-emptive self-defence has (yet) been recognized as customary in international law.[702]

Another issue that merits a mention at this point is the so-called unwilling or unable doctrine. According to the US,

> States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when (…) the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.[703]

Several other States including the UK and the Federal Republic of Germany have used this doctrine to justify attacks, or providing support thereto, against the Afghan Taliban or ISIL in Syria.[704] However, overall support for it has remained mixed.[705] And even if one were to accept it as part of international law, it must be borne in mind that this doctrine is not an independent legal justification for the use of force on foreign territory.[706] In

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[700] See the discussion in Duffy (n 10) 260-268.

[701] This is commonly referred to as the Webster-formula, see Robert Y Jennings, 'The Caroline and McLeod Cases' (1938) 32 *AJIL* 82, 89. See also Alston Report (n 11) para 45 ('accurately reflects State practice and the weight of scholarship'); Heyns and others (n 176) 802; Callamard Report (n 27) para 52. This is also the position of the German Federal Government, see Deutscher Bundestag, 'Haltung der Bundesregierung zu einem verantwortungsbewussten Umgang mit bewaffneten Drohnen' (21 January 2016) BT-Drs 18/10379, 6.

[702] BVerwGE 127, 302 (n 31) [211] – juris; OVG NRW (n 51) [332]-[335] – juris; The UN Secretary-General's High-level Panel Report on Threats, Challenges and Change, 'A more secure world: our shared responsibility' (2 December 2004) UN Doc A/59/565 para 191; Christian J Tams, 'The Use of Force against Terrorists' (2009) 20 *EJIL* 359, 389 *et seq*; Alston Report (n 11) para 45; Wilmshurst, 'Principles' (n 514) 9. See also Moorehead, Hussein and Alhariri (n 252) 118, on some of the criteria that the US uses to determine imminence.

[703] UN Security Council, 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary General' (23 September 2014) UN Doc S/2014/695.

[704] Callamard Report (n 27) para 72.

[705] See Duffy (n 10) 310-312; Olivier Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?' (2016) 29 *LJIL* 777; 'A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism' *EJIL: Talk!* (14 July 2016) <www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/> accessed 21 April 2021; Elena Chachko and Ashley Deeks, 'Which States Support the "Unwilling and Unable" Test?' *Lawfare* (10 October 2016) <www.lawfareblog.com/which-states-support-unwilling-and-unable-test> accessed 21 April 2021; Callamard Report (n 27) para 72.

[706] Heyns and others (n 176) 804; Callamard Report (n 27) para 75.

particular, it does not absolve the State using force from showing that there was an (imminent) attack by a non-State actor. Instead, it is merely an exception to the general rule that the use of force against a non-State actor on the territory of another State is not necessary (within the meaning of customary international law) if the territorial State is willing and able to halt or prevent an attack itself.[707]

Applying these standards to the present case, it is this author's view that in the period following the withdrawal of consent by the Pakistani government, the use of force on the territory of Pakistan did not amount to a legitimate exercise of the right to self-defence. While the requirement of imminence under article 51 of the UN Charter cannot be equated with notion of imminence under the law enforcement standard, there is no evidence that the necessity to use force was 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[708] Moreover, following the TPP's bloody assault on an army-run public school in Peshawar in December 2014, sincere efforts were made by Pakistani government to address the militant threat in the FATA. After this date, the US' use of force was also no longer necessary.

V. Interim Conclusion

Reaching a reliable view on US compliance with international law is an extremely difficult task. Because the use of drones is not unlawful *per se*, the existence of an internationally wrongful act can only be established on a case-by-case basis.[709] However,

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[707] Wilmshurst, 'Principles' (n 514) 11; Trapp (n 697) 147; Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *AJIL* 769, 776; Melzer, *Human Rights Implications* (n 41) 22; Duffy (n 10) 266; Heyns and others (n 176) 804. See also Ashley S Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Va J Intl L* 483.

[708] Concurring Deiseroth (n 326) 987. See also § 5 B. II. 2).

[709] This has repeatedly been emphasised by the German Federal Government, see Deutscher Bundestag, 'Hinweise auf völkerrechtswidrige Praktiken der USA von deutschem Staatsgebiet aus und die diesbezüglichen Kenntnisse der Bundesregierung' (23 December 2013) BT-Drs 18/237, 11; 'Stenografischer Bericht der 78. Sitzung' (14 January 2015) Plenarprotokoll 18/78, 7447 (Statement of Günter Krings); 'Stenografischer Bericht der 99. Sitzung' (22 April 2015) Plenarprotokoll 18/99, 9435-9441 (Statement of Ralf Brauksiepe); Plenarprotokoll 18/205 (n 80) 20453 *et seq* (Statement of Michael Roth); 'Die US-Basis Ramstein als wichtiger Knoten im weltweiten Drohnenkrieg' (25 January 2017) BT-Drs 18/11023, 8. See also NSA Inquiry Committee, 'Stenografisches Protokoll der 77. Sitzung' (3 December 2015) 64 (Testimony of Jürgen Schulz) <http://dipbt.bundestag.de/dip21/btd/18/CD12850/D_I_Stenografische_Protokolle/Protokoll%2077%20I.pdf> accessed 19 March 2021; 'Stenografisches Protokoll der 86. Sitzung' (18 February 2016) 91, 109 (Testimony of Stefan Sohm) <http://dipbt.bundestag.de/dip21/btd/18/CD12850/D_I_Stenografische_Protokolle/Protokoll%2086%20I.pdf> accessed 18 May 2021.

there are significant limits to conducting such an assessment from the outside. In Yemen, the US military has provided details only on a tiny fraction of the overall (suspected) number of attacks and for Pakistan, there is no official information available at all. The data collected by nongovernmental organizations such as the ISACC might allow for an approximation, but their focus on counting civilian casualties is often misleading. Moreover, they are necessarily reliant on second-hand information provided by international and local news media, whose reports are often conflicting, incomplete, or imprecise, making any assessment inherently uncertain.[710] The US' refusal to fully disclose the domestic legal framework underlying its targeted killings programme presents additional difficulties. Without knowing what investigatory processes are applied by the CIA and whether any investigations have been carried out at all, it will be almost impossible to reach a reliable view on the US' compliance with its duty to conduct an investigation under customary international law and IHRL.

However, there are a few notable exceptions to the general uncertainty surrounding a legal assessment of the lawfulness of US actions. First, this study has identified a series of individual attacks in Yemen where the principle of distinction had presumably been violated intentionally. Even if it cannot be said with absolute certainty that these events were a violation of the *ius in bello*, this does not mean that there is no value in considering them in the first place. It is the present author's view that in these cases, it should be for the attacking State to supply a satisfactory and convincing explanation as to why the use of lethal force was justified in the circumstances. In its absence, a strong presumption of illegality should apply.[711] Secondly, it is important to recall that a deprivation of life occurring *outside* the context of an armed conflict is presumed to be arbitrary and that this presumption may only be rebutted on the basis of a proper investigation. And under IHRL, to be effective (in the broad sense) an investigation also needs to be transparent. However, none of the US' counterterrorism operations in Pakistan have been able to meet this requirement. Thirdly and finally, it is the position of this study that any drone strikes in Pakistan occurring after the local government withdrew its consent to the use of force on its territory, which might have

[710] On the probative value of reports prepared by nongovernmental organizations in international adjudication see ICJ, *Armed Activities on the Territory of the Congo* (n 168) [134]; Benzing (n 684) 576 ('unclear probative value'; this author's translation).

[711] See also ECtHR, *El-Masri* (n 32) [152] *et seq*; *Al Nashiri v Poland* [2014] ECHR 875 [395] *et seq*; *Husayn (Abu Zubaydah) v Poland* [2014] ECHR 876 [396].

been the case as early as April 2012, violated the *ius ad bellum* and for that reason alone are internationally wrongful.

§ 6 Aid or Assistance

In addition to the existence of an internationally wrongful act that allows for complicit involvement, the second requirement that must be fulfilled for complicit responsibility under article 16 of the ARSIWA to arise is the provision of aid or assistance in the commission of that act. However, as Helmut Aust cautions right at the beginning of his extensive study on State complicity in international law: '[W]hat actually constitutes aid or assistance within the meaning of Article 16 (…) is (…) rather unclear'.[712]

Indeed, article 16 does not define the term "aid or assistance".[713] Nor does the ARSIWA General Commentary, which only lists – rather incoherently – several examples of what *has* been considered such in the past.[714] For example, delivering weapons, facilitating the abduction of persons on foreign soil, providing means for the closing of an international waterway, or – less apparent – granting a credit line to an oppressive regime have all been considered to fall within the scope of State responsibility for complicity.[715] States have also been held responsible in cases where one State had (actively) allowed another State to use one of its airfields or had granted it overflight rights to launch an internationally wrongful attack against a third State.[716] Moreover, the ILC's use of two different terms to frame the objective *fait générateur* of complicity – "aid *or* assistance" – adds to the confusion since there does not seem to be any difference between the two.[717] In fact, both terms appear to be used as synonyms for one and the same conduct, namely the provision of support to another State in its internationally wrongful doing.

It will be for this chapter to explore the different ways in which a State can provide aid or assistance and to examine whether the different forms of German involvement in

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[712] Aust, *Complicity* (n 30) 197.

[713] Lanovoy, *Complicity* (n 145) 96.

[714] ARSIWA General Commentary (n 50) 66 *et seq* paras 7-9; critical Aust, *Complicity* (n 30) 199 *et seq*.

[715] ARSIWA General Commentary (n 50) 66 para 1; Andreas Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (Schulthess 2007) 181-184; Aust, *Complicity* (n 30) 198 *et seq*.

[716] ARSIWA General Commentary (n 50) 66 *et seq* para 8.

[717] See the comment of the UK in ILC, *Yearbook of the International Law Commission 2001*, vol 2 pt 1 (UN 2010) 52; Aust, *Complicity* (n 30) 197; Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House, the Royal Institute of International Affairs 2016) 5 para 11; Richard Mackenzie-Gray Scott, 'State Responsibility for Complicity in the Internationally Wrongful Acts of Non-State Armed Groups' (2019) 24 *J Conflict & Sec L* 373, 385.

US counterterrorism operations amount to such. For one thing, as evidenced by the examples given at the beginning of this introduction, a Sate may always aid or assist another State through positive action (see A below). Moreover, a second form of aiding or assisting is conceivable, namely by omission (see B below). While this is perhaps the most promising avenue for successfully establishing German complicit responsibility, it will be seen throughout the course of this study that it is also the most complicated.

A. Aid or Assistance by Act

That aid or assistance may be provided by positive action is, in a way, self-evident. Unfortunately, the ILC did not clarify whether only certain actions which meet a specific threshold qualify as aiding or assisting. In fact, most scholars seem to exclude from the scope of article 16 of the ARSIWA such aid that is either minimal or consists of mere moral support.[718] However, the ILC's silence on the issue may very well be interpreted to mean that *any* act may constitute aid or assistance as long as it is sufficiently linked to the principal wrong.[719] This also seems to have been the position of the Special Rapporteur on the topic, Roberto Ago. During the drafting process of the ARSIWA, Ago made it clear that complicit responsibility could also arise in a situation where one State concludes a treaty with another State undertaking to remain neutral in case of an aggression by that other State towards a third State, which is hardly more than moral support.[720] And according to Helmut Aust, 'aid or assistance is a normative and case-specific concept'.[721] Whether a certain conduct amounts to aiding or assisting thus always needs to be established with view to the specific facts of each individual case.[722]

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[718] Quigley (n 156) 80, 120; Epiney (n 147) 49 *et seq*; Lowe (n 42) 5; Felder (n 715) 250; Aust, *Complicity* (n 30) 221 *et seq*; Moynihan, *Aiding and Assisting* (n 717) 9 para 24; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 386. See also § 7.

[719] Concurring Crawford, *State Responsibility* (n 163) 402; Lanovoy, *Complicity* (n 145) 95, noting that even a mere promise may amount to aid or assistance.

[720] ILC, '30th session: Summary record of the 1519th meeting' in ILC, *Yearbook ... 1978*, vol 1 (n 49) 240 para 26 (Statement of Roberto Ago).

[721] Aust, *Complicity* (n 30) 230 (quotation marks omitted).

[722] Concurring ibid 195, 209 *et seq*; Crawford, *State Responsibility* (n 163) 405; Zwijsen, Kanetake and Ryngaert (n 163) 153 *et seq*. See also Giorgio Gaja, 'Seventh report on responsibility of international organizations' (27 March 2009) UN Doc A/CN.4/610 para 75 ('One difficulty in defining more precisely aid or assistance in the commission of an internationally wrongful act is that, for the purpose of assessing whether aid or assistance occurs, much depends on the content of the obligation breached and on the circumstances').

Based on the different forms of German involvement in US targeted killings, three types of conduct may be identified that might possibly amount to aid or assistance within the meaning of article 16:

(i) sharing intelligence with the US;

(ii) granting US forces the use of Ramstein Air Base;[723] and

(iii) "failing to interfere" in the use of Ramstein Air Base and its SATCOM relay station.

The first two of these are clearly positive actions, and there are no major difficulties in conceiving them as possible aid or assistance. It is commonly accepted that providing intelligence to another State may entail complicit responsibility if that intelligence is subsequently used by the receiving State to commit an internationally wrongful act.[724] And the ILC in its general commentary to the ARSIWA explicitly mentioned the provision of an essential facility – which, in the present case, would be Ramstein Air Base – as a possible form of aid or assistance.[725] The third conduct, however, is not a positive action but a failure to act, ie, an omission.

Before the question is addressed whether aid or assistance may also be provided by omission, a further issue merits attention at this point. In addition to the aforementioned types of conduct, one might also consider whether the construction of Ramstein's SATCOM relay station itself could potentially amount to aiding or assisting. The key to answering this question lies in understanding that foreign NATO forces stationed in Germany enjoy special legal status and are granted certain rights and

[723] Ramstein Air Base was built in 1951 as part of a reciprocal agreement between France and the US to expand the latter's presence in what was originally part of the French occupational zone. After the end of the military occupation of West Germany, in 1954 an agreement was concluded which allowed, *inter alia*, for the presence of US forces on German territory (the *ius ad praesentiam*) and the continuity of the *status quo*. When Germany reunified in 1990, the parties agreed that the convention shall remain in force. See Convention on the Presence of Foreign Forces in the Federal Republic of Germany (adopted 23 October 1954, entered into force 6 May 1955) BGBl 1955 II, 253; *Bekanntmachung der Vereinbarung vom 25. September 1990 zu dem Vertrag über den Aufenthalt ausländischer Streitkräfte in der Bundesrepublik Deutschland*, BGBl 1990 II, 1390; 'Ramstein Air Base' (*Global Security*) <www.globalsecurity.org/military/facility/ramstein.htm> accessed 20 March 2020.

[724] eg de Wet, 'Complicity' (n 158) 289.

[725] ARSIWA General Commentary (n 50) 66 para 1. See also BVerwGE 127, 302 (n 31) [215], [221]-[224], [258] *et seq* – juris, on the granting of overflight rights to US and UK forces in connection with their aggression against Iraq.

privileges that are set out in the NATO Status of Forces Agreement (NATO SOFA),[726] its Supplementary Agreement (NATO SOFA SA),[727] and the administrative agreements thereto (together the *ius in praesentia*).[728] In particular, it is one of the US' privileges to carry out certain military construction works with its own personnel or labour employed by it without formal approval by German authorities.[729] This includes 'construction works of a classified nature requiring special security measures' and 'construction works involving integration or installation of such special equipment as signal or weapons systems',[730] which covers Ramstein's SATCOM relay station. Such works are executed 'in consultation'[731] (*im Benehmen mit*) with German authorities, that means 'appropriate co-operation between the US Forces and the German authorities'.[732] Under the administrative guidelines for the co-operation between Germany and the US in matters concerning military construction works,[733] US forces only notify German authorities of their intent to carry out a privileged construction work, giving them the opportunity to state objections.[734] Authorization, consent, or any other contribution on the part of German authorities is not required.[735]

[726] Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (adopted 19 June 1951, entered into force 23 August 1953) BGBl 1961 II, 1190.

[727] Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (adopted 3 August 1959, entered into force 1 July 1963) BGBl 1961 II, 1218, as amended by the Agreement of 18 March 1993 (adopted 18 March 1993, entered into force 29 March 1998) BGBl 1994 II, 2594.

[728] See Andreas Gronimus, 'Allied Security Forces in Germany: The NATO SOFA and Supplementary Agreement Seen from a German Perspective' (1992) 136 *Mil L Rev* 43.

[729] See articles 27.1.2 and 27.1.4 of the Administrative Agreement ABG 1975 between the Federal Minister for Regional Planning, Building and Urban Development and the United States Forces on the Implementation of Construction Works of and for the U.S. Forces stationed in the Federal Republic of Germany in accordance with Article 4 of the Supplementary Agreement to the NATO Status of Forces Agreement (adopted 29 September 1982, entered into force 1 October 1982) BGBl 1982 II, 893 (AGB 1975).

[730] ibid arts 27.1.1, 27.1.4.

[731] ibid art 27.1.

[732] Protocol of Signature to the ABG 1975 (n 729) 914 re art 27 para 1.

[733] Richtlinien zur Ausführung des Verwaltungsabkommens – ABG 1975 – über die Durchführung der Baumaßnahmen für und durch die in der Bundesrepublik Deutschland stationierten US-Streitkräfte nach Artikel 49 des Zusatzabkommens zum NATO-Truppenstatut (ZA NTS) – RiABG (US) – (adopted 1 October 1982).

[734] ABG 1975 (n 729) 923 paras 6.1 *et seq*.

[735] This is consistent with the jurisprudence of the BVerfG and the BVerwG on administrative consultation requirements under German domestic law, which only require that the consulting party gives the consultee an opportunity to voice its concerns and considers his position when making its decision. See, for example, BVerfG, Decision of 19 November 2014 (2 BvL 2/13) E 138, 1 [87] – juris; BVerwG, Judgement of 9 May 2001 (6 C 4/00) E 114, 232 [22] – juris.

This makes it difficult to see how the construction of the SATCOM relay station could possibly be conceived as aiding or assisting within the meaning of article 16. Notwithstanding the question whether there is a clear *de minimis* standard to which the supporting State's actions must have contributed to the principal wrongful act, scholars concur that they must have made its commission at least somehow *easier*.[736] However, the US constructed Ramstein's SATCOM relay station with its own personnel or labour employed by. If anything, the involvement of German authorities in the process – following proper consultation, the *Bundesministerium der Verteidigung* (Federal Ministry of Defense; BMVg) had raised some ecological concerns –[737] had made it *harder* for the US to complete its undertaking. Such conduct cannot give rise to complicit responsibility.

B. Aid or Assistance by Omission

Whether or not aid or assistance may also be provided by omission is unclear. The text of article 16 of the ARSIWA does not make any explicit reference to a State's failure to act, and the ILC in its ARSIWA General Commentary is equally silent on the issue.[738] However, it will be recalled that according to article 2 of the ARSIWA, an internationally wrongful act may consist in 'an action *or* [an] omission'.[739] Thus, the ILC's silence might simply mean that it saw no need to reiterate the general rule already laid down in article 2.[740] In fact, there seems to be some support for such an interpretation in the drafting history of the ARSIWA. In particular, during one of ILC's meetings Special Rapporteur Roberto Ago had made reference to several protest notes issued by the Soviet Union during the cold war against Germany and Turkey. In these notes, the Soviet Union accused Germany and Turkey of having allowed US observation balloons to be launched from their territory, two of which had entered Soviet airspace. As Ago remarked, the responsibility of Germany and Turkey for their participation in the US' internationally wrongful act 'had thus been based on passive conduct or toleration on the part of their organs'[741] rather than on active conduct.

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[736] See § 7.
[737] NSA Inquiry Committee Report (n 59) 1168.
[738] Aust, *Complicity* (n 30) 226.
[739] Emphasis added.
[740] Aust, *Complicity* (n 30) 226 *et seq*, noting that the ILC may have overlooked the issue.
[741] Roberto Ago, 'Summary of the 1312th Meeting' in ILC, *Yearbook of the International Law Commission 1975*, vol 1 (UN 1976) 42 para 4. Turkey did not challenge the assessment of the Soviet Union, but argued that the US had not acted unlawfully, see Quigley (n 156) 85.

While the ILC's position on the issue remains uncertain, several scholars have raised doubts as to whether a State's failure to act may truly be considered aid or assistance. For example according to Harriet Moynihan, 'the traditional view is that Article 16 does not include omissions'.[742] Similarly, James Crawford, former member of the ILC and Special Rapporteur on the topic, asserts: 'Omissions may also be excluded as a form of aid and assistance'.[743] Helmut Aust claims that 'the majority of States are eager to limit the concept of assistance to cases in which active participation is given'.[744] And the ICJ in its famous *Bosnian Genocide* case rejected the possibility that a State could incur complicit responsibility by aiding or assisting in the commission of the international crime of genocide through an omission, holding that 'complicity always requires (…) some positive action'.[745]

Yet, there is nothing in the wording of article 16 that would support such a view.[746] In fact, aiding or assisting is just as conceivable by omission as it is by action.[747] Although this textual argument is certainly not the end of the story,[748] several arguments militate strongly against the eviction of omissions from the scope of complicity. For one thing, according to the ARSIWA General Commentary, article 16 is part of a set of exceptional cases 'where it is *appropriate* that one State should assume responsibility for the internationally wrongful act of another'.[749] However, if a State can provide aid or assistance to another State by actively granting it overflight rights over its territory, why should its deliberate failure to object be treated any different?[750] In both cases, it is equally

[742] Moynihan, *Aiding and Assisting* (n 717) 8. cf Lanovoy, *Complicity* (n 145) 184 ('there is no overwhelming support for the eviction of complicity by omission').

[743] Crawford, *State Responsibility* (n 163) 403, 405. Concurring de Wet, 'Complicity' (n 158) 298, who concedes that including omissions within the scope of article 16 would 'improve the coherence of the [ARSIWA]'.

[744] Aust, *Complicity* (n 30) 209.

[745] ICJ, *Bosnian Genocide* (n 144) [432]. Although *Bosnian Genocide* is a case of international criminal law, Aust concludes that the ICJ's opinion may have some bearing on the interpretation of article 16, see Aust, *Complicity* (n 30) 226.

[746] Lanovoy, *Complicity* (n 145) 71.

[747] Lowe (n 42) 5 *et seq*; Lanovoy, *Complicity* (n 145) 185, 259, noting that no State or international organization has specifically opposed the inclusion of omissions within article 16; Deiseroth (n 326) 987. See also Aust, *Complicity* (n 30) 227-230, 420, referencing the ICJ's *Corfu Channel* case; on this aspect cf Crawford, *State Responsibility* (n 163) 404 *et seq*.

[748] On this aspect see § 8.

[749] ARSIWA General Commentary (n 50) 64 para 5 (emphasis added).

[750] Craig Barker and Sandesh Sivakumaran, 'I. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)' (2007) 56 *ICLQ* 695, 704 *et seq*; Nolte and Aust (n 144) fn 43; Aust, *Complicity* (n 30) 228; Jackson (n 151) 156 *et seq*; Lanovoy, *Complicity* (n 145) 96. See also ARSIWA General Commentary (n 50) 35 para 4.

appropriate that the assisting State incurs complicit responsibility under the ARSIWA. Whether or not a certain conduct merits rebuke should be decided with view to subjective fault and moral blame rather than a State's cunningness to avoid active participation and achieve the same result through deliberate passiveness.[751]

Moreover, the exclusion of omissions as a possible form of aid or assistance in the ICJ's *Bosnian Genocide* case is not as 'absolute'[752] as some scholars would like to suggest. As Antonio Cassese points out, 'the notion of complicity in genocide propounded by the Court is not supported by any national or international case law nor based on general principles of international criminal law, comparative criminal law or public international law'.[753] In fact, it is not even clear if the ICJ's pronouncement is supposed to extend to article 16 of the ARSIWA or if it is confined to the international criminal law offense of complicity in genocide under article 3(e) of the Genocide Convention.[754] And unlike the ICJ, the *ad hoc* international criminal tribunals have long recognized that the international criminal law offense of aiding and abetting is not limited to active involvement but also includes passive behaviour.[755] Now, analogies between the international criminal responsibility of individuals and State responsibility for complicity must certainly be handled with care. They are different areas of law with different

[751] See Michael Duttwiler, 'Liability for Omission in International Criminal Law' (2006) 6 *Intl Crim L Rev* 1, 61 ('moral equivalence of action and omission'); Lanovoy, *Complicity* (n 145) 96.

[752] Crawford, *State Responsibility* (n 163) 404. See also Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 386 *et seq*.

[753] Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2008) 5 *JICJ* 875, 884. Concurring Nolte and Aust (n 144) fn 43; Lanovoy, *Complicity* (n 145) 57, 184. For a comprehensive survey of the liability for omissions in domestic criminal law see Duttwiler (n 751) 26-45.

[754] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. Article 3(e) reads: 'The following acts shall be punishable: (…) (e) Complicity in genocide'. See Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (CUP 2014) 146.

[755] eg ICTR, *Prosecutor v Jean-Paul Akayesu* (Judgement) ICTR-96-4-T, T Ch I (2 September 1998) [548]; ICTY, *Mrkšić* (n 200) [667]; extensively on the latter Jackson (n 151) 98-110; see also Lanovoy, *Complicity* (n 145) 62 *et seq*. The jurisprudence of these courts is generally considered to be a major source of international criminal law, see article 38(1)(d) of the ICJ Statute, which exemplifies the sources of public international law. See also Duttwiler (n 751) 13 *et seq*.

characteristics and histories.[756] However, both share similar notions of complicity, which is why one may still serve as important guidance for the other.[757]

It is important to note that including omissions within the scope of article 16 does not mean that *every* omission will qualify as aid or assistance. As Miles Jackson pointedly notes:

> Once we recognize that certain omissions help or encourage other actors to commit a wrong, the subsequent step is to ask which of these omissions are sufficiently culpable as to justify the imposition of accomplice liability.[758]

In fact, there seems to be general agreement that complicit responsibility through omission may only arise in situations where the assisting State's failure to act is accompanied by a specific duty to act.[759] This is corroborated at the domestic level, where most legal systems provide for a responsibility for omissions only in case of a violation of a specific duty to act.[760] And in the area of international criminal law, an omission has long been defined as a failure to act when under a duty to do so.[761]

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[756] Paolo Palchetti, 'State Responsibility for Complicity in Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 384; Harriet Moynihan, 'Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility' (2018) 67 *ICLQ* 455, 467.

[757] Regarding the *mens rea* element of article 16 see Moynihan, 'Mental Element' (n 756) 467; de Wet, 'Complicity' (n 158) 307 fn 132; Scott, 'State Responsibility for Complicity' (n 717) 398 *et seq*. A parallel was also drawn by the ICJ in its *Bosnian Genocide* case, see § 8 A.

[758] Jackson (n 151) 107 (footnote omitted). On the *mens rea* element see § 8.

[759] eg Felder (n 715) 255; Nolte and Aust (n 144) fn 43; Aust, *Complicity* (n 30) 228; Jackson (n 151) 156. See also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited 1953) 218-232; Crawford, *State Responsibility* (n 163) 218, regarding article 2 of the ARSIWA.

[760] Extensively Duttwiler (n 751) 26-56.

[761] eg ICTY, *Delalić* (n 191) [334]; *Prosecutor v Tihomir Blaškić* (Judgement) IT-95-14-T, T Ch (3 March 2000) [271]; *Prosecutor v Blagoje Simić, Miroslav Tadić and Simo Zarić* (Judgement) IT-95-9-T, T Ch II (17 October 2003) [162]; *Prosecutor v Dusko Tadić* (Judgement) IT-94-1-A, A Ch (15 July 1999) [188]; *Galić* (n 377) [175]; *Prosecutor v Milutinović and others* (Judgement, vol 3) IT-05-87-T, T Ch (26 February 2009) [620]; ICTR, *Musema* (n 191) [123]; *Prosecutor v Ignace Bagilishema* (Judgement) ICTR-95-1A-T, T Ch I (7 June 2001) fn 19; *Prosecutor v André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe* (Judgement and Sentence) ICTR-99-46-T, T Ch III (25 February 2004) [659]; *Prosecutor v Ntagerura, Bagambiki and Imanishimwe* (Judgement) ICTR-99-46-A, A Ch (7 July 2006) [334]; Duttwiler (n 751) 13 *et seqq*; Jessie Ingle, 'Aiding and Abetting by Omission before the International Criminal Tribunals' (2016) 14 *JCIJ* 747, 748 *et seqq*; Robert Roth, 'Improper Omission' in Jérôme de Hemptinne, Robert Roth and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (CUP 2019) paras 9, 26 *et seq*. See also AP I, art 86(1) ('The High Contracting Parties and the Parties to the conflict shall repress grave breaches (…) which result from *a failure to act when under a duty to do so*'; emphasis added).

Thus, if one accepts that complicit liability for omissions may only arise in the face of a specific duty to act, a further and even more difficult issue is to identify the possible sources of such a duty. In principle, there is little doubt that an *international* duty to act, ie, where the imperative to act is based on customary or treaty international law, allows for complicit involvement through omission (see I below).[762] However, it is far less clear if a State may also incur international responsibility for complicity through omission based on a failure to comply with a *domestic* duty to act (see II below). Both aspects shall be addressed in turn.

I. International Omission

For the purposes of the present case, two different sources of international law might provide for a duty of the Federal Republic of Germany to intervene in the use of Ramstein Air Base – and therefore of its territory – for the commission of an internationally wrongful drone strike in Pakistan or Yemen: first, customary international law (see 1) below); and secondly, international treaty law, especially the ICCPR (see 2) below) and the ECHR (see 3) below).[763]

1) Customary International Law

In general, a State must prevent its territory from being used to inflict harm upon a third party.[764] This seemingly simple rule of customary international law was first established in the so-called *Trail Smelter Arbitration* of 1938, in which the US had called upon an arbitral tribunal to hold Canada responsible for the damage caused to local farms and

[762] Gordon A Christenson, 'Attributing Acts of Omission to the State' (1991) 12 *Mich J Intl L* 312, 323 *et seq*. See also ARSIWA, art 14(3).

[763] On the ECHR's status in Germany see *Gesetz über die Konvention zum Schutze der Menschenrecht und Grundfreiheiten* (adopted 7 August 1952, entered into force 3 September 1953) BGBl 1952 II, 685, 953. On the ICCPR see n 173.

[764] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 137 *et seqq*; IACtHR, 'Environment and Human Rights' (n 615) para 97; Maria L Banda, 'Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm' (2019) 103 *Minn L Rev* 1879, 1934 *et seq*. As a primary rule, failure to comply with the obligations arising under the no-harm rule is in itself an internationally wrongful act. See Julio Barboza, 'International Liability for the Injurious Consequences of Acts Not Prohibited by International Law and Protection of the Environment' (1994) 247 *Recueil des Cours* 291, 319; Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff 2005) 147; Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (CUP 2018) 184, 329 ('in addition to being a "principle", prevention has also become an "obligation" whose breach is assimilated to an internationally wrongful act').

forests in the US by sulphuric fumes emanating from a Canadian smelter located across the border in Trail, British Columbia. According to the arbitral tribunal,

> under the principles of international law, (…) no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[765]

Ten years later, the ICJ in its *Corfu Channel* case held that Albania's failure to notify and warn two British warships of the imminent danger when they were approaching a minefield in Albanian territory waters had violated 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[766] Although the duty not to cause transboundary injury is not limited to harm resulting from environmental damage,[767] it was subsequently affirmed by various UN declarations in particular in the area of environmental law. For example, the 1972 Stockholm Declaration on the human environment and the 1992 Rio Declaration on environment and development emphasized that States have 'the responsibility to ensure that activities

[765] Arbitral Tribunal, *Trail Smelter Arbitration (US v Canada)* (Decision) [1938 and 1941] 3 RIAA 1905, 1965 *et seq*. See also Permanent Court of Arbitration, *Iron Rhine ("Ijzeren Rijn") Railway (Belgium v Netherlands)* (Award) [2005] 27 RIAA 35 [59]; *Indus Waters Kishenganga Arbitration (Pakistan v India)* (Partial Award) [2013] 154 ILR 1 [448], [451]; *South China Sea Arbitration (Philippines v China)* (Award) [2016] 33 RIAA 153 [941].

[766] ICJ, *Corfu Channel* (n 177) 22. See also idem, *Nuclear Weapons* (n 177) [29]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgement) [2010] ICJ Rep 14 [101]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica)* (Judgement) [2015] ICJ Rep 665 [104]. In its concluding observations on the sixth period report of the UK, the CCPR demanded that the UK stop its territory from being used as a transit point for rendition flights, see CCPR, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6 para 13.

[767] Robert Q Quentin-Baxter, 'Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law' in ILC, *Yearbook of the International Law Commission 1983*, vol 2 pt 1 (UN 1985) 205 *et seq* para 17; Julio Barboza, *The Environment, Risk and Liability in International Law* (Martinus Nijhoff 2011) 83-85; Birnie, Boyle and Redgwell (n 764) 141; Beatrice A Walton, 'Duties Owed: Low-Intensity Cyber Attacks and Liability for Transboundary Torts in International Law' (2017) 126 *Yale L J* 1460, 1480, 1483 *et seq* and fn 118. In the ICJ's *Corfu Channel* case, the damage to the British warships had not been caused by environmental pollution, but by mines lain in the Corfu Channel.

within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.[768]

The notion that one State must not allow its territory to be used to cause damage to the territory of another State or to the persons living therein (*sic utere tuo ut alienum non laedas*)[769] is commonly referred to as the no-harm rule.[770] In the following, this study will first try to outline the general requirements of the no-harm rule (see a) below), paying particular attention to the difficult element of causality (see b) below). The standards identified in this first step shall then be applied to the specific facts of the present case in a second step to determine the existence of an international duty to act flowing from the no-harm rule (see c) below).

a) General Requirements

Being a rule of customary international law, the obligation not to cause transboundary harm is applicable to all States, regardless of how, when and where they decide to exercise their jurisdiction.[771] Yet, in a globalized world, where even a simple domestic decision

[768] Principle 21 of UN, 'Declaration of the United Nations Conference on the Human Environment' in idem, *Report of the United Nations Conference on the Human Environment* (UN 1973) 5 (Stockholm Declaration) and principle 2 of UNGA, Rio Declaration on Environment and Development (12 August 1992) UN Doc A/CONF.151/26 (Vol I) (Rio Declaration). See also UNGA, 'International Responsibility of States in Regard to the Environment' (15 December 1972) UN Doc A/RES/2996(XXVII) ('basic rul[e]'). Critical regarding the customary law-status of principle 21 of the Stockholm Declaration see John H Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96 *AJIL* 291.

[769] 'Use your own in such a way that you do not harm that which belongs to another' (translation by Fellmeth and Horwitz (n 170) 263).

[770] This rule is often equated, mixed or confounded with the principle of prevention and the due diligence principle. While all three are closely related and have similar requirements, they are separate concepts and should not be confused. On the difficulty of mainting a strict separation see Verheyen (n 764) 146-151 and fn 52, who distinguishes the no-harm rule from the principle of prevention, but concludes that the no-harm rule *also* includes a duty to prevent or minimize injury; Birnie, Boyle and Redgwell (n 764) 141, who note that the APTH codifies 'existing obligations of environmental impact assessment, notification, consultation, monitoring, prevention, and diligent control of activities likely to cause transboundary harm'; Timo Koivurova, 'Due Diligence' *Max Planck Encyclopedia of Public International Law* (February 2010) para 15 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034> accessed 3 February 2021, noting that because the no-harm rule is an obligation of due diligence, it is often referred to as the principle of due diligence; Duvic-Paoli (n 764) 10 ('prevention finds its origins in the no-harm rule [and] it still integrates it to varying degrees (…) [but has since] evolved beyond the no-harm rule'), 183 ('close connection between no-harm (…) and prevention'), 203 ('the relationship between prevention and due diligence tends to be blurred because, given their close proximity, they are often used interchangeably'). On the principle of prevention see also Shinya Murase, 'Third report on the protection of the atmosphere' (25 February 2016) UN Doc A/CN.4/692 para 15.

[771] ICJ, *Military and Paramilitary Activities* (n 177) [177]; *Certain Activities and Construction of a Road* (n 766) [108]; Bing Bing Jia, 'The Relations between Treaties and Custom' (2010) 9 *Chinese JIL* 81 paras 23, 40. See also Arbitral Tribunal, *Island of Palmas Arbitration (US v Netherlands)* [1928] 2 RIAA 829, 839; ILC, 'Survey of International Law in Relation to the Work of Codification of the

might have far-reaching, unforeseen and unintended consequences, it goes without saying that the no-harm rule cannot be applied without limits.[772] However, despite the jurisprudence's readiness to affirm its customary nature, so far it has provided only little guidance on the specific requirements of the no-harm rule.[773] For example, in the *Trail Smelter Arbitration*, the arbitral tribunal merely noted that a State must prevent the use of its territory for harmful conduct in the face of 'serious consequence[s]', which need to be established by 'clear and convincing evidence'.[774] And the ICJ in its *Pulp Mills on the River Uruguay* case regarding a dispute between Uruguay and Argentina over the construction of two pulp mills on the river Uruguay only held that a State must use 'all the means at its disposal' to prevent activities on its territory from causing 'significant damage to the environment of another State'.[775]

Further insights into the specific content of the no-harm rule might be gained from the works produced by several intergovernmental forums. For the purposes of the present study, two shall be analysed in greater detail.[776] First, the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (APTH).[777] These draft

International Law Commission' (10 February 1949) UN Doc A/GN.4/1/Rev.l paras 57 *et seq*; Barboza, *Environment, Risk and Liability* (n 767) 91, 154 *et seq*.

[772] See Banda (n 764) 1933, 1947 *et seq*, referencing Henry Shue, 'Mediating Duties' (1988) 98 *Ethics* 687, 694, who points out that 'a vote in Washington to change the wheat price supports for Nebraska can change the price of bread in Calcutta and the price of meat in Kiev' and that the (monetary) decisions taken by major actors might have a significant impact on the standards of living elsewhere, including birth-rates and life-expectancies.

[773] ICJ, *Nuclear Weapons* (n 177) para 29; Epiney (n 147) 22; Duvic-Paoli (n 764) 93, 97, who is critical of the literature's excessive reliance on the jurisprudence of the arbitral tribunal and the ICJ.

[774] Arbitral Tribunal, *Trail Smelter* (n 765) 1965. Similar idem, *Lanoux Arbitration (France v Spain)* [1957] 12 RIAA 281, 308 [13] ('gravement'). cf Duvic-Paoli (n 764) 147, noting that both thresholds are now considered to be lower than those set by the tribunal.

[775] ICJ, *Pulp Mills* (n 766) [101] and [104]-[107] on the procedural obligations; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7 [140]. The threshold of significant harm was also at the heart of the proceedings in idem, *Certain Activities and Construction of a Road* (n 766) [104] *et seqq*, [153] *et seqq*.

[776] Other works predominantly in the field of environmental law include the UN Environment Programme's Environmental Law Guidelines and Principles on Shared Natural Resources and the Final Report of the Experts Group on Environmental Law on Legal Principles for Environmental Protection and Sustainable Development. Additional contributions have come from nongovernmental organizations like the ILA or the *Institut de Droit International*. In detail see Duvic-Paoli (n 764) 112 *et seqq*.

[777] ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' in idem, *Yearbook … 2001*, vol 2 pt 2 (n 50) 146. On the relevance of the APTH for interpreting the no-harm rule see Verheyen (n 764) 154 *et seq*; Birnie, Boyle and Redgwell (n 764) 141; Will Frank, 'Überlegungen zur Klimahaftung nach Völkerrecht' (2014) *NVwZ-Extra 11/2014* 1, 2; Duvic-Paoli (n 764) 181; Banda (n 764) 1948; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 340, calling the APTH an 'authoritative statement' on the scope of the duty to prevent transboundary harm. But cf Kerryn A Brent, 'The *Certain Activities* case: what implications for the no-harm rule?' (2017) 20 *APJEL* 28, 40, who claims that the APTH are 'a mixture of codified customary law, emerging legal

articles were adopted by the committee after almost 30 years of work and represent an early attempt at the codification and progressive development of the international law on the liability of States for harm emerging from their territory.[778] While their drafting was not without difficulties,[779] they have 'generally been well received by States and have achieved broad support'.[780] Secondly, the so-called Tallinn Manual, a study commissioned by the NATO and conducted by an international group of legal experts on the current state of the international law on cyber warfare.[781] Although the findings of the experts are limited to the cyber context, they have been deduced from the general principles of international law, including from the due diligence principle and the no-harm rule.[782] What is more, the manual's specific focus on non-physical cyber activities might be useful when it comes to the special nature of the activity in question here, namely the use of Ramstein Air Base as a relay point for drone data streams.[783]

Key provision of the APTH is article 3, which reiterates every State's customary duty to prevent transboundary harm. A consolidated version reads as follows:

> The State [in the territory or otherwise under the jurisdiction or control of which an activity not prohibited by international law that involves a risk of causing significant transboundary harm through its physical consequences is planned or carried out] shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.[784]

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principles and progressive development'; Duvic-Paoli (n 764) 103, remarking that State opinion has been divided in that regard.

[778] For a summary of the different positions held throughout the drafting process see Pemmaraju S Rao, 'First report on prevention of transboundary damage from hazardous activities' (18 March 1998) UN Doc A/CN.4/487 paras 45 *et seqq*. On their future see Duvic-Paoli (n 764) 104 *et seq*.

[779] Major controversy was raised by the ILC's historic distinction between State liability for internationally lawful acts and State responsibility for internationally wrongful acts. See Verheyen (n 764) 150 *et seqq*; Birnie, Boyle and Redgwell (n 764) 141, who call the ILC's early work 'fundamentally misconceived' and 'of no real value to an understanding of the subject'.

[780] Duvic-Paoli (n 764) 102.

[781] Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 3 (Tallinn Manual).

[782] ibid 2-4.

[783] Cyber activities are defined as '[a]ny activity that involves the use of cyber infrastructure or employs cyber means to affect the operation of such infrastructure', see ibid 564.

[784] Barboza, *Environment, Risk and Liability* (n 767) 111, describes article 3 as a generalization of principle 21 of the Stockholm Declaration; similar Duvic-Paoli (n 764) 98.

Similarly, according to rule number six of the Tallinn Manual,

> [a] State must exercise due diligence in not allowing its territory, or territory or cyber infrastructure under its governmental control, to be used for cyber operations that affect the rights of, and produce serious adverse consequences for, other States.[785]

Despite the manual's rather unfortunate decision to refer to this obligation as 'the due diligence principle',[786] rule number six is a direct restatement of the no-harm rule in the cyber context.[787] And both the Tallinn Manual and the APTH have identified almost identical criteria for the obligation to prevent transboundary harm to arise, the former often by analogy to the latter.[788] In particular, the ILC has understood the term "activity" to refer to anything done by human agency or at human instigation.[789] Moreover, both regimes concur that the duty arises only in cases where the intensity of the transboundary harm has crossed a certain threshold. While the ILC requires "significant" harm, a term which it has taken to mean 'something more than "detectable" but [which] need not be at the level of "serious" or "substantial"',[790] the experts of the Tallinn Manual require 'serious adverse consequences'.[791] Furthermore, both agree that the obligation incumbent upon the territorial State is one of means, not of results.[792] This means that a State only needs to adopt appropriate (reasonable) measures to prevent harmful activities taking

[785] Tallinn Manual (n 781) 30 (Rule 6).

[786] ibid paras 1 *et seqq*. See See also ps 31 *et seq* para 5 ('The due diligence principle is sometimes also referred to as the (…) "obligation of prevention", or the "duty of prevention". The International Group of Experts adopted the term "due diligence" in light of its prevalent use (…)').

[787] ibid ps 31 para 2 and fn 34, referencing the ICJ's *Corfu Channel* case and clarifying that '[f]or the purposes of this Manual, the due diligence principle encompasses the notion *sic utere tuo*'. On the existence of a general principle of due diligence in international law see n 1353.

[788] eg Tallinn Manual (n 781) 36 *et seq* para 25 and fn 49.

[789] See Robert Q Quentin-Baxter, 'Third report on international liability for injurious consequences arising out of acts not prohibited by international law' in ILC, *Yearbook of the International Law Commission 1982*, vol 2 pt 1 (UN 1984) 60 para 42 and article 2(b) of the schematic outline (p 62 para 53).

[790] ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities: General commentary' in idem, *Yearbook … 2001*, vol 2 pt 2 (n 50) 152 para 4 (APTH General Commentary). On this requirement see already n 774 *et seq* and the corresponding text. In ICJ, *Certain Activities and Construction of a Road* (n 766) [192], the court considered that 'Nicaragua's submission that any detrimental impact on the [San Juan] river that is susceptible of being measured constitutes significant harm is unfounded'. In that regard see Brent (n 777) 53 ('matches the interpretation (…) promoted by the ILC').

[791] Tallinn Manual (n 781) 36-38 paras 25-28. See also Walton (n 767) 1500 *et seqq*, who proposes to apply the duty of prevention to third-party cyber-attacks that do not meet this threshold. See also Verheyen (n 764) 151 *et seq*.

[792] APTH General Commentary (n 790) 154 para 7; Tallinn Manual (n 781) 49 para 24.

place on its territory from causing transboundary damage.[793] Once these measures have been taken, the duty is discharged and the territorial State will not incur international responsibility even if the harm occurs anyway.[794] And finally, adequate measures need only be adopted in relation to reasonably foreseeable harm, ie, harm that the territorial State knew of or, had it acted diligently and with the required care, would have known of.[795]

b) In Particular: Causality

In addition to aforementioned requirements, particular attention needs to be paid to the element of causality. Causality, simply put, is 'the process of connecting an act (or omission) with an outcome as cause and effect'[796] and it may appear at two different stages of every legal assessment. First, it might be necessary to establish a causal connection between the action or omission of a State and the breach of its obligation. In German law doctrine, this is commonly referred to as *haftungsbegründende Kausalität* (causality relating to breach). Whether causality is required at this stage will depend on the applicable primary rule.[797] However, once it has been established that there needs to be a causal link between the action or omission and the breach, responsibility cannot arise in the absence of such a connection.[798] Secondly, causality might also play a role at the stage of determining to what extent a State will have to repair the damage that flowed

[793] APTH General Commentary (n 790) 154 paras 7-11; Tallinn Manual (n 781) 43 (Rule 7). See also ICJ, *Pulp Mills* (n 766) [101]; *Certain Activities and Construction of a Road* (n 766) [118]; Verheyen (n 764) 159 *et seq*; Birnie, Boyle and Redgwell (n 764) 147 *et seq*. Note that the APTH recognizes a duty to adopt *ex ante* preventive measures to prevent transboundary harm from occurring, see APTH General Commentary (n 790) 148 para 2 ('prevention as a policy is better than cure'), 152 para 3; Duvic-Paoli (n 764) 181 *et seq*. The experts of the Tallinn Manual, on the other hand, hold the view that in the cyber context, the territorial State is under no obligation to take preventive measures. Instead, it only needs to stop an ongoing harmful cyber operation once it has or ought to have been discovered, see Tallinn Manual (n 781) 43 *et seq* paras 7 *et seq*. This may, in part, be motivated by a desire not grant States an excuse for widespread surveillance of cyber activities. However, an exception may be made in situations where a future cyber operation is reasonably certain to occur, see ibid ps 46 *et seq* paras 14 *et seq*.

[794] APTH General Commentary (n 790) 154 para 7; Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 *EJIL* 471, 481; Brent (n 777) 54; Duvic-Paoli (n 764) 183.

[795] APTH General Commentary (n 790) 153-155 paras 4-6, 10 *et seq*, 18; Tallinn Manual (n 781) 40 *et seq* paras 37-39. Some significant differences between the two regimes remain. For example, according to the Tallinn Manual, a State's due diligence obligation applies only in the face of an internationally wrongful cyber operation. The ILC's APTH, on the other hand, are applicable only to activities not prohibited by international law. See APTH, art 1; Tallinn Manual (n 781) 34 para 17.

[796] Plakokefalos (n 794) 472.

[797] Castellanos-Jankiewicz (n 164) 22 *et seq*, 45; Plakokefalos (n 794) 481.

[798] Plakokefalos (n 794) 492.

from the breach.[799] In German law doctrine, this is commonly referred to as *haftungsausfüllende Kausalität* (causality relating to reparation).

Where the causality relating to breach (*haftungsbegründende Kausalität*) is concerned, omissions are a special case. An omission presupposes a duty to act and such a duty may either be an obligation of conduct or an obligation of result. In the latter case, the respondent State's obligation is to prevent a harmful event from occurring, and to establish a violation of that duty it will usually be necessary to show that there is a causal link between its failure to act and the occurrence of that event. This was also emphasised by Roberto Ago, who noted in his seventh report on State responsibility:

> [W]here international law places an obligation on a State to prevent a certain type of event, observance of that obligation can be called in question and the responsibility of the State affirmed only if one of the events which it was the purpose of international law to prevent actually occurs (…). It is further necessary that, between the conduct of the State in the case in question and the event which has occurred, there should be a link such that the conduct in question may be regarded as one of the *sine qua non* elements of the event. In other words, it must be possible to establish the existence of a certain relationship of causality, at least indirect, between the conduct of State organs and the event.[800]

With obligations of conduct, on the other hand, the situation may be different. In these cases, compliance with the duty resting upon a State solely depends on whether it has taken the measures prescribed by the obligation.[801] This usually leaves no room for a test of causality. Instead, 'the assessment of the breach seemingly takes place at the normative level, and it is not connected to any particular result'.[802] For example, in the *Bosnian Genocide* case, the ICJ had to decide whether Serbia's failure to exercise its influence over the Bosnian Serb Army to prevent the genocide at Srebrenica amounted to a violation

[799] See ICJ, *Bosnian Genocide* (n 144) [462]; Plakokefalos (n 794) 476.

[800] Ago, 'Seventh Report' (n 46) 35 para 14 (emphasis in the original). See also Andrea Gattini, 'Breach of International Obligations' in Nollkaemper and Plakokefalos (eds) (n 754) 28 *et seq*.

[801] Ago, 'Seventh Report' (n 46) 35 para 15. See also Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 *EJIL* 371.

[802] Plakokefalos (n 794) 482.

of its obligations under article 1 of the Genocide Convention.[803] Addressing the issue of causality, the ICJ held that

> [it] did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome.[804]

Because the obligation to prevent genocide is one of means rather than of results, the court did not consider it necessary to establish that there was a causal link between Serbia's failure to do what was required of it under the Genocide Convention and the result, namely the occurrence of genocide.[805]

However, this need not always be the case. There are primary rules which provide for a duty to act and, despite being an obligation of conduct, stipulate that for this duty to be breached the harm must actually occur and that its occurrence is causally linked to the failure to act.[806] With the no-harm rule, the case is somewhat similar. Although it need not be shown that the territorial State's failure to take all reasonable measures to prevent transboundary harm is causally linked to the damage occurring on the territory of another State, international responsibility will only arise if such harm actually occurs and if there is a causal connection between the harm and *the harmful activity* causing it.[807] This was recently affirmed by the ICJ in its *Certain Activities Carried out by Nicaragua / Construction of a Road in Costa Rica* case.[808] The case concerned two inter-related

[803] Article 1 of the Genocide Convention reads: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.

[804] ICJ, *Bosnian Genocide* (n 144) [461].

[805] See ibid [438]; Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 *EJIL* 695, 707. cf Plakokefalos (n 794) 482 fn 70.

[806] Plakokefalos (n 794) 482.

[807] Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 366; Epiney (n 147) 27; Xue Hanqin, *Transboundary Damage in International Law* (CUP 2003) 4, 6; Walton (n 767) 1465; Banda (n 764) 1949 *et seq*. See also Lanovoy, *Complicity* (n 145) 216.

[808] See Jutta Brunnée, 'Procedure and Substance in International Environmental Law Confused at a Higher Level?' *ESIL Reflection* (June 2016) <https://esil-sedi.eu/post_name-123/> accessed 13 February 2021; concurring, but overall critical of the judgement Brent (n 777) 54 *et seq*.

disputes between Costa Rica and Nicaragua over each other's activities involving the San Juan River which marks the border between Costa Rica and Nicaragua. Both claimed that certain activities carried out by the other party – Nicaragua had started to dredge the San Juan River and Costa Rica had started to construct a road along its side – had a significant detrimental effect on their respective territories and thus constituted a breach of international law.[809] While the court agreed that under customary international law a State is under an obligation to use all means at its disposal to avoid activities taking place in its territory from causing significant damage to another State,[810] it dismissed both claims. Since neither party had produced convincing evidence that the activities of the other party had caused significant harm, or, where such harm had occurred, that it was a causally linked to that other party's activities,[811] the court concluded that the no-harm rule had not been breached.[812]

A second issue which merits further attention is that of the applicable causal test. In general, the necessary causal standard must be derived from the applicable primary rule itself. However, most primary rules are silent on the issue, in which case the casual standard under general international law applies.[813] Unfortunately, there is no uniform approach to causality in international law.[814] In fact, in domestic as in international law, there are a myriad of theories about when a result may be considered to have been caused by an event.[815] And international adjudicatory bodies neither use one causal test consistently nor do they explain why they have adopted a certain approach.[816]

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[809] ICJ, *Certain Activities and Construction of a Road* (n 766) [114], [117]. [174].

[810] ibid [118].

[811] ibid [119], [192]-[196], [203]-[207], [211]-[213]. It did, however, find a violation of the duty to conduct an environmental impact assessment, see [162].

[812] ibid [120], [217]. This judgement has been interpreted to create a distinction between the procedural and the substantive dimension of the no-harm rule, see Brunnée (n 808); Tim Stephens and Duncan French, 'ILA Study Group on Due Diligence in International Law – Second Report' (July 2016) 4 *et seq* <www.ila-hq.org/index.php/study-groups?study-groupsID=63> accessed 13 May 2021; Brent (n 777) 52-56.

[813] Lanovoy, *Complicity* (n 145) 274.

[814] Gattini, 'Obligation to Prevent' (n 805) 708; Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 163.

[815] For an overview see A M Honoré, 'Causation and Remoteness of Damage' in André Tunc (ed), *International Encyclopedia of Comparative Law*, vol XI pt 1 (Martinus Nijhoff 1983) paras 44 *et seqq*. On the legitimacy of drawing analogies between domestic and international law where causation is concerned see Plakokefalos (n 794) 475 *et seq*.

[816] Castellanos-Jankiewicz (n 164) 48; Plakokefalos (n 794) 473, 486-491, who concludes that international adjudicatory bodies employ causal tests 'rather randomly, without reference to previous jurisprudence and without consistency'; Gattini, 'International Obligations' (n 800) 29, calling the international case law 'confused and opaque'.

Nonetheless, three theories may be identified which, over time, have gained most prominence among scholars and courts alike: first, the so-called "but-for" or *conditio sine que non* test; secondly the so-called necessary element of a sufficient set (NESS) test; and thirdly, the substantial factor or contributory test.[817] According to the "but-for" or *conditio sine que non* test, an event is the cause of a result if that result would not have occurred but for the event.[818] The substantial factor or contributory test, on the other hand, considers a result to have been caused by an event if that event was a substantial factor in its production or if it at least contributed to the result.[819] Somewhere in between those extremes lies the NESS test. Under this approach, an event is the cause of a result whenever that event is a necessary part of a specific set of conditions that is jointly enough to bring about the result.[820]

Regardless of which of these tests is applied, today there seems to be general agreement that an assessment of causality cannot stop at establishing a purely factual chain of causes and effects.[821] Otherwise, the responsibility for an injury could be traced back through a tangled network to even the most remote causes and far beyond what is commonly regarded as reasonable.[822] To make liability stop at some point, a normative corrective to an otherwise purely factual approach to causality needs to be introduced, often referred to as causal proximity (*causa proxima*) or normative causation.[823] Despite

[817] Castellanos-Jankiewicz (n 164) 8-10; Gattini, 'International Obligations' (n 800) 29 *et seq*; Plakokefalos (n 794) 476 *et seq*. On a possible categorization of the different types of causation see Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in Nollkaemper and Plakokefalos (eds) (n 754) 223 *et seqq*.

[818] ICJ, *Bosnian Genocide* (n 144) [462]; Honoré (n 815) paras 60 *et seq*; ILA, 'International Committee on Legal Aspects of Long-Distance Air Pollution' (1990) 64 *Intl L Assn Rep Conf* 282, 293 *et seq* para 31; Verheyen (n 764) 253 *et seq*; Michael Moore, 'Causation in the Law' *The Stanford Encyclopedia of Philosophy* (3 October 2019) 2.2 <https://plato.stanford.edu/entries/causation-law/> accessed 11 February 2021.

[819] Honoré (n 815) paras 108 *et seqq*; ILA, 'Long-Distance Air Pollution' (n 818) 297 *et seq* para 42; Gaetano Arangio-Ruiz, 'Second Report on State Responsibility' in ILC, *Yearbook of the International Law Commission 1989*, vol 2 pt 1 (UN 1992) 14 para 44; Verheyen (n 764) 254 *et seq*; Castellanos-Jankiewicz (n 164) 9 *et seq*.

[820] HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Clarendon Press 1985) 109-129; Richard W Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 *Iowa L Rev* 1001, 1019; Plakokefalos (n 794) 477 *et seq*.

[821] See Crawford, *State Responsibility* (n 163) 492, regarding causation at the level of reparation.

[822] See ILA, 'Long-Distance Air Pollution' (n 818) 293 *et seq* para 31; Castellanos-Jankiewicz (n 164) 46 ('prevent infinite regress towards irrelevant facts and acts').

[823] ARSIWA General Commentary (n 50) 93 *et seq* para 10, regarding the duty to make reparation. See also Hart and Honoré (n 820) 96-108; Honoré (n 815) para 20; Verheyen (n 764) 250; Castellanos-Jankiewicz (n 164) 8-10, 47 *et seq*.

its name, this is no inquiry of causality *stricto sensu*.[824] Other than the "but for", the substantial factor or the NESS test, a test of causal proximity is not aimed at finding responsibility for a specific injury, but instead at limiting responsibility in cases where factual causation has already been established.[825] It asks if, for legal purposes and based on the underlying legal norms, principles and public policy, an event should not be considered the cause of an injury despite it factually being such.[826] And although international adjudicatory bodies do not cleanly distinguish between factual and normative causation,[827] they are two different inquiries and should not be confused.[828]

As for the specific content of a requirement of causal proximity, it has often been noted to exclude damage that is "indirect", "uncertain", "too remote", or "too consequential".[829] However, none of these terms are inherently self-explanatory and provide only little guidance on the practical application of the concept of normative causation.[830] Instead, international courts and tribunals have used a wide array of factors to determine whether an event is proximate enough to a result to be regarded its normative cause.[831] In particular, they have asked whether the event may be regarded as the true source of the injury;[832] whether the result is a normal or natural consequence of such an

[824] Wright (n 820) 1011.

[825] ibid; Verheyen (n 764) 251; Plakokefalos (n 794) 478.

[826] Leon Green, 'The Causal Relation Issue in Negligence Law' (1962) 60 *Mich L Rev* 543, 548 *et seq*; Hart and Honoré (n 820) 105 *et seq*; ILA, 'Long-Distance Air Pollution' (n 818) 294 para 32; Honoré (n 815) para 44; Verheyen (n 764) 249-251; Plakokefalos (n 794) 475.

[827] Honoré (n 815) para 45; Plakokefalos (n 794) 486-490.

[828] See Plakokefalos (n 794) 475, 489 *et seq*; Moore (n 818) 2.1.

[829] See Arbitral Tribunal, *Trail Smelter* (n 765) 1931; ILA, 'Long-Distance Air Pollution' (n 818) 294 para 32; ARSIWA General Commentary (n 50) 92 *et seq* para 10. See also Honoré (n 815) para 3 ('[These expressions] do not refer to what is far or near in space or time'); Castellanos-Jankiewicz (n 164) 62, who argues that the term "*too* remote" allows for some remote causes to be considered a proximate cause.

[830] Very critical Mixed Claims Commission, *War-Risk Insurance Premium Claims (US v Germany)* [1923] 7 RIAA 44, 62 *et seq* ('The use of the term "indirect" (…) is inapt, inaccurate, and ambiguous. The distinction (…) between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law'; emphasis omitted); Aust, *Complicity* (n 30) 217; Castellanos-Jankiewicz (n 164) 51 *et seq*.

[831] Hart and Honoré (n 820) 103 *et seq*; Honoré (n 815) paras 45 *et seqq*; Arangio-Ruiz (n 819) 14 para 41. cf Verheyen (n 764) 297 ('a common or generally accepted theory is not discernible in the various decisions [of international tribunals]').

[832] Mixed Claims Commission, *Administrative Decision No 2 (US v Germany)* [1923] 7 RIAA 23, 29 *et seq*; *War-Risk Insurance* (n 830) 55; European Commission on Human Rights, *Tugar v Italy* App no 22869/93 (18 October 1995) (unpublished). See also Honoré (n 815) para 48, who calls it a 'common sense causal judgemen[t]' to conclude that '[t]he cause of the rail accident is not the force of gravity or the weight of the train (unless it was abnormally heavy) but the collapse of the bridge over which the train passes'; Arangio-Ruiz (n 819) 12-14 paras 34-43; ARSIWA General Commentary (n 50) 92 *et seq* para 10.

event;[833] and whether the occurrence of the result was reasonably foreseeable or predictable.[834] Other factors to consider may include the overall significance of the event in the production of the harm or the *mens rea* of the actor.[835] This list, however, is not exhaustive. Nor are there any general principles governing how these factors should be balanced,[836] although some guidance might be derived from the applicable primary rule.[837] Thus, when applying the criterion of proximate causality, one will have to 'focus attention on the precise way in which harm has eventuated in a particular case, and then ask and answer, in a more or less intuitive fashion, whether or not on these particular facts [an actor] should be held responsible'.[838]

c) Application to the Present Case

According to the standards developed in the preceding sections, for the Federal Republic of Germany to be under a customary duty to prevent its territory from being used to cause harm to the territory of another State or the persons living therein, a threefold condition must be met: first, there needs to be an activity taking place on German territory; secondly, significant transboundary harm must occur; and thirdly, there needs to be a proximate causal link between the activity and the harm. Only once these key elements of the no-harm rule have been satisfied will it be necessary to determine whether the Federal Republic has successfully discharged its preventive obligation.

The first two of these requirements do not seem to present any major difficulties. As will be remembered, the ILC has interpreted the term "activity" to mean anything done

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[833] Mixed Claims Commission, *Provident Mutual Life Insurance Company and others (US v Germany)* [1923] 7 RIAA 91, 112 *et seq*; *James A Beha, Superintendent of Insurance of the State of New York, as Liquidator of Norske Lloyd Insurance Company, Limited, for American Policyholders (US v Germany)* [1928] 8 RIAA 55, 56; Francisco V García Amador, 'International responsibility: Sixth report' in ILC, *Yearbook of the International Law Commission 1961*, vol 2 (UN 1962) para 160; Arangio-Ruiz (n 819) 12 *et seq* para 37; ILA, 'Long-Distance Air Pollution' (n 818) 293 para 32.

[834] Arbitral Tribunal, *Responsabilité de l'Allemagne à raison de dommages causés dans les colonies portugaises du Sud de l'Afrique (Portugal contra Allemagne)* (Award) [1928] 2 RIAA 1019, 1031 *et seq* (*Naulilaa Arbitration*); García Amador (n 833) para 161; Hart and Honoré (n 820) 105; Arangio-Ruiz (n 819) 13 paras 38 *et seq*; ILA, 'Long-Distance Air Pollution' (n 818) 297 para 42; Castellanos-Jankiewicz (n 164) 57-59.

[835] Mixed Claims Commission, *Dix (US v Venezuela)* [1903] 9 RIAA 119, 121; Arbitral Tribunal, *Naulilaa Arbitration* (n 834) 1031 *et seq*; García Amador (n 833) para 161; Verheyen (n 764) 296, 301 *et seq*. See also Castellanos-Jankiewicz (n 164) 59, arguing that in the presence of intent, a presumption of causality applies.

[836] Hart and Honoré (n 820) 103.

[837] See Aust, *Complicity* (n 30) 218; Castellanos-Jankiewicz (n 164) 53. See also ARSIWA General Commentary (n 50) 92 *et seq* para 10, which notes that 'the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation'.

[838] Hart and Honoré (n 820) 103.

by human agency or at human instigation, which is sufficiently broad to include the automatic relay of data at Ramstein Air Base (which, after all, is done at human instigation). And there can be little doubt that the damage inflicted by US drone strikes in Pakistan and Yemen meets the threshold of "significant transboundary harm" as required by the jurisprudence, the APTH, and the experts of the Tallinn Manual. Establishing a proximate causal link between those two, on the other hand, is more complex. Regardless of which test of factual causality is considered to be determinative under the no-harm rule, at the level of *normative* causality the work of the ILC indicates a standard that focuses on the question whether the activity is the true source of the transboundary harm. For example, during the drafting process of the APTH, the Special Rapporteur on the topic, Julio Barboza, made it clear that 'the effects felt within the territory or control of one State must have their *origin* in something which takes place within the territory or control of another State'.[839] And the APTH General Commentary further provides that these effects must be a consequence of *the very nature* of the activity, which 'implies that the activities covered in these articles must themselves have a physical quality, and the consequences must *flow from that quality*'.[840]

While the ILC's traditional focus on physicality might have been outgrown by the general advancement of technology,[841] both statements raise serious doubts as to whether the condition of a proximately causal link between the activity taking place on German territory and the transboundary harm occurring in Pakistan or Yemen would be fulfilled in the present case. After all, the origin of the harm is not the relay of data at Ramstein, but a drone hovering over Pakistan or Yemen or, in the alternative, its pilot pulling the trigger from the safety of US territory. This is further corroborated by the fact that

[839] Julio Barboza, 'Third report on international liability for injurious consequences arising out of acts not prohibited by international law' (16 March 1987) UN Doc A/CN.4/405 paras 37 *et seq*, citing ILC, *Yearbook of the International Law Commission 1984*, vol 2 pt 2 (UN 1985) 77 *et seq* para 239 (emphasis added).

[840] APTH General Commentary (n 790) 151 para 17 (emphasis added). See also ILC, *Yearbook … 1984*, vol 2 pt 2 (n 839) 77 *et seq* para 239; Verheyen (n 764) 299 ('This test is also part of the elements of the no harm rule').

[841] This element was originally introduced to exclude liability for the consequences of a State's monetary and political decisions, see APTH General Commentary (n 790) 151 para 16; Hanqin (n 807) 5; Barboza, *Environment, Risk and Liability* (n 767) 96; Duvic-Paoli (n 764) 181. However, according to the Tallinn Manual, most States, the NATO, and other UN experts share the opinion that the existing international law also applies in the non-physical (cyber) context, see Tallinn Manual (n 781) 3 *et seq*, 31 para 4. See also Verheyen (n 764) 168; Walton (n 767) 1465 fn 25 ('"Causation" requires a proximal, though not necessarily physical, link between an activity and the ill effect produced').

remotely controlled drone strikes are, in a sense, the equivalent of a cruise missile being launched from a nearby platform, minus the delay caused by the need to programme the missile and the time it would need to arrive on target. In such a case, the relay of data at Ramstein would be comparable to the missile passing through German airspace. However, the same way that one would not consider the mere passage through another State's airspace to be the origin of the harm caused by a cruise missile, it would be equally inconclusive to consider the relay of data to be such.[842]

The Tallinn Manual, on the other hand, seems to adopt a more generous approach to proximate causality. Although it does not explicitly comment on the necessary quality of the link between the activity and the ensuing harm, the group of experts took the view that 'as a strict matter of law',[843] the duty to prevent transboundary (cyber-) harm may also rest with a State through which data only transits, for instance through a fibre optic cable. Provided that the transit State possesses knowledge of the harmful cyber operation, it will be under an obligation to take feasible measures to effectively terminate the operation even though its territory is neither the origin nor the source of the harm.[844] In fact, the scenario described in the Tallinn Manual bears strong resemblance to the relay of data at Ramstein Air Base. Yet, it is this author's view that the Tallinn Manual's standards are not easily detachable from its original context, which is cyber-to-cyber operations *sensu stricto*.[845] A typical example thereof would be a malware that disrupts enemy command and control systems.[846] Although such operations might also have physical effects, eg a malware that causes failure of a cooling system, which then leads to the components overheating and melting down,[847] their distinctive element is that they use cyberspace as a gateway and as a platform for attack.[848] Given the non-tangible and cross-border nature of cyberspace which challenges traditional notions of sovereign

[842] Concurring NSA Inquiry Committee Report (n 59) 1354 ('Even if Ramstein Air Base (…) plays an important role (…) in the operation of US military drones, this does not necessarily mean that there is a wrongful or criminal act originating in German territory'; this author's translation).

[843] Tallinn Manual (n 781) 33 para 13.

[844] ibid.

[845] Cyber operations form part of cyber activities and are defined as '[t]he employment of cyber capabilities to achieve objectives in or through cyberspace', see ibid 564.

[846] Michael N Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP 2013) 5.

[847] Tallinn Manual (n 781) 20 para 11.

[848] The Tallinn Manual defines cyberspace as 'the environment formed by physical and non-physical components to store, modify, and exchange data using computer networks', see ibid 564.

territory,[849] it makes sense to relax the strict territorial focus of the no-harm rule. However, in cases such as the present one, where cyberspace is merely the means of communication in an otherwise exclusively physical environment, there is no reason to depart from the general rule that the obligation to prevent transboundary harm arises only if the harm has its origin in an activity taking place on the territory of the respondent State. And as has been mentioned earlier in this section, it is difficult to conclude that the mere relay of data at Ramstein Air Base is the true origin of the harm caused by a drone's AGM-114 Hellfire missile.

2) Article 6(1) of the ICCPR

Other than from customary international law, an international duty to act might also be derived from treaty international law, especially from article 6(1) of the ICCPR. While earlier in this study the focus has been on the negative dimension of the right to life – namely, the obligation not to arbitrarily deprive anyone of his right to life –, this section shall turn its attention on its positive dimension. The obligation to actively protect the right to life is set out in the second sentence of article 6(1), which reads as follows:

> Every human being has the inherent right to life. *This right shall be protected by law*. No one shall be arbitrarily deprived of his life.[850]

According to the CCPR, the duty to protect the right to life by law includes an obligation 'to adopt any appropriate laws or other measures to protect life from all reasonably foreseeable threats, including those emanating from private persons and entities'.[851] This not only requires a State to enact a protective legal framework that deters and punishes the commission of crimes against a person,[852] but the authorities must also take adequate

[849] See also BVerfG, Judgement of 19 May 2020 (1 BvR 2835/17) E 154, 152 [109] – juris (*BND – Ausland-Ausland-Aufklärung*).

[850] Emphasis added.

[851] General Comment No. 36 (n 177) para 18. See also CCPR, *Peiris v Sri Lanka* (Views concerning Communication No 1862/2009) (18 April 2012) UN Doc CCPR/C/103/D/1862/2009 para 7.2; IACtHR, *Street Children (Villagran-Morales and others v Guatemala)* (Merits) IACHR Series C No 63 (19 November 1999) [144]; *Ortiz Hernández et al v Venezuela* (Preliminary objections, merits, reparations and costs) IACHR Series 3 No 338 (22 August 2017) [100]; Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (CUP 2020) 64.

[852] General Comment No. 36 (n 177) para 20.

operational measures to protect an individual and his right to life against a specific threat emanating from a third party.[853]

Several paragraphs of the CCPR's General Comment No. 36 deal with the question which obligations *in concreto* flow from the right to life, two of which are of special relevance for the present study. The first one – paragraph sixty-three – was already addressed in the context of the applicability of the ICCPR to US drone strikes, but its wording shall be recalled here:

> [A] State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner. *States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life*.[854]

The highlighted part warrants further examination. On the face of it, one might interpret this to mean that there is an independent obligation not to provide aid or assistance in a violation of the right to life by another State arising directly from the right to life itself.[855] However, the affirmative character of the sentence ('States also have (…)') casts doubt on such a reading. In fact, the members of the committee held the view that the question of aid or assistance fell within the purview of article 16 of the ARSIWA rather than within that of article 6(1) of the ICCPR.[856] Thus, athough General Comment No. 36

[853] This obligation is one of means, not of results, see ibid para 21. See also IACtHR, *Case of the Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs) IACHR Series C No 159 (31 January 2006) [123]; *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) IACHR Series C No 146 (29 March 2006) [155]; 'Environment and Human Rights' (n 615) paras 118-120; *IV v Bolivia* (Preliminary objections, merits, reparations and costs) IACHR Series C No 329 (30 November 2016) [208]; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered* (CUP 2017) 400 *et seqq*.

[854] General Comment No. 36 (177) para 63 (internal references and footnotes omitted).

[855] During the drafting process of General Comment No. 36, this was the opinion held by Olivier de Frouville, see CCPR, 'Summary record of the 3547th meeting' (n 617) para 50, who made reference to the committee's jurisprudence in *Yassin v Canada* (Views concerning Communication No 2285/2013) (26 October 2017) UN Doc CCPR/C/120/D/2285/2013 and *Munaf v Romania* (Views concerning Communication No 1539/2006) (21 August 2009) UN Doc CCPR/C/96/D/1539/2006. See also Epiney (n 147) 38 *et seq*.

[856] CCPR, 'Summary record of the 3547th meeting' (n 617) paras 46 *et seq* (Statements of Bruno Zimmermann and Yuval Shany).

acknowledges that States have an obligation not to aid or assist in a violation of the right to life under general international law, it does not purport to create such an obligation itself.

The second paragraph that merits particular attention is paragraph twenty-two, which deals with the obligation of States to prevent threats to the right of life emanating from their territory. It reads as follows:

> States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility and of the right of victims to obtain an effective remedy.[857]

This paragraph raises two initial questions. First, what is the relationship between the first sentence and the second sentence? And secondly, what do the terms "impact", "direct" and "reasonably foreseeable" mean? Unfortunately, so far General Comment No. 36 has received only scare academic attention, and the specific content of many of its key paragraphs remains virtually unexplored. While this study aims to close that gap, it will be necessary to first consider the question whether the ICCPR is applicable to the Federal Republic of Germany (see a) below). Following that, the aforementioned issues shall be addressed, namely how the two sentences of paragraph twenty-two relate to each other (see b) below) and how their specific requirements are to be interpreted (see c) below). Finally, the findings will be applied to the present case to determine whether article 6(1) places upon the Federal Republic to Germany a duty to protect the right to life of those affected by US drone strikes in Pakistan and Yemen (see d) below).

[857] General Comment No. 36 (n 177) para 22 (footnotes omitted).

a) Applicability

As will be remembered, a contracting State must respect and ensure the rights of the covenant only to those individuals who are located within its territory or subject to its jurisdiction.[858] Although it has already been established that drone strikes amount to an exercise of jurisdiction over their victims, what is at issue here is not the US' negative obligation not to arbitrarily deprive anyone of his right to life, but a positive obligation of the Federal Republic of Germany to actively protect it.[859] In fact, none of the different approaches to jurisdiction identified earlier in this study seem to allow for the conclusion that those targeted by the US were, at the time of the attack, subject to the jurisdiction of Germany. A careful reading of paragraph twenty-two of General Comment No. 36, however, suggests that for it to be applicable it will not be necessary to show that the Federal Republic exercised jurisdiction over the victim of a violation of the right to life, but instead that the State, the international organization, the foreign corporation or, more generally, the activity that is responsible for the violation – in short, the *origin of the harm* – is located within German territory or in other areas subject to its jurisdiction.[860]

This interpretation is corroborated by the CCPR's jurisprudence in *Yassin v Canada*.[861] In that case, Israel had expropriated a stretch of land located on Palestinian territory and had erected a separation barrier, barring the Palestinian authors from access to approximately 25 per cent of that land. In addition, it had also ordered the construction of an Israeli settlement on that land, which was carried out by two private companies incorporated in Canada. When the authors claimed that Canada had violated its obligations under the ICCPR by failing to ensure that these companies did not violate the covenant abroad, Canada contested that its provisions were inapplicable as it did not have jurisdiction over the authors.[862] Although the CCPR recognized that the authors indeed were not subject to Canadian jurisdiction, it clarified that *the two private companies* had been incorporated in Canada and were thus subject to Canadian jurisdiction. In these

[858] ICCPR, art 2(1). See also Besson, 'Extraterritoriality' (n 562) 868; Stoyanova (n 853) 327; Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 *EJIL* 581, 588.

[859] See also Monnheimer and Schäferling (n 57) 364, 366.

[860] Critical Besson, 'Mind the Gap!' (n 564).

[861] (Views concerning Communication No 2285/2013) (26 October 2017) UN Doc CCPR/C/120/D/2285/2013, which is referenced by General Comment No. 36 (n 177) fn 70.

[862] ibid paras 3.4, 6.2, 6.4.

circumstances, the committee concluded that Canada could be under an obligation to 'ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction'.[863]

A similar approach to jurisdiction was also adopted by the Inter-American Court of Human Rights (IACtHR). In an advisory opinion issued in response to a request by the Republic of Colombia regarding, *inter alia*, the obligations of States party to the ACHR in relation to transboundary environmental damage,[864] the IACtHR held that States parties are under an obligation to ensure that their territory is not used in a way as to cause significant damage to the environment of another State, and that they may be held responsible where activities originating in their territory or under their effective control or authority cause such damage to individuals located outside their territory.[865] On the question of the applicability of the ACHR, the IACtHR concluded that

> [t]he potential victims (…) are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage. (…) The exercise of jurisdiction arises when the State of origin *exercises effective control over the activities that caused the damage* and the consequent human rights violation.[866]

The UN Committee on Economic, Social and Cultural Rights (CESCR) reached a similar conclusion regarding the obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[867] According to the CESCR, a State party will be in breach of its duties under the covenant if a corporation that is domiciled in its territory and / or its jurisdiction violates the ICESCR outside that State's territory, provided that

[863] ibid para 6.5. See also CCPR, 'Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (15 October – 2 November 2012)' (12 November 2012) UN Doc CCPR/C/DEU/CO/6 para 16; 'Concluding observations on the sixth periodic report of Canada' (13 August 2015) UN Doc CCPR/C/CAN/CO/6 para 6; 'Concluding observations on the fourth periodic report of the Republic of Korea' (3 December 2015) UN Doc CCPR/C/KOR/CO/4 paras 11 *et seq*. See also Taylor (n 851) 65.

[864] See Besson, 'Mind the Gap!' (n 564).

[865] IACtHR, 'Environment and Human Rights' (n 615) paras 101-103.

[866] ibid para 102 (emphasis added). See also para 104(h).

[867] (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

the violation was reasonably foreseeable and that the respondent State failed to take reasonable measures to prevent its occurrence.[868]

In sum, for the purposes of paragraph twenty-two of General Comment No. 36, the necessary jurisdictional link between the Federal Republic of Germany and the victim of a violation of the right to life in Pakistan or Yemen will be established whenever the *origin of the harm* is located within its territory or in other areas subject to its jurisdiction. Whether or not this is the case shall be discussed in further detail below.[869]

b) Delimiting the Obligations

According to the first sentence of paragraph twenty-two, 'States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction'. And pursuant to its second sentence, States parties 'must also take appropriate (…) measures to ensure that all activities taking place in whole or in part within its territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory' are consistent with article 6(1) of the ICCPR.

Based on their wording alone, two main differences may be identified between them. For one, whereas the first sentence does not seem to require anything else other than that the origin of the harm is located within the territory of the respondent State, the obligation of the second sentence arises only if the additional requirements of a direct and reasonably foreseeable impact on the right to life are fulfilled.[870] Secondly, the second sentence explicitly refers only to individuals located outside the territory of the respondent State, but no similar reference is made in the first sentence. Although neither aspect is problematic *per se*, the issue is complicated by the fact that both sentences seem

[868] CESCR, 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E/C.12/GC/24 paras 30-32. On the applicability of the ICESCR see Milanovic, *Extraterritorial Application* (n 560) 13.

[869] See § 6 B. I. 2) d).

[870] These criteria are identical to those enunciated in paragraph sixty-three, except for the fact that paragraph twenty-two uses the word "impacted" whereas paragraph sixty-three employs the word "affected". The difference is surprising, given that the committee had paid special attention to using the same wording in both paragraphs. In fact, this change seems to have been introduced after General Comment No. 36 was formally adopted, see CCPR, 'General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life – Advance unedited version' (30 October 2018) UN Doc CCPR/C/GC/36.

to provide for the same legal consequences. In fact, there is no apparent difference between an obligation to take appropriate measures to 'protect individuals against deprivation of life by [another entity] (…) operating within [the respondent State's] territory' (first sentence) and an obligation to 'ensure [through appropriate measures] that all activities taking place (…) within [the respondent State's] territory' are consistent with the right to life (second sentence). And since the first sentence is seemingly applicable regardless of whether the victim is located within the territory of the respondent State or not, this calls very much into question whether there could be any sensible scope of application for the second sentence. This problem is best illustrated by the following example:

> International corporation C operates on the territory of State A and has been dumping chemical waste into a nearby river for several years.
> Scenario (1): Local resident L, who is living nearby and who has been drinking the water from the river for weeks, gets sick and dies;
> Scenario (2): The polluted river crosses over into the territory of State B. Foreign citizen F, who is living in B and who has also been drinking the river's water, gets sick and dies.

In the first scenario, the second sentence of paragraph twenty-two would not apply *ab initio* since L, whose right to life is being affected by the activities of C, is not located outside the territory of A. By contrast, its first sentence does not seem to contain any limitations regarding the location of the victim and would thus be applicable. In the second scenario, both sentences would apply. The first one because it does not depend on the location of the victim, and the second one because F is located outside the territory of A. However, whereas the first sentence does not seem to require anything else for the duty to protect the right to life to arise, the applicability of the second sentence is subject to the additional requirements of a direct and reasonably foreseeable impact on the right to life. And since the legal consequences entailed by both seem to be identical, the second sentence and its stricter requirements would be left without any useful scope of application.

It is evident that such a reading, which would make half of paragraph twenty-two redundant, cannot be correct. In fact, the wording of the second sentence – namely, that

States parties 'must *also* take appropriate (…) measures'[871] – suggests that it is supposed to contain an obligation which is different from that of the first sentence. Thus, if each is to have its own distinct scope of application, how are they to be delimited? The reference made by first sentence to the CCPR's concluding observations on the sixth periodic report submitted by Poland suggests that both obligations must be distinguished *territorially*. In its observations, the CCPR had raised concerns about Poland's compliance with its human rights obligations given reports about a secret US detention centre which was located on *Polish* territory, ie, *within* the territory of the respondent State.[872] Such an interpretation is corroborated by the statement of member of the committee Christof Heyns, who explained during one of the deliberations on paragraph twenty-two that '[t]he first sentence is about what comes into the country and then the second sentence is what goes out of the country'.[873]

The above analysis may be summarized as follows. Whenever the victim of a violation of the right to life is located *within* the territory of the respondent State, the first sentence of paragraph twenty-two applies. In these cases, the respondent State will be under an obligation to take appropriate measures to protect his right to life subject to no other condition than that the entity responsible for the violation operates within its territory. However, if the victim is located *outside* the territory of the respondent State, the second sentence applies. In those cases, the obligation to take appropriate measures is

[871] Emphasis added.

[872] CCPR, 'Concluding observations on the sixth periodic report of Poland' (27 October 2010) UN Doc CCPR/C/POL/CO/6 para 15. The draft General Comment had contained a second reference to the CCPR's jurisprudence in *García v Ecuador* (Views concerning Communication No 319/1988) (5 November 1991) UN Doc CCPR/C/43/D/319/1988. The case concerned a Colombian citizen who was wanted in the US for several drug-trafficking offences and was arrested on US order by the Ecuadorian Police while in Ecuador. Following his arrest, he was transported to a private residence on Ecuadorian territory where he was subjected to ill-treatment. It remained unclear whether any US officials had participated in the ordeal. Ultimately, he was transferred to the US and imprisoned on a drug-trafficking conviction. The CCPR concluded that Ecuador had violated the ICCPR, including the prohibition on torture. However, the members of the committee felt that the language used in *García* was too complicated and that the point they were trying to make was better conveyed by its concluding observations. See CCPR, '(Part 3) General Comment – 3513th Meeting 123rd Session of Human Rights Committee' *UN Web TV* (18 July 2018) at 13:08 *et seqq* <https://media.un.org/en/asset/k1k/k1kwbnip5t> accessed 18 December 2021.

[873] CCPR, '(Part 3) 3513th Meeting' (n 872) at 20:29 (Statement of Christof Heyns). See also the submission of Amnesty International, 'The Right to Life: Submission to the United Nations Human Rights Committee on the Revised Draft General Comment No. 36' (2017) 27 <www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/AI.docx> accessed 22 January 2021, which notes that the first sentence is inward facing, whereas the second sentence is outward facing; Fatima (n 618).

subject to the fulfilment of the additional requirements of a direct and reasonably foreseeable impact on the right to life.

Before this study turns to the question of how to interpret these requirements, a final remark on the overall scope of the second sentence is warranted. The explicit mention of 'corporate entities', of the 'international standards of corporate responsibility', and the reference to *Yassin v Canada* – a case revolving around State responsibility for the activities of private companies abroad – might raise doubts as to whether the obligation contained therein is supposed to extend to activities undertaken by State entities.[874] In fact, so far much of the jurisprudence of the CCPR and other bodies of IHRL has focused on the activities of transnational private corporations and their impact on the right to life rather than on those of other States. This, however, should not be taken to mean that the latter are excluded from the scope of application of the second sentence. It explicitly refers to *all* activities taking place within one's territory, *including* activities taken by corporate entities. Activities undertaken by private companies are thus one of the categories covered by the second sentence, but not the only one.[875] What is more, to distinguish between the activities of another State and those of a private corporation would disregard that in both cases, responsibility is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities in question are carried out that has effective control over them and that is in a position to prevent them from causing transboundary harm.[876]

c) Specific Requirements

General Comment No. 36 does not define the terms "activity", "impact", "direct" and "reasonably foreseeable". Nor are they inherently self-explanatory.[877] For example, it is

[874] The Netherlands criticized that it is unclear which activities other than those of corporate entities are being referred to in the second sentence and suggested deleting it altogether, see The Government of the Netherlands, 'Comments to the Draft General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on Right to Life' para 18 <www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/KingdomofNetherlands.docx> accessed 22 January 2021.

[875] CCPR, '123rd session: Summary record of the 3498th meeting' (17 July 2018) UN Doc CCPR/C/SR.3498 para 59, clarifying that the same responsibility that attaches to the activities of corporate entities would also apply, *mutatis mutandis*, to other entities.

[876] See IACtHR, 'Environment and Human Rights' (n 615) para 102.

[877] The Government of the Netherlands, 'Comments to General Comment No. 36' (n 874) para 29, criticized that the wording is 'vague and does not provide more clarity on the meaning of Article 6 or other parts of the Covenant'.

unclear what constitutes an activity and whether an impact on the right to life needs to meet some kind of intensity threshold. The requirement of directness is equally ambiguous. While this might simply mean that there needs to be some kind of causal connection between the activity and the impact on the right to life, it could also be interpreted narrowly to mean that the harm must be brought about in one causal step.[878] And when exactly is an impact reasonably foreseeable?

Little insight may be gained from the CCPR's jurisprudence on the topic. In *Yassin v Canada*, the only meaningful connection between Canada and the case was that the two private companies had been incorporated in Quebec for Israeli tax reasons. However, since the authors had not substantiated their claim, eg why Canada had failed to adequately regulate these companies or why the consequences of their activities had been foreseeable, the CCPR dismissed the case.[879] The key to resolving the problem of the correct interpretation of the aforementioned terms thus lies in looking at the drafting history of General Comment No. 36. As will be shown, over the course of more than three years paragraph twenty-two underwent several changes, and some of its constituent elements were heavily disputed among the members of the committee.

Starting as a mere five-page issues list in preparation of a half-day general discussion,[880] an early first draft of the General Comment was made available in the committee's 115th session in late 2015.[881] The predecessor to paragraph twenty-two then read as follows:

> States parties should also take appropriate measures to protect individuals against deprivations of life by other States operating within their territory, and to ensure that all activities taking place in whole or in part within their territory, but having a direct, foreseeable and significant impact on individuals outside their territory,

[878] See also Amnesty International, 'Submission on Draft General Comment No. 36' (n 873) 26, which seems to have understood the term to include an element of intent.

[879] CCPR, *Yassin* (n 855) paras 6.6 *et seq*. See also *Munaf v Romania* (n 855), which is a case of jurisdiction and therefore does not fit squarely within the current context.

[880] See Yuval Shany and Nigel Rodley, 'Draft general comment No. 36 – Article 6: Right to Life' (1 April 2015) UN Doc CCPR/C/GC/R.36; CCPR, 'Human Rights Committee discusses draft General Comment on the right to life' *United Nations Office of the High Commissioner on Human Rights* (14 July 2015) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16234> accessed 22 January 2021.

[881] See Yuval Shany and Nigel Rodley, 'Draft general comment No. 36 – Article 6: Right to life' (2 September 2015) UN Doc CCPR/C/GC/R.36/Rev.2.

> including activities taken by corporate entities, be consistent with the right to life.[882]

During the First Reading of General Comment No. 36, the Special Rapporteur on the topic, Yuval Shany, and several other members of the committee emphasised that the obligation of States to prevent the right to life from being violated by an activity taking place within their territory or in other areas subject to their jurisdiction was rooted in the customary duty not to cause transboundary harm.[883] The requirement that the impact be significant and foreseeable directly related to this standard and remained virtually uncontested.[884] However, several members of the CCPR opposed the criterion of directness, which they considered too restrictive and unfounded in the language of the Stockholm and the Rio Declaration.[885] Although the Special Rapporteur agreed to revisit the term in the Second Reading, he cautioned that '[doing] away with direct, we may open up to a lot of chain reaction type of issues, such as using of cars, which is raising the temperature, (…) so we may be opening up [Pandora's Box]'.[886]

At the end of its 120th session, the committee adopted a revised version of paragraph twenty-two, which now read as follows:

> States parties must take appropriate measures to protect individuals against deprivations of life by other States operating within their territory or in other areas subject to their jurisdiction. They must also ensure that all activities taking place in whole or in part within their territory and in other areas subject to their jurisdiction, but having a [direct], significant and foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate

[882] ibid para 25 (footnotes omitted).

[883] See CCPR, '118th session: Summary record of the 3321st meeting' (8 November 2016) UN Doc CCPR/C/SR.3321 paras 38 *et seqq*, where multiple references to due diligence, principle 21 of the Stockholm Declaration, and principle 2 of the Rio Declaration were made.

[884] idem, 'General Comment on Article 6 – 3321st meeting 118th Session of Human Rights Committee' *UN Web TV* (25 October 2016) at 1:29:03 (Statement of Yuval Shany) <https://media.un.org/en/asset/k1t/k1tixgwjxb> accessed 18 December 2021.

[885] idem, 'Summary record of the 3321st meeting' (n 883) para 46. German member of the committee Anja Seibert-Fohr proposed to replace "direct, significant and foreseeable" with "real and immediate", but her proposal was rejected on the grounds that it was too narrow. See paras 43-45.

[886] idem, '3321st meeting' (n 884) at 1:29:38 (Statement of Yuval Shany).

> entities, are consistent with article 6, taking due account of related international standards of corporate social responsibility.[887]

When work on paragraph twenty-two was continued in late 2017 as part of the Second Reading of General Comment No. 36, the members of the committee still remained divided over whether the requirement of directness should be retained. Although they agreed that *some* sort of limiting factor was required as not to introduce 'an open-ended obligation for everything that happens in the world that [the States parties] may be even very marginally related to',[888] several of them feared that such a condition would allow States to deny their responsibility under the ICCPR too easily.[889] Special Rapporteur Shany agreed to delete the word "significant" but insisted on keeping "direct".[890] According to him,

> [the second sentence is] primarily designed to address the obligations of States for activities which may have an extraterritorial impact. (…) So when [an oil manufacturing] State (…) decides to raise the prices of oil, there are going to be significant consequences on life in many other States. When a State starts mining coal and as a result there is a release of CO^2 to the atmosphere and there could be over time an increase in global temperature, this is a very serious issue but for us to actually make an article 6 claim, this is somewhat far reaching and this is why the elements of directness and foreseeability [were introduced].[891]

In fact, when the committee next discussed paragraph twenty-two, the element of directness no longer seemed to be at issue.[892] It was adopted in its current form at the end of the CCPR's 123rd session.

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[887] idem, 'General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life – Revised draft prepared by the Rapporteur' (27 July 2017) UN Doc CCPR/C/GC/R.36/Rev.7 para 26.

[888] idem, '(Part Two) 3498th Meeting 123rd Session of Human Rights Committee' *UN Web TV* (6 July 2018) at 2:18:49 (Statement of Yuval Shany) <https://media.un.org/en/asset/k1n/k1n19yoctu> accessed 18 December 2021. See also idem, 'Summary record of the 3498th meeting' (n 875) paras 58, 61.

[889] See idem, 'Summary record of the 3498th meeting' (n 875) paras 62-64.

[890] idem, '(Part Two) 3498th Meeting' (n 888) at 2:48:57 (Statement of Yuval Shany).

[891] ibid at 2:45:31 (Statement of Yuval Shany).

[892] See idem, '123rd session: Summary record of the 3513th meeting' (24 July 2018) UN Doc CCPR/C/SR.3513 paras 7 *et seqq*.

An analysis of this drafting history of paragraph twenty-two allows for several important conclusions to be drawn. First, the committee did not explicitly address the question of what amounts to an *activity*.[893] Considering, however, that paragraph twenty-two is an expression of the customary duty not to cause transboundary harm, it is this author's view that additional guidance on its interpretation may be derived from the standards governing the application of the no-harm rule. And as will be recalled, the ILC has interpreted the term in the broadest possible sense to mean anything done by human agency or at human instigation.

The ILC's work is also instructive for the question of the necessary level of intensity that must be met for there to be an *impact* on the right to life. Although earlier drafts of the General Comment had required that the impact be significant, this was subsequently removed in favour of the element of directness. Still, the Special Rapporteur made it clear that '[w]e are in the area of due diligence (…) we are not dealing with *de minimis*, we are dealing with real issues'.[894] In light of the notion of significance as propounded by the ILC in the APTH, this should be interpreted to mean that the impact on the right to life need not be at the level of "serious" or "substantial", but it will have to be more than detectable.[895]

The question when an impact is *reasonably foreseeable* was not explicitly addressed by the CCPR. In fact, what is reasonably foreseeable is difficult to answer in the abstract. Under customary international law, foreseeability is an objective standard which relates to the general consequences of an activity rather than its details.[896] What is reasonably foreseeable will always depend on the specific circumstances of each

[893] During the discussion on the same topic under paragraph sixty-three, the Special Rapporteur had resisted a proposal to delete the reference to a State's 'other activities', arguing that the same term had already been used in paragraph twenty-two and that he did not want to narrow it down. Moreover, he pointed out that the term was not limited to military activities but also included other activities such as the supply of electricity, see CCPR, '(Part Four) 3400th Meeting' (n 622) at 18:36 (Statement of Yuval Shany).

[894] idem, '3321st Meeting' (n 884) at 1:29:03 (Statement of Yuval Shany).

[895] Concurring idem, '(Part Two) 3498th Meeting' (n 888) at 2:42:37 (Statement of Marcia Kran), who notes that responsibility should not be excluded where the impact is only partial or at a medium level or where there is only "some" impact.

[896] Birnie, Boyle and Redgwell (n 764) 153. In the ICJ's *Corfu Channel* case, the court did not require that Albania knew or foresaw which ships or to what extent they would be damaged by the mines, see Verheyen (n 764) 180.

individual case, taking into account the type of activity at issue, its likelihood to cause damage, and the magnitude of the threatened harm.[897]

The most controversial aspect of paragraph twenty-two has certainly been the element of *directness*. While it is clear from the discussion on the topic that the activity must somehow be causally linked to the impact on the right to life,[898] there seems to be no requirement that the harm was brought about in one causal step. However, according to CCPR member Christof Heyns, 'the question (…) [is] not simply whether there [is] a causal link between an activity and its impact on the right to life, but rather whether *that impact* [is] direct and foreseeable'.[899] Moreover, Special Rapporteur Shany pointed out that the notion of directness was not a new concept invented by the committee, but one that had already been used by the ILC in connection with articles 22 and 31 of the ARSIWA, and by the IACtHR in its advisory opinion on the environment and human rights.[900] In fact, both sources indicate that something more than a mere link of factual causality might be required. According to the IACtHR's advisory opinion, States party to the ACHR must prevent transboundary environmental damage that may affect the human rights of individuals outside their territory if 'there is a causal link between the act that *originated* in its territory and the infringement of the human rights of persons outside its territory'.[901] Under article 31 of the ARSIWA, the wrongdoing State is obliged to repair all damage that has been *caused* by its internationally wrongful act. On the question when an injury has been caused by an act, the ARSIWA General Commentary states:

> [C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity".[902]

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[897] See ICJ, *Corfu Channel* (n 177) 18; Arbitral Tribunal, *Trail Smelter* (n 765) 1958 *et seq*; APTH General Commentary (n 790) 152 paras 2 *et seq*, 154 paras 10 *et seq*; Birnie, Boyle and Redgwell (n 764) 153; Duvic-Paoli (n 764) 181 *et seqq*.

[898] CCPR, 'Summary record of the 3321st meeting' (n 883) para 47; cf Monnheimer and Schäferling (n 57) 365, who allege that the activity must be a *sine que non* of the impact.

[899] idem, 'Summary record of the 3498th meeting' (n 875) para 66 (emphasis added).

[900] ibid at 2:46:40 (Statement of Yuval Shany).

[901] IACtHR, 'Environment and Human Rights' (n 615) para 101 (emphasis added).

[902] ARSIWA General Commentary (n 50) 92 *et seq* para 10 (footnotes omitted). See also ILC, 'Report of the Commission to the General Assembly on the work of its fifty-second session' in idem, *Yearbook of the*

The words of the Special Rapporteur need no further explanation: '[T]his is the direction that the draft is trying to propose. That we introduce elements of causal proximity'.[903]

d) Application to the Present Case

Applying the standards developed in the previous sections to the present case, it seems to be clear that it must be assessed under the second sentence of paragraph twenty-two of General Comment No. 36. Since the victims of US drone strikes are not located within the territory of the Federal Republic of Germany or in other areas subject to its jurisdiction, an obligation to prevent a transboundary violation of article 6(1) of the ICCPR will only arise if the activity taking place on German territory has a direct and reasonably foreseeable impact on the right to life. In particular, a direct impact requires that the activity taking place on German territory is a *proximate* cause of the harm occurring aborad. This means that for the Federal Repulic to be under an obligation to protect the right to life in Pakistan or in Yemen, it needs to be established that the violation originated in German territory. This, however, is not the case. As was shown in the section on the no-harm rule, the true origin of the harm caused by a US drone strike is not the relay of data at Ramstein, but a drone hovering over Pakistan or Yemen or, in the alternative, its pilot pulling the trigger in the US.[904] German territory, on the other hand, serves as a mere transit point for the weapon release signal. This is not sufficient to statisfy the requirement of a "direct" impact and to engage an obligation of the Federal Republic under the ICCPR to prevent a transboundary violation of the right to life.

3) Article 2(1) of the ECHR

Similar to the ICCPR and the ACHR, it is firmly established in the jurisprudence of the ECtHR that pursuant to article 2(1) of the ECHR a State is not only under a negative obligation not to arbitrarily deprive anyone of his right to life, but that it also needs to actively protect the right to life against threats emanating from third parties.[905] The

International Law Commission 2000, vol 2 pt 2 (UN 2006) 27 para 97. On the same concept under article 22 see ARSIWA General Commentary (n 50) 75 para 4.

[903] CCPR, '(Part Two) 3498th Meeting' (n 888) at 2:47:37 (Statement of Yuval Shany).

[904] See § 6 B. I. 1) c).

[905] This obligation is one of means, not of results, see ECtHR, *Osman v UK* [1998] ECHR 101 [115] *et seq*; *LCB v UK* [1998] ECHR 49 [36]; *Mastromatteo v Italy* [2002] ECHR 694 [67]-[69]; *Öneryildiz v Turkey* App no 48939/99 (30 November 2004) [93]; *Budayeva and others v Russia* App no 15339/02 and others (20 March 2008) [134]-[136]; *Rantsev v Cyprus and Russia* App no 25965/04 (7 January 2010) [218]; *O'Keeffe v Ireland* App no 35810/09 (28 January 2014) [144].

specific circumstances under which a State may be found to have violated this duty were articulated by court in its *Osman* case:

> [I]t must be established (…) that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[906]

However, as is the case with article 6(1) of the ICCPR, the positive obligation to protect the right to life under article 2(1) of the ECHR is dependent on the applicability of the convention itself. As will be recalled, the ECtHR has generally been more restrictive in applying the ECHR extraterritorially than the CCPR with the ICCPR. And contrary to the CCPR and the IACtHR, the ECtHR has yet to explicitly address the question whether a State also has jurisdiction in cases where it exercises effective control over the origin of the harm rather than over the individual whose human rights are being violated.[907] So far, the traditional models of territorial and personal jurisdiction both require that the respondent State has some sort of effective control either over the territory where the victim is located or over the victim himself. Cases of domestic third-party activities producing harmful transboundary effects, on the other hand, do not seem to fit within these categories.[908]

What is more, the ECtHR in its *Banković* decision explicitly rejected a "cause and effect" notion of jurisdiction. Although the case did not concern the issue whether jurisdiction is also established by exercising effective control over the activity that produces the harmful extraterritorial effect, the court's conclusion must be applicable *a*

[906] ECtHR, *Osman* (n 905) [116]. Note that the ECtHR has never officially defined the threshold criterion of a "real and imminent threat". On a possible interpretation see Stoyanova (n 853) 404; *Hoge Raad* (Supreme Court of the Netherlands), *Netherlands v Urgenda* (20 December 2019) ECLI:NL:HR:2019:2007 [5.2.2]. For the applicable causal test see ECtHR, *E and others v UK* App no 33218/96 (26 November 2002) [99]; *O'Keeffe* (n 905) [149]; Stoyanova (n 853) 327 *et seq*.

[907] cf ECtHR, *Loizidou* (n 563) [52] ('the responsibility of Contracting States can be involved by acts and omissions of their authorities which *produce effects outside their own territory*'; emphasis added); *Chiragov and others v Armenia* App no 13216/05 (16 June 2015) [167]. For a brief overview of the ECtHR's case law see Banda (n 764) 1928-1930. See also Besson, 'Mind the Gap!' (n 564).

[908] Altwicker (n 858) 589 *et seq*; Banda (n 764) 1931.

fortiori to cases where the violation is not even attributable to the territorial State itself.[909] As John Knox, former UN Special Rapporteur on human rights and the environment, remarked in connection with the issue of transboundary environmental harm: 'If dropping bombs on a city does not amount to effective control of its occupants, allowing pollution to move across an international border almost certainly would not'.[910] Thus, for lack of German jurisdiction over the victims of US drone strikes, the ECHR is not applicable.

II. Domestic Omission

Other than from international law, duties to act may also be derived from domestic law. In fact, where the duties of a State *vis-à-vis* its own citizens and potentially even foreigners are concerned, the domestic constitutional order will regularly be the prime source of its legal obligations.[911] In particular, according to article 2(2)(1) of the German constitution, the *Grundgesetz* (Basic Law), '[e]very person shall have the right to life and physical integrity'.[912] As is the case with article 6(1) of the ICCPR and article 2(1) of the ECHR, two different obligations flow from this fundamental guarantee: first, a negative obligation not to illegally interfere in the enjoyment of the right to life and physical integrity; and secondly, a positive obligation to actively protect the right to life against illegal violations by third parties,[913] including by other States.[914] Moreover, article 2(2)(1) of the Basic Law is a so-called *Jedermann-Grundrecht*, a universal human right. This means that it can be relied upon not only by German citizens but by every person,

[909] More positive Monnheimer and Schäferling (n 57) 367, 369. On the distinction between jurisdiction and attribution see Besson, 'Extraterritoriality' (n 562) 867 *et seq*; Altwicker (n 858) 598 *et seq*.

[910] John H Knox, 'Diagonal Environmental Rights' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania UP 2010) 87. See also Altwicker (n 858) 590.

[911] See Jan Kratochvíl, 'The Inflation of the Marin of Appreciation by the European Court of Human Rights' (2011) 29 *NQHR* 324, 352, who argues that human rights are best protected at the national level.

[912] Translation by Christian Tomuschat and others <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 17 January 2020.

[913] BVerfG, Judgement of 25 February 1975 (1 BvF 1/74 and others) E 39, 1 [153] – juris; Decision of 4 September 2008 (2 BvR 1720/03) K 14, 192 [36] – juris (*Schloss Bensberg*); Decision of 15 March 2018 (2 BvR 1371/13) NJW 2018, 2312 [31] – juris; Josef Isensee in idem and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, vol 9 (3rd edn, CF Müller 2011) s 191 paras 1 *et seqq*.

[914] BVerfG, *Schloss Bensberg* (n 913) [36] – juris; Matthias Herdegen in Theodor Maunz and Günter Dürig (eds), *Grundgesetz* (92nd supp, CH Beck 2020) art 1(3) para 85.

including foreigners.[915] As will be shown in the further progress of this section, under certain circumstances this protection may even extend to foreigners living abroad.[916]

The scope of protection afforded by article 2(2)(1) had also been at issue in the so-called *Bin Jaber* case, a German domestic lawsuit filed by three Yemeni citizens against the Federal Republic of Germany in October 2014. The plaintiffs were relatives of the deceased Ahmed Salem bin Ali Jaber, a Yemeni imam who had been known for openly criticizing al-Qaeda in his sermons. Bin Jaber had been killed in August 2012 in the Yemeni province of Hadramawt when a US drone attacked the spot where he was meeting with three local extremists after they had demanded that they talk.[917] Allegedly, he had died in a so-called signature strike, that is, an attack which targets individuals who 'bear certain signatures, or defining characteristics associated with terrorist activity, but

[915] OVG NRW (n 51) [100] – juris; Ino Augsberg, 'Grundfälle zu Art. 2 II 1 GG' (2001) *JuS* 128, 133; Helmuth Schulz-Fielitz in Horst Dreier, *Grundgesetz-Kommentar*, vol 1 (3rd edn, Mohr Siebeck 2013) art 2(2) para 39; Christian Starck in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds), *Grundgesetz*, vol 1 (7th edn, CH Beck 2018) art 1 paras 205 *et seq*.

[916] See § 6 B. II. 3) a).

[917] VG Köln, Judgement of 27 May 2015 (3 K 5625/14) [5] – juris (*Bin Jaber*); Horton (n 138) 20. A second lawsuit was filed in the US, where the plaintiffs directly challenged the lawfulness of the attack and sought a declaration that the drone strike had violated domestic and international law, see *Bin Ali Jaber v US* 861 F.3d 241, 243 *et seq*, 246 *et seq*, 250 (DC Cir 2017). However, the court declared the case nonjusticiable and dismissed the claim based on the so-called political question doctrine. This doctrine excludes from judicial review any 'controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch', see US Supreme Court, *Japan Whaling Association v American Cetacean Society* 478 US 221, 230 (1986). Arguing that the decision to launch an attack against a foreign target is a question of policy, the US government has successfully invoked the political question doctrine to throw cases out of court which challenged the legality of a specific attack, see, for example, *El-Shifa Pharmaceutical Industries Co v US* 607 F3d 836, 844 (DC Cir 2010). Two further procedural obstacles have made it almost impossible for an individual to do so. The first one is the so-called State secrets privilege. Similar to the political question doctrine, this privilege allows the executive to refuse to disclose evidence if there is reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. This may even require the court to dismiss the case entirely where the very subject matter of the action is a State secret, see *US v Reynolds* 345 US 1, 10 (1953) 11 fn 26, citing *Totten v US* 92 US 105, 107 (1876); *Mohamed v Jeppesen Dataplan, Inc.* 614 F.3d 1070, 1096 (DC Cir 2010). This privilege was successfully invoked in the context of targeted killings in *Kareem v Haspel* (Memorandum Opinion) Civil Action No 17-581 (RMC) (DC Cir 2019); see also Joshua Andresen, 'Due Process of War in the Age of Drones' (2016) 41 *Yale J Intl L* 155. The second one concerns the general rule that under US domestic law, a plaintiff trying to bring a lawsuit against the US government must first overcome its sovereign immunity. This is usually done by pointing to a waiver contained in 5 USC § 702. Cases of 'military authority exercised in the field in time of war or in occupied territory', however, are explicitly exempted from the waiver, see 5 USC § 701(b)(1)(G). The US has interpreted this exception broadly to include counterterrorism operations, with varying success. See James D Cromley, 'In the Field or in the Courtroom: Redefining the APA's Military Authority Exception in the Age of Modern Warfare' (2016) *Ariz St L J* 1163, 1175 *et seqq*.

whose identities aren't necessarily known'.[918] According to the plaintiffs, a simple family gathering, any other social event where participants often wear arms and fire ritualistic shots into the air, or even just being a military age male might suffice to attract such a signature strike.[919] The plaintiffs, two of whom were living in Hadramawt themselves, thus feared that they, too, could fall victim to a US drone attack.[920] Arguing that the US relies heavily on the SATCOM relay station located at Ramstein Air Base to carry out its counterterrorism operations in Yemen, they claimed that the Federal Republic was under a domestic duty to protect their right to life against a possible violation by a US drone strike and demanded that it ensure through appropriate action that Ramstein is not used for internationally unlawful attacks in Hadramawt.[921]

Before the validity of this claim is assessed,[922] a preliminary issue must be dealt with. Assuming that the Federal Republic indeed is under an obligation to protect the right to life of the Yemeni plaintiffs but fails to adopt the measures that are required of it under article 2(2)(1), thereby providing aid or assistance to an internationally wrongful drone strike that kills the plaintiffs, would it incur complicit responsibility under article 16 of the ARSIWA? In other words, may a State be held internationally responsible for complicity through omission if it fails to comply not with an international duty to act but with a *domestic* duty to act? To date, this question has been afforded only scarce academic attention and shall be examined in the following section.[923]

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[918] Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Houghton Mifflin Harcourt 2012) 41.

[919] Yemen has been rumoured to have thrice as many weapons as people. Among Yemeni tribesmen, firearms are a sign of virility and wealth, see Clarke (n 114) 182, 187 *et seq*. On the different signatures and their adequacy under international law see Heller (n 176) 92 *et seqq*.

[920] The third plaintiff was living in Qatar and Canada. Given his current location, the BVerwG did not consider his right to life to be at risk and dismissed his action for lack of legal standing. See BVerwG, *Bin Jaber* (n 403) [25] – juris.

[921] VG Köln, *Bin Jaber* (n 917) [1]-[5], [10] – juris.

[922] See § 6 B. II. 3) and § 6 B. II. 4).

[923] See only Lars C Berster, ''Duty to Act' and 'Commission by Omission' in International Criminal Law' (2010) 10 *Intl Crim L Rev* 619, 629 *et seq*, who, in the area of international criminal law, points to the preparatory works of the ILC on article 2 of the 1991 Draft Code of Crimes Against the Peace and Security of Mankind. According to article 2 and the ILC's commentary thereto, the determination of what constitutes an act or omission as a crime against the peace and security of mankind must be made entirely independent of national law. See also ILC, *Yearbook of the International Law Commission 1987*, vol 2 pt 2 (UN 1989) 14 paras 1, 3; *Yearbook of the International Law Commission 1991*, vol 2 pt 2 (UN 1994) 94 *et seqq*.

1) Eligibility of a Domestic Duty to Act

As will be remembered, the ILC did not explicitly address the issue of aiding or assisting through omission. Although several scholars, including the present author, support the notion, subject to the condition that there is a specific duty to act, none of them discuss whether such a duty may also root in domestic law.[924] Instead, some authors simply seem to assume that the duty to act can only be international in character. Andreas Felder, for example, notes that while a State may also aid or assist through omission if there is a specific duty to act, such an omission would automatically amount to the commission of an independent internationally wrongful act.[925] And for Helmut Aust, the necessity of a duty to act

> calls very much into question whether there could be a sensible scope of application for complicity through omission. If there is a specific duty to act, this duty would need to be established on the level of primary rules. If the State in question fails to act, then it would incur responsibility for not having complied with this positive obligation.[926]

It is important not to confuse the question whether complicit liability for omissions may also be incurred in cases where the duty to act is domestic rather than international in character with the more general issue of the commission of an internationally wrongful act through omission. As will be recalled, a wrongful act may be committed either through positive action or through omission.[927] In the latter case, the conduct *consisting of an omission* must constitute a breach of the respondent State's international obligations. This means that the duty to act which is being disregarded cannot be imposed by anything else other than international law.[928] By contrast, if the respondent State fails to comply with a domestic duty to act which, at the same time, is no such duty under international law, then its act would only be domestically wrongful, but not internationally wrongful. With

[924] eg Felder (n 715) 255 *et seq*; Nolte and Aust (n 144) fn 43; Jackson (n 151) 156. See only Christenson (n 762) 324, who noted in 1991 that the commentary to the ARSIWA defined "conduct" to include omissions if a duty to act derives from an international obligation. No reference is made.

[925] Felder (n 715) 256.

[926] Aust, *Complicity* (n 30) 228 (footnotes omitted).

[927] ARSIWA, art 2.

[928] See ICJ, *US Diplomatic and Consular Staff in Tehran (US v Iran)* (Judgement) [1980] ICJ Rep 45 [62] *et seqq*.

article 16 of the ARSIWA, however, a similar conclusion is not as compelling. After all, complicit responsibility is, in a sense, derivative responsibility.[929] In the absence of an internationally wrongful act of another State that allows for complicit involvement there can be no complicit liability. In fact, to aid or assist another State is not unlawful *per se*.[930] Instead, it is 'the connection between the complicit conduct and the principal wrongful act that can transform otherwise lawful conduct into wrongful conduct'.[931] Depending on whether the receiving State decides to use the support lawfully or for the commission of an internationally wrongful act, the provision of aid or assistance itself will be either be lawful or internationally wrongful. To aid or assist is thus not inherently wrongful but becomes so by virtue of the receiving State's actions. In principle, this means that for the "act" of aiding or assisting through omission to qualify as *internationally* wrongful, it is not necessary that the duty to act underlying the omission is international in character. It may simply become internationally wrongful because the act of the receiving State is.

Turning to the question whether a State may incur international complicit responsibility through omission based on a failure to comply with a domestic duty to act, a good starting point for analysis is aiding or assisting through positive action. As was established at the beginning of this chapter on the objective *fait générateur* of complicity, any act may constitute aid or assistance as long as it is sufficiently linked to the principal wrong.[932] In fact, none of the examples of complicity provided by the ILC in the ARSIWA General Commentary relate to an action which is necessarily international in the sense that it is allowed for or forbidden by international law. Nor does the text of the draft articles suggests that they be. Instead, many actions that may ultimately result in complicit responsibility are governed exclusively by domestic law. For example, the furnishing of weapons or the provision of funds will rarely be based on an international treaty but on a private contract subject to the domestic laws of one of the parties.[933] Thus, if one accepts that aid or assistance may be provided by omission just as much as by positive action, why should an omission have to be international in character (in the sense that the duty

[929] ARSIWA General Commentary (n 50) 65 para 7.
[930] Aust, *Complicity* (n 30) 238 *et seq*.
[931] Lanovoy, *Complicity* (n 145) 263. See also Aust, *Complicity* (n 30) 273, 280.
[932] See § 6 A.
[933] For some other examples of economic cooperation which amount to complicity in an internationally wrongful act see Aust, *Complicity* (n 30) 147-152.

to act needs to root in international law rather than in domestic law) when an action does not?[934] Moreover, if one were to assume that a duty to act can only be derived from international law, then non-compliance with the imperative would automatically result in the commission of an independent internationally wrongful act within the meaning of article 2. As noted by Aust, this would leave complicity through omission without any sensible scope of application.[935]

Another argument militates for an interpretation of article 16 which includes cases where the complicit State has violated a domestic duty to act. In domestic civil and criminal law, one generally does not violate a legal command by remaining completely passive.[936] As Michael Duttwiler points out, an omission is ontologically a "nothing", which is why 'the question whether somebody has omitted an action or not can only be assessed on a purely normative level'.[937] The decision to hold an individual responsible for his failure to act is thus a normative judgement of the underlying legal system. Those whose relationship with a certain harmful event is sufficiently close, both in terms of causation and of moral blame, as to be expected to prevent its occurrence should be held responsible for the resulting damage if they fail to do so.[938] Miles Jackson provides the example of a father who ought not to let his child drown or a man who ought not to watch his cigarette burn.[939] If the child drowns or if the cigarette sets the house on fire, they will be held responsible for their failure to prevent the harm. Similarly, if a State ought to prevent a certain damage from occurring, why should it matter whether the obligation to do so is derived from domestic law or from international law? In order to identify those whose relationship with a harm is sufficiently culpable as to be blamed for its occurrence, ought one not look to the substance of a specific imperative rather than to its form? By

[934] A similar argument is made by Berster (n 923) 631 *et seq*, who claims that deriving international criminal responsibility from omissions based on domestic *non-criminal* law duties would create an inconsistent bias towards omissions, since committing the same crime by action would always require a provision of international *criminal* law.

[935] Felder (n 715) 256; Aust, *Complicity* (n 30) 228; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 387 ('one is hard pressed to find a non-hypothetical instance of an omission being considered as aid/assistance for complicity evaluations, instead of being deemed a breach of a primary due diligence obligation').

[936] Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 40.

[937] Duttwiler (n 751) 4 (commas omitted).

[938] ibid 5; Monica Hakimi, 'State Bystander Responsibility' (2010) 21 *EJIL* 341, 364, regarding the ICJ's *Bosnian Genocide* case and the duty of Serbia to restrain the Bosnian Serb Army; Jackson (n 151) 104, 156; Ingle (n 761) 761. See also Aust, *Complicity* (n 30) 229, but cf ps 193 *et seq*.

[939] Jackson (n 151) 104; Duttwiler (n 751) 5 *et seq*.

comparison, where liability for omissions in international criminal law is concerned, duties to act are just as often drawn from domestic law (eg from a statute, a contract or an undertaking) as they are from international law.[940] Jackson builds upon the example of a civilian who is tasked with manning a checkpoint during a civil war to inform other civilians passing through the checkpoint of nearby enemies. One day, he deliberately omits to inform a group of civilians that there are enemies waiting on them. As a consequence, the group unsuspectingly passes the checkpoint and gets killed. Jackson then concludes as follows:

> It would be difficult to argue that the checkpoint operator breached any duty to act imposed by international law. But to give that answer is really to ask the wrong question. Rather than asking whether the omission violated a duty imposed by international law, we should be searching for those individuals with a culpable relationship to the perpetration of the wrong proscribed by international criminal law. That is the essence of complicity liability. In this case, there is little doubt that the checkpoint operator's omission aided the commission of the war crime (…). Likewise, he acted with a guilty mind. The duty arising on the basis of his undertaking to prevent such harms from occurring brings him into the category of culpable participant and ought to ground individual criminal responsibility.[941]

Although Jackson's argument concerns the international criminal responsibility of an individual rather than the international responsibility of a State, it has already been mentioned earlier in this subchapter on omissions that both share a common concept of complicity which allows for using the former as careful guidance for the latter.[942] In this light, it is submitted that Jackson's point is transferable, *mutatis mutandis*, to the level of States and complicit responsibility under the ARSIWA, especially is situations where the fundamental rights of individuals are at stake. A State which omits to fulfil a domestic duty to protect a fundamental right and as a consequence thereof aids or assists another

[940] Duttwiler (n 751) 55 *et seq*, 60 *et seq*; Jackson (n 151) 103-107; see also Kerstin Weltz, *Die Unterlassungshaftung im Völkerstrafrecht: Eine rechtsvergleichende Untersuchung des französischen, US-amerikanischen und deutschen Rechts* (edition iuscrim 2004) 301-305; critical Berster (n 923) 625 *et seqq*, regarding the application of domestic non-criminal law duties to international criminal law; Roth (n 761) paras 34-37.

[941] Jackson (n 151) 105 *et seq* (footnotes omitted).

[942] See § 6 B.

State in the commission of an internationally wrongful act which violates that certain right has a sufficiently culpable relationship to the harm. If the supporting State also acts – or, more precisely, fails to act – with a guilty mind, ie, if it possesses the necessary *mens rea*, then there is no compelling reason why it should not be held internationally responsible for its participation in the principal wrong.

In sum, it is the opinion of this author that for the purpose of aiding or assisting through omission, a duty to act may be drawn from domestic law just as much as from international law. This, in turn, raises a further question, namely about the role of domestic law in international adjudication. May an international court or tribunal incidentally examine, apply and, if necessary, even interpret domestic law *propio motu* to resolve an issue of international law – presently, State responsibility under article 16 of the ARSIWA – over which it has inherent jurisdiction (see 2) below)? Following a discussion of that issue, this study shall turn to an examination of whether the Federal Republic of Germany indeed is under a domestic duty to act (see 3) below), and, if so, whether it has failed to comply with what is required of it under such duty (see 4) below).

2) Domestic Law in International Adjudication

In principle, where two States bring a dispute before an international court or tribunal, the jurisdiction of that body also extends to questions of domestic law. This was first established by the PCIJ in its *Serbian* and *Brazilian Loans* cases. Having to decide on the interpretation of certain loan agreements governed by domestic law, the court held that it was enough for the parties to the disputes to be States to give it jurisdiction over the matter.[943] Accordingly, Judge Lauterpacht remarked in his separate opinion in the ICJ's *Guardianship of Infants* case: 'The examination of municipal law, wherever that is necessary, is a proper function of the Court'.[944] The authority to apply domestic law

[943] See PCIJ, *Payment of Various Serbian Loans Issued in France (France v Kingdom of the Serbs, Croats, and Slovenes)* (Judgment) [1929] PCIJ Rep Series A no 20 [33]-[44] and *Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* (Judgement) [1929] PCIJ Rep Series A no 21 [29]. See also Robert Kolb, *The International Court of Justice* (Hart 2013) 349 *et seqq*; Jarrod Hepburn, 'Domestic Law in International Adjudication' (December 2018) *MPIL* para 5, who notes that international arbitral tribunals have ruled on purely domestic contractual claims not connected to any alleged breaches of international law.

[944] ICJ, *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* (Judgement) [1958] ICJ Rep 55 Separate Opinion of Judge Lauterpacht 91.

incidenter tantum to determine a breach of international law was also affirmed by the ICTY,[945] and the ILC expressly notes in the ARSIWA General Commentary:

> [C]ompliance with internal law is relevant to the question of international responsibility (…) because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. *Especially in the fields* of injury to aliens and their property and *of human rights*, the content and application of internal law will often be relevant to the question of international responsibility.[946]

An international court or tribunal may even interpret domestic law, especially in cases where different interpretations of the law have been put forward.[947] However, it may not do so freely, but has to take due account of the interpretation afforded to it by the domestic courts.[948] Although such an interpretation is not *res judicata* for an international court or tribunal,[949] the general rule when applying domestic law internationally seems to be that

> [o]nce the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, (…) it must seek to apply it *as it would be applied in that country*. It would not be applying the municipal law of a country

[945] ICTY, *Kupreškić* (n 376) [539].

[946] ARSIWA General Commentary (n 50) 38 para 7 (emphasis added). See also ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 para 45, noting that '[a] limited jurisdiction does not (…) imply a limitation of the scope of the law applicable in the interpretation and application of [certain] treaties'.

[947] See PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (Advisory Opinion) [1935] PCIJ Rep Series A/B no 65 Individual Opinion of Judge Anzilotti ('the Court may find it necessary to interpret a municipal law, quite apart from any question of its consistency or inconsistency with international law'); Sharif Bhuiyan, *National Law in WTO Law* (CUP 2007) 215-217, 234 *et seq*; Hepburn (n 943) paras 13-20. cf PCIJ, *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Rep Series A no 7, 19 ('The Court is certainly not called upon to interpret the Polish law as such'), which has sometimes been interpreted to the contrary. Critical of such a reading Wilfred C Jenks, *The Prospects of International Adjudication* (Oceana Publications 1964) 549-555; Bhuiyan (n 947) 213-215.

[948] PCIJ, *Serbian Loans* (n 943) [104]; *Brazilian Loans* (n 943) [80] *et seq*; ICJ, *Elettronica Sicula SPA (ELSI) (US v Italy)* (Judgement) [1989] ICJ Rep 15 [62]; ECtHR, *Deweer v Belgium* [1980] ECHR 1 [52]; *Malone v UK* [1984] ECHR 10 [79]; *Masson and van Zon v Netherlands* App nos 15346/89 and 15379/89 (28 September 1995) [49]; Bhuiyan (n 947) 218, 223-225; Hepburn (n 943) paras 23-29.

[949] Hepburn (n 943) paras 38-41, 45; cf Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 39. See also ECtHR, *Roche v UK* App no 32555/96 (19 October 2005) [120], noting that it would need strong reasons to differ from the interpretation by domestic superior courts; Bhuiyan (n 947) 218 ('near-binding authority').

> if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.[950]

Still, there may be cases where the position in domestic law is uncertain, disputed, or subject to conflicting jurisprudence from different local courts. In those situations and for the purposes of the international case alone, it will be for the court or tribunal to 'select the interpretation which it considers most in conformity with the [domestic] law',[951] even if that means giving preference to the interpretation of a lower instance court over that of a higher instance.[952]

A related but distinct question is that of the applicable standard of judicial review. As will be shown in the further progress of this chapter, this issue arises at two different stages of finding German complicit responsibility. First, at the level of establishing a fundamental duty of the Federal Republic of Germany to protect the right to life extraterritorially. Without wanting to anticipate the discussion, there is considerable debate whether a German domestic court is entitled to fully scrutinize the assessment of the executive that the conduct of another State does not violate international law.[953] And secondly, at the level of finding a failure to comply with that duty. It is the established jurisprudence of the *Bundesverfassungsgericht* (German Federal Constitutional Court; BVerfG) that the executive enjoys a wide margin of appreciation when deciding *how* to comply with its fundamental obligations and that those decisions are subject only to limited judicial review.[954] This raises the question whether an international court or tribunal, when applying German constitutional law *incidenter tantum*, must respect these limitations on the scope of judicial review.[955]

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[950] PCIJ, *Brazilian Loans* (n 943) [80] (emphasis added).

[951] ibid [82].

[952] ICJ, *ELSI* (n 948) [62]; WTO, *US: Anti-Dumping Act of 1916 – Report of the Panel* (31 March 2000) WT/DS136/R paras 6.53-6.57; Wilfred C Jenks, 'The Interpretation and Application of Municipal Law by the Permanent Court of International Justice' (1938) 19 *BYIL* 67, 69 *et seq*, on the PCIJ's case law; Bhuiyan (n 947) 223 *et seq*; Hepburn (n 943) paras 42 *et seq*. cf n 1119.

[953] See § 6 B. II. 3) b).

[954] See § 6 B. II. 4).

[955] This issue is not to be confused with the general international law principle that a State cannot rely on domestic law to avoid international obligations, see ARSIWA General Commentary (n 50) 36 paras 1, 3-6; PCIJ, *SS Wimbledon (Britain and others v Germany)* [1923] PCIJ Rep Series A no 1, 29 *et seq*; ICJ, *Fisheries (UK v Norway)* (Judgement) [1951] ICJ Rep 116, 132; *Guardianship of Infants* (n 944) 67; *ELSI* (n 948) [73], [124].

In general, being adjudicatory bodies of *international* law, international courts or tribunals are not bound by the limitations on the scope of judicial review applicable to local courts under domestic law. However, if the general rule is that they must apply domestic law as it would be applied in that country, then it seems that such limitations cannot be ignored either. In fact, international adjudicatory bodies are no strangers to the idea of a margin of appreciation.[956] The ECtHR, in particular, has repeatedly emphasised that 'it is not the Court's role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive obligations'.[957] Although the status of the doctrine is far less clear outside the specialized sub-system of the ECHR,[958] the ICJ and other bodies of international law have also from time to time given some deference to States where compliance with their international obligations was concerned.[959] And they might be even more willing to do so where a State's compliance with its own *domestic* obligations is concerned. In any case, it is important to note that some of the questions about the applicable standard of review in the field of international law are heavily disputed among German scholars and have attracted conflicting jurisprudence even at the highest judicial level.[960] To that extent, an international court or tribunal could always endorse the view

[956] According to Bhuiyan (n 947) 164, 'the margin of appreciation refers to the latitude allowed to (…) states (…) in their observance of [their international obligations] (…) The wider the margin is, the less exacting is the scrutiny to which the impugned act or decision of the defendant state is subjected and, as a result, the less likely is a finding of a violation of the [obligation]'. See Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *EJIL* 907, 909, who notes a growing international acceptance of the doctrine. Generally in favour of applying it at the international level Jean-Pierre Cot, 'Margin of Appreciation' (June 2007) *MPIL* para 5.

[957] ECtHR, *Opuz v Turkey* App no 33401/02 (9 June 2009) [165]. See also *Bevacqua and S v Bulgaria* App no 71127/01 (12 June 2008) [82]; *Kolyadenko and others v Russia* App nos 17423/05 and others (28 February 2012) [160]. Despite the ECtHR's willingness to grant national authorities a wide, narrow, or a "certain" margin of apprectiation, a clear standard of review seems to be absent from the court's jurisprudence, see extensively Kratochvíl (n 911) 335-351; Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 *Hum Rts L Rev* 495, 500-506.

[958] See Shany (n 956) 931-940, who alleges that the ICJ explicitly or implicitly rejected such a doctrine in its *Oil Platforms* case and the *Wall* advisory opinion, but cf Bhuiyan (n 947) 152 fn 27; Enzo Cannizzaro, 'Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines?' (2017) 27 *EJIL* 1061, 1064 *et seq*. In recent times, see also ICJ, *Whaling in the Antarctic* (Australia v Japan; New Zealand intervening) (Judgement) [2014] ICJ Rep 226 and the different interpretations by Eirik Bjorge, 'Been There, Done That: The Margin of Appreciation and International Law' (2015) 4 *CJICL* 181, 186-190 and Cannizzaro (n 958) 1068 *et seq*.

[959] Cot (n 956) paras 8-10; Cannizzaro (n 958) 1066 *et seq*. For other bodies of international law see Shany (n 956) 928-931; Bhuiyan (n 947) 144-206, for the WTO judiciary.

[960] See § 6 B. II. 3) b).

that a limitation on the scope of judicial review would not be in conformity with domestic law and proceed to apply a standard of full review.

3) Duty to Act

As will be recalled, article 2(2)(1) of the Basic Law obliges the Federal Republic of Germany to actively protect the right to life against illegal violations by third parties, including by other States. For this protective obligation to arise, it must be established that article 2(2)(1) is applicable in personal (*ratione personæ*), material (*ratione materiæ*), spatial (*ratione loci*), and temporal terms (*ratione temporis*). Its personal scope was already dealt with at the beginning of this subchapter. Any person, including foreigners, may invoke the constitutional right to life and physical integrity. As regards the other elements, their application *in concreto* had been at issue in the *Bin Jaber* case and was heavily disputed among the courts of different instance. In particular, they were divided over the question under which circumstances a foreigner living abroad may rely on the protection afforded by the German Basic Law (see a) below); what is the scope of judicial review applicable to the executive's assessment that the actions of another State do not violate international law (see b) below); and whether the life of the Yemeni plaintiffs had sufficiently been at risk of being violated by a US drone strike (see c) below). Since the views held by the different courts are instructive also for the present case, their positions and arguments shall be presented and discussed in the following sections.

a) Spatial Scope

The obligation of German state authority to respect fundamental rights is set out in article 1(3) of the Basic Law, which reads:

> The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.[961]

Article 1(3) does not contain a reference to German territory, which has been interpreted to mean that respect for fundamental rights does not end at the German border. Instead, German authorities must respect fundamental rights also when acting abroad or whenever

[961] Translation by Tomuschat and others (n 912).

the effects of their actions unfold on foreign territory.[962] The obligation to protect fundamental rights on foreign territory may even exist in situations where the violation is attributable to the agents of another State, provided that there is a genuine link between the violation and the German State (*hinreichend konkreter Bezug zum deutschen Staat*).[963] Although the Federal Republic of Germany may in such a situation not be in a position to afford the same level of protection as in a purely domestic context, this does not mean that there is no obligation to protect the fundamental right at stake *per se*. However, these difficulties will have to be considered when determining the specific content of the Federal Republic's protective obligation.[964]

In the *Bin Jaber* case, the question whether there is a genuine link between a potential violation of the right to life of the plaintiffs – Yemeni citizens living in Yemen – by the US and the German State had been at the heart of the proceedings. At the outset, the courts of different instance seemed to agree that a violation of a German fundamental right by another State on foreign territory is genuinely linked to the German State whenever

> the other State is carrying out its conduct – the infringement of the fundamental right – essentially from within German territory [*in wesentlicher Hinsicht vom deutschen Staatsgebiet (…) heraus*] and thus from within the primary area of responsibility of German public authority.[965]

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[962] BVerfG, Decision of 21 March 1957 (1 BvR 65/54) E 6, 290 [16] – juris; *BND – Ausland-Ausland-Aufklärung* (n 849) [87] *et seq* – juris; Horst Dreier in idem (ed), vol 1 (n 915) art 1(3) para 44; Hans D Jarass in idem and Bodo Pieroth (eds), *Grundgesetz* (16th edn, CH Beck 2020) art 1 para 44; Herdegen in Maunz and Dürig (eds) (n 914) art 1(3) para 79. cf Christian Starck in von Mangoldt, Klein and Starck (eds), vol 1 (n 915) art 1 para 212.

[963] BVerfG, Judgement of 14 July 1999 (1 BvR 2226/94 and others) E 100, 313 [175]-[178] – juris; *Schloss Bensberg* (n 913) [35] *et seq* – juris; OVG NRW (n 51) [106]-[113], [189] – juris; Dreier in idem (ed), vol 1 (n 915) art 1(3) paras 44 *et seq*; Jarass in idem and Pieroth (eds) (n 962) art 1 para 44; Herdegen in Maunz and Dürig (eds) (n 914) art 1(3) para 85, advocating a high threshold. cf Josef Isensee in idem and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, vol 5 (3rd edn, CF Müller 2007) s 115 paras 87 *et seqq*.

[964] BVerfG, Judgement of 10 January 1995 (1 BvF 1/90 and others) E 92, 26 [76] *et seq* – juris; Decision of 8 October 1996 (1 BvL 15/91) E 95, 39 [20] *et seqq* – juris; OVG NRW (n 51) [195] – juris.

[965] OVG NRW (n 51) [215] – juris (this author's translation). BVerwG, *Bin Jaber* (n 403) [39]-[48] – juris; critical Patrick Heinemann, 'US-Drohneneinsätze vor deutschen Verwaltungsgerichten' (2019) *NVwZ* 1580, 1581. A genuine link with the German State may also be established by the victim's citizenship as a German national, see BVerfG, *Schloss Bensberg* (n 913) [36] – juris; OVG NRW (n 51) [113], [189] – juris; Jarass in idem and Pieroth (eds) (n 962) art 1 para 44.

The court of second instance – the OVG NRW – did not provide further guidance on when exactly a violation is carried out 'essentially from within German territory'. However, it seemed satisfied that the use of Ramstein's SATCOM relay station as a relay point for the drone data stream was sufficient to fulfil this requirement.[966] A different view was held by the court of third instance, the *Bundesverwaltungsgericht* (Federal Administrative Court; BVerwG), Germany's highest administrative court.[967] According to the BVerwG, a violation is essentially carried out from within German territory if the event or the technical operation *which is decisive for the legal assessment of the violation* has taken place within German borders.[968] The activity taking place on German territory must thus have what the court called a 'relevant decisional character' (*relevanter Entscheidungscharakter*).[969] Applying this standard to the case before it, the court concluded that the relay of data at Ramstein was a 'purely technical transmission process without any decisional elements'[970] and as such was insufficient to genuinely link a (potential) violation of the right to life to the German State.[971] Still, the court recognized that the case might be different if Ramstein were also used to evaluate operational information.[972] As will be remembered from earlier in this study, there are good reasons

[966] OVG NRW (n 51) [252] – juris.

[967] For a critical appraisal of the judgement see Mehrdad Payandeh and Heiko Sauer, 'Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts' (2021) *NJW* 1570; Thilo Marauhn, Daniel Mengeler and Vera Strobel, 'Deutsche Außen- und Verteidigungspolitik vor dem BVerwG: Extraterritoriale grundrechtliche Schutzpflichten bei US-amerikanischen Drohneneinsätzen' (2021) 59 *AVR* 328.

[968] BVerwG, *Bin Jaber* (n 403) [50] – juris.

[969] ibid (this author's translation). In cases where the violation is the result of a sequence of events, it needs to be shown that at least some of these events having a relevant decisional character took place on German territory. Critical Marauhn, Mengeler and Strobel (n 967) 338, who consider it to be sufficient that the Federal Republic has granted the US the use of Ramstein Air Base (and therefore of its territory), thereby actively limiting its own control rights; concurring Payandeh and Sauer (n 967) 1571.

[970] BVerwG, *Bin Jaber* (n 403) [49] – juris (this author's translation).

[971] ibid [61] – juris. Concurring, albeit for different reasons, Herdegen in Maunz and Dürig (eds) (n 914) art 1(3) para 85, arguing that the relay of data is a 'causal contribution [to a violation of the right to life] of only minor importance'(this author's translation); Heinemann (n 965) 1582, who points out that the activities taking place on German territory are 'pretty neutral' (this author's translation); Dreist (n 403) 208. cf Thilo Marauhn, 'Sicherung grund- und menschenrechtlicher Standards gegenüber neuen Gefährdungen durch private und ausländische Akteur' in Hans C Röhl and others, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer – Band 74* (De Gruyter 2015) 392; Beinlich (n 584) 18; Marauhn, Mengeler and Strobel (n 967) 334-336. See also David Krebs, 'Extraterritoriale Schutzpflichten im Grundgesetz: Das BND-Urteil und die Debatte um ein „Lieferkettengesetz"' *Verfassungsblog* (4 June 2020) <https://verfassungsblog.de/globale-gefahren-und-nationale-pflichten/> accessed 31 March 2021, arguing that a genuine link exists whenever the event that gives rise to the violation ('Handlungsort') occurred on German territory, which he considers to be the case for the relay of data at Ramstein.

[972] BVerwG, *Bin Jaber* (n 403) [61] – juris.

to assume that this is indeed the case.[973] However, for reasons of administrative court procedure, the BVerwG did not decide on that aspect.[974]

Thus, and notwithstanding the fact that the BVerwG did not dispute the existence of a genuine link *per se*, the following analysis shall be effected in three steps. First, this study will outline and discuss the argumentative basis of the BVerwG's position (see aa) below), before examining it against the backdrop of the recent jurisprudence of the BVerfG on the extraterritorial application of the Basic Law (see bb) below). Following that, an alternative approach to identifying the existence of a genuine link will be presented, and its standards shall be used to determine whether such a link could be established in the present case (see cc) below).

aa) *Bin Jaber*

According to the BVerwG, the fact that the applicability of the Basic Law is not limited to the territory of the Federal Republic of Germany cannot be taken to mean that it must protect the fundamental rights of anyone anywhere in the world.[975] Two arguments are provided to support this view. First, to extend the Federal Republic's protective obligation that far would run contrary to the international law principle of non-interference. And secondly, such an interpretation would also be incompatible with the dogmatic concept of the Basic Law, which considers the obligation to respect fundamental rights to be a corollary of the legislative and executive authority of the Federal Republic.[976] At the outset, the court is certainly right in pointing out that the Federal Republic ought not to be held responsible for every single extraterritorial violation of fundamental rights that might only be remotely connected to it. However, while this author agrees that *some* sort of limiting factor must be introduced, neither argument justifies restricting the

[973] See § 2. Concurring ibid ('substantial indications'; this author's translation).

[974] In proceedings concerning an appeal on points of law, the court is not allowed to hear new evidence or find new facts that have not previously been established. Since the OVG NRW had already considered the relay of data to be sufficient to establish a genuine link with the German State, it had not addressed the question whether Ramstein Air Base is also used for the analysis of intelligence, see OVG NRW (n 51) [279]. Critical of the BVerwG's refusal Marauhn, Mengeler and Strobel (n 967) 345. Generally on the admissibility of new facts under the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*; VwGO) see Joachim Suerbaum in Herbert Posser and Heinricht A Wolff (eds), *Beck'scher Online-Kommentar VwGO* (56th edn, CH Beck 2021) s 137 paras 57 *et seqq*.

[975] BVerwG, *Bin Jaber* (n 403) [46] – juris.

[976] ibid. See also BVerfG, Decision of 30 January 2008 (2 BvR 793/07) K 13, 246 [19] – juris; Decision of 6 November 2019 (1 BvR 16/13) E 152, 152 [42]; *Ausland-Ausland-Aufklärung* (n 849) [89], [91] – juris; Isensee in idem and Kirchhof (eds), vol 9 (n 913) s 191 para 186; Heinemann (n 965) 1581.

extraterritorial application of the Basic Law to those cases where there is an activity with a relevant decisional character taking place on on German territory.

The first argument presented by the court deals with the principle of non-interference. As will be remembered, a specific expression thereof was already addressed in the context of an intervention in a foreign NIAC.[977] As a rule of customary international law, this principle prohibits the exercise of jurisdiction on the sovereign territory of another State unless such an interference is legitimized by the existence of genuine link, either personally or territorially, with the State claiming jurisdiction.[978] In the present case, however, a distinction must be made between the negative obligation not to interfere in the enjoyment of a fundamental right, and the positive obligation to actively protect it. Where the former case is concerned, to apply the Basic Law extraterritorially does not extend German sovereign authority to the territory of other States, but *limits* the scope of action of the executive.[979] This does not violate the principle of non-interference but instead furthers it. By contrast, things may lie differently with a positive duty to protect. To impose such a duty extraterritorially does not limit the executive's scope of action, but instead demands that the Federal Government actively protect a specific fundamental right on the territory of another State. While this might indeed interfere with the other State's sovereignty,[980] it need not always be the case. Especially in situations such as the present one, where the extraterritorial application of a fundamental duty to protect would mandate action only on *German* territory, the territorial integrity of other States would be left intact.[981]

The BVerwG's second argument relating to the dogmatic concept of the Basic Law is equally unconvincing. If the obligation of the Federal Republic of Germany to respect fundamental rights is a corollary of its legislative and executive authority, the question arises why a distinction should be made between activites that have a decisional

[977] See § 5 A. III.

[978] Marauhn (n 971) 378; Wolfgang Graf Vitzthum and Alexander Proelß, *Völkerrecht* (8th edn, De Gruyter 2019) 32 para 76.

[979] BVerfG, *Ausland-Ausland-Aufklärung* (n 849) [101] – juris.

[980] Benedikt Reinke, 'Rights reaching beyond Borders: A discussion of the BND-Judgment, dated 19 May 2020, 1 BvR 2835/17' *Verfassungsblog* (30 May 2020) <https://verfassungsblog.de/rights-reaching-beyond-borders/> accessed 31 March 2021.

[981] See also Marauhn, Mengeler and Strobel (n 967) 336, arguing that the principle of non-interference only prohibits a forceful interference in *domestic* matters of another State, but not working towards an observance of its *international* obligations.

character and those that do not in cases where there is no exercise of German State authority in the first place. The responsibility for an extraterritorial violation of the right to life in Pakistan or Yemen lies exclusively with the US, and its conduct is not attributable to the Federal Republic either.[982] This means that such a violation can never be linked to the German State on the grounds that there has been some sort of exercise of legislative or executive authority on its part. In fact, the only connection between the German State and a US drone strike in Africa and Central Asia is the territorial control exercised by it over the activity that caused – in the sense of factual causation – the damage.[983] However, this territorial control always remains the same, and to try to determine the extraterritorial applicability of the Basic Law based on whether or not the foreign activity taking place on German territory has a relevant decisional character is really to ask the wrong question.

bb) *Ausland-Ausland-Aufklärung*

The recent case law of the BVerfG raises further doubts as to whether the BVerwG's distinction between activities with a relevant decisional character and those whithout can be upheld.[984] In the so-called *Ausland-Ausland-Aufklärung* case, several journalists had challenged the constitutionality of several provisions of the Act on the Federal Intelligence Service (*Gesetz über den Bundesnachrichtendienst*), which allowed, *inter alia*, for strategic telecommunication surveillance of foreigners in other countries. The complainants argued that these provisions violated their fundamental right to the privacy of telecommunications and the freedom of the press.[985] Addressing the issue whether a foreigner living abroad could rely on the fundamental rights protection of the Basic Law, the court held that at least where the negative obligation not to interfere in the enjoyment of those rights is concerned, the applicability of the Basic Law does not depend on the

[982] On that aspect see BVerwG, *Bin Jaber* (n 403) [28]-[33] – juris; OVG NRW (n 51) [134]-[181] – juris.

[983] Similar Payandeh and Sauer (n 967) 1571; Marauhn, Mengeler and Strobel (n 967) 334 *et seq*. It is undeniable that this bears a certain resemblance to the customary no-harm rule, see § 6 B. I. 1).

[984] See also Marauhn, Mengeler and Strobel (n 967) 339.

[985] An English summary of the judgment is available at <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-037.html> accessed 31 March 2021. For a discussion see Helmut P Aust, 'Auslandsaufklärung durch den Bundesnachrichtendienst – Rechtsstaatliche Einhegung und grundrechtliche Bindungen im Lichte des Urteils des Bundesverfassungsgerichts zum BND-Gesetz' (2020) 16 *DÖV* 715.

existence of a genuine link to German territory.[986] This is not surprising. Where German authorities actively violate fundamental rights abroad, such violations will always be connected to the German State *qua* the exercise of sovereign authority.[987] While the BVerfG's conclusion is certainly not easily transferable to the area of positive obligations, ie, to situations where the German State has *failed* to exercise sovereign authority,[988] its dogmatic reasoning is of relevance also for the present case.[989]

In particular, the court has made it clear that '[t]he Basic Law's aim [is] to provide comprehensive fundamental rights protection and to place the individual at its centre'.[990] This suggests that fundamental rights as rights of the individual 'ought to provide protection whenever the German state acts and thus potentially creates a need for protection – irrespective of where, towards whom and in what manner it does so'.[991] Moreover, to extend the Basic Law's protection beyond the traditional borders of the Federal Republic corresponds to an expanded reach (*erweiterter Handlungsradius*) of German State authority.[992] States, including Germany, have increasingly acted outside their own territory, and to extend the application of the Basic Law to those cases ensures that 'the protection of fundamental rights keeps pace with an expansion of governmental activities into the international realm'.[993] A comprehensive obligation to respect fundamental rights abroad also takes due account of the fact that those rights might be threatened by new technical developments in a manner that was previously unknown, especially by developments that expand a State's reach into other countries.[994]

In light of these considerations, two arguments militate against the position taken by the BVerwG in the *Bin Jaber* case. For one thing, if it is the aim of the Basic Law to provide comprehensive protection of fundamental rights whenever it is needed, then the question whether such need has arisen in the individual case can only be decided with view to the substance of a specific event rather than its form (that is, whether or not it has

[986] BVerfG, *Ausland-Ausland-Aufklärung* (n 849) [88] *et seq* – juris.
[987] Krebs (n 971).
[988] ibid.
[989] The BVerfG indicated that its reasoning may, in principle, also apply to the positive obligation to protect fundamental rights, see BVerfG, *Ausland-Ausland*-Aufklärung (n 849) [104] – juris; Krebs (n 971).
[990] BVerfG, *Ausland-Ausland-Aufklärung* (n 849) [89] – juris (translation by the BVerfG, see n 985).
[991] ibid (translation by the BVerfG, see n 985).
[992] ibid [96] – juris.
[993] ibid (this author's translation).
[994] ibid [105] – juris. Similar BVerfGE 100, 313 (n 963) [175] – juris.

a relevant decisional character). As evidenced by the present case, even a mere technical operation without any decisional elements may play an important role in the violation of a fundamental right and may thus create the need for its protection. Moreover, the BVerfG has emphasised that the obligation to respect fundamental rights must not be outpaced by the technical developments of the modern age.[995] It is, however, these very developments that have made it possible to carry out targeted killings in another country half a world away. In fact, if it weren't for the technical advances which enable the US to remotely control a drone from the safety of its own territory, drones would have to be controlled directly from Ramstein Air Base itself.[996] In that case, there could be little doubt that the BVerwG's criterion of an activity having a relevant decisional character and taking place on German territory would be fulfilled.

cc) A More Inclusive Approach

In sum, it is this author's view that the criterion of a relevant decisional character is overly formalistic and does not adequately reflect the obligation of the Federal Republic to respect the fundamental rights of the Basic Law including on foreign territory.[997] Instead, and based on an understanding of the Basic Law that puts the individual at its centre, the key question to be asked is whether there is a *need for fundamental rights protection*. This is, in a sense, a value judgement that evidently cannot be answered by an abstract formula, but which will have to be made in the light of the circumstances of each individual case. In particular, attention will have to be given to the importance of the fundamental right at stake. Especially in cases where the right to life as one of the core values of the Basic Law and a prerequisite for the exercise of all other rights is at stake, a need for protection might readily arise. Moreover, one must also consider the overall significance of the activity taking place on German territory for the extraterritorial violation of that right. While this consideration might take into account whether the activity in question has a relevant decisional character, it is by no means determinative. Even an automatic process without any decisional elements may trigger the need for fundamental rights protection if it is a substantial or even an indispensable element of the violation. Finally, the *mens rea*

[995] This was also recognized by the Tallinn Manual, see § 6 B. I. 1) a).

[996] See BVerfG, *Ausland-Ausland-Aufklärung* (n 849) [109] – juris, which points out that the volatile flow of data through satellite and cable challenges traditional notions of territory and State borders.

[997] Concurring Marauhn, Mengeler and Strobel (n 967) 334-336.

of the Federal Republic of Germany may also play a role, including the question whether the occurrence of the extraterritorial violation of the fundamental right was reasonably foreseeable.[998]

Applying these criteria to the specific case at hand, two reasons, in particular, militate for the fact that the relay of data alone may be sufficient to satisfy the requirement of a genuine link.[999] The first reason is the supreme value of the right to life, wheras the second reason relates to the overall importance of the relay of data for the remote operation of US drones. As will be shown in greater detail later on, the US itself has pointed out that without the SATCOM relay station at Ramstein Air Base, drone strikes would not be possible.[1000] Thus, although the relay of data is only a technical transmission process without a relevant decisional character, it plays a substantial role in the violation of the right to life and might even be a *sine que non* of its occurence.[1001] Still, it is important to note that not all of the critera identified earlier in this section are indicative of the existence of a genuine link. In particular, there is no evidence that the Federal Republic actually intended for the right to life to be violated. If anything, as will be shown shortly, its engagement with the US so far has revealed a genuine intent to prevent such violations.[1002] And without wanting to anticipate the discussion whether a violation of the right to life was reasonably foreseeable, it shall be mentioned here that this may have been the case only under very limited circumstances.[1003]

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[998] Seemingly concurring Herdegen in Maunz and Dürig (eds) (n 914) art 1(3) para 85, who, on the question whether the Federal Republic might be obliged to protect the right to life against a violation by another State in the context of an armed conflict to which it is not party, argues that the protection of the Basic Law may be invoked only in exceptional circumstances, ie, in cases of '*foreseeable* and clear violations of IHL' or where German authorities 'participate *in a collusive manner* in the violation of basic and universal human rights' (this author's translation; emphasis added).

[999] See also Beinlich (n 584) 22; critical Herdegen in Maunz and Dürig (eds) (n 914) art 1(3) para 85, who argues that this would 'overstretch the territorial protection of German fundamental rights' (this author's translation) and would transform every foreseeable and internationally wrongful violation of the right to life by another State that is somehow linked to the use of German territory into a violation of the Basic Law.

[1000] See § 7 A. II.

[1001] Concurring Payandeh and Sauer (n 967) 1571; Monnheimer and Schäferling (n 57) 373; cf BVerwG, *Bin Jaber* (n 403) [50] – juris, which notes, without further explanation, that the fact that a violation could not be committed without the use of installations located on German territory is 'a necessary but not sufficient condition' for the existence of a genuine link (this author's translation).

[1002] See § 6 B. II. 4) c).

[1003] See § 7 B. II.

b) Material Scope

According to article 20(3) of the Basic Law, '[t]he legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice'.[1004] The term "law" not only refers to domestic law, but includes the general rules of international law, especially customary international law. This is provided for by article 25 of the Basic Law, which reads:

> The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.[1005]

Article 25 thus reflects what is commonly referred to as the general commitment of the Basic Law to international law (*Völkerrechtsfreundlichkeit des Grundgesetzes*).[1006] While this means that international law will also have to be observed in the context of domestic fundamental rights protection, not every general rule of international law may be relied on *vis-à-vis* the German State. Instead, an individual may do so only with respect to those rules that confer on him individual rights or protection.[1007] This includes, most importantly, the principle of distinction,[1008] the prohibition on indiscriminate attacks,[1009]

[1004] Translation by Tomuschat and others (n 912).

[1005] Translation by ibid.

[1006] This commitment crystalizes in three different obligations, namely (i) a negative obligation of the Federal Republic of Germany not to violate the applicable rules of general international law; (ii) a positive obligation to adopt a domestic legal framework that allows for remedying any violations of these rules by German State authority; and (iii) a positive obligation to assert international law whenever it is violated by another State within the area of German responsibility. See BVerfG, Decision of 31 March 1987 (2 BvM 2/86) E 75, 1 [42] – juris; Decision of 5 November 2003 (2 BvR 1506/03) E 109, 38 [46] – juris; Decision of 26 October 2004 (2 BvR 955/00 and others) E 112, 1 [90]-[97] – juris (*Alteigentümer*); BVerwG, Judgement of 24 July 2008 (4 A 3001/07) E 131, 316 [88] – juris; Ferdinand Wollenschläger in Horst Dreier (ed), *Grundgesetz-Kommentar*, vol 2 (3rd edn, Mohr Siebeck 2015) art 25 para 48; Herdegen in Maunz and Dürig (eds) (n 914) art 25 paras 7, 73 *et seq*. See also Thomas Giegerich, 'Can German Courts Effectively Enforce International Legal Limits on US Drone Strikes in Yemen?' (2019) 4 *ZEuS* 601, 608, who categorizes these obligations as an obligation to comply, an obligation to correct, and an obligation to implement.

[1007] BVerfG, 2 BvR 1371/13 (n 913) [35] – juris; BVerwGE 154, 328 (n 581) [42] *et seq*– juris; Herdegen in Maunz and Dürig (eds) (n 914) art 25 paras 85 *et seqq*; Doris König in von Mangoldt, Klein and Starck (eds), vol 1 (n 915) art 25 paras 57–62; Wollenschläger in Dreier (ed), vol 2 (n 1006) art 25 paras 34-36. See also BVerfG, *Alteigentümer* (n 1006) [81] – juris and 2 BvR 1371/13 (n 913) [36] – juris, speaking of rules which are closely connected to individual rights of superior importance; similar OVG NRW (n 51) [210], [216] – juris.

[1008] BVerwGE 154, 328 (n 581) [46] *et seq* – juris; OVG NRW (n 51) [216]; Herdegen in Maunz and Dürig (eds) (n 914) art 25 paras 89-91.

[1009] On the customary prohibition of indiscriminate attacks see AP I, art 51(4); Henckaerts and Doswald-Beck (n 227) 37-43 (Rule 11 and 12).

and the general obligation not to arbitrarily deprive anyone of his right to life under customary international law.[1010] The *ius ad bellum*, however, purports to protect not the rights of an individual, but of the State itself.[1011] In the present case, this means that protection under article 2(2)(1) of the Basic Law cannot be demanded on the grounds that US drone strikes in Pakistan have violated the inter-State prohibition on the use of force and are therefore internationally wrongful.[1012] As concerns a violation of the duty to conduct an effective investigation, the picture is mixed.[1013] While such a duty certainly intends to protect the right of the victim's next of kin to an effective remedy, reliance is doubtful at least in those cases where a violation has not yet occurred but is only threatened.[1014]

The *ratione materiæ* of fundamental rights protection had also been at issue in the *Bin Jaber* case. It was, however, not so much the issue of the international wrongfulness of US drone strikes that caused major controversy among the courts. Instead, it revolved around the question whether German courts are entitled to fully review the executive's assessment that US drone strikes *do not* violate international law. To lay the ground for a discussion of the issue, this study will first have to outline the general circumstances under which judicial review might be limited (see aa) below). Following that, it will address two judgements of the BVerfG on the topic – *Rudolf Heß* and *Brücke von Varvarin* – which are of particular relevance for the present case (see bb) below), before discussing whether a limitation on the standard of judicial review might be justified in the present case (see cc) below).

aa) Limited Judicial Review

In general, the constitutional principle of effective legal protection demands that the judiciary's review of a public measure is thorough both in factual and in legal terms.[1015] In particular, a court may not stop at examining whether domestic law was correctly

[1010] OVG NRW (n 51) [216]; König in von Mangoldt, Klein and Starck (eds), vol 1 (n 915) art 25 para 68; Rudolf Streinz in Michael Sachs (ed), *Grundgesetz* (9th edn, CH Beck 2021) art 25 para 68; Helmut P Aust in Ingo von Münch and Philip Kunig, *Grundgesetz*, vol 1 (7th edn, CH Beck 2021) art 25 para 72.

[1011] BVerfG, 2 BvR 1371/13 (n 913) [37] – juris; Aust in von Münch and Kunig (eds) (n 1010) art 25 paras 56 *et seq*. cf Deiseroth (n 326) 991, 993.

[1012] See § 5 B. IV.

[1013] See § 5 B. III.

[1014] Critical also Beinlich (n 584) 18, who argues that a violation of the duty to investigate does not necessarily involve Ramstein Air Base and is therefore only indirectly linked to German territory.

[1015] See Basic Law, art 19(4).

applied, but it must also assess whether public authorities complied with international law.[1016] However, under very exceptional circumstances, judicial review might limited to the effect that a court may only examine whether the measures in question contained manifest errors.[1017] While such limitations on judicial review may, within certain boundaries, be imposed by law,[1018] little is certain beyond that. Absent a formal decision by the German legislator, the BVerfG has made it clear that such a limitation of the standard of full judicial review may only be considered, *if at all*,

> for areas where there are undefined legal terms which, owing to the high complexity or special dynamic of the matter at issue, are so vague and, in the context of a review of an administrative decision, the interpretation of which is so difficult that judicial scrutiny thereof would touch upon the functional limits of the judiciary.[1019]

In fact, there seems to be broad support for the notion that a full judicial review of political decisions made in the area of foreign affairs, as well as of decisions made in the area of defence policy would touch upon the functional limits of the judiciary.[1020] In the *Bin Jaber* case, however, the court of first instance and the BVerwG held the view that a limitation on judicial review should also apply when examining the validity of the executive's

[1016] See BVerfG, Decision of 31 May 2011 (1 BvR 857/07) E 129, 1 [68] – juris; Decision of 13 August 2013 (2 BvR 2260/06 and others) [53] – juris (*Brücke von Varvarin*); Decision of 23 October 2018 (1 BvR 2523/13 and others) E 149, 407 [19] – juris; Schulze-Fielitz in Dreier (ed), vol 1 (n 915) art 19(4) para 116; Eberhard Schmidt-Aßmann in Maunz and Dürig (eds) (n 914) art 19(4) para 183.

[1017] In detail see Michael Sachs in Paul Stelkens, Heinz J Bonk and Michael Sachs, *Verwaltungsverfahrensgesetz* (9th edn, CH Beck 2018) s 40 paras 220 *et seqq*.

[1018] See BVerfGE 129, 1 (n 1016) [73] *et seq* – juris; *Brücke von Varvarin* (n 1016) [54] – juris. See also Schulze-Fielitz in Dreier (ed), vol 1 (n 915) art 19(4) para 125 *et seqq*; Martin Nettesheim in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, vol 11 (3rd edn, CF Müller 2013) s 241 para 24; Schmidt-Aßmann in Maunz and Dürig (eds) (n 914) art 19(4) paras 184a *et seq*; Michael Sachs in idem (ed) (n 1010) art 19 para 132.

[1019] BVerfG, *Brücke von Varvarin* (n 1016) [54] – juris (this author's translation). See also BVerfG, Decision of 17 April 1991 (1 BvR 419/81 and others) E 84, 34 [48] – juris; E 129, 1 (n 1016) [76] – juris; Jarass in idem and Pieroth (n 962) art 19 para 73. Critical Schmidt-Aßmann in Maunz and Dürig (eds) (n 914) art 19(4) paras 185, 185c, who points out that since full judicial review is the rule, this exception would have to be construed narrowly; similar Peter M Huber in von Mangoldt, Klein and Starck (eds), vol 1 (n 915) art 19 para 516.

[1020] See BVerfG, Decision of 7 July 1975 (1 BvR 274/72 and others) E 40, 141 [121] – juris; Judgement of 18 December 1984 (2 BvE 13/83) E 68, 1 [171] – juris; Judgement of 7 May 2008 (2 BvE 1/03) E 121, 135 [65], [82] – juris; *Brücke von Varvarin* (n 1016) [54] – juris; Decision of 13 October 2016 (2 BvE 2/15) E 143, 101 [169] *et seq* – juris. See also BVerfGE 40, 141 (n 1020) [121] – juris, regarding the negotiation and conclusion of international treaties; BGH, Judgement of 27 May 1993 (III ZR 59/92) [29], [32] – juris, regarding military flights in low-altitude exercises.

assessment regarding the international lawfulness of the actions of another State.[1021] In these cases, a court should only be allowed to examine whether the position taken by the executive is legally acceptable (*Vertretbarkeitskontrolle*).[1022]

bb) *Rudolf Heß* and *Brücke von Varvarin*

To support their view, the courts drew upon the BVerfG's jurisprudence in its *Rudolf Heß* case.[1023] Heß, a high ranking official in Nazi Germany, had been tried by the occupying powers as part of the Nuremberg trials and sentenced to life in prison for crimes against peace. After more than 30 years in prison and due to his degrading health, he filed several petitions for his release, none of which were successful. While the German Federal Government also tried to effect his release, it did so only on humanitarian grounds. When Heß demanded that it challenge his imprisonment on legal grounds, the Federal Government refused. As his trial and sentence had been based on measures imposed by the occupying powers, it did not consider having jurisdiction over the matter.[1024] When Heß challenged this assessment in court, the BVerfG refused to question it. Instead, the court emphasised that *even if* it were to consider the legal opinion held by the Federal Government to be incorrect in (international) law, this would not automatically mean that the government's assessment was erroneous.[1025] Because international law does not provide for a legally binding mechanism to resolve disputes about its correct interpretation, greater weight must be ascribed to a State's legal opinion on the international level than would be the case on the domestic level, where domestic courts have the power to decide on the correct interpretation of the law in a manner that is legally binding even upon the State. For that reason, 'it is of considerable importance for safeguarding the interest of the Federal Republic of Germany that on the international level, it is able to speak with one voice, namely that of the competent authorities of foreign

[1021] BVerwG, *Bin Jaber* (n 403) [15], [55]-[59] – juris; VG Köln, *Bin Jaber* (n 917) [76]-[80] – juris. Balancing Deiseroth (n 326) 994; critical Marauhn, Mengeler and Strobel (n 967) 342 ('hard to sustain'; this author's translation).

[1022] BVerwG, *Bin Jaber* (n 403) [15] – juris; VG Köln, *Bin Jaber* (n 917) [80] – juris.

[1023] BVerwG, *Bin Jaber* (n 403) [57] *et seq*. See BVerfG, *Anti-IS-Einsatz* (n 690) [46] – juris, regarding the standard of judicial review applicable to an interpretation of the rights and duties of the UN Charter. Note, however, that this case involved a formal decision of the legislator, namely in the form of the consent act to the UN Charter. See also Beinlich (n 584) 17 fn 58; Heinemann (n 965) 1581 and fn 14. For a similar case see BVerfG, Judgement of 3 July 2007 (2 BvE 2/07) E 118, 244 [66]-[68] – juris.

[1024] BVerfG, Decision of 16 December 1980 (2 BvR 419/80) E 55, 349 [1]-[24] – juris (*Rudolf Heß*).

[1025] ibid [40] – juris.

affairs'.[1026] Domestic courts should thus exercise 'greatest restraint'[1027] in finding that the legal opinion held by these authorities does not reflect the correct interpretation of international law and is therefore erroneous.[1028] An exception should only be made in those cases where the position of the competent authorities is arbitrary in nature, ie, where it is not supported by any reasonable considerations whatsoever.[1029]

This jurisprudence has remained heavily disputed.[1030] Several scholars have argued that the court's position is incompatible with the fundamental guarantee of effective judicial protection under the Basic Law.[1031] And even though *Rudolf Heß* was never explicitly overruled, the BVerfG itself subsequently seemed to limit it in its so-called *Brücke von Varvarin* case.[1032] The case concerned a NATO air strike that had been carried out in the context of the Kosovo conflict and which had targeted a bridge leading to the Serbian city of Varvarin. While the attack succeeded in destroying the bridge, it also killed ten civilians and wounded 30 more. Following the attack, relatives of the deceased sought damages from the Federal Republic. Although German fighter aircraft had not been involved in the operation, the claimants argued, *inter alia*, that it should nonetheless be held responsible for the damage since it had failed to veto the designation of the bridge as a military target within the meaning of article 52(2)(2) of the AP I.[1033] Their claims were dismissed in first, second and third instance. In particular, the courts argued that the Federal Governement's decision not to exercise its veto right had been a

[1026] ibid (this author's translation).
[1027] ibid (this author's translation).
[1028] Critical Martin Nettesheim in Isensee and Kirchhof (eds), vol 11 (n 1018) s 241 para 29.
[1029] BVerfG, *Rudolf Heß* (n 1024) [40] – juris.
[1030] eg Anatol Dutta, 'Amtshaftung wegen Völkerrechtsverstößen bei bewaffneten Auslandseinsätzen deutscher Streitkräfte' (2008) 133 *AöR* 191, 224; Martin Nettesheim in Isensee and Kirchhof (eds), vol 11 (n 1018) s 241 para 24; Helmut P Aust, 'US-Drohneneinsätze und die grundrechtliche Schutzpflicht für das Recht auf Leben: „German exceptionalism"?' (2020) 6 *JZ* 303, 308 *et seq*, 311; Beinlich (n 584) 16. cf Heinemann (n 965) 1581 *et seq*; Thomas Jacob, 'Drohneneinsatz der US-Streitkräfte im Jemen: Keine unbegrenzte Verantwortung Deutschlands für extraterritoriale Sachverhalte' (2021) *jM* 205, 208.
[1031] Dutta (n 1030) 224; Nettesheim in Isensee and Kirchhof (eds), vol 11 (n 1018) s 241 para 24; Aust, 'US-Drohneneinsätze' (n 1030) 308 *et seq*, 311 ('difficult to sustain'; this author's translation); Beinlich (n 584) 16. cf Heinemann (n 965) 1581 *et seq*.
[1032] Giegerich (n 1006) 613, who remarks that the BVerfG 'tacitly abandoned or at least restricted' its previous jurisprudence and that the intensity of review seems to depend on the importance of the individual rights at stake; similar Schulze-Fielitz in Dreier (ed), vol 1 (n 915) art 19(4) para 131. See also Nettesheim in Isensee and Kirchhof (eds), vol 11 (n 1018) s 241 para 39.
[1033] Article 52(2)(2) of the AP I reads: 'In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.

decision in the field of foreign and defence policy and as such was subject only to limited judicial review.[1034] The BVerfG, on the other hand, rejected this argument. According to the court, neither the (non-) exercise of the veto right nor the qualification of a particular object as a military target was a political decision and as such beyond judicial control.[1035] Although international law uses undefined legal terms to describe what exactly constitutes a legitimate military target, the BVerfG considered that the interpretation of these terms and their application *in concreto* could be scrutinized on the basis of objective criteria in factual as well as in legal terms, and that neither touches upon the functional limits of the jurisprudence.[1036]

cc) Discussion

Although *Brücke von Varvarin* does not directly deal with the question whether the executive should be granted a margin of discretion when assessing the international lawfulness of the actions of another State,[1037] it implicitly rejects some of the key arguments that seem to support such a notion. In particular, the fact that international law does not provide for a binding mechanism to determine its correct interpretation did not prevent the BVerfG from explicitly rejecting such a margin of discretion regarding the question what exactly constitutes a legitimate military objective in armed conflict.[1038] By extension, if domestic courts must undertake their own assessment of what exactly constitutes such a target and may thus deviate from the interpretation put forward by the executive, then this leaves little room to argue that on the international level, the Federal Republic of Germany must be allowed to speak with one voice. In fact, the idea that a court may not challenge the executive's assessment of international law as it might weaken the position of the Federal Government *vis-à-vis* another sovereign State disregards that virtually every judicial decision in the field of international law might have

[1034] See BVerfG, *Brücke von Varvarin* (n 1016) [1]-[15] – juris. For a discussion of the judgement see Klaus F Gärditz, 'Bridge of Varvarin' (2014) 108 *AJIL* 86.

[1035] BVerfG, *Brücke von Varvarin* (n 1016) [55] – juris.

[1036] ibid; Niclas von Woedtke, *Die Verantwortlichkeit Deutschlands für seine Streitkräfte im Auslandseinsatz und die sich daraus ergebenden Schadensersatzansprüche von Einzelpersonen als Opfer deutscher Militärhandlungen* (Dunker & Humblot 2010) 335 *et seq*; Dutta (n 1030) 225. See also Gärditz (n 1034) 90, 92, who calls the court's decision 'surprising' and its standards 'bold'.

[1037] See BVerwG, *Bin Jaber* (n 403) [59] – juris.

[1038] See Beinlich (n 584) 16 fn 56, who argues that it is precisely because international law does not provide for a binding mechanism to determine the correct interpretation that its development depends, *inter alia*, on the way it is interpreted and applied by domestic courts; concurring Aust, 'US-Drohneneinsätze' (n 1030) 308; Payandeh and Sauer (n 967) 1573 *et seq*. cf Gärditz (n 1034) 92.

such an effect.[1039] However, to limit judicial control to the few cases where the view held by the executive is arbitrary would frustrate judicial protection for the whole area of international law. Notwithstanding the fact that such a limitation could not even be imposed formally by law,[1040] it would render article 25 of the Basic Law obsolete.[1041]

As concerns the concrete case at hand, if the designation of a particular object as a legitimate military target is no political decision, then it is difficult to see why this should be any different where the character of an individual as a legitimate military target under the *ius in bello* or IHRL is concerned.[1042] Although the interpretation and application of the rules governing the use of lethal force in and outside the context of an armed conflict is certainly no easy task, the question who may legitimately be deprived of his right to life is neither political in nature nor does it touch upon the functional limits of the jurisprudence.[1043] For domestic courts, the consequence is twofold. On the one hand, they must not overly defer to the executive by limiting the scope of their review to one of legal acceptability. On the other, they need to take account of the different interpretations of international law and may not unduly restrict the government's ability to contribute to its development on the international level. This is certainly a balancing act. *De lege lata*, however, a general limitation on the standard of judicial review when assessing the validity of the executive's assessment regarding the international lawfulness of the actions of another State finds no support in German constitutional law.

c) Temporal Scope

It is generally accepted that an individual need not wait until his right to life and physical integrity has actually been violated to be able to invoke the protection of article 2(2)(1) of the Basic Law *vis-à-vis* the German State. Instead, he may already do so in situations

[1039] Dutta (n 1030) 226. Critical also Payandeh and Sauer (n 967) 1574; Marauhn, Mengeler and Strobel (n 967) 334, who argue that the Federal Government's participation in the development of international law must not prejudice existing obligations under IHRL and IHL *vis-à-vis* the civilian population; concurring Monnheimer and Schäferling (n 57) 375.

[1040] BVerfGE 129, 1 (n 1016) [75] – juris.

[1041] Dutta (n 1030) 226; Nettesheim in Isensee and Kirchhof (eds), vol 11 (n 1018) s 241 para 39; Payandeh and Sauer (n 967) 1573.

[1042] Concurring Marauhn, Mengeler and Strobel (n 967) 343.

[1043] OVG NRW (n 51) [561] – juris; Beinlich (n 584) 22, who, alluding to the political question doctrine under US law, remarks that German constitutional law does not know a "difficult question doctrine"; Marauhn, Mengeler and Strobel (n 967) 350. cf Aust, 'US-Drohneneinsätze' (n 1030) 306 *et seq*, 309; BVerwG, *Bin Jaber* (n 403) [79] – juris.

where there is a mere risk of a violation, provided that the risk is real or serious.[1044] Which likelihood of such harm occurring is required will depend on the specific circumstances of each individual case. In particular, an assessment will have to consider the importance of the right to life as a key value of the Basic Law and a prerequisite for the exercise of all other rights; the nature and extent of a possible violation; and whether the damage incurred as a result thereof would be irreversible.[1045]

In the *Bin Jaber* case, the courts of second and third instance debated fiercely over whether the right of the Yemeni plaintiffs was sufficiently at risk of being violated by an internationally unlawful drone strike.[1046] While both courts seemed to agree that such a forward-looking assessment required to show that the US had in the past violated the *ius in bello* on a continuing or regular basis rather than just in individual cases,[1047] their approaches to resolving this question were fundamentally different. The OVG NRW found there to be '[s]ubstantial indications known or at least obvious to the [Federal Republic of Germany] which suggest that (…) [US drone strikes in Yemen] at least partly violate international law'.[1048] For the court, it was seriously doubtful

> whether the general practice of US drone strikes in Yemen complies with the international humanitarian law principle of distinction, in particular whether targeted attacks are restricted to those individuals who, as members of a party to the conflict, fulfil a continuous combat function or who, as civilians, directly participate in hostilities.[1049]

[1044] BVerfG, Decision of 19 June 1979 (2 BvR 1060/78) E 51, 324 [71]-[74] – juris; Decision of 16 December 1983 (2 BvR 1160/83 and others) E 66, 39 [43] *et seq* – juris; Philip Kunig and Jörn A Kämmerer in von Münch and Kunig (eds), vol 1 (n 1010) art 2 para 101; Jarass in idem and Pieroth (eds) (n 962) art 2 para 89.

[1045] See BVerfG, Decision of 8 August 1978 (2 BvL 8/77) E 49, 89 [117] – juris; Decision of 29 July 2009 (1 BvR 1606/08) K 16, 86 [10] – juris; Helmuth Schulze-Fielitz in Dreier (ed), vol 1 (n 915) art 2(2) para 43; Stephan Rixen in Sachs (ed) (n 1010) art 2 paras 176-179.

[1046] See also Heinemann (n 965) 1581; Beinlich (n 584) 18 *et seq*; Vera Strobel, 'Kein Schutzanspruch gegen Drohnenangriffe? Das Urteil des BVerwG zu US-Drohneneinsätzen im Jemen mittels Ramstein' *PRIF Blog* (11 December 2020) <https://blog.prif.org/2020/12/11/kein-schutzanspruch-gegen-drohnenangriffe-das-urteil-des-bverwg-zu-us-drohneneinsaetzen-im-jemen-mittels-ramstein/> accessed 8 April 2021.

[1047] BVerwG, *Bin Jaber* (n 403) [51] – juris; OVG NRW (n 51) [426] *et seq* – juris. cf Marauhn, Mengeler and Strobel (n 967) 341, who consider this to be too strict a standard.

[1048] OVG NRW (n 51) [226] – juris (this author's translation).

[1049] ibid [456] – juris (this author's translation).

To reach this conclusion, the court primarily drew upon statements made by high-ranking US government officials, making reference only to a handful of reports of individual drone strikes where a civilian had allegedly been made the object of the attack. The BVerwG, on the other hand, held the view that the question whether there have been continuing or regular violations of IHL could only be anwered on the basis of an overall assessment of individual operations rather than by 'abstract reference to official statements made by the US'.[1050] Although it did not dispute that some of the sources cited by the OVG NRW could indeed allow for such a conclusion, it criticized that the court had failed to form its own conviction as to whether the information contained therein was actually true.[1051]

Before the issue is addressed whether the right to life of an individual living in Pakistan or Yemen is sufficiently at risk of being violated by an internationally unlawful drone strike, a clarification regarding the relationship between the *ratione temporis* of fundamental rights protection and complicit responsibility under article 16 of the ARSIWA is warranted. As will be recalled, complicity is only possible if an internationally wrongful act is actually committed. In that case, however, the question whether the threat to the right to life is sufficiently serious does not arise in the first place. But this does not mean that there is no relationship between State responsibility for complicity and the *ratione temporis* of fundamental rights protection at all. As will be shown later in this study, for complicit responsibility to arise it needs to be established that the assisting State's contribution has made at least some difference in the commission of the principal wrongful act.[1052] Article 16 of the ARSIWA thus establishes a chronological order to the effect that aid or assistance must be provided *before* the act, not after or concurrently with it. In cases of aiding or assisting through omission, this means that the duty to protect must have arisen *prior* to the actual violation of the right to life. And such a duty cannot exist in the absence of a sufficiently serious risk to the right to life.

[1050] BVerwG, *Bin Jaber* (n 403) [63] – juris (this author's translation). Overall cirtical Marauhn, Mengeler and Strobel (n 967) 340.
[1051] BVerwG, *Bin Jaber* (n 403) [65] – juris.
[1052] See § 7 A.

Turning to the question whether the right to life of an individual living in Pakistan or Yemen is sufficiently at risk of being violated, the analysis is complicated by the uncertainties identified in the chapter on the existence of an internationally wrongful act.[1053] Although this study has identified several attacks where the principle of distinction was presumably violated intentionally, those cases represent only a tiny fraction of all alleged US drone strikes since 2008. In fact, the general lack of transparency on part of the US makes an overall assessment of individual operations – as required by the BVerwG – practically impossible.[1054] Thus, it is this author's view that the existence of a sufficiently serious risk cannot be determined exclusively by reference to individual operations. Instead, the supreme value of the right to life and the fact that a violation would be irreversible militate for an approach that looks at all the information in the round, of which the US' past conduct is part.[1055] However, such conduct is just one indicator as to its future behaviour and not necessarily determinative. In particular, one must also take into consideration the nature of the conflict in which US targeted killings are carried out, and what is its general policy on the use of lethal force abroad.

Applying this approach to the concrete case at hand, there are significant reasons to assume that the right to life of an individual in Pakistan in Yemen was sufficiently at risk of being violated by an internationally unlawful drone strike.[1056] As was shown earlier in this study, the US' policy allows for the killing of individuals who would be considered civilians under IHL or who do not pose an imminent threat for which the use of lethal force would be justified under the law enforcement standard.[1057] In practice, individuals have even been targeted for the mere reason of being a military age male, which puts the right to life of every such male at risk *per se*.[1058] Moreover, in Pakistan, up to 70 per cent of all drone strikes have been found to have taken place in the law

[1053] See § 5 B.

[1054] Although the BVerwG recognized the issue, it held the view that in such a case the general principle of *actori incumbit onus probandi* ('The (burden of) proving weighs on the plaintiff'; translation by Fellmeth and Horwitz (n 170) 13) would have to apply, see BVerwG, *Bin Jaber* (n 403) [65] – juris. On situations of evidentiary difficulties in German administrative procedural law see BVerfG, Decision of 11 December 1990 (1 BvR 1170/90 and others) E 83, 162 [34] – juris; BVerwG, Judgement of 30 October 2013 (6 C 22.12) [18] – juris.

[1055] Similar Payandeh and Sauer (n 967) 1572, arguing that a "pattern" of violations need not be established; Marauhn, Mengeler and Strobel (n 967) 341.

[1056] Concurring OVG NRW (n 51) [531] – juris; see also BVerfGE 39, 1 (n 913) [153] – juris; Judgement of 15 February 2006 (1 BvR 357/05) E 115, 118 [117] – juris (*Luftsicherheitsgesetz*).

[1057] See § 5 B. I. 3) a) and § 5 B. II. 1).

[1058] See § 5 B. III. 3) a).

enforcement context, where the use of force is almost never likely to be legal. And even though it cannot be said with absolute certainty that those attacks were indeed internationally unlawful, it has to be remembered that a deprivation of life occurring outside the context of an armed conflict is presumed to be arbitrary.

However, this duty to protect the right to life against a potential future violation does not persist indefinitely. Once the likelihood of the harm occurring falls below the required threshold with certain permanence (or once the risk materializes), the protective obligation of the German State will cease. For the purposes of the present case, this means that with Pakistan, the duty to protect was extinguished by the end of 2016, when drone strikes had let up almost completely.[1059] With Yemen, things are different. Although the number of drone strikes decreased substantially after 2012, they remained stable at a high level in the years that followed. And after US President Donald Trump took office in January 2017, numbers even started to increase again. Under those circumstances, it can reasonably be assumed that the threat to the right to life had at no time diminished to a point where the Federal Republic of Germany was no longer under an obligation to protect it.[1060]

4) Failure to Act

While the Basic Law mandates that certain fundamental rights must be protected, it does not dictate *how* this protection is to be achieved.[1061] Instead, it is for the executive to decide how to best comply with its fundamental obligations, and according to the settled jurisprudence of the BVerfG, those decisions are subject only to limited judicial review.[1062] A domestic court may find a violation of a duty to act only in cases where public authorities have remained completely passive; where their actions were wholly unsuitable or manifestly inadequate (*gänzlich ungeeignet oder völlig unzulänglich*) to achieve the desired result; where the adopted course of action fell significantly short of

[1059] See § 3 A.

[1060] There have been signs that as of 2019, the threat to the right to life might have fallen below the requisite threshold.

[1061] BVerfG, Decision of 29 October 1987 (2 BvR 624/83 and others) E 77, 170 [101] – juris (*C-Waffen-Einsatz*); Decision of 6 May 1997 (1 BvR 409/90) E 96, 56 [29] – juris.

[1062] BVerfGE 39, 1 (n 913) [157] – juris; *C-Waffen-Einsatz* (n 1061) [101] – juris; *Luftsicherheitsgesetz* (n 1056) [137] – juris; *Schloss Bensberg* (n 913) [38] – juris; Judgement of 1 December 2009 (1 BvR 2857/07 and others) E 125, 39 [135] – juris; Jarass in idem and Pieroth (eds) (n 962) art 2 para 92; Dreier in idem (ed), vol 1 (n 915) pre art 1 para 103. Critical of the OVG NRW in that regard Aust, 'US-Drohneneinsätze' (n 1030) 311.

the required level of protection; or where the authorities' decision was based on an insufficient investigation of the facts or on unjustifiable assessments.[1063]

Regarding the involvement of Ramstein Air Base in US counterterrorism operations, the Federal Government has relied on two different measures to discharge its duty to protect, the effectiveness of which was heavily disputed among the courts of the *Bin Jaber* case. Fore one thing, it has repeatedly reminded the US that all activities at Ramstein Air Base must respect German law and, by extension, also international law. The US, in turn, has assured it time after time that drones are neither flown nor piloted (*weder gestartet noch gesteuert*) from Ramstein, and that none of its activities violate the applicable law. Moreover, it has engaged 'in a regular and trustful exchange with its US partners on the political, military, and legal issues arising in connection with US forces stationed in Germany'.[1064] The OVG NRW, however, found neither to be sufficient. Instead, it held the view that the Federal Government had already failed to investigate and to assess whether US counterterrorism operations complied with international law, which is why none of the aforementioned measures could discharge the duty to protect in the first place.[1065] In the following, this latter issue shall be addressed first (see a) below), before this study turns to examine whether the duty to protect was successfully discharged by the obtention of an assertion of compliance (see b) below) and / or by the diplomatic and political consultations with the US (see c) below).

a) No Assessment of the Law

Since mid-2013, a multitude of parliamentary questions (*Kleine Anfragen*) and written questions (*Schriftliche Fragen*) lodged by members of the German Parliament have addressed the role of Ramstein Air Base.[1066] Over the years, the response of the German Federal Government has remained more or less the same, namely that it has reminded the

[1063] BVerfG, Judgement of 28 May 1993 (2 BvF 2/90 and others) E 88, 203 [166] – juris; Judgement of 10 January 1995 (1 BvF 1/90 and others) E 92, 26 [74] – juris; *C-Waffen-Einsatz* (n 1061) [101] – juris; *Schloss Bensberg* (n 913) [38] – juris; 2 BvR 1371/13 (n 913) [45] – juris; Schulze-Fielitz in Dreier (ed), vol 1 (n 915) art 2(2) paras 86, 89; Hans-Jürgen Papier and Foroud Shirvani in Maunz and Dürig (eds) (n 914) art 14 para 133; Jarass in idem and Pieroth (eds) (n 962) pre art 1 para 57; Kunig and Kämmerer in von Münch and Kunig (eds), vol 1 (n 1010) art 2 para 102. See also Nettesheim in Isensee and Kirchhof (eds), vol 11 (n 1018) s 241 para 69.

[1064] Deutscher Bundestag, BT-Drs 19/2318 (n 51) 4 (this author's translation).

[1065] OVG NRW (n 51) [551] – juris.

[1066] See Deutscher Bundestag, BT-Drs 17/13381 (n 60) 7; 'Zur Rolle des in Deutschland stationierten United States Africa Command bei gezielten Tötungen durch US-Streitkräfte in Afrika' (18 July 2013) BT-Drs 17/14401.

US that all activities at Ramstein Air Base must respect German and international law; that the US has explained that drones are neither flown nor piloted from Ramstein, and that it has assured that all of its activities comply with the applicable law;[1067] and that it has seen no reason to question the US' assessment.[1068]

The OVG NRW, however, not only considered this position to be incorrect in law,[1069] but also criticized that it was apparently 'not based on a factual and legal assessment undertaken by the German Federal Government itself'.[1070] For the court, this followed from the fact that whenever the Federal Government had been asked about its own legal position, it had always avoided the issue. For example, although the Federal Government claimed that it '[had] been dealing with the legal issues raised by the operation of UAV for quite some' and that it was 'discussing these issues (…) with its partners on a regular basis',[1071] it never revealed the results of its assessment.[1072] Instead, it emphasised the 'longstanding and trustful cooperation with the US',[1073] and that the US as a State governed by the rule of law 'has a broad institutional tradition of respecting and

[1067] eg idem, BT-Drs 17/14401 (n 1066) 5; BT-Drs 18/237 (n 709) 4, 10-12; 'Gezielte Tötung deutscher Staatsbürger oder aus Deutschland ausgereister Ausländer durch US-Drohnen sowie die mögliche Verwicklung deutscher Behörden in „gezielte Tötungen"' (24 April 2014) BT-Drs 18/1214, 5; 'Antwort der Staatssekretärin Cornelia Rogall-Grothe auf die Schriftliche Frage der Abgeordneten Sevim Dağdelen' (8 April 2015) BT-Drs 18/4642, 41; Plenarprotokoll 18/205 (n 80) 20453-20455 (Statement of Ralf Brauksiepe); BT-Drs 19/2318 (n 51) 4; 'Verantwortung der Bundesregierung für die Einhaltung des Völkerrechts im US-amerikanischen Drohnenkrieg im Jemen' (27 May 2019) BT-Drs 19/10477, 2.

[1068] eg idem, BT-Drs 18/237 (n 709) 10-12; Plenarprotokoll 18/99 (n 709); BT-Drs 18/11023 (n 709) 1, 3; BT-Drs 19/2318 (n 51) 5; 'Antwort des Staatsministers Niels Annen auf die Schriftliche Frage der Abgeordneten Canan Bayram' (15 June 2018) BT-Drs 19/2766, 45. See also NSA Inquiry Committee Report (n 59) 1176 *et seq*.

[1069] OVG NRW (n 51) [551] – juris.

[1070] ibid [564] – juris (this author's translation).

[1071] Deutscher Bundestag, BT-Drs 18/11023 (n 709) 7 (this author's translation). See also idem, BT-Drs 19/2318 (n 51) 4 *et seq*.

[1072] OVG NRW (n 51) [564] – juris.

[1073] Deutscher Bundestag, BT-Drs 18/11023 (n 709) 7 (this author's translation). Similar idem, BT-Drs 17/14401 (n 1066) 5; 'Antwort der Staatsministerin Maria Böhmer auf die Schriftliche Frage des Abgeordneten Niema Movassat' (29 April 2014) BT-Drs 18/1294, 4; 'Einstellung von Prüfvorgängen der Bundesanwaltschaft zur gezielten Tötung von deutschen Staatsangehörigen durch US-Kampfdrohnen' (5 May 2014) BT-Drs 18/1318, 4; 'Antwort der Staatsministerin Maria Böhmer auf die Schriftliche Frage des Abgeordneten Niema Movassat' (15 July 2014) BT-Drs 18/2145, 5; 'Die Rolle des United Staates Africa Commands und der US-Militärbasis in Ramstein für US-Drohnenangriffe' (8 October 2014) BT-Drs 18/2794, 4; Plenarprotokoll 18/99 (n 709) 9434 *et seq*; 'Stenografischer Bericht der 178. Sitzung' (22 June 2016) Plenarprotokoll 18/178, 17564 (Statement of Michael Roth); BT-Drs 19/2318 (n 51) 4; BT-Drs 19/2766 (n 1068) 45; 'Stenografischer Bericht der 91. Sitzung' (3 April 2019) Plenarprotokoll 19/91, 10865 (Statement of Niels Annen); 'Stenografischer Bericht der 223. Sitzung' (21 April 2021) Plenarprotokoll 19/223, 28385 (Statement of Michael Roth).

enforcing compliance with [IHL]'.[1074] The criticism articulated by the OVG NRW is clear:

> For the purpose of protecting the plaintiffs against internationally wrongful drone strikes, this dialogue or exchange with the US is manifestly inadequate. It is based on the Federal Government's incorrect assumption that there is no reason to question the lawfulness of the use of Ramstein Air Base for armed drone operations. However, because there are strong doubts as to whether the general practice of US drone strikes in Yemen [complies with IHL], the Federal Government must not be satisfied with the blanket assertion of the US that all activities carried out at US military bases in Germany comply with the applicable law. *In the absence of any visible assessment and disclosure of what exactly is considered to be lawful with regard to the drone operations at issue here, a general reminder that the US may use its bases only in compliance with the applicable law that lacks further legal specification is neither objectively adequate to eliminate or at least mitigate the risk (...) of falling victim to an internationally unlawful drone strike nor does it intend to do so*.[1075]

The BVerwG, on the other hand, did not share this criticism. In particular, it emphasised that the Federal Government had publicly declared that it *had* undertaken such an assessment.[1076] And because it must consider the full spectrum of acceptable interpretations of international law when assessing the international lawfulness of the actions of another State, it is also entitled to exercise restraint when making public statements on the results of such an assessment.[1077] This is especially true if the correct interpretation of the law is heavily disputed.[1078] For the BVerwG, the mere non-disclosure of the results of its assessment could thus not be understoood to mean that such an assessment had not been undertaken in the first place.[1079]

In this author's view, there is little merit in surmising whether the Federal Government has indeed undertaken its own assessment of the situation or whether, as the

[1074] idem, BT-Drs 18/11023 (n 709) 7 (this author's translation).
[1075] OVG NRW (n 51) [568] – juris (this author's translation; emphasis added).
[1076] BVerwG, *Bin Jaber* (n 403) [71] – juris.
[1077] ibid.
[1078] ibid [74] – juris.
[1079] ibid [71] – juris.

OVG NRW suggests, it has relied blindly on the US' assertion that none of its activities violate the applicable law. *De lege lata*, there appears to be no obligation of the executive to reveal the results of its assessment, let alone to make a public declaration on the lawfulness of US counterterrorism operations. While this may certainly seem unsatisfactory in terms of judicial control, it is the result of the wide margin of appreciation enjoyed by the executive in the area of foreign affairs and national security. It is for the Federal Government alone to decide on certain foreign policy goals and what is the best way to achieve them.[1080] Being political in nature, such decisions are subject only to limited judicial control.[1081] In particular, where the goal of the executive is to maintain good relations with the US, it may freely choose to desist from (publicly) criticizing its actions and may refrain from anything that could potentially encourage the criticism of others.[1082] A recent example of this is the assassination of Iranian General Qasem Soleimani, who was killed by a US drone strike in January 2020. While the broader implications of this case shall be addressed at the end of this study,[1083] what is important here is that the Federal Government did not condemn the attack and refused to comment on the assessment undertaken by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnès Callamard, who had found the strike to be 'an arbitrary killing for which, under IHRL, the US is responsible'.[1084] Still, this author does not dispute that this conclusion leaves a somewhat bitter aftertaste. In particular, in April 2015, Member of the German Parliament Niema Movassat asked Parliamentary State Secretary of the BMVg Ralf Brauksiepe why the Federal Government had not undertaken further measures to verify the truth of the US' assertion of compliance, to which Brauksiepe replied:

[1080] BVerfG, *Rudolf Heß* (n 1024) [37], [39] – juris; *Alteigentümer* (n 1006) [98] – juris; OVG NRW (n 51) [215] – juris; Dreier in idem (ed), vol 1 (n 915) art 1(3) para 47; Wollenschläger in Dreier (ed), vol 2 (n 1006) art 25 para 13.

[1081] BVerwG, Judgement of 29 October 2009 (7 C 22/08) [15] – juris.

[1082] ibid [17] – juris. See also BVerfG, *Rudolf* Heß (n 1024) [40] – juris; E 143, 101 (n 1020) [169] *et seqq* – juris; BVerwG, Judgement of 24 February 1981 (7 C 60/79) E 62, 11 [38]-[40] – juris; 7 C 22/08 (n 1081) [16] – juris; *Bin Jaber* (n 403) [79] – juris.

[1083] See § 9.

[1084] Callamard Report (n 27) Annex para 82. See Auswärtiges Amt, 'Erklärungen des Auswärtigen Amts in der Regierungspressekonferenz vom 03.01.2020' (3 January 2020) <www.auswaertiges-amt.de/de/newsroom/regierungspressekonferenz/2290686> accessed 3 May 2021; 'Erklärungen des Auswärtigen Amts in der Regierungspressekonferenz vom 06.01.2020' (6 January 2020) <www.auswaertiges-amt.de/de/newsroom/regierungspressekonferenz/2290926> accessed 3 May 2021.

> Dear colleague, by now I have repeated almost a dozen times that the US government [has assured us that its activities on German territory respect the applicable law]. We are working together with the US in a relationship based on mutual trust. *This includes taking the other's word for it*'.[1085]

b) Assertion of Compliance

In the *Bin Jaber* case, the BVerwG held the view that in situations where the fundamental rights of a foreigner are allegedly violated by another State on foreign territory, the Federal Republic of Germany may obtain from the perpetrating State a guarantee that its actions comply with the applicable law.[1086] Unless such an assertion of compliance is based on an interpretation of international law that goes beyond what is legally acceptable or unless it is contradicted by the facts, its obtention alone will be sufficient to discharge the Federal Republic's protective obligation.[1087]

There is, in principle, nothing wrong with this view. Especially in situations where the circumstances surrounding a specific event or a series of events lie within the exclusive knowledge of another State, that State's assertion that "it has done nothing wrong" may be of significant value.[1088] In the present case, however, it appears questionable whether the US' assertion of compliance with international law may truly be relied on. For one, in this author's view, such a *general and blanket* assertion that *all* activities comply with the applicable law must be assigned less overall value than would be the case with guarantee relating only to a single incident.[1089] Otherwise, the executive

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[1085] Deutscher Bundestag, Plenarprotokoll 18/99 (n 709) 9439 (Statement of Ralf Brauksiepe; this author's translation; emphasis added). Critical also Bartsch and others (n 74); Jan-Christian Niebank, Andrea Kämpf and Wolfgang S Heinz, *Beihilfe zu Menschenrechtsverstößen vermeiden – außenpolitische Zusammenarbeit kritisch prüfen* (Deutsches Institut für Menschenrechte 2017) 39; Deiseroth (n 326) 985 *et seq*.

[1086] BVerwG, *Bin Jaber* (n 403) [77] – juris; concurring NSA Inquiry Committee Report (n 59) 1357; Aust, 'US-Drohneneinsätze' (n 1030) 307. Critical Beinlich (n 584) 19; Heiko Sauer, 'Angst vor der eigenen Courage? Licht und Schatten im Drohnenurteil des OVG Münster' *Verfassungsblog* (22 March 2019) <https://verfassungsblog.de/angst-vor-der-eigenen-courage-licht-und-schatten-im-drohnenurteil-des-ovg-muenster/> accessed 29 March 2021.

[1087] BVerwG, *Bin Jaber* (n 403) [77] – juris. Note that this means that an assertion of compliance may never be relied on blindly.

[1088] Anderson, 'Predators Over Pakistan' (n 40). See also Moynihan, *Aiding and Assisting* (n 717) paras 145-147. From a German procedural perspective see Michael Dawin in Friedrich Schoch and Jens-Peter Schneider (eds), *VwGO* (39th supp, CH Beck 2020) s 108 para 55; similar Sauer (n 1086).

[1089] A standard of manifest indadequacy suggests that isolated reports about violations of international law might not be enough to preclude reliance. On the factors to consider see Deutscher Bundestag (Wissenschaftliche Dienste), 'Rolle des Militärstützpunktes Ramstein' (n 51) 13, regarding political protest

would be incentivized to frustrate fundamental rights protection by obtaining from the other State a guarantee that is framed in the broadest possible terms, which no one but the perpetrating State itself would be able to reliably disprove. More importantly, the preceding chapter has raised serious doubts about whether the US' general policy of targeted killings complies with the international law governing the use of lethal force in and outside the context of an armed conflict. Although the BVerwG posits that a different interpretation of international law does not preclude reliance on an assertion of compliance as long as it is not legally unacceptable, this view seems to rest on the erreonous understanding that the executive's assessment of the international lawfulness of another State's actions is subject only to limited judicial review.[1090] Instead, as Leander Beinlich summarizes, 'once one accepts the strong doubts about the lawfulness of US drone operations, it is hardly conceivable how blanket assertions of compliance can be assigned any credibility. (…) On that basis, it seems nearly impossible not to categorise these assertions as "manifestly inadequate"'.[1091]

c) Diplomatic and Political Consultations

Despite the BVerwG's *critique* of the legal assessment undertaken by the court of second instance, it ultimately did not consider these issues to be of relevance for deciding the *Bin Jaber* case. Instead, the court held the view that even *if* the Federal Republic of Germany were under a fundamental duty to protect the right to life of the Yemeni plaintiffs, this duty would have been successfully discharged by the diplomatic and political consultations between the German Federal Government and the US.[1092] In fact, by its own account, the Federal Government has been engaged in a continuing, 'regular, and trustful exchange (…) on the political, military, and legal issues arising in connection with US

and diplomatic consultations; Marauhn, Mengeler and Strobel (n 967) 348. In the field of arms trade see article 2(6)(b) of the common rules of the EU governing the control of exports of military technology and equipment, pursuant to which Member States considering granting an export license shall take into account, *inter alia*, the record of the buyer with regard to its compliance with IHL. See Council Common Position 2008/944/CFSP (adopted 8 December 2008) OJ L 335/99 (Arms Export CCP); User's Guide to the Council Common Position 2008/944/CFSP (16 September 2019) 12189/19, 55.

[1090] See § 6 B. II. 3) b).

[1091] Beinlich (n 584) 19. Concurring Deiseroth (n 326) 989; Payandeh and Sauer (n 967) 1573. See also Monnheimer and Schäferling (n 57) 372, who doubt that obtaining a blanket assertion of compliance would be considered 'a serious attempt at investigating individual operations' (this author's translation).

[1092] BVerwG, *Bin Jaber* (n 403) [66] – juris, noting that such talks were entered into by 2016 at the latest; VG Köln, *Bin Jaber* (n 917) [51] *et seqq* – juris.

forces stationed in Germany'[1093] since 2013, including 'political and military talks at all levels, (…) a general exchange of information between the BMVg and US armed forces, and talks held by liaison officers at different US agencies'.[1094] For example, when in May 2013 several media reports alleged that Ramstein Air Base and the AFRICOM headquarters located in Stuttgart were involved in US targeted killings in Somalia,[1095] German Chancellor Angela Merkel herself raised the issue with US President Barack Obama.[1096] These reports were also the subject of a conversation between the German Federal Foreign Minister Guido Westerwelle and his US counterpart John Kerry.[1097] In September 2014, talks took place between the Federal Chancellery (*Bundeskanzleramt*), the Federal Foreign Office, the BMVg, and the Deputy Commander of AFRICOM.[1098] The role of Ramstein Air Base in US counterterrorism operations was also addressed by the Federal Foreign Minister Frank-Walter Steinmeier *vis-à-vis* the US Secretary of Defense.[1099] And when representatives of the US Embassy informed the Federal Foreign

[1093] Deutscher Bundestag, BT-Drs 19/2318 (n 51) 4 (this author's translation).

[1094] Deutscher Bundestag, BT-Drs 17/14401 (n 1066) 5 (this author's translation). See also idem, BT-Drs 18/237 (n 709) 11; BT-Drs 18/1294 (n 1073) 4; BT-Drs 18/1318 (n 1073) 9; BT-Drs 18/2794 (n 1073) 4; Plenarprotokoll 18/78 (n 709) 7442 (Statement of Maria Böhmer); BT-Drs 18/99 (n 709) 9434-9438; 'Antwort des Staatssekretärs Markus Ederer auf die Schriftliche Frage des Abgeordneten Andrej Hunko' (1 April 2016) BT-Drs 18/8052, 10; Plenarprotokoll 18/178 (n 1073) 17564 (Statement of Michael Roth); Plenarprotokoll 18/205 (n 80) 20454 (Statement of Michael Roth); 'Stenografischer Bericht der 214. Sitzung' (25 January 2017) Plenarprotokoll 18/214, 21449 (Statement of Maria Böhmer); BT-Drs 18/11023 (n 709) 3; 'Stenografischer Bericht der 233. Sitzung' (17 May 2017) Plenarprotokoll 18/233, 23573 (Statement of Maria Böhmer); BT-Drs 19/2766 (n 1068) 45; Plenarprotokoll 19/91 (n 1073) 10865; Plenarprotokoll 19/223 (n 1073) 28385 (Statement of Michael Roth).

[1095] Christian Fuchs, John Goertz and Hans Leyendecker, 'US-Streitkräfte steuern Drohnen von Deutschland aus' *Süddeutsche Zeitung* (30 May 2013) <www.sueddeutsche.de/politik/luftangriffe-in-afrika-us-streitkraefte-steuern-drohnen-von-deutschland-aus-1.1684414> accessed 24 March 2020; Buchen and others (n 74). Subsequently also 'Geheimer Krieg – Drohnenkrieg von deutschen Boden' *Beckmann* (28 November 2013) <www.youtube.com/watch?v=skQTeDmT0g0> accessed 2 May 2021; Robert Bongen and others, 'Deutschland: Schaltzentrale im Drohnenkrieg' *Panorama* (3 April 2014) <https://daserste.ndr.de/panorama/archiv/2014/Deutschland-Schaltzentrale-im-Drohnenkrieg,drohnen177.html> accessed 18 May 2021; John Goetz and Frederik Obermaier, '"Immer fließen die Daten über Ramstein"' *Süddeutsche Zeitung* (4 April 2014) <www.sueddeutsche.de/politik/us-drohnenkrieg-immer-fliessen-die-daten-ueber-ramstein-1.1929160> accessed 2 May 2021; John Goetz and others, 'Ramstein ist Zentrum im US-Drohnenkrieg' *Süddeutsche Zeitung* (16 July 2014) <www.sueddeutsche.de/politik/us-militaerflughafen-in-deutschland-ramstein-ist-zentrum-im-us-drohnenkrieg-1.1928810> accessed 18 May 2021.

[1096] Deutscher Bundestag, BT-Drs 17/14401 (n 1066) 6 *et seq*.

[1097] ibid 5.

[1098] idem, BT-Drs 18/2794 (n 1073) 4.

[1099] NSA Inquiry Committee, 'Stenografisches Protokoll der 91. Sitzung' (17 March 2016) 60 (Testimony of Frank-Walter Steinmeier) <http://dipbt.bundestag.de/dip21/btd/18/CD12850/D_I_Stenografische_Protokolle/Protokoll%2091%20I.pdf> accessed 19 March 2021. See also idem, '77. Sitzung' (n 709) 62 *et seq* (Testimony of Jürgen Schulz).

Office in August 2016 that Ramstein was part of a global network of telecommunication facilities which supports US drone operations, talks were held in Washington at the highest level.[1100]

Although no details on the specific content of these exchanges were made public, there is force in the BVerwG's argument that those consultations were not manifestly inadequate to protect the right to life of the Yemeni plaintiffs.[1101] The key to this understanding lies in the insight that in international law, there is no dedicated mechanism to enforce compliance with it rules. Nor is there an adjudicatory body that would have mandatory jurisdiction over inter-State disputes.[1102] Instead, where one State seeks a change in the behaviour of another State, such change may only be achieved in cooperation with that State, not against its will.[1103] For that, political and diplomatic consultations are a classical instrument.[1104] And although they might not have had the desired effect so far, this does not automatically mean that the Federal Republic must take further action.[1105] In fact, it is questionable whether there are any feasible alternatives to begin with.[1106] In the *Bin Jaber* case, the plaintiffs argued that Germany could terminate the current lease for Ramstein Air Base, withdraw the radio frequencies needed for the operation of its SATCOM relay station, or initiate the process for a revision of the *ius in praesentia*,[1107] none of which can reasonably be demanded.[1108] To claim otherwise

[1100] Deutscher Bundestag, Plenarprotokoll 18/205 (n 80) 20453 (Statement of Michael Roth); Plenarprotokoll 18/208 (n 51) 20808 (Statement of Maria Böhmer). In some instances, members of the Federal Government paid personal visits to Ramstein and explicitly raised the question of Ramstein's role as a relay point but got no answer. See Deutscher Bundestag, BT-Drs 18/2794 (n 1073) 6; NSA Inquiry Committee, '77. Sitzung' (n 709) 57 *et seq*, 63, 78, 81 (Testimony of Jürgen Schulz); Deutscher Bundestag, Plenarprotokoll 18/178 (n 1073) 17564 (Statement of Michael Roth).

[1101] cf Payandeh and Sauer (n 967) 1573; Marauhn, Mengeler and Strobel (n 967) 347, albeit regarding a standard of effectiveness, not manifest inadequacy.

[1102] See Janne E Nijman and Wouter G Werner, 'Legal Equality and the International Rule of Law' (2012) 43 *NYIL* 3, 13.

[1103] See BVerfG, *Rudolf Heß* (n 1024) [36] *et seq* – juris; E 66, 39 (n 1044) [47] – juris; *Schloss Bensberg* (n 913) [38] – juris; 2 BvR 1371 (n 913) [46] – juris; BVerwGE 154, 328 (n 581) [24] – juris; *Bin Jaber* (n 403) [76] – juris; Herdegen in Maunz and Dürig (eds) (n 914) art 1(3) paras 80, 84. See also the dispute resolution mechanism of the NATO SOFA SA, art 80a.

[1104] BVerwG, *Bin Jaber* (n 403) [76] – juris; VG Köln, *Bin Jaber* (n 917) [88] – juris.

[1105] BVerfG, *Rudolf Heß* (n 1024) [39] – juris; VG Köln, *Bin Jaber* (n 917) [74] – juris.

[1106] cf Marauhn, Mengeler and Strobel (n 967) 348 *et seq*, arguing that the Federal Republic has not yet exhausted the catalogue of possible measures. Note that only in very exceptional cases will a claimant be able to demand that a specific measure be adopted, see BVerwGE 62, 11 (n 1082) [38] *et seq* – juris; Thomas Giegerich in Maunz and Dürig (eds) (n 914) art 16(1) para 210, regarding diplomatic protection.

[1107] VG Köln, *Bin Jaber* (n 917) [10] – juris.

[1108] BVerwG, *Bin Jaber* (n 403) [81] – juris; VG Köln, *Bin Jaber* (n 917) [92] – juris. See also OVG NRW (n 51) [570]-[572] – juris.

disregards that Ramstein Air Base fulfils a myriad of functions, of which the relay of data for US counterterrorism operations is just one small part. For example, it is the operational headquarters for the NATO's ballistic missile defence system, which protects the NATO Member States and their allies against possible threats from missile attacks.[1109] At the same time, it also plays an important role in the US' efforts to support its African allies and enables the US to provide humanitarian aid around the globe.[1110] While none of these functions are unlawful, they would be heavily impacted by the measures proposed by the Yemeni plaintiffs. As will be remembered, not even drone strikes are unlawful *per se*. However, there is no way that a lawful use of the SATCOM relay station can be separated from an unlawful use.[1111]

Several scholars have suggested that the Federal Government must 'intensify its efforts'[1112] to protect the fundamental rights at stake. For example, Thilo Marauhn argues that 'the German Federal Government [must] inform the US that in Germany's view, the targeted killing of terrorist suspects outside the context of armed conflicts regularly violates international law'.[1113] This also seems to be the position of the OVG NRW in the *Bin Jaber* case, which held that the Federal Government must confront the US with its own assessment of what it considers to be internationally lawful and engage with the US to ensure that Ramstein Air Base is only used for internationally lawful operations.[1114] However, it needs to be remembered that the question is not whether other measures

[1109] See Allied Air Command (AIRCOM), 'What We Do' <https://ac.nato.int/missions> accessed 4 May 2021.

[1110] eg in the context of the 2014 Ebola epidemic in West Africa, see Sara Keller, 'Ramstein launches first C-130J flight to assist Ebola outbreak efforts' *US Air Force* (8 October 2014) <www.af.mil/News/Article-Display/Article/503456/ramstein-launches-first-c-130j-flight-to-assist-ebola-outbreak-efforts/> accessed 4 May 2021. When the Afghan government collapsed in August 2021 and the Taliban seized control of Afghanistan, thousands were evacuated via Ramstein Air Base, see Ridge Miller, 'Ramstein completes role in historic humanitarian airlift' *Ramstein Air Base* (2 November 2021) <www.ramstein.af.mil/News/Article-Display/Article/2829699/ramstein-completes-role-in-historic-humanitarian-airlift/> accessed 10 December 2021.

[1111] See VG Köln, *Bin Jaber* (n 917) [90] – juris; Heinemann (n 965) 1582.

[1112] Beinlich (n 584) 13. Concurring Michael Bothe, 'Wegschauen verletzt das Recht auf Leben: Zum Drohnenurteil des OVG Münster' *Verfassungsblog* (21 March 2019) <https://verfassungsblog.de/wegschauen-verletzt-das-recht-auf-leben-zum-drohnenurteil-des-ovg-muenster/> accessed 29 March 2021; Sauer (n 1086); similar Giegerich (n 1006) 620, 623; Strobel (n 1046).

[1113] Marauhn (n 971) 392 (this author's translation).

[1114] OVG NRW (n 51) [568] – juris. Critical about the enforceability of the judgement see Dreist (n 403) 208 *et seq*; Heinemann (n 965) 1582; Aust, 'US-Drohneneinsätze' (n 1030) 307; but cf BVerwG, *Bin Jaber* (n 403) [19]-[22] – juris, which remains critical of how compliance could be documented. See also BVerfG, *C-Waffen-Einsatz* (n 1061) [120] – juris.

might potentially achieve better protection, but whether the measures adopted by the Federal Government were wholly unsuitable or manifestly inadequate to achieve the desired result.[1115] If the demand is simply to do more of the same, for example by confronting the US more frequently or more emphatically, then this can hardly be the case.[1116] And to argue that political and diplomatic consultations are generally unsuitable or inadequate to fulfil the Federal Republic's protective obligations would significantly curtail the executive's scope of action in the area of foreign policy.[1117]

C. Conclusion

Identifying the objective *fait générateur* of complicity is often a relatively straightforward exercise. For example, where one State furnishes arms to another State and that other State subsequently uses these arms to commit grave violations of the *ius in bello*, the element of aiding or assisting will rarely be discussed in detail. Instead, the focus will most likely be on the question whether the assisting State also acted with the necessary *mens rea*. In the same vein, neither the provision of intelligence nor that of Ramstein Air Base itself has raised major difficulties. Although the problem with these actions lies elsewhere, as will be shown in the next chapter of this study, they are readily conceivable as possible forms of complicity.

Yet, things are not always as simple. Especially in situations of complicity through omission, the analysis quickly becomes incredibly complex. There is relatively little practice and *opinio juris* on the question whether aid or assistance may also be provided by omission, and even those who support that view have questioned whether there might be any sensible scope of application for it in practice.[1118] This chapter, however, has

[1115] cf Payandeh and Sauer (n 967) 1573.

[1116] See BVerwG, *Bin Jaber* (n 403) [79] – juris, pointing out that it is difficult to see how this could be done outside existing diplomatic and political consultations. See also Beinlich (n 584) 13, who doubts that the obligations imposed by the OVG NRW would yield any results; similar Giegerich (n 1006) 621. In that regard BVerfG, *Rudolf Heß* (n 1024) [39] – juris; BVerwGE 62, 11 (n 1082) [38] – juris, stating that the executive may assess which of the available options have any prospect of success and limit itself to those that do.

[1117] Concurring Herdegen in Maunz and Dürig (eds) (n 914) art 1(3) para 84, who notes that as a general rule, protection will be limited to exerting one's existing influence.

[1118] eg Felder (n 715) 256; Aust, *Complicity* (n 30) 228, but cf ps 403 *et seq*, arguing that complicit responsibility might in some cases be easier to establish under positive obligations and obligations of prevention; Lanovoy, *Complicity* (n 145) 211 *et seq*, 216, 332. See also Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 387; 'Due Diligence as a Secondary Rule of General International Law' (2021) 34 *LJIL* 343, 369.

shown that in cases such as the present one, where the requirements of various international duties to act do not appear to be met, building complicit responsibility on a failure to comply with a domestic duty to act acquires considerable significance. Such an approach is admittedly not without its own difficulties. International adjudicatory bodies might be reluctant to venture too far into the unfamiliar realm of domestic law, let alone to pronounce themselves on which interpretation of domestic law they consider to be correct.[1119] This is particularly true with omissions in the sensitive area of foreign policy, where even domestic courts struggle to find the right balance between overly constraining and overly deferring to the executive. A perfect example of this is the OVG NRW's second instance judgement in the *Bin Jaber* case, which found that the Federal Republic of Germany had failed to comply with its fundamental obligation to protect the right to life against a potential violation by an internationally unlawful drone strike. UN Special Rapporteur Agnès Callamard hailed the judgement a 'watershed ruling' that might 'augur a stronger legal response to the use of drones in acts of force',[1120] and Thomas Giegerich complimented the court for its wise decision in a politically highly sensitive case.[1121] Other commentators, however, have been far less positive. For example, Patrick Heinemann, expressed concerns that the court was walking on 'very thin ice'[1122] and let itself be carried away to make a political statement.[1123] Peter Dreist claimed that the judgement leaves the reader 'surprised and perplex'.[1124] And on appeal on points of law, the BVerwG held the view that the OVG NRW had misapplied the law in almost every aspect and restored the first instance judgement.[1125]

The truth probably lies somewhere in between these extremes. While this chapter has shown that there are good reasons to assume that the Federal Republic of Germany is indeed under an obligation to protect the right to life of Pakistani and Yemeni individuals

[1119] See, for example, LCIA, *EnCana Corporation v Ecuador* (Award) (3 February 2006) UN3481 [200] fn 138 ('The Tribunal cannot pick and choose between different and conflicting national court rulings in order to arrive at a view as to what the local law should be'); ICSID, *Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania* Case ARB/11/24 (30 March 2015) [768] ('It is not the Tribunal's role to take sides [in the disputed domestic legal question]'). See also Jenks, *Prospects of International Adjudication* (n 947) 552; Hepburn (n 943) paras 21, 42.

[1120] Callamard Report (n 27) para 28.

[1121] Giegerich (n 1006) 609, 623; similar Beinlich (n 584) 23 ('remarkable decision'); concurring also Marauhn (n 971) 391 *et seq*.

[1122] Heinemann (n 965) 1581 (this author's translation).

[1123] ibid 1582; more nuanced Aust, 'US-Drohneneinsätze' (n 1030) 311.

[1124] Dreist (n 403) 208 (this author's translation).

[1125] See BVerwG, *Bin Jaber* (n 403) [18], [38] – juris.

from being violated by an internationally unlawful drone strike, such a duty exists only within the narrow confines of the *ratione temporis* of fundamental rights protection. And although the US' blanket assertion of compliance with international law is not sufficient to discharge the Federal Republic's protective obligation, a strong case can be made that the ongoing consultations between the German Federal Government and the US were. Still, in the *Bin Jaber* case, the final word is yet to be spoken. In early 2021, the Yemeni plaintiffs filed a constitutional complaint with the BVerfG, arguing that the third instance judgement violates German constitutional law.[1126] As of the date of this study, the court had yet to decide on the complaint.

§ 7 Causal Nexus

With the element of causality, two important observations have already been made. First, that causality may appear at two different stages, namely at the level of the breach (*haftungsbegründende Kausalität*) and at the level of reparation (*haftungsausfüllende Kausalität*). And secondly, that a test of factual causation must be supplemented by a test of causal proximity.[1127] Complicity adds yet another layer of complexity to the picture. While in situations where there is only one wrongdoing State and one injured State, it will be sufficient to establish a proximately causal link between the former State's action or omission, the breach of its international obligations and the damage sustained by the latter State, the involvement of a third (complicit) actor raises the question whether there also needs to be some kind of causal relationship between the complicit conduct and the principal wrongful act. Article 16 of the ARSIWA itself is silent on the issue. In fact, the draft articles explicitly address causality only in connection with the scope of reparation, ie, regarding the necessary causal link between the internationally wrongful act and the injury flowing from it.[1128] The ARSIWA General Commentary, on the other hand, provides more insights into the requirement of causality in situations of complicity. According to the ILC, the assisting State 'will only be responsible to the extent that its own conduct has *caused* or contributed to the internationally wrongful act'.[1129] Moreover,

[1126] 'Ramstein vor dem Verfassungsgericht' (*ECCHR*, 23 March 2021) <www.ecchr.eu/pressemitteilung/ramstein-verfassungsgericht/> accessed 23 March 2021.

[1127] See § 6 B. I. 1) b).

[1128] Gattini, 'International Obligations' (n 800) 28; Plakokefalos (n 794) 480. See also ARSIWA, arts 34 and 36(1).

[1129] ARSIWA General Commentary (n 50) 66 para 1 (emphasis added).

the commission emphasises that 'the aid or assistance must be given with a view to facilitating the commission of the wrongful act, *and must actually do so*'.[1130] This has generally been interpreted to mean that although article 16 is silent on the issue, there must be some kind of causal connection between the aid or assistance and the principal wrongful act.[1131] In this chapter, it will thus be necessary to first address the element of factual causation (see A below), before this study turns its attention to the complicated requirement of proximate causality (see B below).

A. Factual Causation

It will be remembered that the necessary standard of factual causation must, in principle, be derived from the applicable primary rule itself.[1132] In that regard, the ARSIWA General Commentary makes it clear that '[t]here is no requirement that the aid or assistance [is] essential to the performance of the internationally wrongful act',[1133] which has commonly been understood to mean that article 16 of the ARSIWA does not require that the principal wrongful act would not have occurred *but for* the aid or assistance.[1134] Beyond that, however, little is clear. Although the commission seems to touch on the question of the applicable causal test at various points of its general commentary, this does little to provide clarity on issue.[1135] For example, at one point the ILC seems to require that the aid or assistance 'contributed significantly to [the internationally wrongful act]',[1136] but recognizes elsewhere that 'the assistance may have been only an incidental factor in the commission of the [internationally wrongful] act, and may have contributed only to a minor degree, if at all, to the injury suffered'.[1137] As a consequence, academic literature has equally struggled to find a uniform line. Helmut Aust and John Quigley, for example, argue that the aid or assistance must have made a *substantial* or a *material* difference in the commission of the internationally wrongful act, but admit that this might not be a very

[1130] ibid 66 para 5 (emphasis added).

[1131] Aust, *Complicity* (n 30) 210; Plakokefalos (n 794) 479 *et seq*; Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 161; de Wet, 'Complicity' (n 158) 297.

[1132] This also applies to article 16 despite being a secondary norm, see only Plakokefalos (n 794) 474.

[1133] ARSIWA General Commentary (n 50) 66 para 5.

[1134] Quigley (n 156) 122; Epiney (n 147) 50; Felder (n 715) 249-251; Aust, *Complicity* (n 30) 212.

[1135] Felder (n 715) 249 *et seq*; Crawford, *State Responsibility* (n 163) 403 ('internally inconsistent'); Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 388 ('level of contradiction within the commentary is high').

[1136] ARSIWA General Commentary (n 50) 66 para 5. Concurring Plakokefalos (n 794) 480, noting that this test should be more lenient than the ones usually employed by the courts.

[1137] ARSIWA General Commentary (n 50) 67 para 10.

high standard.[1138] Vladyslav Lanovoy, on the other hand, considers it to be sufficient if the support has made it at least somehow easier for the receiving State to commit its wrongful act.[1139] For him, this test 'only requires a simple factual link between two conducts (complicit and principal) and the more than absolutely trivial form of complicity'.[1140] Although a stronger link between the principal and complicit conduct may be taken into account when assessing the legal consequences of complicity, Lanovoy claims that such a link should not be determinative for establishing complicit responsibility in the first place.[1141] Be that as it may, there seems to be general agreement that complicit responsibility cannot arise unless the aid or assistance has made at least *some* difference in the commission of the internationally wrongful act.[1142] And whenever the aid or assistance does so in a way that is significant, substantial, or material, there can be little doubt that this will be sufficient to statisfy the factual element of causality.[1143]

In the following, this study will examine whether, and, if so, to what extent the different actions and omissions of the Federal Republic of Germany have contributed to US counterterrorism operations. It will first address the provision of intelligence (see I below), before turning to the act of granting US forces the use of Ramstein Air Base (see II below). Finally, it will look into the complicated relationship between an internationally wrongful drone strike and a possible omission to protect the fundamental right to life abroad (see III below).

[1138] Quigley (n 156) 122, drawing a comparison with domestic criminal law, but admitting that under those standards, it would be sufficient to establish that the support increased the possibility of the illegal act being committed; Epiney (n 147) 50; Aust, *Complicity* (n 30) 213-215, 218, 420, who, like Quigley, makes an analogy to domestic and international criminal law, but admits that the standard may vary depending on the content of the underlying primary rule; Crawford, *State Responsibility* (n 163) 403; Jackson (n 151) 157 *et seq*; Deiseroth (n 326) 988. See also Plakokefalos (n 794) 480, who notes that the test could also depend on the primary rule that is breached by the principal offender; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 401 *et seq*, who argues that the applicable test could be influenced by the *mens rea* of the assisting State.

[1139] Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 162; *Complicity* (n 145) 173 *et seq*, 185 *et seq*, 218; similar Dominicé (n 165) 285 *et seq* ('aid or assistance must be clearly connected to the unlawful act, in the sense that it must constitute a contribution to the commission of the act'; footnote omitted). See also Epiney (n 147) 49 ('factual relevance'; this author's translation); Felder (n 715) 250, who requires a noticeable influence; de Wet, 'Complicity' (n 158) 300 *et seq*.

[1140] Lanovoy, *Complicity* (n 145) 185. See also idem, 'Complicity in an Internationally Wrongful Act' (n 754) 162.

[1141] Lanovoy, *Complicity* (n 145) 174.

[1142] Aust, *Complicity* (n 30) 215.

[1143] See Moynihan, *Aiding and Assisting* (n 717) 9 para 11.

I. Sharing of Intelligence

In the present case, finding a causal link between the provision of intelligence and a specific internationally wrongful drone strike is extremely difficult. Although the BND and the BfV repeatedly provided their US counterparts with datasets, there are only a handful of known cases where they had done so on a specific individual who, a month, sometimes even a year later, was reported to have been killed in the Afghan-Pakistani border region.[1144] One of these cases involved the death of German-Turkish national and terrorist suspect Bünyamin Erdoğan. Erdoğan, who had left Germany in mid-2010 to join a militant organization in North Waziristan,[1145] was killed several months later when a drone struck the house where he and his older brother Emrah were allegedly meeting two representatives of al-Qaeda and the TTP to discuss Erdoğan's role in an upcoming suicide bomber attack against western coalition forces in Afghanistan.[1146] Another IMU militant and three unidentified Pashtun locals were also killed in the attack.[1147] According to one of the testimonies made before the so-called NSA Inquiry Committee, a committee of inquiry (*Untersuchungsausschuss*) of the German Parliament set up in 2017 and tasked with investigating the revelations by whistle-blower Edward Snowden, only a couple of weeks earlier the BfV had provided the US with personal information on Erdoğan, including his cell phone number.[1148]

It is not necessary here to dwell on the question whether the killing of Erdoğan (or anyone else of those present) was internationally wrongful.[1149] Instead, the key question

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[1144] Deutscher Bundestag, '100. Sitzung' (n 60) 74-76 (Testimony of Henrik Isselburg), 145 (Testimony of Dieter Romann); 'Stenografisches Protokoll der 102. Sitzung' (9 June 2016) 52 *et seq* (Testimony of Heinz Fromm) <https://dipbt.bundestag.de/dip21/btd/18/CD12850/D_I_Stenografische_Protokolle/Protokoll%20102%20I.pdf> accessed 21 January 2020; NSA Inquiry Committee Report (n 59) 1150-1165.

[1145] Report of the Federal Prosecutor General (n 245) 15. Erdoğan's concrete affiliation remained unclear. After joining and leaving several different organizations, by mid-September 2010, he was allegedly 'involved with Al Qaeda, or at least the outer circles thereof', see ibid (translation by Kreß (n 364) 723).

[1146] ibid; Johannes Gunst, 'Deutschtürke war für Terroranschlag eingeplant' *Stern* (29 March 2012) <www.stern.de/investigativ/projekte/terrorismus/us-drohnenopfer-deutschtuerke-war-fuer-terroranschlag-eingeplant-3274852.html> accessed 13 January 2021.

[1147] Report of the Federal Prosecutor General (n 245) 13 *et seq*. It has remained unclear whether Erdoğan was the intended target of the attack, see NSA Inquiry Committee Report (n 59) 1153 *et seq*.

[1148] NSA Inquiry Committee, '100. Sitzung' (n 60) 145 (Testimony of Dieter Romann); '102. Sitzung' (n 1144) 7 *et seq*, 53 (Testimony of Heinz Fromm). In other cases, the cell phone number had been provided more than a year before the attack, see idem, '100. Sitzung' (n 60) 81 (Testimony of Henrik Isselburg).

[1149] See Report of the Federal Prosecutor General (n 245) 15, 20 *et seq*, 24, arguing that Erdoğan, who had been armed, trained, and designated for a specific suicide mission, had exercised a continuous combat function and had therefore been a legitimate target under IHL. In fact, and notwithstanding the (unresolved) question whether Erdoğan had been part of an organized armed group that was engaged in a NIAC with the

to be asked is whether the killing of Erdoğan was made at least somehow easier by the information provided by the BfV.[1150] For that purpose, it will be necessary to first address the issue of the required standard of proof in international adjudication (see 1) below), before applying these findings to the present case (see 2) below).

1) Proof in International Adjudication

In the domestic context, different standards of proof are employed depending on whether the system is one of common law or one of civil law.[1151] In the former, the standard of proof for civil proceedings is typically one of preponderance of the evidence.[1152] According to this standard, proof on a balance of probabilities suffices,[1153] which means that proof is established once it is more likely that a result has been caused by an event than not (the so-called "51 per cent" threshold).[1154] Civil law systems, on the other hand,

US, provided that there was indeed reliable and substantial evidence of an imminent suicide attack on the coalition forces in Afghanistan, his death would have been justified even under the law enforcement standard. Note, however, that the member of the TTP, who was identified as a specialist in training suicide bombers, and the member of al-Qaeda, who was allegedly responsible for the group's finances, might not have been legitimate military targets. A financer, in particular, normally does not exercise a continuous combat function. On the character of a trainer of suicide bombers as a legitimate military target in armed conflict (which does not apply to the TTP) see DPH Guidance (n 227) 53.

[1150] On the so-called *Disclaimer* that was attached to every piece of information shared with the US and that prohibited its use for other than intelligence purposes (*nachrichtendienstliche Zwecke*) see NSA Inquiry Committee Report (n 59) 1138-1140. Note, however, that this does not exclude the possibility that the information was indeed used for the targeting of a specific individual, see explicitly ibid 1361 ('In any case, it would not be possible to prevent that the information which has been obtained by way of an international cooperation amongst allies and their intelligence agencies (…) *might contribute significantly to the identification and localization of a particular individual* as part of a "network of information" composed of various different pieces of information, *nor would such use be objectionable*'; this author's translation; emphasis added). See also Kai Biermann, 'Hellfire-Raketen mit schönen Grüßen aus Berlin' *ZEIT* (21 September 2016) <www.zeit.de/digital/mobil/2016-09/hellfire-drohnen-verfassungsschutz-nsa/> accessed 2 June 2021, who claims that a secret qualifier to the disclaimer allowed its use for military purposes in case of an 'ongoing or imminent attack' (translation by Cvijic and Klingenberg in ECCHR (ed), *Litigating Drone Strikes* (n 39) 44). On the US' extensive interpretation of these terms see § 5 B. II. 1).

[1151] Honoré (n 815) para 203; Verheyen (n 764) 260. In either system, the exact degree of proof may vary depending on whether proof is required in relation to an actual event (in which case a stricter standard may be applied) or in relation to a hypothetical event, ie, what would have happened in the absence of a certain conduct (in which case a more relaxed standard might be justified). See Hart and Honoré (n 820) 101 *et seq*; Honoré (n 815) para 203. In the criminal law context, both systems seem to use a virtually identical standard of "beyond reasonable doubt", see Kevin M Clermont and Emily Sherwin, 'A Comparative View of Standards of Proof' (2002) 50 *Am J Comp L* 243, 256, 251 *et seq*; Benzing (n 684) 508-510.

[1152] Chittharanjan F Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff 2005) 233.

[1153] House of Lords, *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, 616 (per Lord Reid); Honoré (n 815) para 203; Eduardo Valencia-Ospina, 'Evidence before the International Court of Justice' (1999) 1 *Intl L F D Intl* 202, 203; Benzing (n 684) 508-510.

[1154] US Supreme Court, *Concrete Pipe & Products of California, Inc v Construction Laborers Pension Trust for Southern California* 508 US 602, 622 (1992); Kevin M Clermont, 'Procedure's Magical Number Three: Psychological Bases for Standards of Decision' (1987) 72 *Cornell L Rev* 1115, 1119; Tobias

commonly rely on a standard of conviction.[1155] Under such a standard, mere probability is not enough to prove a fact.[1156] Instead, proof may only be established on the positive belief that something is actually true.[1157]

In international law, there does not seem to be a clear-cut standard of proof.[1158] In the *Trail Smelter Arbitration*, the arbitral tribunal held that a violation of the no-harm rule must be established by 'clear and convincing evidence'.[1159] The ECtHR, on the other hand, has insisted that the applicable standard of proof for establishing State responsibility under the ECHR is one of "beyond reasonable doubt".[1160] And the ICJ's approach, which is seemingly followed by the IACtHR and other international adjudicatory bodies,[1161] 'appears to reflect the civil law system, in which all that is needed is that the court be persuaded, without reference to a specific standard'.[1162] Depending on the specific case, this latter standard might vary between one resembling preponderance of the evidence for less serious allegations and a standard coming close to "beyond reasonable doubt" where the most serious charges are concerned.[1163] And in cases of State responsibility, where

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Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights' (2007) 50 *German YB Intl L* 543, 567-569; Amerasinghe (n 1152) 242.

[1155] Amerasinghe (n 1152) 233.

[1156] Honoré (n 815) para 203.

[1157] For German law see BGH, Judgement of 2 February 1970 (III ZR 139/67) Z 53, 245 [72]; Thienel (n 1154) 569-571; Benzing (n 684) 507. Since such a standard requires the rejection of (reasonable) doubt, it is often equated with the criminal law standard of "beyond reasonable doubt", see Clermont and Sherwin (n 1151) 245 *et seq*. Critical of this equation Thienel (n 1154) 570. See also Clermont (n 1154) 1120, noting that "beyond reasonable doubt" translates to "virtual certainty".

[1158] Verheyen (n 764) 261, 331; Rüdiger Wolfrum, 'Taking and Assessing Evidence in International Adjudication' in Tafsir M Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007) 354; Benzing (n 684) 548 *et seq*. On the standard in international criminal law see ICC Statute, art 66(3); ICTR, 'Rules of Procedure and Evidence' (13 May 2015) Rule 87(A); ICTY, 'Rules of Procedure and Evidence' (8 July 2015, last amended 10 July 2015) IT/32/Rev.50 Rule 87(A); Special Court for Sierra Leone, *Fofana and Kondewa* (n 424) [254].

[1159] Arbitral Tribunal, *Trail Smelter* (n 765) 1965.

[1160] eg ECtHR, *Ireland v UK* [1978] ECHR 1 [160] *et seq*; *Nachova* (n 503) [147]; *Kaya and others v Turkey* App no 4451/02 (25 October 2006) [31]; *Soylu v Turkey* App no 43854/98 (15 February 2007) [42]. Critical of the ECtHR's approach Thienel (n 1154) 563-566, 578-585; Benzing (n 684) 537-540.

[1161] IACtHR, *Velásquez Rodríguez* (n 536) [129]; Thienel (n 1154) 575, who mentions the Iran-US Claims Tribunal; Benzing (n 684) 525, 540-543 *et seq*, also on the Eritrea Ethiopia Claims Commission.

[1162] Valencia-Ospina (n 1153) 203. A standard of "convincing evidence" was mentioned in ICJ, *Military and Paramilitary Activities* (n 177) [29]; *Armed Activities on the Territory of the Congo* (n 168) [83]. See also Amerasinghe (n 1152) 232; Benzing (n 684) 505, 512-515, 549, who cautiously concludes that the ICJ's basis standard of proof is one of "clear and convincing evidence"; Kathrine Del Mar, 'The International Court of Justice and standards of proof' in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law* (Routledge 2012) 105.

[1163] eg ICJ, *Corfu Channel* (n 177) 17; *Bosnian Genocide* (n 144) [209]. See also IACtHR, *Velásquez Rodríguez* (n 536) [129]; Thienel (n 1154) 571-578, discussing the ICJ's case law; Amerasinghe (n 1152)

the ICJ's decision is likely to have a significant impact on the interests of the respondent State, the court seems to lean towards a standard of "beyond reasonable doubt" rather than one of mere preponderance of the evidence.[1164]

In the present case and in the hypothetical scenario of a claim being brought under article 16 of the ARSIWA, this means that it would be virtually impossible for the claimant State to prove the existence of a causal link between the provision of intelligence and the commission of an internationally wrongful act.[1165] Only the US knows which of the intelligence it receives is subsequently used to find, track and eliminate a specific target.[1166] However, as a matter of principle, it does not comment on how it uses the information it obtains.[1167] And in international procedural law, there is neither a general obligation of the parties to present to the court any evidence which it might need to establish the truth,[1168] nor is there a general mechanism that would allow one party to request from the opposing party the evidence it might need to prove its case.[1169] In these situations of extreme evidentiary difficulties, where the party bearing the *onus* of proof is unable to furnish any (direct) evidence for a fact because such evidence rests almost exclusively with the other party, there seems to be general agreement that a rigid application of the general principle of *actori incumbit onus probandi* would often lead to unreasonable and unjust results.[1170] To address the procedural inequality, an international court or tribunal may order the opposing party's agent to produce the necessary

235-237; Benzing (n 684) 515-520; Lanovoy, *Complicity* (n 145) 232 *et seq*; Del Mar (n 1162) 101, 115 *et seq*.

[1164] See ICJ, *Corfu Channel* (n 177) Dissenting Opinion of Judge Krylov 69; Del Mar (n 1162) 104.

[1165] Note that under the *Monetary Gold* principle, the US would have to join the proceedings.

[1166] See NSA Inquiry Committee Report (n 59) 1361. See also BVerwGE 127, 302 (n 31) [260] – juris.

[1167] NSA Inquiry Committee Report (n 59) 1354. German authorities are not provided with any information on specific drone operations, including in cases where the victim was a German citizen, see Deutscher Bundestag, BT-Drs 17/13381 (n 60) 4; BT-Drs 18/1318 (n 1073) 6.

[1168] The view first articulated by the General Claims Commission (*William A Parker (US v Mexico)* [1926] 4 RIAA 35 [6]) that there is a legal obligation incumbent upon all States to search out and present to the court all evidence which is in their possession and which may be relevant to the case, including such that may be detrimental to their own position, is commonly rejected today, see Benzing (n 684) 295-299.

[1169] Benzing (n 684) 300, 321 *et seq*. This is also the position under German law, see BGH, Judgement of 11 June 1990 (II ZR 159/89) NJW 1990, 3151. On the exemplary instruments of "discovery" or "disclosure" under US and UK law, see Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2003) 36 *Vanderbilt J Transnatl L* 1313, 1325; Benzing (n 684) 301-304.

[1170] See ICJ, *Oil Platforms* (n 692) Separate Opinion of Judge Owada 321 paras 46 *et seq*; *Bosnian Genocide* (n 144) Dissenting Opinion of Judge Mahiou 418 *et seq* para 61. See also Benzing (n 684) 690, who remarks that such situations are not uncommon in inter-State proceedings.

evidence.[1171] In case of the ICJ, this power is explicitly provided for in article 49 of the Statute of the International Court of Justice,[1172] which reads as follows:

> The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.[1173]

In practice, however, the court has been very hesitant to use that power.[1174] In part, this may be owed to the fact that it does not dispose over any tools to enforce an order against the will of the addressee.[1175] While it might draw negative inferences from a party's silence or its refusal to produce a certain document,[1176] the ICJ has shown a tendency not to do so where the order was resisted on grounds of national security.[1177] For example, in the *Corfu Channel* case, the court refused to draw negative inferences from the UK's refusal to produce a naval order on grounds of naval secrecy.[1178] And in its *Bosnian Genocide* case, the court did not call on Serbia to produce several unredacted documents which might have shed some light on the question of Serbia's intent, and the production

[1171] Amerasinghe (n 1152) 152, who notes that this power appears to be inherent in international courts and tribunals; similar Benzing (n 684) 257 *et seq*.

[1172] (adopted 26 June 1945, entered into force 24 October 1945) UKTS 67 (1946).

[1173] See also International Tribunal for The Law of the Sea, Rules of the Tribunal (adopted 28 October 1997, last amended 25 September 2020) ITLOS Doc ITLOS/8, 76, 77, 81-83; ECtHR, Rules of Court (last amended 4 November 2019, entered into force 1 January 2020) A1 *et seqq* (ECtHR Rules); IACtHR, Rules of Procedure (adopted 16 to 25 November 2000) 44(2) (IACtHR Rules); Iran-US Claims Tribunal, Rules of Procedure (adopted 3 May 1983) 24(3).

[1174] Ruth Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6 *LPICT* 119, 122 *et seq*; Amerasinghe (n 1152) 141, 152; Benzing (n 684) 259, 324, 690 *et seq*.

[1175] Benzing (n 684) 159; Michael P Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' (2012) 13 *Chi J Intl L* 123, 150. Some scholars have questioned whether an order made under article 49 of the ICJ Statute has binding force at all, see Danesh Sarooshi, 'The Powers of the United Nations International Criminal Tribunals' (1998) 2 *Max Planck YB UN L* 141, 157 fn 43; Christian J Tams and James G Devaney in Andreas Zimmermann and Christian Tomuschat (eds), *The Statute of the International Court of Justice – A Commentary* (3rd edn, OUP 2019) 1424 para 21; cf Benzing (n 684) 159-164, 266.

[1176] While this is not explicitly allowed for by the ICJ Statute, it is a common tool of all international courts and tribunals, see Teitelbaum (n 1174) 129; Amerasinghe (n 1152) 142; Benzing (n 684) 330, 332 *et seq*, but cf ps 696 *et seq*. See also the explicit provision in ECtHR Rules 44(C). Note that a refusal does not constitute an admission, nor does it reverse the burden of proof, see Benzing (n 684) 333 *et seq*.

[1177] Whether national security interests constitute a valid excuse under article 49 of the ICJ Statute is unsettled, see Dapo Akande and Sope Williams, 'International Adjudication on National Security Issues: What Role for the WTO' (2003) 43 *Va J Intl L* 365, 369; Benzing (n 684) 336, 415, 419-423; Scharf and Day (n 1175) 149. See also article 346(1)(a) of the Treaty on the Functioning of the European Union ([2012] OJ C326/47), which stipulates that no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security.

[1178] ICJ, *Corfu Channel* (n 177) 32. The court did not clarify whether it accepted the UK's excuse.

of which had been refused by Serbia for reasons of military secrecy and national security.[1179] In fact, even in situations where orders were resisted deliberately and with no apparent explanation, international courts have usually refrained from drawing negative inferences or have done so only very cautiously.[1180] Whatever the reasons behind this,[1181] in case of US drone strikes, where national security is commonly invoked as a reason for not disclosing information about the programme, it highly unlikely the ICJ would either order the US to produce the necessary evidence or that it would draw negative inferences from its refusal to do so.

However, this should not be taken to mean that the ICJ has remained completely oblivious to the hardship of the party bearing the *onus* of proof. Rather than by investigating the facts of a case *propio motu*, it has at times refrained from insisting on direct evidence, allowing the party carrying the burden of proof to satisfy the *onus* by reference to indirect evidence instead. This was first established in the court's *Corfu Channel* case. In that case, the ICJ recognized that the exclusive territorial control exercised by Albania over its territory made it virtually impossible for the UK to furnish direct proof of events that allegedly took place on Albania's territory and that might have given rise to Albanian responsibility.[1182] In such circumstances,

> a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[1183]

[1179] idem, *Bosnian Genocide* (n 144) [42], [44], [205] *et seq* and the critical Dissenting Opinion of Vice-President Al-Khasawneh 254 *et seq* para 35. Very critical also Benzing (n 684) 312 ('hard to reconcile with the right to a fair trial'; this author's translation).

[1180] Benzing (n 684) 334 *et seq*. See also IUSCT, *William J Levitt v Iran and others* (Award) [1991] Award No 520-210-3, 27 Iran-US CTR 145 [64]-[66], where the tribunal, in the face of 'deliberate non-compliance', only chose to 'interpret the incomplete record (…) in the light of the Respondent's failure to comply with the Tribunal's production Orders'. cf ECtHR, *Al Nashiri* (n 711) [395]; *Husayn* (n 711) [395]; UN Committee against Torture, *Agiza v Sweden* (Decision concerning Communication No 233/2003) (24 May 2005) UN Doc CAT/C/34/D/233/2003 para 12.34.

[1181] Several possible explanations are offered by ICJ, *Bosnian Genocide* (n 144) Dissenting Opinion of Judge Mahiou 416 *et seq* para 58.

[1182] ICJ, *Corfu Channel* (n 177) 18.

[1183] ibid. See also idem, *Bosnian Genocide* (n 144) [373]-[376], where the court rejected circumstantial evidence of Serbia's intent to commit genocide since that evidence was not such which could *only* point to

This merits some clarification. In general, the party bearing the *onus* of proof may prove a fact by reference to direct or indirect evidence. Direct evidence is such where the alleged fact flows directly from the submitted evidence. Indirect or circumstantial evidence, on the other hand, 'means facts which, while not supplying immediate proof of the charge, yet make the charge probable with the assistance of reasoning'.[1184] In international law, there is no general rule that would render indirect evidence inadmissible *per se*.[1185] Moreover, no formal hierarchy exists between the different types of evidence that would oblige an international court or tribunal to rely only on the "best evidence",[1186] nor are there any concrete rules on the probative weight that attaches to certain pieces of evidence.[1187] Instead, any court or tribunal may freely assign to each item the evidentiary value it sees fit.[1188] In practice, however, the ICJ places far greater weight on direct evidence than on indirect evidence.[1189] For example, it prefers 'contemporaneous evidence from persons with direct knowledge',[1190] and is careful not to put too much emphasis on public sources such as media reports.[1191] Against this background, the ICJ's statement in the *Corfu Channel* case is best understood as not relating to the admissibility of indirect evidence itself, but instead should be interpreted to mean that in situations of extreme evidentiary difficulties, the court is willing to attach to it much greater weight than it normally does.[1192]

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the existence of such intent; ECtHR, *Ireland* (n 1160) [161]; IACtHR, *Velásquez Rodríguez* (n 536) [130]. cf ICJ, *Bosnian Genocide* (n 144) Separate Opinion of Judge Lauterpacht 424 para 46 ('appropriate evidence').

[1184] ICJ, *Corfu Channel* (n 177) Dissenting Opinion by Judge Badawi Pasha 59.

[1185] cf idem, *Oil Platforms* (n 692) Separate Opinion of Judge Higgins 77 paras 34 *et seq*; Benzing (n 684) 578; Scharf and Day (n 1175) 136 fn 86.

[1186] ICJ, *South West Africa (Second Phase) (Ethiopia v South Africa; Libera v South Africa)* (Judgement) [1966] ICJ Rep 6 Dissenting Opinion of Judge Jessup 430; *Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belgium v Spain)* (Judgement) [1970] ICJ Rep 3 Separate Opinion of Judge Fitzmaurice 98 para 58; *Bosnian Genocide* (Further Provisional Measures) [1993] ICJ Rep 325 Separate Opinion of Judge Shahabuddeen 357 *et seq*; IACtHR, *Velásquez Rodríguez* (n 536) [130]; Amerasinghe (n 1152) 204-208, 223 *et seqq*; Benzing (n 684) 453-456, 579.

[1187] Benzing (n 684) 493 *et seq*.

[1188] ICJ, *Military and Paramilitary Activities* (n 177) [60]; *Armed Activities on the Territory of the Congo* (n 168) [59]; *Bosnian Genocide* (n 144) [213]; Amerasinghe (n 1152) 187. See also ECtHR, *Ireland* (n 1160) [210]; IACtHR, *Velásquez Rodríguez* (n 536) [127].

[1189] Benzing (n 684) 552.

[1190] ICJ, *Armed Activities on the Territory of the Congo* (n 168) [61].

[1191] eg ICJ, *Military and Paramilitary Activities* (n 177) [62] *et seq*; *Oil Platforms* (n 692) [60]; *Bosnian Genocide* (n 144) [357]; *Armed Activities on the Territory of the Congo* (n 168) [68].

[1192] Similar Benzing (n 684) 581, 693 *et seq*, who argues that the value of the *Corfu Channel* case lies in the fact that the ICJ was willing to form its conviction based *exclusively* on circumstantial evidence.

Before this study turns to examine whether the evidentiary standards of the ICJ allow for finding a causal link between the provision of intelligence and an internationally wrongful drone strike, a further standard of proof that merits a mention at this point is that of so-called *prima facie* evidence.[1193] Although its exact contours remain blurry, a standard of *prima facie* evidence also seeks to assist the claimant in situations where it is extremely difficult to furnish direct proof for a fact. According to the Iran-US Claims Tribunal,

> [p]rima facie evidence must be recognized as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty and an inference from the evidence can reasonably be drawn.[1194]

However, if a standard of *prima facie* evidence may also be applied in inter-State proceedings is questionable.[1195] Its rules have been developed primarily in the context of post-war litigation of individuals against a foreign State,[1196] and as such are not readily transposable to disputes between two States. Moreover, under the ICJ's *Corfu Channel* case, the burden of proof is only discharged if the indirect evidence produced for the fact leads logically only to a single conclusion. This standard must not be undermined by reference to the more relaxed rules of *prima facie* evidence, where all that is needed is for the claimant State to produce reasonable evidence of its claim.[1197]

2) Application to the Present Case

However, even if the claimant State is allowed a more liberal recourse to inferences of fact and circumstantial evidence, it is questionable whether it would be able to prove

[1193] *Prima facie* evidence, in turn, must be distinguished from a *prima facie* case, see Benzing (n 684) 181-184, 545 *et seq*. cf Amerasinghe (n 1152) 246-252, who uses the terms interchangeably.

[1194] IUSCT, *Rockwell International Systems, Inc v Iran* (Award) [1989] Award No 438-430-1, 23 Iran-US CTR 150 [141]. See also General Claims Commission, *William A Parker* (n 1168) [6]; *Lillie S Kling (US v Mexico)* [1930] 4 RIAA 575, 585; British-Mexican Claims Commission, *Robert John Lynch (GB v Mexico)* [1929] 5 RIAA 17, 19. See also Amerasinghe (n 1152) 247.

[1195] Benzing (n 684) 699 *et seq*, who admits that so far, no clear rules have emerged in international procedural law. cf Cheng (n 759) 323-326, 329 *et seq*.

[1196] Hans Das, 'Claims for Looted Cultural Assets: Is there a Need for Specialized Rules of Evidence?' in International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes* (Schulthess 2003) 210; see also Amerasinghe (n 1152) 251-258, who notes that the jurisprudence on the topic has not addressed the question of the relationship between *prima facie* evidence and the applicable standard of proof.

[1197] Concurring Benzing (n 684) 699. See also James A Green, Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58 *ICLQ* 163, 166.

beyond reasonable doubt that the information shared by German intelligence agencies has made any drone strike at least somehow easier. Realistically, this might only be considered in the handful of cases where information was provided on a specific individual who was later reported to have been killed by the US. However, and notwithstanding the question whether these attacks were actually internationally unlawful, even in situations of extreme evidentiary difficulties may a case not be founded on mere allegations or suspicions.[1198] For example, the allegation that there is some connection between the killing of Bünyamin Erdoğan and the provision of intelligence by the BfV seems to rest on the fact that a drone is able to geolocate a particular handset using only its cell phone number, and that the information shared with the US had also included Erdoğan's number. Here, the underlying assumption appears to be that a certain cell phone number will always lead to the individual associated with it.[1199] While this may certainly be true in some cases, as exemplified by the assassination of Pakistani Taliban commander Nek Mohammad described at the beginning of this study, it is by no means a generalizable principle. Afghan, Pakistani, and Yemeni militants all seem to have long realized that their mobile phones might make them a potential target of US drone strikes. According to *The Intercept*, some targets have as many as 16 different SIM cards associated with their identity.[1200] Moreover, according to a former JSOC drone operator interviewed by *The Intercept*, Taliban leaders 'would do things like go to meetings, take all their SIM cards out, put them in a bag, mix them up, and everybody gets a different SIM card when they leave'.[1201] Others, unaware that they are being targeted, might lend their phone to a family member or friend who then ends up being targeted in their stead.[1202] Thus, although cell phone metadata may facilitate the geolocation of a certain handset, it has no bearing on the question whether that handset is, at the time of an attack,

[1198] See ICJ, *Oil Platforms* (n 692) [59]; IUSCT, *Jalal Moin v Iran* (Award) [1994] Award No 557-950-2, 30 Iran-US CTR 70 [19]; Amerasinghe (n 1152) 140 *et seq*.

[1199] eg NSA Inquiry Committee, '100. Sitzung' (n 60) 145 *et seq* (Statements of Hans-Christian Ströbele).

[1200] Jeremy Scahill and Glenn Greenwald, 'The NSA's Secret Role in the U.S. Assassination Program' *The Intercept* (10 February 2014) <https://theintercept.com/2014/02/10/the-nsas-secret-role/> accessed 2 March 2021. See also NSA Inquiry Committee, '67. Sitzung – Teil 1' (n 63) 121 (Testimony of Brandon Bryant).

[1201] Scahill and Greenwald, 'Secret Role' (n 1200). See also Shah and others (n 221) 38; NSA Inquiry Committee, '67. Sitzung – Teil 1' (n 63) 120 *et seq* (Testimony of Brandon Bryant).

[1202] Scahill and Greenwald, 'Secret Role' (n 1200); Sarah Holewinski 'Just Trust Us: The Need to Know More About the Civilian Impact of US Drone Strikes' in Peter L Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law and Policy* (CUP 2015) 58.

still in use by the individual associated with it.[1203] The claim that there must be a causal link between the exemplary killing of Erdoğan and the provision of intelligence by the BfV is merely speculative, no more.[1204]

In sum, there is no evidence, whether direct or indirect, that would suggest that the intelligence provided by the Federal Republic of Germany has made any particular drone strike at least somehow easier. This conclusion was also the result of the investigations conducted by the NSA Inquiry Committee, which found that 'none of the documents submitted to the committee indicate that US drone operations or even targeted killings were caused by information provided by German authorities, regardless of their nature or origin'.[1205]

II. Granting the Use of Ramstein Air Base

With Ramstein Air Base, evidence of its involvement in US targeted killings is more readily available. Although the US has never officially confirmed what exactly happens at Ramstein, in August 2016, a member of the US Embassy in Berlin told representatives of the German Federal Foreign Office that its drone operations are conducted via a global network of telecommunication facilities, some of which serve as relay points and some of which are located at Ramstein Air Base. Moreover, he admitted that Ramstein was also supporting the planning, monitoring, and evaluation of certain aerial operations, but did not provide further details on their exact nature or scope.[1206] However, there appears to be convincing evidence that the communications for *all* drone strikes in Pakistan and Yemen were conducted via Ramstein Air Base. In particular, this is supported by the testimony of former member of the US Air Force and drone sensor operator Brandon Bryant,[1207] who claimed before the NSA Inquiry Committee: 'All data – every single

[1203] Shah and others (n 221) 38; NSA Inquiry Committee Report (n 59) 1359-1361.

[1204] In case of Bünyamin Erdoğan, the German Federal Government asked the US to provide an explanation of the facts surrounding his death, which the US never did. See Deutscher Bundestag, 'Tötung eines deutschen Staatsangehörigen durch einen US-Drohnenangriff' (7 December 2011) BT-Drs 17/8088, 6.

[1205] NSA Inquiry Committee Report (n 59) 1360 (this author's translation), 1361. See also NSA Inquiry Committee, '96. Sitzung' (n 59) 121 (Testimony of Klaus Rogner).

[1206] See Deutscher Bundestag, Plenarprotokoll 18/205 (n 80) 20452 *et seq* (Statement of Michael Roth); NSA Inquiry Committee Report (n 59) 1177.

[1207] On Brandon Bryant see Matthew Power, 'Confessions of a Drone Warrior' *GQ* (23 October 2013) <www.gq.com/story/drone-uav-pilot-assassination> accessed 3 March 2021; NSA Inquiry Committee Report (n 59) 1111.

piece of data and information – that was transferred between aircraft and air crew was done through Ramstein Air Force Base'.[1208]

Regarding the *quality* of the link between the relay of data and US counterterrorism operations, Bryant's testimony in particular led the NSA Inquiry Committee to conclude that 'it is safe to assume that Ramstein Air Base (…) plays a *substantial* role for the operation of US drones'.[1209] Two arguments militate for this position. For one, it will be remembered that without Ramstein, the latency in the communications between a drone and its crew could not be kept low enough to allow the sensor operator to reliably fix the laser beam which guides the drone's AGM-114 Hellfire missile on a target, especially if it is moving.[1210] Secondly, according to Bryant,

> [without Ramstein Air Base the US] would have to forward and deploy entire squadrons (…). If you take away the relay then that means the Air Force is going to have to spend money to mobilize these kinds of units and get them over there. Which also means that they are going to have to develop new technology, probably make the systems more mobile (…). There would be a lot of changes if Ramstein wasn't around.[1211]

In fact, the US itself highlighted the importance of Ramstein Air Base for its counterterrorism operations when it notified the German authorities of its intent to construct a SATCOM relay station in accordance with the *ius in praesentia*.[1212] In particular, it emphasised that '[w]ithout these facilities, the aircraft will not be able to perform their essential UAS missions (…), UAS weapons strikes cannot be supported and necessary intelligence information cannot be obtained'.[1213] And further, that '[t]he absence of this UAS relay station could significantly reduce the operational capabilities and could have serious consequences for current and future missions'.[1214] By its own

[1208] NSA Inquiry Committee, '67. Sitzung – Teil 1' (n 63) 23, 26 (Testimony of Brandon Bryant).
[1209] NSA Inquiry Committee Report (n 59) 1354 (this author's translation; emphasis added). See also Deutscher Bundestag (Wissenschaftliche Dienste), 'Rolle des Militärstützpunktes Ramstein' (n 51) 12; OVG NRW (n 51) [252]-[278].
[1210] Whittle (n 17) 212.
[1211] NSA Inquiry Committee, '67. Sitzung – Teil 1' (n 63) 89 (Testimony of Brandon Bryant).
[1212] See § 6 A.
[1213] Quoted by NSA Inquiry Committee Report (n 59) 1170.
[1214] Quoted by OVG NRW (n 51) [273] – juris (this author's translation).

account, the US had even considered various alternatives to constructing a SATCOM relay station at Ramstein Air Base, but its analysis had shown that this was the only option which fulfilled the operational requirements.[1215]

Thus, while it seems clear that allowing US forces to use Ramstein Air Base has made all drone strikes, including those that are internationally wrongful, significantly, substantially, or materially easier, two final remarks are in order. First, one might object that US forces were granted the use of Ramstein Air Base in the 1950s, and that there can hardly be a causal relationship with a drone strike conducted more than half a century later.[1216] While this concern might have a bearing on the question of normative causation, which will be addressed in the second half of this chapter, it has to be remembered that for the element of *factual* causation, it does not matter how far removed in time or in space an event is from the injury as long as 'there is no break in the chain [of causation] and the loss can be clearly, unmistakably, and definitely traced, link by link'[1217] to the event. Secondly, it should be noted that another SATCOM relay station is currently being constructed at Sigonella Naval Air Station in Sicily, Italy. According to the description by *RLF Architecture*, the contractor responsible for its construction, this station is supposed to 'provid[e] critical backup for its sister SATCOM relay station in Ramstein, Germany'.[1218] Christian Fuller, on the other hand, alleges that the Sigonella station is supposed to take over half of the data transit currently handled by Ramstein.[1219] Whatever role it plays in US counterterrorism operations, it is highly questionable whether the Signolla station is already operable, and, if so, since when. According to a Google Earth satellite image dated December 2018, at the time construction had only been completed for three of an estimated 12 SATCOM relay structural pads, and the central SATCOM

[1215] See ibid [274] – juris. See also Whittle (n 17) 208-212, who reports that the CIA had studied 12 different alternatives to Ramstein Air Base, ranging from placing the ground control station in a different country to even putting it on a ship, but none had turned out to be politically or technically feasible.

[1216] On the history of Ramstein Air Base see n 723.

[1217] Mixed Claims Commission, *Administrative Decision No 2* (n 832) 29 *et seq*. See also Honoré (n 815) para 3.

[1218] 'Unmanned Aircraft System (UAS) Satellite Communications Relay Station' (*RLF Architects*) <http://rlfarchitects.com/federal/unmanned-aircraft-system-uas-satellite-communications-relay-station/> accessed 2 August 2019. See also Scahill, 'Tell-Tale Heart' (n 67).

[1219] Christopher Fuller, 'The assassin in chief: Obama's drone legacy' in Michelle Bentley and Jack Holland (eds), *The Obama Doctrine: A legacy of continuity in US foreign policy?* (Routledge 2019) 138.

facility was still a roofless shell.[1220] As regards any drone strikes carried out before that date, Ramstein's involvement may safely be assumed.[1221]

III. Omission to Protect

Identifying a causal relationship between a State's failure to comply with its international and / or domestic obligations and the commission of an internationally wrongful act is, as Andrea Gattini has remarked in a similar context, 'a particularly tricky [issue]'.[1222] It introduces into the judicial reasoning a purely hypothetical factor,[1223] namely what would have happened had the Federal Republic of Germany complied with its fundamental duty to protect. Would it have made the US' targeted killings more difficult? In other words, has a possible failure of Germany to comply with what was required of it under article 2(2)(1) of the Basic Law made it at least somehow easier for the US to carry out an internationally wrongful drone strike?

It is evident that this question cannot be answered without knowing which measures would have been adopted by the German Federal Government and how the US would have reacted to them. Although it appears safe to assume that the necessary causal link would be established if the required action were to terminate the lease of Ramstein Air Base or to withdraw the radio frequencies needed for the operation of its SATCOM relay station, the previous chapter has shown that such extreme measures cannot reasonably be demanded.[1224] If, on the other hand, the demand were that the Federal Government intensify its engagement with US and confront it with its own view of what it considers to be internationally lawful, it is hard to judge whether this would have had any noticeable influence on the US' activities, that means whether a *failure* to do so has

[1220] See Google Earth, 37°23'53"N 14°54'08"E. For a sketch of what the completed facility is supposed to look like see 'Unmanned Aircraft System (UAS) Satellite Communications Relay Station' (*RLF Architects*, n 1218).

[1221] Note that article 16 of the ARSIWA does not require that the aid or assistance is a *sine que non* of the internationally wrongful act. Assuming that the Sigonella station only acts as a backup to Ramstein, it would not matter whether, in Ramstein's absence, the relay of data would alternatively be done via Italy. Concurring Deutscher Bundestag (Wissenschaftliche Dienste), 'Rolle des Militärstützpunktes Ramstein' (n 51) 12.

[1222] Gattini, 'Obligation to Prevent' (n 805) 709. Similar Aust, *Complicity* (n 30) 283. cf Christenson (n 762) 346.

[1223] François Rigaux, 'International Responsibility and the Principle of Causality' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005) 85; Gattini, 'Obligation to Prevent' (n 805) 709.

[1224] See § 6 B. II. 4) c).

made it at least somehow easier for the US to carry out its attacks. However, that this might not be at all inconceivable is evidenced by the progress made in other questions relating to Ramstein Air Base. For example, while at first the US refused to comment on anything that happens at Ramstein Air Base, the Federal Government's continuing and persistent engagement with it ultimately led to the admission that Ramstein plays at least some part in the operation of drones and in the support of certain aerial operations.[1225] Although this does not seem much, it is tender evidence for the fact that there might be some sort of influence after all.

Be that as it may, these considerations demonstrate the difficulties presented by the purely hypothetical reasoning of factual causality of an omission, and which have led Special Rapporteur Roberto Ago to suggest that with omissions, the requirement of causality should be assessed purely in normative terms.[1226] The element of proximate causality, however, does not pose fewer problems, as will be shown in the following section.

B. Normative Causation

There appears to be general agreement that not every action or omission which has made the commission of an internationally wrongful act at least somehow easier also amounts to aiding or assisting within the meaning of article 16 of the ARSIWA.[1227] Already during the drafting process of the ARSIWA, several members of the ILC had questioned whether support that is "indirect" or "too remote" would fall within the purview of the provision. Paul Reuter, for instance, 'doubted whether assistance that was materially too remote could be regarded as complicity',[1228] and Special Rapporteur Nikolai Ushakov cautioned

[1225] See NSA Inquiry Committee, '77. Sitzung' (n 709) 81 (Testimony of Jürgen Schulz).

[1226] Ago, 'Le délit international' (n 43) 503; see also Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 389.

[1227] Without distinguishing between factual and normative causation see eg Lowe (n 42) 5; Felder (n 715) 250; Nolte and Aust (n 144) 10; Lanovoy, *Complicity* (n 145) 184; Jackson (n 151) 158; Moynihan, *Aiding and Assisting* (n 717) 9 paras 24, 26. See also Vladyslav Lanovoy, 'Responsibility for Complicity in an Internationally Wrongful Act: Revisiting a Structural Norm' (Paper presented at the SHARES Conference "Foundations of Shared Responsibility in International Law", Amsterdam, 18 November 2011) 16 ('subsequent legal literature has been unanimous in recognizing that it is necessary to circumvent any remote or indirect aid or assistance'); Zwijsen, Kanetake and Ryngaert (n 163) 153 *et seq*.

[1228] ILC, '30th session: Summary record of the 1517th meeting' in idem, *Yearbook ... 1978*, vol 1 (n 49) 229 para 5.

that if 'participation were too indirect, there might be no real complicity'.[1229] Similar positions have also been taken with regard to various prohibitions on complicity contained in specialized regimes.[1230] For example, under the Anti-Personnel Landmines Convention,[1231] the provision of assistance to the use, development, acquisition, or transfer of anti-personnel mines is prohibited.[1232] This led the Australian government to remark that providing medical assistance to a soldier who is responsible for the laying of anti-personnel mines would be too indirect and could not be considered assistance within the meaning of the convention. However, if a State were to provide fuel or drivers for the trucks that transport the mines, then such conduct would be sufficiently direct to fall under the prohibition.[1233]

As will be recalled, the concepts of directness and remoteness belong to the area of normative causation, which provides a legal corrective to an otherwise purely scientific test of factual causation.[1234] However, despite its importance, the ILC has addressed the issue of causal proximity only in connection with causality relating to reparation (*haftungsausfüllende Kausalität*), and it has done so only superficially.[1235] Normative causality at the level of *establishing* State responsibility for complicity, on the other hand, has received no treatment, and most scholars have remained equally silent.[1236] In the

[1229] idem, 'Summary Record of the 1519th meeting' (n 720) 239 para 11, noting that participation must be 'active and direct'.

[1230] See Aust, *Complicity* (n 30) 200 and Lanovoy, *Complicity* (n 145) 186, who point out that such comparative analysis may shed additional light on the way in which article 16 as the general rule on responsibility for complicity is to be interpreted.

[1231] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

[1232] ibid art 1(1)(c).

[1233] See Stuart Maslen, *Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction*, vol 1 (OUP 2004) 93 *et seq* paras 1.57-1.59, who notes that this interpretation seemed to be widely accepted by the States Parties.

[1234] See § 6 B. I. 1) b).

[1235] See only ARSIWA General Commentary (n 50) 92 *et seq* para 10; critical of the ILC's silence Brigitte Stern, 'The Obligation to Make Reparation' in Crawford, Pellet and Olleson (eds) (n 165) 569 *et seq*; Lanovoy, *Complicity* (n 145) 274; cf Crawford, *State Responsibility* (n 163) 493.

[1236] See only Aust, *Complicity* (n 30) 216 *et seq*, who remarks that an analysis of the link between the aid or assistance and the internationally wrongful act must be 'normative and case-specific' and that for this purpose, notions such as proximity or remoteness are only of limited usefulness; Jackson (n 151) 109, who proposes an element of proximity where international criminal accomplice liability for omissions is concerned; de Wet, 'Complicity' (n 158) 309, speaking of 'factual and temporal proximity (nexus) between the assisting and principal act'; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 389, who argues that the issue of a causal link between the complicit conduct and the principal wrongful act should be viewed 'through a lens of proximity/remoteness'.

following, it will therefore be necessary to first determine how the requirement of a proximately causal link between the complicit conduct and the principal wrongful act is to be interpreted (see I below), before applying these findings to the different forms of German involvement in US targeted killings (see II below).

I. Standard for Causal Proximity

It has already been mentioned that international courts and tribunals use a wide array of factors to determine whether an event is proximate enough to a result to be regarded its normative cause, asking, for instance, whether the event was the true source of the result, or whether the occurrence of the result was reasonably foreseeable.[1237] With complicity, however, their application is complicated by the involvement of the supporting State as a third actor.[1238] For example, in the context of causality relating to reparation, Vladyslav Lanovoy has remarked that '[t]echnically, complicity only occasions the harm (…) rather than causes it',[1239] and that it will always be the internationally wrongful act of the receiving State that is the true source of the injury sustained by the injured State.[1240] This would mean that although the complicit State contributed in some form to the occurrence of the harm, he could never be held responsible for it.[1241] For Lanovoy, this somewhat paradoxical result merits correction, namely by assessing proximate causality primarily in light of the criterion of foreseeability. At the level of reparation, this means that the aid or assistance would be considered the proximate cause of an injury if, at the time of the decision to grant the support, the complicit actor could have reasonably foreseen that the harm would occur as a consequence of the principal wrongful act to which he was providing assistance.[1242]

[1237] Note that the situation here is different from the one dealt with in sections § 6 B. I. 1) and § 6 B. I. 2). There, the question had been whether the US' activity taking place on German territory could be considered a proximate cause of the injuries inflicted in Pakistan and Yemen. This, however, is no situation of complicity.

[1238] Aust, *Complicity* (n 30) 217; Lanovoy, *Complicity* (n 145) 281.

[1239] Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 164.

[1240] ibid; *Complicity* (n 145) 272; concurring Jackson (n 151) 168. Note that Lanovoy does not cleanly distinguish between factual and normative causation.

[1241] Lanovoy, *Complicity* (n 145) 281.

[1242] idem, 'Complicity in an Internationally Wrongful Act' (n 754) 164 *et seq*; *Complicity* (n 145) 262; concurring Lowe (n 42) 12; Jackson (n 151) 170. See also Arbitral Tribunal, *Naulilaa Arbitration* (n 834) 1023 *et seq*, which held Germany responsible for those "indirect" damages that it could have foreseen; for an appraisal of the causal analysis undertaken by the tribunal see Plakokefalos (n 794) 486 *et seq*; Eritrea-Ethiopia Claims Commission, *Guidance Regarding Jus ad Bellum Liability (Decision No 7)* [2007]

Lanovoy's concerns about the sensibility of applying some of the criteria used by international courts and tribunals to assess normative causality in situations of complicity are not limited to the level of reparation, but apply *a fortiori* to the level of establishing complicit responsibility. To ask whether the aid or assistance is the source of the principal wrongful act despite the ILC's comment that the support need not be essential to its performance would make no sense.[1243] In fact, if the aid or assistance were indeed the cause of the internationally wrongful act, then why should the assisting State only be held responsible for complicity instead of co-authorship for the principal wrong?[1244] Thus, it is this author's view that Lanovoy's proposal should also be applied, *mutatis mutandis*, to the level of establishing complicit responsibility. This means that the aid or assistance may be considered the proximate cause of an internationally wrongful act if, at the time of the decision to provide support, whether by act or by omission, the accomplice could have reasonably foreseen that his action or omission would be used for the commission of the principal wrong.[1245]

II. Application to the Present Case

Applying the standard developed in the preceding section to the different forms of German involvement in US counterterrorism operations, it appears to be clear that although granting US forces the use of Ramstein Air Base is factual cause of an internationally wrongful drone strike, it is no *proximate* cause. After all, when US were granted the use of Ramstein Air Base almost 70 years ago, targeted killings by remotely controlled aircraft were still wishful thinking.[1246]

The picture is different with respect to a possible failure of the Federal Republic of Germany to comply with its fundamental duty to protect the right to life abroad.

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26 RIAA 10, 15, deciding that proximate causality is best assessed by applying a test of foreseeability; Rigaux (n 1223) 88, identifying previsibility as the main test to justify liability.

[1243] See also Aust, *Complicity* (n 30) 212, who notes that in case of assistance to a wrongful act and under general legal theory, 'the participant would neither cause the principal to act nor would the latter act in consequence of this assistance'.

[1244] Felder (n 715) 249 fn 643, 251 *et seq*; Aust, *Complicity* (n 30) 212 *et seq*.

[1245] See Christopher Kutz, 'Responsibility' in Jules L Coleman, Kenneth E Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 563 *et seq*, who argues that in situations of complicity, the requirement of causality should be replaced by a test of "participatory intention", ie, the will to join in an act that does injury; Jackson (n 151) 109 *et seq*, who also puts an increased focus on the element of fault.

[1246] Concurring OVG NRW (n 51) [151] – juris. See also BVerfG, 2 BvR 1371/13 (n 913) [44] – juris, regarding the danger of terrorist attacks against foreign nuclear weapons stationed on German territory.

Assuming that the commission of an internationally wrongful act was made at least somehow easier by the omission – it is not necessary here to re-enter the discussion whether this is indeed the case –, aid or assistance is provided whenever an internationally wrongful act is actually carried out.[1247] The question whether or not at that time it was reasonably foreseeable that an internationally wrongful act would be committed overlaps considerably with the issue of the requisite subjective element under article 16 of the ARSIWA, which will be examined in the following chapter. Without wanting to anticipate the discussion, it shall be mentioned here that for the assisting State to have the necessary *mens rea*, it needs to be shown that at the time of the provision of the aid or assistance, it was *virtually certain* that an internationally wrongful act *would* be committed.[1248] While this is an extremely high threshold, reasonable foreseeability is a much more relaxed standard. Especially in Pakistan, where most drone strikes have been conducted outside the context of an armed conflict and the lawfulness of which must be assessed under the strict requirements of the law enforcement standard, there is good reason to assume that the commission of an internationally wrongful act was reasonably foreseeable. A different conclusion, however, may be warranted with regard to Yemen, where the use of lethal force is subject to the more permissive rules of the *ius in bello* and is thus much more likely to be lawful. In fact, since it is impossible for German authorities to know in which part of the world a specific strike (to which they are providing aid or assistance through omission) will be conducted, even a standard of reasonable foreseeability may be increasingly difficult to satisfy once the US started to expand its counterterrorism operations to other countries. This leaves the period between 2008 and 2011, when drone strikes were carried out almost exclusively in Pakistan. Although there is considerable room to argue that in this period, the commission of an internationally wrongful act was reasonably foreseeable, beyond that, uncertainty reigns supreme.

[1247] This touches upon the difficult issue of the *tempus delicti commissi* of complicity through omission, which will be addressed in section § 8 B. I. Although an omission is, in principle, continuing in character, it must be remembered that complicit responsibility is, in a sense, derivative responsibility. In the absence of an internationally wrongful act that allows for complicit involvement, there can be no complicity. Technically, this means that aid or assistance cannot be provided beyond the existence of the principal wrongful act itself, and whenever the principal wrongful act is completed in character – as is the case with US drone strikes – an omission would have to be conceived as a recurring completed act.

[1248] See § 8 C. II.

C. Conclusion

Already in 1998, David Caron noted that causation 'as an aspect of State Responsibility is (…) an undeveloped area of international law'.[1249] This may, in part, be owed to its ambivalent role in establishing State responsibility. In the majority of cases involving only a single State as possible perpetrator and a relatively straightforward breach of international law, causality will hardly ever be mentioned.[1250] And in the few complicated cases where it is unclear "who has caused precisely what", it will often be glazed over all too quickly. State responsibility for complicity is certainly one of them, and the ILC's failure to offer coherent guidance on how to apply the requirement of causality has left scholars wondering whether there is a clear *de minimis* standard to which the complicit conduct must have contributed to the principal wrong, or how the requirement of normative causality fits within the triangular relationship between the complicit conduct, the principal wrongful act and the injury caused by the latter. And once omissions are added to the equation, things become even more complicated.

These legal uncertainties, however, are not the only reason why it will be difficult to establish a causal relationship between the different forms of German involvement in US counterterrorism operations and the commission of an internationally wrongful act. For example, there is simply no evidence, whether direct or indirect, that the provision of intelligence has made the even a single drone strike at least somehow easier. Similarly, if one accepts an approach to normative causality that focuses on whether the commission of an internationally wrongful act was reasonably foreseeable, then allowing US forces to use Ramstein Air Base may also be excluded as a potential basis for complicit responsibility. And with an omission to protect, prospects appear equally bleak. Even if one overcomes the difficulties of showing that such an omission has made it at least somehow easier for the US to conduct its operations (let alone that it has done so in a significant, substantial, or material way), there might be only a small window of time in which the Federal Republic of Germany could have reasonably foreseen that an internationally wrongful act would be committed. Whether or not this coincides with the

[1249] David D Caron, 'The Basis of Responsibility: Attribution and Other Transsubstantive Rules' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers 1998) 153.

[1250] Aust, *Complicity* (n 30) 211.

presence of the requisite *mens rea* element of complicit responsibility will be for the next chapter to determine.

§ 8 Subjective Element

There is general agreement that for a State to incur complicit responsibility under article 16 of the ARSIWA, it does not suffice to show that it has furnished aid or assistance to the commission of an internationally wrongful act by another State. Instead, article 16 itself stipulates that the assisting State will only be responsible if it does so 'with knowledge of the circumstances of the internationally wrongful act'.[1251] However, despite the seemingly clear wording of the provision, there is significant uncertainty surrounding the specific content of this requirement. For one, this is owed to the fact that in international law there is no unified interpretation of the term "knowledge".[1252] While it may imply a standard of constructive knowledge, that is, knowledge which could have been obtained had the accomplice acted with reasonable care, it may also be interpreted to mean only actual, positive knowledge.[1253] Moreover, the text of the ARSIWA is no source of law, but evidence of a pre-existing source of (customary) international law.[1254] This means that to interpret the draft articles, one cannot stop at their wording, but must at least read them in conjunction with the preparatory documents and the ARSIWA General Commentary.[1255] Although the latter does not necessarily reflect customary international law itself, it was adopted precisely to help with the interpretation of the draft articles.[1256] In fact, while the text of the ARSIWA may suggest to mean one thing, 'a whole complex of additional meaning[s] can be found in the commentar[y] and in decades of consideration by the ILC and the Sixth Committee'.[1257]

[1251] As a non-corporeal entity, the *culpa* of a State is generally established by reference to its agents and representatives, see PCIJ, *German Settlers in Poland (Germany v Poland)* (Advisory Opinion) [1923] PCIJ Rep Series B no 6, 22. The question whether a State had the necessary *mens rea* implicates an analysis of whether its agents or representatives possessed such, see Lanovoy, *Complicity* (n 145) 46.

[1252] Lanovoy, 'Revisiting a Structural Norm' (n 1227) 22.

[1253] ibid.

[1254] David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *AJIL* 857, 867. Note that it is also the aim of the ILC to progressively develop the law, see Statute of the International Law Commission (adopted 21 November 1947) UN Doc A/Res/174(II), art 1(1).

[1255] Caron, 'Paradoxical Relationship' (n 1254) 868-870, who argues that the text of the ARSIWA should even be read last; Aust, *Complicity* (n 30) 237; Moynihan, *Aiding and Assisting* (n 717) paras 60-64.

[1256] Giorgio Gaja, 'Interpreting Articles adopted by the International Law Commission' (2015) 85 *BYIL* 1, 19 *et seq*, critical about whether in the case of article 16 the commentary should prevail over the text of the provision; Aust, *Complicity* (n 30) 237.

[1257] Caron, 'Paradoxical Relationship' (n 1254) 869.

This chapter aims to establish the requisite subjective element of State complicity. For that purpose, it will first explore whether article 16 requires an additional *mens rea* element that goes beyond what is provided for in the text of the draft article (see A below), before it turns to examine the meaning of the term "knowledge of the circumstances" itself (see B below). The insights obtained in these sections shall then be used to determine whether the Federal Republic of Germany possessed the necessary *mens rea* (see C below).

A. Wrongful Intent

Although the text of article 16 of the ARSIWA establishes knowledge of the circumstances of the internationally wrongful act as the only relevant cognitive standard, the ARSIWA General Commentary appears to require an additional element of wrongful intent. According to the ILC, it must be shown that the aid or assistance was given '*with a view* to facilitating the commission of the wrongful act',[1258] and that the assisting State 'was aware of *and intended* to facilitate the commission of the internationally wrongful conduct'.[1259] In fact, most commentators seem to accept that intent forms an additional requirement for triggering complicit responsibility alongside knowledge of the circumstances.[1260] Agreement, however, is much more difficult to identify where the meaning of the term "intent" is concerned. The commission does not define the term, and it is not self-explanatory either. For example, intent can be synonymous with "aim", "purpose", or "desire" – terms which have often been used interchangeably and seemingly at random –,[1261] but may also be understood in a broader sense to include all different types of *mens rea*.[1262] This is evidenced by article 30(2) of the ICC Statute, which reads:

[1258] See ARSIWA General Commentary (n 50) 66 para 3 (emphasis added).

[1259] ibid 67 para 9 (emphasis added). See also p 66 para 5 ('A State is not responsible for aid or assistance under article 16 unless the relevant State organ *intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct (…); emphasis added).

[1260] eg Moynihan, *Aiding and Assisting* (n 717) paras 60-64; de Wet, 'Complicity' (n 158) 301; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 401. cf Lanovoy, *Complicity* (n 145) 240.

[1261] See, for example, Aust, *Complicity* (n 30) 236 *et seq*, who notes that 'it is also debated whether the assisting State must actually share the purpose of the primary law-breaker or whether it is sufficient to wish to further the concrete conduct'. It remains unclear what is the difference between the two. Similar Crawford, *State Responsibility* (n 163) 407 *et seq*.

[1262] Quigley (n 156) 112 fn 187; Jens D Ohlin, 'Targeting and the Concept of Intent' (2013) 35 *Mich J Intl L* 79, 82 *et seq*; Moynihan, *Aiding and Assisting* (n 717) paras 64 *et seq*; de Wet, 'Complicity' (n 158) 306; Zwijsen, Kanetake and Ryngaert (n 163) 154.

> For the purposes of this article, a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

The ICC Statute thus distinguishes between two different types of *mens rea*. First, *dolus directus* in the 1st degree, which is a person's purpose or desire to cause a wrongful consequence. And secondly, *dolus directus* in the 2nd degree, which is characterized by a person's positive knowledge that an unlawful consequence will occur in the ordinary course of events. According to the International Criminal Court (ICC), in the former case the volitional element of fault is prevalent, whereas in the latter, the cognitive element, namely knowledge that one's actions *will* cause the *undesired* consequence, dominates.[1263] Under the ICC Statute, both states of mind are equally intentional.

This raises the question how the ILC's requirement that the assisting State must intend to facilitate the commission of the internationally wrongful act is to be understood. Several scholars have suggested that the term should be interpreted narrowly within the meaning of *dolus directus* in the 1st degree. This means that unless the assisting State wishes or desires for the wrongful outcome to come about, no complicit responsibility will follow.[1264] To support their view, they regularly point to the ICJ's *Bosnian Genocide* case, where the court had to decide whether responsibility for complicity in genocide under article 3(e) of the Genocide Convention required a specific *mens rea* element on the part of the accomplice.[1265] Comparing article 3(e) to article 16 of the ARSIWA,[1266] the ICJ held that

> [it] sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of [article 3(e) of the Genocide Convention], and

[1263] ICC, *Bemba* (n 332) [358] *et seq*.

[1264] eg Klein (n 43) 431; Aust, *Complicity* (n 30) 237-249, but cf p 420; tentatively Crawford, *State Responsibility* (n 163) 407 *et seq*; Nolte and Aust (n 144) 13 *et seq*.

[1265] Article 3(e) establishes both criminal responsibility of an individual and international responsibility of a State, see ICJ, *Bosnian Genocide* (n 144) [167]. cf Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *EJIL* 669, 681.

[1266] The ICJ's approach might be based on the drafting history of article 16. Special Rapporteur Ago had referred to several examples of complicity, including, *inter alia*, the provision of weapons to aid another State to commit genocide. See Ago, 'Seventh report' (n 46) 58 *et seqq* paras 71 *et seqq*.

> the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of (…) Article 16 [of the ARSIWA] (…). In other words, to ascertain whether the Respondent is responsible for "complicity in genocide" (…), [the Court] must examine whether (…) the respondent State (…) furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.[1267]

The court then went to state:

> [T]here is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.[1268]

Thus, if article 3(e) of the Genocide Convention is not significantly different from article 16 of the ARISWA, what is true for the former must also be true for the latter. And if complicity in genocide requires *at the least* knowledge of the specific intent of the principal perpetrator, then, as a general rule, something more than knowledge of the illegality of the wrongful act must also be required under article 16.[1269] This something, the argument goes, can only be an aim or a desire to bring the wrongful consequence about.[1270]

However, as Miles Jackson has noted, this is probably 'not a natural interpretation of the judgement'.[1271] The ICJ did not to clarify whether the term "at the least" is supposed to imply that the accomplice needs to desire to further the wrongful outcome.[1272] Since the court had been able to reject Serbian responsibility for complicity in genocide on other

[1267] ICJ, *Bosnian Genocide* (n 144) [420].
[1268] ibid [421] (emphasis added).
[1269] Nolte and Aust (n 144) 14; Aust, *Complicity* (n 30) 236.
[1270] Crawford, *State Responsibility* (n 163) 407 ('something more than mere knowledge is required, namely *the need for actual intent* that aid and assistance be given to the illegal act'; emphasis added).
[1271] Jackson (n 151) 160. Concurring Lanovoy, *Complicity* (n 145) 230 ('reliance is exaggerated'), 231-234; de Wet, 'Complicity' (n 158) 306.
[1272] Palchetti (n 756) 389; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 395 *et seq*.

grounds,[1273] an in-depth analysis of the requisite subjective element under article 3(e) of the Genocide Convention had not been necessary. In fact, a narrow interpretation of intent disregards that under the general principle of *actori incumbit onus probandi*, it would be for the claimant State to furnish proof that the complicit State acted with the specific purpose or desire to bring the wrongful outcome about.[1274] In most cases, however, this will be extremely difficult, if not impossible, to do,[1275] and would thus render article 16 of the ARSIWA unworkable in practice.

Instead of interpreting intent narrowly to mean *only* purpose or desire, it is this author's view that an analogy should be drawn to article 30(2)(b) of the ICC Statute. Although analogies between the international law on the criminal responsibility of individuals and State responsibility for complicity must be handeled with care, it has already been mentioned earlier in this study that the former may still serve as important guidance for interpreting the latter.[1276] For the purpose of article 16 of the ARSIWA, this means that the assisting State has wrongful intent whenever it means to cause an internationally wrongful act (purpose or desire within the meaning of *dolus directus* in the 1st degree), *or* if it is aware that such an act will occur in the ordinary course of events (knowledge within the meaning of *dolus directus* in the 2nd degree).[1277] A desire or a wish

[1273] The court had been unable to establish that Serbia had been aware that its aid would be used to commit genocide, see ICJ, *Bosnian Genocide* (n 144) [422] *et seq*.

[1274] See, for example, ICJ, *Bosnian Genocide* (n 144) [204]; *Pulp Mills* (n 766) [162]; *Diallo* (n 628) [54]; ECtHR, *Orhan* (n 629) [266]; Thienel (n 1154) 550.

[1275] Quigley (n 156) 114; Graefrath (n 152) 375; Gibney, Tomaševski and Vedsted-Hansen (n 44) 294; Felder (n 715) 261 *et seq*; Lanovoy, *Complicity* (n 145) 101; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 396-398; André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 *EJIL* 15, 43. Critical of that argument Aust, *Complicity* (n 30) 242 *et seq*, who claims that, just like in domestic criminal law, a State's intent may be established by reference to what it has "said" or done. However, in international proceedings and especially in situations of complicity, where the actions of *two* States need to be investigated, judicial fact-finding is easily obstructed by a State's unwillingness to cooperate, see Quigley (n 156) 104; Lanovoy, *Complicity* (n 145) 229. On the practical difficulties of sanctioning a State's failure to cooperate see § 7 A. I. 1).

[1276] See § 6 B.

[1277] Concurring Moynihan, *Aiding and Assisting* (n 717) paras 68 *et seq*; 'Mental Element' (n 756) 467 *et seq*; de Wet, 'Complicity' (n 158) 301, 307 and fn 132; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 398-400. Speaking more generally of a "standard of knowledge" see Quigley (n 156) 111-113; Graefrath (n 152) 375; Epiney (n 147) 50 *et seq*; Lowe (n 42) 8; Felder (n 715) 260-265; Palchetti (n 756) 389; Dominicé (n 165) 286; Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 152 *et seq*; *Complicity* (n 145) 101, 227; Jackson (n 151) 161; Nollkaemper and others (n 1275) 40, 43. See also Milanović, 'Follow-Up' (n 1265) 683, regarding complicity in genocide.

for the wrongful outcome to come about is thus a sufficient but not a necessary condition for complicit responsibility to arise.[1278]

Helmut Aust, in particular, has argued strongly against such a broad interpretation of intent. Pointing to the drafting process of the ARSIWA, he claims that 'more States wished to have the intent requirement strengthened than weakened'.[1279] Moreover, he cautions that to discard the element of intent (in the sense of purpose or desire) would amount to nothing less than to 'introduc[ing] a risk-based form of responsibility through the back door',[1280] and would convert cooperation between States into 'a particularly hazardous form of conduct'.[1281] This, in turn, could prejudice the realisation of important community goals that depend on inter-State cooperation.[1282]

Neither argument is particularly convincing. As Miles Jackson has rightfully pointed out, 'it is an overstatement to suggest that a rule prohibiting knowing assistance that materially facilitates wrongdoing would be unworkable or render interstate cooperation hazardous'.[1283] In fact, the opposite is probably true. If one were to limit complicit responsibility to all but the few cases where the assisting State acted with the purpose or desire to bring the wrongful outcome about, then article 16 would be inapplicable in the most common scenario, that is, where a State, acting on its own political or economic agenda, knowingly accepts the commission of an internationally wrongful act but is otherwise indifferent to it.[1284] This would not only reduce the practical significance of article 16 to the point where it becomes redundant, but would also impede a victim's access to justice and reparation.[1285] And while cooperation between States is

[1278] Intent (in the sense of purpose or desire) may also be taken into account as an aggravating circumstance at the level of the content of complicit responsibility, see Mixed Claims Commission, *Dix* (n 835) 121; General Claims Commission, *H G Venable (US v Mexico)* [1927] 4 RIAA 219, 224.

[1279] Aust, *Complicity* (n 30) 237 *et seq*. Concurring Crawford, *State Responsibility* (n 163) 408; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 390 *et seq*. There seems to have been great confusion among the members of the commission whether intent or knowledge was the intended standard, see Felder (n 715) 259.

[1280] Aust, *Complicity* (n 30) 240.

[1281] ibid. See also Nolte and Aust (n 144) 14 *et seq*; Dominicé (n 165) 286; Crawford, *State Responsibility* (n 163) 408.

[1282] Aust, *Complicity* (n 30) 240.

[1283] Jackson (n 151) 161.

[1284] Quigley (n 156) 111; Gibney, Tomaševski and Vedsted-Hansen (n 44) 294 ('deliberate indifference'); Felder (n 715) 263; Lanovoy, *Complicity* (n 145) 228 *et seq*.

[1285] Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in Crawford, Pellet and Olleson (eds) (n 165) 650; Lanovoy, *Complicity* (n 145) 236.

most certainly beneficial and desirable, so is compliance with international law.[1286] Aust's concern that a broader interpretation of intent would introduce a risk-based form of responsibility through the back door seems equally exaggerated. As will be shown in the further progress of this chapter, knowledge that the recipient State will act unlawfully in the ordinary course of events is still a significant threshold and very different from a risk-based form of responsibility or even negligence.[1287]

Admittedly, several prominent States like the US, Germany, and the UK expressed their support for a narrow interpretation of intent,[1288] whereas only a handful of States favoured a broader understanding or rejected the inclusion of a subjective element altogether.[1289] However, while State opinion certainly plays an important role in determining the specific content of a rule of customary international law,[1290] it is not the only *opinio juris* that needs to be taken into account. For instance, several international expert panels have pronounced themselves in favour of a broader interpretation of intent. In an opinion paper on the legality of secret detention centres, the European Commission for Democracy through Law (Venice Commission) noted explicitly in connection with article 16 that '[f]or a State *knowingly* to provide transit facilities to another State may amount to providing assistance to the latter in committing a wrongful act, if the former State is *aware* of the wrongful character of the act concerned'.[1291] Similarly, a joint committee appointed by the UK House of Lords and the House of Commons and tasked with examining allegations of the use of torture in Pakistan and Egypt, recognized that State responsibility for complicity including under article 16 is incurred by 'one State

[1286] Jackson (n 151) 161.

[1287] Lanovoy, *Complicity* (n 145) 235; Jackson (n 151) 161. See also § 8 C. II.

[1288] See UNGA, 'Summary record of the 37th meeting' (3 November 1978) UN Doc A/C.6/33/SR.37 para 18 (Statement of the UK); ILC, *Yearbook ... 2001*, vol 2 pt 1 (n 717) 52 (Statement of the UK and the US). See also *Yearbook of the International Law Commission 1998*, vol 2 pt 1 (UN 2008) 128 *et seq* (Statement of the Federal Republic of Germany and the US); Lanovoy, *Complicity* (n 145) 227 *et seq*, who notes that the same view was also held by Canada (fn 322), the Czech Republic, Trinidad and Tobago, Greece, and the EU (fn 324-327).

[1289] See UNGA, '55th session: Summary record of the 20th meeting' (14 November 2000) UN Doc A/C.6/55.SR.20 para 42 (Statement of Mexico); ILC, *Yearbook ... 2001*, vol 2 pt 1 (n 717) 51 *et seq* 52 (Statements of Argentina, the Netherlands, and Denmark, on behalf of the Nordic countries).

[1290] See Aust, *Complicity* (n 30) 238; cf Lanovoy, *Complicity* (n 145) 101, 235.

[1291] European Commission for Democracy through Law (Venice Commission), 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners' (17 March 2006) Opinion No 363/2005 para 45 (emphasis added) <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)009-e> accessed 18 June 2021.

giving assistance to another State in the commission of torture, or acquiescing in such torture, *in the knowledge, including constructive knowledge, of the circumstances* of the torture which is or has been taking place'.[1292]

A broad interpretation of intent also draws support from the jurisprudence of several international courts and tribunals. For example, in the area of international criminal law, both the ICTY and the ICTR accept that complicity in a specific intent crime only requires awareness of the specific intent of the principal perpetrator, not that the accomplice actually has the specific intent himself.[1293] Moreover, the ICJ in its *Bosnian Genocide* case and following its above-quoted remarks on complicity in genocide, 'believe[d] it especially important to lay stress'[1294] on the fact that

> there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way (…). In other words, an accomplice must have given support in perpetrating the genocide with *full knowledge of the facts*.[1295]

If anything, this appears more indicative of a broader standard of knowledge than one of purpose or desire.[1296] And Vladyslav Lanovoy has raised yet another interesting point in connection with the jurisprudence of the ECtHR. It will be remembered that in its *El-Masri* case, the court found that the Macedonian authorities had violated the ECHR by handing el-Masri over to the CIA despite the fact that they 'were aware or ought to have

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[1292] House of Lords / House of Commons (Joint Committee on Human Rights), 'Allegations of UK Complicity in Torture' (4 August 2009) HL Paper 152 / HC 230, 35 (emphasis added), 24-27 <https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf> accessed 19 February 2021.

[1293] ICTY, *Prosecutor v Milorad Krnojelac* (Judgement) IT-97-25-A, A Ch (17 September 2003) [52]; *Prosecutor v Mitar Vasiljević* (Judgement) IT-98-32-A, A Ch (25 February 2004) [102]; *Prosecutor v Tihomir Blaškić* (Judgement) IT-95-14-A, A Ch (29 July 2004) [49]; ICTR, *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgement) ICTR-96-10-A and ICTR-96-17-A, A Ch (13 December 2004) [501]. On using the law on the international criminal responsibility of individuals as guidance for the law on State responsibility for complicity see § 6 B.

[1294] ICJ, *Bosnian Genocide* (n 144) [432].

[1295] ibid (emphasis added).

[1296] Lanovoy, *Complicity* (n 145) 231; Zwijsen, Kanetake and Ryngaert (n 163) 155. See also ICJ, *Bosnian Genocide* (n 144) Dissenting Opinion of Judge *Ad Hoc* Mahiou 413 *et seq* para 125 ('it is regrettable that [the court] does not rule clearly when all the underlying reasoning relies on the notion that knowledge is sufficient to result in complicity') and the Declaration of Judge Keith 352 para 1 ('the Respondent (…) must be proved to have knowledge of the genocidal intent of the principal perpetrator (but need not share that intent)').

been aware'[1297] of the risk of ill-treatment.[1298] This combination of a standard of constructive knowledge and risk-based responsibility is certainly particular to the principle of *non-refoulment* under article 3 of the ECHR. However, the ECtHR expressly cited article 16 of the ARSIWA as 'relevant international law',[1299] which Lanovoy has interpreted to mean that the norm constituted at least a partial basis of the responsibility of the Yugoslav Republic of Macedonia.[1300] And although the concrete standard of knowledge may vary between the two regimes, Lanovoy has found it important to stress that the ECtHR identified knowledge and not purpose or desire as the decisive cognitive element of international responsibility for complicity.[1301]

Be that as it may, there is limited value to be derived from a mathematical approach to customary international law that tries to compare the number of States, international organizations, courts, tribunals, and expert panels that have expressed themselves in favour of a certain interpretation to those who favour another.[1302] If anything, the decision of the ILC to retain the wording "knowledge of the circumstances" in article 14 of the Draft Articles on the Responsibility of International Organizations (ARIO)[1303] – article 16's twin provision in the ARIO – without further amendment or clarification ten years after the ARSIWA were adopted should be read as a sign that the international practice regarding the *mens rea* element is still unsettled.[1304]

In sum, it is this author's view that for a State to act intentionally within the meaning of the ARSIWA General Commentary, and using the definition in

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[1297] ECtHR, *El-Masri* (n 32) [239]. See also *Al Nashiri* (n 711) [441] *et seq*, [517]-[519]; *Husayn* (n 711) [512] *et seq*.

[1298] See § 4.

[1299] ECtHR, *El-Masri* (n 32) [92], [97].

[1300] Lanovoy, *Complicity* (n 145) 225.

[1301] ibid 226; concurring Nina HB Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 104 *AJIL* 722, 733. cf Nolte and Aust (n 144) 16 *et seq*.

[1302] Lanovoy, *Complicity* (n 145) 235.

[1303] ILC, 'Draft Articles on the Responsibility of International Organizations' in idem, *Yearbook of the International Law Commission 2011*, vol 2 pt 2 (UN 2018) 40. Article 14 of the ARIO reads: 'An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization'. In the ARIO, the ILC decided to retain much of the structure and content of the ARSIWA, including responsibility for complicity. On this "copy-paste approach" see Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste Approach"' (2012) 9 *IOLR* 53; Lanovoy, *Complicity* (n 145) 167-172.

[1304] Lanovoy, *Complicity* (n 145) 236.

article 30(2)(b) of the ICC Statute by analogy, it needs to be shown that at the time of the decision to provide aid or assistance it was either the purpose or desire of the assisting State to bring the wrongful outcome about (*dolus directus* in the 1st degree) or that it knew that the recipient State would act unlawfully in the ordinary course of events (*dolus directus* in the 2nd degree).[1305] In fact, if understood this way, there may not be a big difference with those who support a narrow interpretation of wrongful intent after all.[1306] Aust himself concedes that 'the requirement of wrongful intent should not allow States to deny their responsibility for complicity in situations where internationally wrongful acts are manifestly being committed'.[1307] Similarly, James Crawford admits that 'if aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed'.[1308] And Georg Nolte acknowledges that 'a lack of intent can be offset by sufficient knowledge'.[1309]

B. Knowledge of the Circumstances

A broad interpretation of the element of wrongful intent that accommodates both purpose or desire and knowledge creates some overlap with the requirement of knowledge of the circumstances of the internationally wrongful act.[1310] In fact, if the assisting State needs to know that the recipient State will act unlawfully in the ordinary course of events, then it is readily apparent that its knowledge of the circumstances cannot stop at the general facts of the case, but needs to extend to the illegality of the principal act. This is also the position of the ILC, whose general commentary makes it clear that 'the assisting State [must] be aware of the circumstances *making the conduct of the assisted State*

[1305] On the temporal element see ibid 46, 227, 238 *et seq*; Moynihan, 'Mental Element' (n 756) 465 *et seq*; de Wet, 'Complicity' (n 158) 297, 301. See also ILC, 'State responsibility: Comments and observations received from Governments' in idem, *Yearbook … 1998*, vol 2 pt 1 (n 1288) 129 para 4 (Comment of the UK and Northern Ireland on draft article 27), clarifying that with article 16, the wrongful act occurs when the aid or assistance is given, not when it is used.

[1306] Similar Moynihan, *Aiding and Assisting* (n 717) paras 74, 78.

[1307] Aust, *Complicity* (n 30) 244 *et seq*.

[1308] Crawford, *State Responsibility* (n 163) 408. See also Marco Sassòli, 'State responsibility for violations of international humanitarian law' (2002) 84 *Intl Rev RC* 401, 413 ('[O]nce the violations are known, ongoing assistance is *necessarily* given with a view to facilitating further violations'; emphasis added); Jackson (n 151) 160 ('In most situations, where a state provides assistance to another state with the actual knowledge that the aid will be used to commit a wrongful act, the state's intent that its aid facilitates that act may be inferred').

[1309] Nolte and Aust (n 144) 15.

[1310] Moynihan, *Aiding and Assisting* (n 717) para 73; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 401.

internationally wrongful'.[1311] Most commentators have understood this to refer to the *specific* illegality of the principal act, which means that the assisting State must have knowledge of the commission of a *specific* wrongful act.[1312] Beyond that, however, little is certain.[1313] In particular, it remains unclear what is the level of specificity of the knowledge that is required.[1314] According to Vladyslav Lanovoy, there is no need for the assisting State to be 'fully [aware] of the content, specific form or modalities of the wrongful act as executed'.[1315] Instead, it will be sufficient for it to have knowledge of 'the pattern surrounding the wrongful act, and not necessarily [of] the specific facts that establish its constituent elements'.[1316] In that regard, Harriet Moynihan provides the example of the supply of weapons. To incur complicit responsibility, Moynihan argues that it would be enough for the supplying State to know that the weapons in question will be used to carry out intentionally indiscriminate attacks.[1317] Knowledge of the concrete modalities of their use or of the identity of the victim is not required. Support for this position seems to come from the ICTY. In its *Orić* case, the tribunal considered it to be a 'basic elemen[t] of aiding and abetting' that the aider and abettor is aware 'of the *essential elements* of the crime which [is] ultimately committed by the principal'.[1318]

The requisite level of specificity of the knowledge is not the only issue that surrounds the element of knowledge of the circumstances. For instance, in situations where a State aids or assists another State in a serious breach of international law, article 41(2) of the ARSIWA provides for a system of aggravated responsibility that must be distinguished from the common regime of article 16 (see I below). Moreover, as mentioned at the beginning of this chapter, there is no uniform interpretation of the term

[1311] ARSIWA General Commentary (n 50) 66 para 4 (emphasis added).

[1312] eg Felder (n 715) 266 *et seq*; Moynihan, *Aiding and Assisting* (n 717) para 35; de Wet, 'Complicity' (n 158) 301; Mackenzie-Grey Scott, 'State Responsibility for Complicity' (n 717) 391.

[1313] Lowe (n 42) 8 *et seq*; Felder (n 715) 265 *et seq*.

[1314] de Wet, 'Complicity' (n 158) 301.

[1315] Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 153 and *Complicity* (n 145) 227, for the case of targeted killings specifically. Concurring Nollkaemper and others (n 1275) 42.

[1316] Lanovoy, *Complicity* (n 145) 226, but cf p 238. cf ICJ, *Bosnian Genocide* (n 144) [432] ('full knowledge of the facts'), but see Lanovoy, *Complicity* (n 145) 213, who interprets this to simply mean actual knowledge; Dominicé (n 165) 286 ('high degree of particularity').

[1317] Moynihan, 'Mental Element' (n 756) 459. A similar example is offered by Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 153; *Complicity* (n 145) 226 *et seq*. See also Nollkaemper and others (n 1275) 42, who, in the context of constructive knowledge, argue that if a State shares intelligence on nationals in a third State with another State that has a record of carrying out unlawful targeted killings with drones in that third State, the assisting State cannot claim absence of knowledge of the circumstances.

[1318] ICTY, *Prosecutor v Naser Orić* (Judgement) IT-03-68-A, A Ch (3 July 2008) [43] (emphasis added).

"knowledge" in international law, which has led some scholars to suggest that it should be understood to include a standard of constructive knowledge (see II below). Others have argued that once it is established that the supporting State has made a (significant) contribution to the principal wrongful act, its *mens rea* should be presumed (see III below). Finally, it has also been proposed that the assisting State should not be held responsible where it was providing aid or assistance in a legally ambiguous situation, ie, in a situation where the underlying law is unclear (see IV below). In the following, each of these issues shall be addressed in turn.

I. Aggravated Responsibility

A special situation of complicity is addressed in article 41(2) of the draft articles ('Particular consequences of a serious breach of an obligation under this chapter'), which reads as follows:

> No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, *nor render aid or assistance in maintaining that situation*.[1319]

The scope of article 41(2) is much narrower than that of article 16. Whereas the latter applies to all breaches of international law,[1320] article 41(2) relates only to situations created by a serious breach of a peremptory norm of general international law (*ius cogens*).[1321] However, once these requirements are met, article 41(2) entails a system of aggravated responsibility that is, in certain aspects, stricter than under article 16.[1322] In particular, it is not necessary to show that the assisting State had knowledge of the

[1319] Emphasis added. On the obligation of non-recognition contained in the first part of the sentence see Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation Without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 99 *et seqq*; Aust, *Complicity* (n 30) 326-337. It has also been suggested that the obligation of non-recognition could involve a duty to protest, see Ian Brownlie, 'Recognition in Theory and Practice' (1982) 53 *BYIL* 197, 201; critical Aust, *Complicity* (n 30) 331. See also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (Advisory Opinion) [1971] ICJ Rep 16 Separate Opinion of Judge Petrén 134 ('The very term *non-recognition* implies not positive action but abstention from acts signifying recognition'; emphasis in the original); ARSIWA General Commentary (n 50) 114 para 4 ('duty of abstention').

[1320] Aust, *Complicity* (n 30) 239.

[1321] ARSIWA, art 40(1). In these situations, article 41(2) acts as *lex specialis* to article 16, see Aust, *Complicity* (n 30) 336; Lanovoy, *Complicity* (n 145) 106; de Wet, 'Complicity' (n 158) 308.

[1322] See Crawford, *Brownlie's Principles* (n 777) 565 *et seq*.

circumstances of the breach.[1323] Instead, it will be presumed to have the necessary *mens rea*, given that 'it is hardly conceivable that [the assisting State] would not have notice of the commission of a serious breach by another State'.[1324]

As mentioned above, this system of aggravated responsibility is only applicable in situations of a serious breach of *ius cogens*.[1325] Generally speaking, this is a norm 'that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules',[1326] and so far, only a handful of norms have been recognized as such.[1327] Common examples include the prohibition on torture,[1328] the prohibition on aggression and the illegal use of force,[1329] and the prohibition on genocide.[1330] Moreover, there seems to be general agreement to treat the 'basic rules of [IHL] applicable in armed conflicts'[1331] as peremptory, which would almost certainly include the prohibition on the deliberate targeting of civilians.[1332] As for the requirement of a "serious" breach, only a breach that involves a gross or systematic failure to fulfil one's international obligation qualifies as such.[1333] A systematic violation is one that is carried out in an organized and in a

[1323] Alexandra Boivin, 'Complicity and beyond: International law and the transfer of small arms and light weapons' (2005) 87 *Intl Rev RC* 467, 493; Aust, *Complicity* (n 30) 341 *et seq*; Lanovoy, *Complicity* (n 145) 115; Moynihan, *Aiding and Assisting* (n 717) para 81; de Wet, 'Complicity' (n 158) 308. It will still be necessary to establish a causal link between the aid or assistance and the maintenance of the situation, although there is some dispute whether the applicable standard is more relaxed than under article 16, see Boivin (n 1323) 493; Felder (n 715) 140; Aust, *Complicity* (n 30) 336, 340 *et seq*; Lanovoy, *Complicity* (n 145) 116 *et seq*.

[1324] ARSIWA General Commentary (n 50) 115 para 11.

[1325] ibid 110 para 1, p 112 para 1.

[1326] ICTY, *Prosecutor v Furundžija* (Judgement) IT-95-17/1-T, T Ch (10 December 1998) [153]. Article 53 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention), defines a peremptory norm of general law as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

[1327] ARSIWA General Commentary (n 50) 85 para 5; critical Shelton (n 148) 843.

[1328] ICTY, *Furundžija* (n 1326) [144] and [153] fn 170; ARSIWA General Commentary (n 50) 113 para 5.

[1329] ICJ, *Military and Paramilitary Activities* (n 177) [190]; ILC, 'Reports of the International Law Commission on the work of its eighteenth session' in idem, *Yearbook of the International Law Commission 1966*, vol 2 pt 2 (UN 1967) 247 para 1; ARSIWA General Commentary (n 50) 112 *et seq* para 4.

[1330] ARSIWA General Commentary (n 50) 112 *et seq* para 4. See also Crawford, *Brownlie's Principles* (n 777) 581-583.

[1331] ARSIWA General Commentary (n 50) 113 para 5. See also ICJ, *Nuclear Weapons* (n 177) [79]; *Wall* (n 180) [155]-[157]; Stefan Kadelbach, '*Jus Cogens*, Obligations *Erga Omnes* and other Rules – The Identification of Fundamental Norms' in Tomuschat and Thouvenin (n 1319) 27 ('core elements'), 30 *et seq*; Aust, *Complicity* (n 30) 341 *et seq*.

[1332] de Wet, 'Complicity' (n 158) 307.

[1333] ARSIWA, art 40(2).

deliberate way, whereas the term "gross" refers to the intensity of the breach.[1334] Whether or not a breach is sufficiently intense to qualify as gross must be assessed in light of the perpetrating State's intent to violate the peremptory norm, the scope and number of violations, and the gravity of the consequences for the individual victim.[1335]

While these criteria appear to suggest that US drone strikes, to the extent that they violate international law, might indeed fall within the purview of article 41(2), two reasons cast doubt on the usefulness of the provision for the present case.[1336] The first one pertains to the legal status of the norm itself. Several scholars have questioned whether article 41(2) indeed represents a rule of customary international law.[1337] Although answering this question in the negative would not automatically render the provision inapplicable in international proceedings, it would significantly reduce its practical relevance.[1338] The second reason why article 41(2) might not have a bearing on the present case is that it is concerned with a situation where a State provides aid or assistance to another State *after* a serious breach of a peremptory norm of general international law has occurred and where its support helps to *maintain* the situation created by such a breach.[1339] Article 41(2) is thus mostly relevant in cases where the principal wrongful act is continuing in character. The distinction between completed and continuing wrongful acts is reflected in article 14 of the ARSIWA (the *tempus delicti commissi*), which reads as follows:

[1334] ARSIWA General Commentary (n 50) 113 paras 7 *et seq*.

[1335] ibid para 8.

[1336] cf Moynihan, *Aiding and Assisting* (n 717) para 83, who claims that article 41(2) might imply a stricter duty not to provide aid or assistance where breaches of peremptory norms are concerned. Critical of this Aust, *Complicity* (n 30) 345-352, 422, admitting that it might play a role in the future development of the law.

[1337] Aust, *Complicity* (n 30) 344 ('doubtful quality'); Moynihan, *Aiding and Assisting* (n 717) para 81; Crawford, *Brownlie's Principles* (n 777) 583 ('If there is an element of customary international law [in article 41], it is the element of collective non-recognition').

[1338] de Wet, 'Complicity' (n 158) 309. See also Aust, *Complicity* (n 30) 344, who finds it 'remarkable' how often domestic courts mention article 41(2).

[1339] ARSIWA General Commentary (n 50) 115 para 11; Aust, *Complicity* (n 30) 338; Lanovoy, *Complicity* (n 145) 106 *et seq*.

> 1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
> 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
> (…)

According to the ILC, the difference between completed and continuing wrongful acts lies in the way the underlying breach of international law extends over time. With completed internationally wrongful acts (paragraph 1), the breach is instantaneous, that is, fixed at a particular point in time.[1340] In case of a continuing wrongful act (paragraph 2), the conduct of the perpetrating State extends over a certain period, remaining in breach of its international obligations throughout.[1341] However, an act is not continuing in character merely because its effects or consequences extend in time.[1342] Instead, it always needs to be the wrongful act as such which continues.[1343] This means that an internationally wrongful US drone strike is no continuing but a completed wrongful act within the meaning of article 14(1). Although it causes permanent damage, the attack itself does not extend in time.[1344]

It should be noted that according to the ARSIWA General Commentary, article 41(2) may also apply to situations where the principal breach is completed in character.[1345] It is, however, difficult to imagine a scenario where this could be

[1340] Crawford, *State Responsibility* (n 163) 254. For some examples see ARSIWA General Commentary (n 50) 60 para 6.

[1341] See ARSIWA General Commentary (n 50) 60 paras 3 *et seq*, providing several examples. See also Crawford, *State Responsibility* (n 163) 259 *et seq*.

[1342] ARSIWA General Commentary (n 50) 60 para 6.

[1343] ibid.

[1344] According to article 15(1) of the ARSIWA, a series of individual wrongful acts may amount to a single continuing breach if that series is defined in aggregate as wrongful (so-called composite wrongful act). Crawford, *State Responsibility* (n 163) 268, makes it clear that this is only the case when 'the obligation itself (and thus the primary underlying rule) fixes on the cumulative character of the conduct as constituting the essence of the wrongful act'. For the present case, this means that repeated violations of the right to life by US drone strikes would not fall under article 15(1) since they are neither defined in their aggregate as wrongful nor does the (customary) prohibition on the arbitrary deprivation of life fix on the cumulative character of the conduct. See also ARSIWA General Commentary (n 50) 62 *et seq* paras 2-5 for some examples of composite wrongful acts.

[1345] ARSIWA General Commentary (n 50) 115 para 11.

relevant.[1346] Helmut Aust rather generally envisages situations where 'there are other effects of serious breaches of peremptory norms which continue to have an impact although they have terminated as such in their quality as wrongful acts'.[1347] And Christian Tomuschat provides the example of a State that, by committing the wrongful act, obtains some valuable asset.[1348] Nonetheless, in situations 'where the result of its conduct is only death and destruction, the issue of maintaining the situation brought about by it does not arise'.[1349]

II. Constructive Knowledge

In general, knowledge of the circumstances means actual positive knowledge or virtual certainty thereof.[1350] The Netherlands, however, holds the view that article 16 of the ARSIWA also includes a standard of constructive knowledge ("should have known"). In a comment submitted during the final drafting stages of the ARSIWA, it suggested the following wording for the provision:

> [A State is responsible for aiding or assisting another State if it] does so when it knows *or should have known* the circumstances of the internationally wrongful act.[1351]

The Netherlands' proposal has mostly been met with opposition. In fact, the prevailing opinion appears to be that article 16 does not include a standard of constructive knowledge.[1352] However, this general rule is diluted by the judicial exercise of distilling

[1346] See House of Lords / House of Commons (Joint Committee on Human Rights) (n 1292) 152, which argues that a systematic and regular receipt of information obtained under torture would fall under article 41(2).

[1347] Aust, *Complicity* (n 30) 338 *et seq*.

[1348] Christian Tomuschat, 'International crimes by states: an endangered species?' in Karel Wellens (ed), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (Martinus Nijhoff 1998) 259.

[1349] ibid.

[1350] Jackson (n 151) 161 ('something approaching practical certainty as to the circumstances of the principal wrongful act'); Moynihan, 'Mental Element' (n 756) 460; de Wet, 'Complicity' (n 158) 302, 309 ('high level of factual certainty').

[1351] ILC, *Yearbook … 2001*, vol 2 pt 1 (n 717) 52 (emphasis added). Concurring Epiney (n 147) 51; Boivin (n 1323) 471; Felder (n 715) 269; tentatively Lanovoy, *Complicity* (n 145) 235 ('constructive knowledge could suffice in certain circumstances'). See also Nollkaemper and others (n 1275) 40-43.

[1352] ICJ, *Bosnian Genocide* (n 144) [421]; Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law' (2007) 12 *J Conflict & Sec L* 359, 385; Crawford, *State Responsibility* (n 163) 406; Duffy (n 10) 105 fn 159 ('debatable'); Jackson (n 151) 161 *et seq*; Moynihan, 'Mental Element' (n 756) 460 *et seq*; de Wet, 'Complicity' (n 158) 301, 309; Mackenzie-Gray Scott, 'State

a State's *mens rea* from the circumstances of the case, which widens the scope of article 16 beyond actual and proven knowledge (see 1) below). Moreover, in recent times, some scholars have argued in favour of the emergence of a general obligation of due diligence in international law.[1353] While it is not the objective of this study to explore the truth of this claim, it raises the question whether article 16 *in concreto* provides for a duty of the assisting State to look into evidence of possible illegality and to ascertain that its support is not used in a wrongful way (see 2) below).[1354] Both issues shall be examined in the present section.

1) Judicial Fact-Finding

In practice, it will often be very difficult to establish what a State positively knew at a certain point in time. Internal communications, diplomatic exchanges, and official statements may shed some light on the question,[1355] but access to these documents might be restricted and records might not always be consistent.[1356] Instead, it will often be for the court or tribunal to look at the available evidence and to infer from that evidence whether or not a State had the requisite knowledge. As Harriet Moynihan has rightfully pointed out, in this process 'the distinction between the different levels of knowledge – what a State actually knew, what a State must have known and what a State ought to have known – becomes a fine one'.[1357] For example, in the ICJ's *Corfu Channel* case, Albania disputed to have had knowledge of the presence of the minefield in its waters. However, on the grounds that the mines had been placed in close proximity to the Albanian coast and that at the time Albania had constantly kept close watch over the Corfu Channel, the

Responsibility for Complicity' (n 717) 391 *et seq*; Zwijsen, Kanetake and Ryngaert (n 163) 155 *et seq*, but conceding that there might be room for a standard of constructive knowledge with failures to prevent.

[1353] eg Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (CUP 2021). cf Lowe (n 42) 10; Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Philip Shiner and Andrew Williams, *The Iraq War and International Law* (Hart 2008) 219; Jackson (n 151) 162; Tallinn Manual (n 781) 31 para 3 ('a general due diligence principle (…) has not achieved *lex lata* status'); Neil McDonald, 'The Role of Due Diligence in International Law' (2019) 68 *ICLQ* 1041, 1042. On due diligence in international law in general see Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and The Nature of the International Responsibility of States' in René Provost (ed), *State Responsibility in International Law* (Routledge 2002) 110 *et seqq*. See also Lanovoy, *Complicity* (n 145) 210-217, on its relationship with complicity.

[1354] See de Wet, 'Complicity' (n 158) 301 *et seq*, who emphasises that the inquiries would have to be made before aid or assistance is provided.

[1355] Boivin (n 1323) 470; Lanovoy, *Complicity* (n 145) 100 *et seq*; de Wet, 'Complicity' (n 158) 302.

[1356] Quigley (n 156) 111; Moynihan, 'Mental Element' (n 756) 464.

[1357] Moynihan, 'Mental Element' (n 756) 464. See also Boivin (n 1323) 470 *et seq*; Lanovoy, *Complicity* (n 145) 227.

court concluded that it was impossible for it not to have had knowledge of the laying of the mines.[1358] Similarly, in the ICJ's *Fisheries* case, Norway had delimited the Norwegian fisheries zone by decree, thereby effectively banning UK fishermen from fishing there. When the UK claimed that the Norwegian system of delimitation was unknown to it, the court argued that as coastal State on the North Sea, a maritime power, and being greatly interested in the fisheries in this area, the UK could not have been ignorant of the decree or its significance.[1359]

As has been observed in connection with the question of proof in international adjudication, an international court or tribunal may consider any evidence which it deems relevant to the question of the assisting State's knowledge.[1360] In particular, it might be unwilling to accept the defence of a lack of positive knowledge where it concerns information that is readily available in the public domain and stemming from credible sources such as court judgements, reports of fact-finding commissions or independent monitors, or investigations by international organizations.[1361] In fact, in situations where the State receiving aid or assistance is continuously reproached by international organizations for using drones in extrajudicial executions, the supporting State will rarely be able to convincingly argue that it did not have knowledge of the specific illegality of the furthered act.[1362] An international court or tribunal may also consider the nature of the aid or assistance, and whether a violation of the principal State's obligations is continuous or recurring in character.[1363] The longer a breach of international law is ongoing, the

[1358] ICJ, *Corfu Channel* (n 177) 18-22.

[1359] idem, *Fisheries* (n 955) 139. See also ECtHR, *El-Masri* (n 32) [151]-[153], [167].

[1360] See § 7 A. I. 1).

[1361] Lowe (n 42) 10; Boivin (n 1323) 471; Jackson (n 151) 162; Moynihan, 'Mental Element' (n 756) 462, 464, who notes that in the context of armed conflict and counterterrorism, where violations of international law are likely to be serious, a court may be more reluctant to allow the assisting State to rely on ignorance; de Wet, 'Complicity' (n 158) 302 *et seq*. Other factors to consider may include a special interest of the assisting State in the respective region, its geographical proximity to the scene of events, and the relationship between the complicit and the principal actor, see ICJ, *Fisheries* (n 955) 139; *Armed Activities on the Territory of the Congo* (n 168) [174]-[180]; *Bosnian Genocide* (n 144) [430]; Lanovoy, 'Responsibility for Complicity' (n 754) 26; de Wet, 'Complicity' (n 158) 302 *et seq*. On the probative value of media reports see § 8 C. I.

[1362] See Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 153; Nollkaemper and others (n 1275) 42.

[1363] Lanovoy, 'Complicity in an Internationally Wrongful Act' (n 754) 155 *et seq*; *Complicity* (n 145) 238.

harder it will be for the assisting State to argue that it did not know what was happening.[1364]

2) Due Diligence

While the concept of due diligence is notoriously absent from the ARSIWA, it was explicitly addressed by the ILC in the context of the APTH.[1365] According to the committee, due diligence manifests itself in 'reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them'.[1366] In the absence of a general principle of due diligence in international law, such an obligation must be provided for by the applicable primary rule itself.[1367] For instance, it will be recalled that whenever a State puts its territory at the disposition of another State, it follows from the customary no-harm rule that the territorial State must adopt appropriate measures to ensure that its territory is not used to cause damage to the territory of a third State or to the persons living therein.[1368] This may include making reasonable inquiries in situations where there is reliable information that this might indeed be the case.[1369]

However, it appears questionable whether such an obligation may also be derived from article 16 of the ARSIWA.[1370] Two arguments militate for this position. First, when the ILC was drafting the ARSIWA, it spent significant time on due diligence, but ultimately decided to abandon the issue and leave it for the applicable primary rule to decide.[1371] Secondly, to recognize a general obligation of due diligence conditioning the provision of aid or assistance would be at odds with the fact that article 16 does not

[1364] idem, *Complicity* (n 145) 238 *et seq*; Moynihan, 'Mental Element' (n 756) 462, 465; de Wet, 'Complicity' (n 158) 303 fn 103; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 391.

[1365] Duncan French and Tim Stephens, 'ILA Study Group on Due Diligence in International Law – First Report' (7 March 2014) 4 *et seq* <www.ila-hq.org/index.php/study-groups?study-groupsID=63> accessed 13 May 2021; Moynihan, 'Mental Element' (n 756) 463.

[1366] APTH General Commentary (n 790) 154 para 10.

[1367] See Jackson (n 151) 162 fn 164. On the existence of such a principle see n 1353.

[1368] Another example is the field of arms trade, see Boivin (n 1323); Jørgensen (n 1301) 722; Zwijsen, Kanetake and Ryngaert (n 163) 151. For further examples see Mackenzie-Gray Scott, 'Due Diligence' (n 1118) 350 *et seq*.

[1369] See Aust, *Complicity* (n 30) 246-248, but without explicit reference to the no-harm rule.

[1370] Jackson (n 151) 162; Moynihan, 'Mental Element' (n 756) 462 *et seq*; de Wet, 'Complicity' (n 158) 301 *et seq*; Mackenzie-Gray Scott, 'Due Diligence' (n 1118) 348. cf Quigley (n 156) 119 *et seq*, for situations where the assisting State has knowledge of facts suggesting a possible planed wrongful use of the support; concurring Felder (n 715) 267 *et seq*; cautiously also Nolte and Aust (n 144) 15.

[1371] See Mackenzie-Gray Scott, 'Due Diligence' (n 1118) 344-348. See also ARSIWA General Commentary (n 50) 34 para 3.

include a standard of constructive knowledge.[1372] Rather, it is a general principle of international law that a State which aids or assists another State may presume that its support will be used in a lawful manner.[1373] This privilege is certainly not absolute. Especially in situations where the wrongfulness of the principal act is clearly established, the assisting State cannot argue that it was entitled to presume that the receiving State would act lawfully.[1374] And it is further limited by the so-called notion of wilful blindness, which revolves around the idea that a State which deliberately avoids knowledge of the specific illegality of the receiving State's actions should not be allowed to hide behind its self-induced ignorance.[1375] In fact, wilful blindness is best understood as an extreme case of a failure to exercise due diligence,[1376] and there is widespread agreement that a wilfully blind State may, including for the purposes of article 16, be treated as if it had the requisite knowledge.[1377] Still, this should not be taken to mean that article 16 provides for a due diligence obligation after all. As Harriet Moynihan has pointed out: 'The obligation to

[1372] Moynihan, 'Mental Element' (n 756) 462; Mackenzie-Gray Scott, 'Due Diligence' (n 1118) 355.

[1373] ARSIWA General Commentary (n 50) 66 para 4. See also Lowe (n 42) 9 *et seq*, provided that the receiving State has at least one lawful way of achieving its objective; Aust, *Complicity* (n 30) 248; Lanovoy, *Complicity* (n 145) 99 *et seq*; Jackson (n 151) 159; de Wet, 'Complicity' (n 158) 302. Critical about the nature of this principle Benzing (n 684) 679.

[1374] Aust, *Complicity* (n 30) 248.

[1375] See Moynihan, 'Mental Element' (n 756) 461, who defines wilful blindness as the 'deliberate effort of the assisting State to avoid knowledge of illegality on the part of the State being assisted'; similar Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 393. The exact contours of this notion remain unclear. In particular, scholars are divided over the requisite level of suspicion and whether wilful blindness may only be avoided by reasonable action (as opposed to anything that amounts to more than turning a blind eye, including inadequate, inept, or half-hearted measures). See Quigley (n 156) 12 ('facts suggesting [wrongful use]'); Lowe (n 42) 10 ('clear indications'); Nolte and Aust (n 144) 15 (*manifest* or *obvious* commission of an internationally wrongful act); Moynihan, 'Mental Element' (n 756) 463 ('credible evidence'). On the latter issue see Jon Bauer, 'Obscured By "Willful Blindness": States' Preventive Obligations and the Meaning of Acquiescence Under the Convention Against Torture' (2021) 52 *Colum Hum Rts L Rev* 738, 767 *et seq*; AP Simester and others (eds), *Simester and Sullivan's Criminal Law* (7th edn, Hart 2010) 150; Jackson (n 151) 54, 162. See also article 28(b)(i) of the ICC Statute, which requires a "conscious disregard of information". This seems closer to a standard of complete passiveness than to one of reasonable action.

[1376] Bauer (n 1375) 819. See also Moynihan, 'Mental Element' (n 756) 462 *et seq*; Mackenzie-Gray Scott, 'Due Diligence' (n 1118) 367 *et seq*.

[1377] Lowe (n 42) 10; Jackson (n 151) 162; Moynihan, *Aiding and Assisting* (n 717) paras 43-46; 'Mental Element' (n 756) 461 *et seq*; Elizabeth Wilmshurst, 'Testing Jackson's Discussion of State Responsibility in the Context of Government Assistance. Book Discussion' (13 April 2017) *EJIL: Talk!* <www.ejiltalk.org/testing-jacksons-discussion-of-state-responsibility-in-the-context-of-government-assistance-book-discussion/> accessed 14 May 2021; de Wet, 'Complicity' (n 158) 303 *et seq*; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 390.

make enquiries is the natural counterpoint of constructive knowledge ('should have known'), not of wilful blindness ('deliberately avoided knowing')'.[1378]

III. Presumption of Knowledge

Several scholars have suggested that once it has successfully been established that an internationally wrongful act was committed and that the assisting State contributed to that act at least in some form, a rebuttable presumption (*juris tantum*) of the subjective element should apply.[1379] According to Vladyslav Lanovoy, such presumption is justified at a very minimum where the recipient State has used the aid or assistance to commit human rights violations.[1380] For him,

> it is logical that once complicity's material element is established, the aiding or assisting State would have to establish that it was not aware of or that it took all reasonably available measures to ensure that its aid or assistance would not facilitate the commission of an internationally wrongful act.[1381]

A presumption of the requisite *mens rea* has also been the expressed opinion of Cuba, which, in a submission on article 14 of the ARIO, considered that

> a *new provision of progressive development*, relating to the attribution of responsibility to a State or international organization for its participation in the internationally wrongful act [of another State or international organization], should be introduced. This new provision should contain a *presumption establishing that any State or international organization that aids another in the*

[1378] Moynihan, 'Mental Element' (n 756) 462 *et seq*. See also Jackson (n 151) 162, who notes that the idea of wilful blindness lies '[s]omewhere around the line between knowing and reckless participation'; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 394, who recognizes that the close relationship between wilful blindness, recklessness, negligence, and due diligence adds to the conceptual complexity.

[1379] Graefrath (n 152) 377; Lanovoy, *Complicity* (n 145) 239 *et seq*; Banda (n 764) 1950. cf Klein (n 43) 432; Aust, *Complicity* (n 30) 244. Generally on presumptions in international law see Benzing (n 684) 675 *et seqq*.

[1380] Lanovoy, 'Revisiting a Structural Norm' (n 1227) 27.

[1381] idem, *Complicity* (n 145) 239. Critical about whether a *juris tantum* shifts the burden of proof Amerasinghe (n 1152) 219 *et seq*.

commission of a wrongful act does so with knowledge of the circumstances of the same.[1382]

However, Cuba itself admits that such a presumption would be a 'progressive development' of the international law on State responsibility for complicity and has not yet achieved *lex lata* status. In fact, legal literature and international jurisprudence seem to offer only limited support for Lanovoy's proposal. Helmut Aust, for example, has rightfully cautioned that if the *onus probandi* were upon the assisting State, it would have to prove a negative, namely that it did not act with the necessary *mens rea*.[1383] That this is generally very difficult to do was also recognized by the ICJ in its *Diallo* case. In that case, a dispute had arisen between the Democratic Republic of the Congo (DRC) and the Republic of Guinea over the imprisonment of Ahmadou Sadio Diallo, a Guinean national living in the DRC, who had been arrested and detained by the DRC on multiple occasions before finally being expelled from the country. The Republic of Guinea claimed that in some of those instances, he had remained in detention for longer than allowed for under the applicable law, whereas the DRC denied the allegations.[1384] With the *onus* of proof lying, in principle, with the Republic of Guinea, the ICJ made it clear that 'it would be wrong to regard [the rule that the party which alleges a fact must prove its existence] as an absolute one, to be applied in all circumstances'.[1385] This was done precisely to protect the Republic of Guinea from having to prove a negative, namely that Diallo had *not* been released from imprisonment before the applicable time-limit.[1386] Other than that, however, the ICJ has been very reluctant to depart from the general principle of *actori*

[1382] ILC, 'Comments and observations received from Governments' in idem, *Yearbook of the International Law Commission 2011*, vol 2 pt 1 (UN 2018) 116. See also idem, 'Summary Record of the 1519th meeting' (n 720) 238 para 8 (Statement of Doudou Thiam) ('[Mr. Thiam] believed that the [ILC] should adopt a broad conception of complicity (…), in other words, that it was incumbent on the State that had rendered the aid or *assistance to prove that it had not done so with wrongful intent*. (…) once the provision of aid or assistance (…) has been established, *the element of intent should be presumed*'; emphasis added).

[1383] Aust, *Complicity* (n 30) 244.

[1384] ICJ, *Diallo* (n 628) [49]-[52]. According to the DRC, Diallo had been released and re-arrested several times without the individual arrest exceeding the applicable time limit.

[1385] ibid [54].

[1386] ibid; see also idem, *Military and Paramilitary Activities* (n 177) [147] ('The evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative'). In the *Diallo* case, the court decided that neither party alone was bearing the *onus probandi*.

incumbit onus probandi, let alone to presume the *mens rea* of the respondent State.[1387] In fact, it has refused to shift the burden of proof even in situations of (extreme) evidentiary difficulties, allowing the party bearing the *onus probandi* a more liberal recourse to circumstantial evidence instead.[1388]

That the requisite *mens rea* cannot be presumed even in cases involving human rights violations is further indicated by the ARSIWA General Commentary. According to the ILC,

> [w]here the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case *must be carefully examined* to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.[1389]

Although the commission does not explicitly reject a *juris tantum*, the statement that it must be carefully examined whether the assisting State was aware of and intended to facilitate the commission of an internationally wrongful act may very well be understood to mean that the subjective element must be positively established rather than refuted.[1390]

IV. Legal Ambiguity

In general, there is no excuse of ignorance of the law in international law.[1391] In situations where the law is clear, knowledge of the factual circumstances will automatically imply

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[1387] eg idem, *Corfu Channel* (n 177) 18, where court rejected that the control exercised by Albania over its own territory raised a presumption that it had knowledge of any unlawful act perpetrated therein or of its authors. But cf the Dissenting Opinion by Judge Azevedo 85 *et seq* para 11 ('The victim has only to prove damage and the chain of causation ; and that is enough to involve responsibility, unless the defendant can prove *culpa* in a third party, or in the victim, or *force majeure*; only these can relieve him from responsibility'; emphasis in the original) and the Individual Opinion by Judge Alvarez 44 para 3 ('If the State alleges that it was unaware of [prejudicial acts committed in parts of its territory] (…) it must prove that this was the case, for otherwise its responsibility is involved').

[1388] See § 7 A. I. 1). The ECtHR tends to reverse the burden of proof when the events at issue lie within the exclusive knowledge of the authorities of the respondent State, especially in cases involving forceful disappearances or where injury or death occurs during detention, see ECtHR, *El-Masri* (n 32) [152] *et seq*; *Al Nashiri* (n 711) [395] *et seq*; *Husayn* (n 711) [396].

[1389] ARSIWA General Commentary (n 50) 67 para 9 (emphasis added).

[1390] Concurring ILC, 'Responsibility of international organizations: Comments and observations received from international organizations' (14 and 17 February 2011) UN Doc A/CN.4/637, 156 para 1 (Comment of the World Bank on article 14 of the ARIO).

[1391] James Crawford, 'Summary of the 2577th Meeting' in ILC, *Yearbook of the International Law Commission 1999*, vol 1 (UN 2003) 69 para 14; Felder (n 715) 268, who remarks that chapter 5 of the

knowledge of the specific illegality of the act,[1392] and the assisting State may not avoid complicit responsibility by arguing that it had thought the principal act to be lawful.[1393] However, especially in the area of IHL, the question what exactly is the law will often be difficult to answer. For example, it will be remembered that there is no uniform State practice as to who may be considered a member of an organized armed group, and there is no consensus regarding the question what exactly amounts to a direct participation in hostilities either.[1394] In these cases, Georg Nolte and Helmut Aust caution that burdening the assisting State with the risk of illegality could discourage many beneficial forms of inter-State cooperation.[1395] For them, unless the illegality of the principal act is sufficiently clear, the responsibility for the internationally wrongful act should be borne by the principal perpetrator alone, whereas the assisting State should not incur complicit responsibility.[1396]

Two arguments, in particular, militate against this position. For one, Nolte and Aust do not explain how the assisting State is to obtain sufficient clarity about the wrongfulness of the principal act in a legally ambiguous situation, given that in international law, there is no authoritative judiciary that could rapidly clarify the issue.[1397] What is more, their view is based on the understanding that situations of legal ambiguity are comparable to situations of incitement, ie, cases where one State incites another State to commit a wrongful act, as both share a common element of uncertainty. In the former, it is legally uncertain whether the principal act is unlawful, whereas in the latter, it is factually uncertain whether the incited State will act upon the instigation. And since the inciting State does not incur international responsibility for inciting another State to commit an internationally wrongful act,[1398] neither should the assisting State in a legally

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ARSIWA (Circumstances Precluding Wrongfulness) does not contain an excuse of error in law; Moynihan, 'Mental Element' (n 756) 461.

[1392] Moynihan, 'Mental Element' (n 756) 459. On the interaction between legal and factual uncertainty see Nolte and Aust (n 144) 12.

[1393] Felder (n 715) 267.

[1394] See also the examples provided by Nolte and Aust (n 144) 11 *et seq*.

[1395] On this argument see § 8 A.

[1396] Nolte and Aust (n 144) 12; concurring Lowe (n 42) 11 ('a State which reasonably supposes that the use to which its aid will be put is lawful should not be held responsible if the use is subsequently held to be unlawful'). See also Moynihan, 'Mental Element' (n 756) 460.

[1397] Brooks, 'Rule of Law' (n 194) 98.

[1398] ARSIWA General Commentary (n 50) 65 para 9. See also ICJ, *Military and Paramilitary Activities* (n 177) [255] and the Dissenting Opinion of Judge Schwebel 378 *et seq* para 259; Ago, 'Seventh Report' (n 46) 54 para 62.

ambiguous situation.[1399] However, the reason for this is not so much that it is factually uncertain whether the incited State will act upon the incitement, but instead that the inciting State should not be held responsible for the autonomous decision of another sovereign State to adopt a certain course of action. This was also emphasized by Special Rapporteur Roberto Ago, who clarified that

> neither the State which committed the internationally wrongful act nor the State injured by it can cast all or part of the responsibility for that act on another State which has done no more than encourage or incite the first State to follow a course of conduct it *ultimately adopted with complete freedom of decision and choice*.[1400]

In situations of complicity, the receiving State also commits the internationally wrongful act of its own volition. However, the respondent State will *still* incur international responsibility under article 16 of the ARSIWA if it aids or assists in the commission of that act. In fact, even in stituations of incitement responsibility is not excluded *per se*. If the incitement is accompanied by some form of concrete support, then the inciting State may be held responsible regardless of whether the incited State acted with complete freedom of decision and choice.[1401] This calls very much into question whether the parallel drawn by Nolte and Aust can reasonably be sustained.

In sum, there is no good reason to depart from the general rule that in international law, an error in law is no valid defence.[1402] A State that provides aid or assistance in a legally ambiguous situation may mitigate the risk of incurring complicit responsibility through conditions or more targeted aid.[1403] If, however, the principal act is later found to

[1399] Nolte and Aust (n 144) 13.

[1400] Ago, 'Seventh Report' (n 46) 55 para 63 (emphasis added). See also ps 55 *et seqq* para 62 and fn 105, p 57 para 67; Klein (n 43) 429. In part, this also seems to be recognized by Nolte and Aust (n 144) 13 fn 58.

[1401] ARSIWA General Commentary (n 50) 65 para 9.

[1402] Concurring Astrid Epiney, 'Umweltvölkerrechtliche Rahmenbedingungen für Entwicklungsprojekte' in Werner Meng and others, *Das internationale Recht im Nord-Süd-Verhältnis* (CF Müller 2005) 366; Felder (n 715) 268; Melzer, *Human Rights Implications* (n 41) 38 ('the assisting State does not necessarily have to be conscious of the *unlawfulness* of the assisted conduct, but, rather, must be aware of the *factual circumstances* which make it unlawful'; emphasis in the original).

[1403] Lanovoy, *Complicity* (n 145) 161; Moynihan, 'Mental Element' (n 756) 465, who notes that in situations where the illegality of the principal act is not clearly foreseeable, it will be for the assisting State to evaluate the risk of providing support. See also ILC, 'State responsibility: Comments and observations received from Governments' in idem, *Yearbook ... 1998*, vol 2 pt 1 (n 1288) 128 para 2 (Comment from the UK and Northern Ireland on draft article 27).

be internationally wrongful, then it may be held internationally responsible regardless of whether it had rendered its support based on a different interpretation of the law.

C. Application to the Present Case

Having determined the specific content of the subjective element of article 16 of the ARISWA in the previous sections, it shall be for the present subchapter to assess whether the Federal Republic of Germany actually possessed the requisite *mens rea*. For that purpose, two separate questions will need to be addressed. First, whether or not the Federal Republic had knowledge of the circumstances of the internationally wrongful act (see I below). Since 'it cannot be concluded from the mere fact of the control exercised by a State over its territory (…) that [a] State necessarily knew, or ought to have known, of any unlawful act perpetrated therein',[1404] it must be positively established that German authorities either knew or were virtually certain or wilfully blind of the fact that the US is using Ramstein Air Base to carry out drone-supported targeted killings in Pakistan and Yemen. Their knowledge must also extend to the specific illegality of the act in question, ie, that the victim's right to life, whether customary or treaty-based in nature, was violated by an attack which failed to comply with the restrictions on the use of lethal force under the *ius in bello* or the law enforcement standard. This touches upon the second question, namely whether the Federal Republic of Germany also acted, or, more precisely, omitted to act, with wrongful intent (see II below). As there is no evidence that would suggest that the Federal Republic actually meant (in the sense of purpose or desire) to cause an internationally wrongful act, this study shall focus on whether, at the time of the provision of aid or assistance, it knew that such an act would occur in the ordinary course of events (*dolus directus* in the 2nd degree).

I. General Facts

From the moment it was first reported that Ramstein Air Base might be involved in targeted killings in Africa and Central Asia, the question whether, and if so, what exactly the German Federal Government knew about the US' activities on German territory has been at the heart of the debate. The government itself repeatedly denied that it had secure knowledge of what was going on at Ramstein, or that it had knowledge of it own that

[1404] ICJ, *Corfu Channel* (n 177) 18.

went beyond the allegations by public media reports.[1405] Brandon Bryant, however, claimed that it had known about Ramstein from the very start. Before the NSA Inquiry Committee, he testified as follows:

> When I was told that we used Ramstein Air Force Base as a relay center, and those documents said, „Relative to Great Britain, Germany and the United States", I was briefed as well that the German government knew exactly what we were doing and how we were doing it.[1406]

And further:

> We were told that you guys, the German government, knew what was going on. We didn't have to hide anything from it. (…) But as far as specifically, I don't know agency names, units, I don't know if the military was involved, or if it was the government in general, or what. But we were briefed and told that members of the German government do know exactly what was going on Ramstein Air Force Base. And they approved of it all.[1407]

However, it is questionable whether this would be sufficient evidence for the fact that the Federal Government had been informed about the US' activities at Ramstein right from the start. In fact, Bryant did not have direct knowledge of positive knowledge on the part of the Federal Government, but such knowledge was known to him only from hearsay.[1408] Traditionally, the ICJ has attached only little value to such evidence.[1409] Moreover, several other pieces of indirect evidence cast doubt on whether Bryant was correctly informed. For example, in his narrative accounts of the events leading up to the first armed

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[1405] Deutscher Bundestag, BT-Drs 17/13381 (n 60) 7; BT-Drs 17/14401 (n 1066) 9; BT-Drs 18/237 (n 709) 9; BT-Drs 18/2794 (n 1073) 5. See also NSA Inquiry Committee, '86. Sitzung' (n 709) 129 (Testimony of Hans-Christian Luther); '91. Sitzung' (n 1099) 60, 77 (Testimony of Frank-Walter Steinmeier); affirmative NSA Inquiry Committee Report (n 59) 1353 ('[t]he hearing of evidence by the committee (…) has yielded no indications that these statements would have been an incorrect reflection of the level of knowledge of the Federal Government at the time they were made'; this author's translation).

[1406] NSA Inquiry Committee, '67. Sitzung – Teil 1' (n 63) 55 (Testimony of Brandon Bryant). Bryant joined the Air Force in 2006 and left in April 2011.

[1407] ibid 61 *et seq*.

[1408] NSA Inquiry Committee Report (n 59) 1354.

[1409] ICJ, *Corfu Channel* (n 177) 16 *et seq*; Military *and Paramilitary Activities* (n 177) [68]; General Claims Commission, *Walter JN McCurdy (US v Mexico)* [1929] 4 RIAA 418, 421; Benzing (n 684) 553 *et seq*. On witness testimonies in international adjudication in general see Amerasinghe (n 1152) 191-203; Benzing (n 684) 553-556.

drone strike, Richard Whittle recalls that when the US first set up its operations at Ramstein, it kept its activities secret even from the German government to not risk 'getting *nein* for an answer'.[1410] And in 2015, *The Intercept* published a top secret slide deck, presumably leaked by a former Air Force intelligence analyst,[1411] which described in great detail the technical architecture underlying US drone strikes. Marked 'REL TO USA, FVEY',[1412] it was intended to be released only to the members of the so-called Five Eyes Alliance, ie, the US, Australia, Canada, the UK, and New Zealand.[1413] If it truly were as Bryant claimed, then why, one might ask, wasn't Germany included in that list?[1414]

Be that as it may, in April 2010, the BMVg was formally notified of the US' intentions to construct a UAS SATCOM relay station at Ramstein.[1415] In its letter of intent, the US provided the following rationale for the project, which merits being quoted in full:

> Unmanned aerial systems (UAS) require a sufficiently dimensioned and configured facility to ensure the maximum effectiveness of a mission when using weapon systems or when supporting fighter aircraft through reconnaissance flights. The construction of a satellite antenna relay station (…) is necessary to establish the link with remotely piloted aircraft; [it] connect[s] (…) ground-based control stations / mission control elements with UAS aircraft in the [area of responsibility]. This project will satisfy the long-term SATCOM relay

[1410] Whittle (n 17) 157 (emphasis in the original). Concurring Fuller (n 1219) 138.

[1411] See Matthew Barakat, 'Ex-Air Force analyst pleads guilty to leaking secrets about drone program' *Air Force Times* (1 April 2021) <www.airforcetimes.com/news/your-air-force/2021/04/01/ex-air-force-analyst-pleads-guilty-to-leaking-secrets-about-drone-program/> accessed 19 May 2021.

[1412] Scahill, 'Tell-Tale Heart' (n 67).

[1413] See Privacy International, 'The Five Eyes Fact Sheet' (26 November 2013) <https://privacyinternational.org/news-analysis/1204/five-eyes-fact-sheet> accessed 19 June 2021. See also NSA Inquiry Committee Report (n 59) 210 *et seqq*.

[1414] At times, it has been suggested that the German liaison officer at Ramstein or at the AFRICOM headquarters might have had some knowledge of what was happening. So far, no evidence has been produced in that regard. See 'Angehörige von US-Drohnenopfern werfen deutscher Bundesregierung Mitschuld vor' (*Der Spiegel*, 13 June 2015) <www.spiegel.de/politik/ausland/angehoerige-von-us-drohnenopfern-werfen-bundesregierung-mitschuld-vor-a-1038560.html> accessed 19 May 2021; Deutscher Bundestag, 'Antwort des Parlamentarischen Staatssekretärs Ralf Brauksiepe auf die Schriftliche Frage des Abgeordneten Niema Movassat' (7 July 2015) BT-Drs 18/5536, 59; NSA Inquiry Committee, '86. Sitzung' (n 709) 131 *et seq* (Testimony of Hans-Christian Luther).

[1415] Deutscher Bundestag, BT-Drs 17/14401 (n 1066) 9; NSA Inquiry Committee Report (n 59) 1167. On the applicable procedure see § 6 A.

> requirements for the Predator, Reaper and Global Hawk; the current temporary relays will thereby be eliminated. (…)
>
> Predator (MQ-1), Reaper (MQ-9) and Global Hawk (RQ-4) aircraft will use this base to carry out operations within the areas of responsibility of EUCOM, AFRICOM, and CENTOM to support the Overseas Contingency Operations. Because of the cross-border nature of operations, the SATCOM relay station must be located at Ramstein Air Base to make sure that the warring commander always disposes of the latest information. (…)
>
> The absence of this UAS relay station could significantly reduce the operational capabilities and could have serious consequences for current and future missions.
>
> (…) A preliminary analysis of suitable options was carried out; it showed that only one option fulfils the operational requirements.[1416]

And further:

> Without these facilities, the aircraft will not be able to perform their essential UAS missions within the EUCOM, AFRICOM and CENTCOM [areas of responsibility], UAS weapon strikes cannot be supported and necessary intelligence information cannot be obtained.[1417]

These statements leave no doubt that as of April 2010, the Federal Government had positive knowledge of the fact that Ramstein Air Base would be used to support UAS weapon strikes within the areas of responsibility of EUCOM, AFRICOM, and CENTCOM, which includes both Pakistan and Yemen.[1418] What is more, the US had made it abundantly clear that without the SATCOM relay at Ramstein, drone strikes

[1416] Quoted by OVG NRW (n 51) [271]-[274] – juris (this author's translation).

[1417] Quoted by ibid [268] – juris. The US reiterated its intentions in November 2011, providing essentially the same rationale, see Deutscher Bundestag, BT-Drs 17/14401 (n 1066) 9; NSA Inquiry Committee Report (n 59) 1168 *et seq*; OVG NRW (n 51) [43].

[1418] The geographical area of responsibility of CENTCOM, EUCOM, and AFRICOM encompasses almost all of the African continent, Europe, and parts of Eurasia, see 'Area of Responsibility' (*US Central Command*) <www.centcom.mil/AREA-OF-RESPONSIBILITY/> accessed 16 March 2021; 'Area of Responsibility' (*US Africa Command*, 23 April 2020) <www.africom.mil/image/32731/area-of-responsibility> accessed 16 March 2021.

would not be possible.[1419] And even though no mention was made of al-Qaeda, the Afghan Taliban, the TTP, AQAP, or any other militant organization, by 2010, public media reports about US drone strikes in Pakistan's FATA had become a common phenomenon.[1420]

With regard to this latter aspect, it should be noted that the ICJ has generally treated indirect evidence in the form of reports, press articles, or even extracts from books with great caution. According to the court, they are 'not (…) evidence capable of proving facts', but may only 'contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence'.[1421] However, the court admits that public sources can be useful evidence when they are 'wholly consistent and concordant as to the main facts and circumstances of the case'.[1422] And as has been observed earlier in this chapter, in the face of widespread and continuous allegations against the US of the use of drones for extrajudicial executions, an international court or tribunal would probably be reluctant to accept the defence of a lack of knowledge on the part of the Federal Republic of Germany.[1423]

[1419] It is worth noting that these insights are not contradicted by the US' continuous affirmation that drones are neither flown nor piloted from Ramstein, eg 'Obama: Deutschland nicht Startpunkt der Drohnen-Einsätze' (*Panorama*, 19 June 2013) <https://daserste.ndr.de/panorama/archiv/2013/Obama-Deutschland-nicht-Startpunkt-der-Drohnen-Einsaetze,ramstein129.html> accessed 2 May 2021; Deutscher Bundestag, 'Weitere Tests, Forschungen, Kooperationen oder Marktbeobachtungen zur Nutzung von Drohnen' (14 March 2014) BT-Drs 18/819, 4; BT-Drs 18/1214 (n 1067) 5; BT-Drs 18/1294 (n 1073) 4 (Statement of Maria Böhmer); BT-Drs 18/1318 (n 1073) 9.

[1420] eg John Warrick and Robin Wright, 'Unilateral Strike Called a Model For U.S. Operations in Pakistan' *Washington Post* (19 February 2008) <www.washingtonpost.com/wp-dyn/content/article/2008/02/18/AR2008021802500.html> accessed 25 March 2020; Eric Schmitt and David E Sanger, 'Pakistan Shift Could Curtail Drone Strikes' *New York Times* (22 February 2008) <www.nytimes.com/2008/02/22/washington/22policy.html> accessed 25 March 2020; Robin Wright and Joby Warrick, 'U.S. Steps Up Unilateral Strikes in Pakistan' *Washington Post* (27 March 2008) <www.washingtonpost.com/wp-dyn/content/article/2008/03/27/AR2008032700007.html> accessed 25 March 2020; Greg Miller, 'Drones based in Pakistan' *Los Angeles Times* (13 February 2009) <www.latimes.com/archives/la-xpm-2009-feb-13-fg-uspakistan13-story.html> accessed 26 March 2020. See also the assessment in the Alston Report (n 11) para 18 ('The US also reportedly adopted a secret policy of targeted killings soon after the attacks of 11 September 2001, pursuant to which the Government *has credibly been alleged* to have engaged in targeted killings in other States'; emphasis in the original).

[1421] ICJ, *Military and Paramilitary Activities* (n 177) [62]. See also *Oil Platforms* (n 692) [60]; *Bosnian Genocide* (n 144) [357]; cf *Armed Activities on the Territory of the Congo* (n 168) [68]. Concurring IACtHR, *Velásquez Rodríguez* (n 536) [146]; *Ivcher-Bronstein v Peru* (Merits, Reparations and Costs) IACHR Series C No 74 (6 February 2001) [70]. See also Benzing (n 684) 563-565, who notes that the ICJ's jurisprudence on the probative value of media reports has been contradictory.

[1422] ICJ, *Diplomatic and Consular Staff in Tehran* (n 928) [13]. Similar idem, *Armed Activities on the Territory of the Congo* (n 168) [68], but cf [63], cautioning that '[w]idespread reports of a fact may prove on closer examination to derive from a single source', in which case 'such reports, however numerous, will (…) have no greater value as evidence than the original source'.

[1423] See § 8 B. II. 1).

II. Wrongful Intent

As will be recalled, positive knowledge of the circumstances is a necessary but not sufficient condition for complicit responsibility under article 16 of the ARSIWA to arise. Instead, it also needs to be shown that German authorities acted – or, more precisely, omitted to act – with wrongful intent. Drawing by analogy on the definition of intent set out in article 30(2)(b) of the ICC Statue, this means that they '[must have been] aware that [an internationally wrongful act] [would] occur in the ordinary course of events'.[1424]

These requirements were further elaborated on by the ICC in its *Bemba* case. According to the court, the ICC Statute's use of the word 'will', when read in conjunction with the term "in the ordinary course of events", indicates a standard of occurrence that is close to certainty, ie, virtual certainty. Thus, for a person to act intentionally within the meaning of article 30(2)(b) of the ICC Statue, it needs to be aware that the consequence will be the '*almost inevitable* outcome of his acts or omissions',[1425] prevented only by an unforeseen or unexpected intervention.[1426] This is an extremely high standard, and it appears doubtful whether it would be met in the present case. After all, drone strikes are not unlawful *per se*.[1427] Whether or not the use of lethal force complies with international law can thus only be determined on a case-by-case basis, but without access to the specific targeting information underlying an attack, it will be impossible to reach a reliable view on its international legality.[1428] Depending on whether armed force is used in or outside the context of an armed conflict, one might attempt to make an abstract statement on the likelihood of a violation of international law. In Yemen, for instance, almost all attacks are subject to the more permissive rules of the *ius in bello*, whereas in Pakistan, up to 70 per cent of all drone strikes have been found to have occurred in the law enforcement context where the use of force is almost never likely to be legal. However, the limited usefulness of such an approach is self-evident. The Federal Republic of Germany simply

[1424] See § 8 A.

[1425] ICC, *Bemba* (n 332) [359] (emphasis added).

[1426] ibid [362]. See also ICC, *Dyilo*, T Ch (n 191) [1011]; *Katanga* (n 546) [776] *et seq*; *Prosecutor v Thomas Lubanga Dyilo* (Judgement) ICC-01/04-01/06, A Ch (1 December 2014) [441]-[452]; Albin Eser in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1b (OUP 2002) 913-916; Mohamed E Badar and Sara Porro in Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic Epublisher 2017) 316-320 fn 308.

[1427] See § 5 B. I.

[1428] Moynihan, *Aiding and Assisting* (n 717) para 166. See extensively § 5 B.

does not know (nor could it reasonably find out) in which context a specific strike will be carried out and what will be the law applicable to it.[1429]

In fact, even if one focuses on the period where US drone strikes took place almost exclusively in Pakistan, it remains questionable whether the requisite degree of certainty would be met. The Intergovernmental Panel on Climate Change, for instance, which is the UN body responsible for assessing the scientific production on climate change, uses the following terms to indicate the assessed likelihood of an outcome or a result: 'virtually certain 99-100% probability, very likely 90-100%, likely 66-100%, about as likely as not 33-66%, unlikely 0-33%, very unlikely 0-10%, exceptionally unlikely 0-1%'.[1430] Using this scale as nothing but the roughest of indicators, even if one were to assume, for the sake of the argument, that at the time a drone strike had a 70 per cent chance of being unlawful, the occurrence of an internationally wrongful act would still have been only *likely*, but far from virtually certain. Here, the difference with a standard of reasonable foreseeability that was identified earlier in the section on proximate causality is most evident.[1431] If a violation of the right to life is the likely outcome of an event, then it may very well be reasonably foreseen. However, one can never be (virtually) certain of it.[1432]

For the Federal Republic of Germany, the commission of an internationally wrongful act was thus just a mere possibility rather than a certainty. Depending on the specific (and unknown) circumstances, an attack might or might not violate IHL or IHRL. In the area of international criminal law, this is the purview of a standard of *dolus eventualis* or recklessness.[1433] According to the ICC, such a standard is not captured by article 30 of the ICC Statute.[1434] To support its view, the court not only points to the

[1429] See also Heinemann (n 965) 1582, who notes that Ramstein's data stream does not reveal whether an operation is internationally lawful or unlawful.

[1430] IPCC, 'Summary for Policymakers' in Rajendra K Pachauri and others (eds), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2015) 2 fn 1.

[1431] See § 7 B.

[1432] Note that under article 2(2)(1) of the Basic Law, neither a violation of the *ius ad bellum* nor of the duty to conduct an effective investigation (at least where a violation of the right to life is only threatened) can be relied on, see § 6 B. II. 3) b).

[1433] On the overlap between both notions see Johan D van der Vyver, 'Prosecutor V. Jean-Pierre Bemba Gombo (Decision Pursuant to Article 67(1)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)' (2010) 104 *AJIL* 241, 243-245.

[1434] ICC, *Bemba* (n 332) [360]. cf *Prosecutor v Thomas Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06, Pre-T Ch I (29 January 2007) [352]-[365]; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07, Pre-T Ch I (30 September 2008) [251] fn 329.

express wording of the provision but also to its *travaux préparatoires*, which show that the drafters of the ICC Statute had abandoned the idea of including *dolus eventualis* at an early stage of the drafting process.[1435]

This reasoning is certainly specific to article 30 and cannot be transferred, not even by analogy, to article 16 of the ARSIWA. In fact, traces of a broader standard of *dolus eventualis* may be found in the early jurisprudence of the UN Commission on Human Rights, even if not explicitly in the field of State responsibility for complicity. In 1984, the commission called upon all States 'to avoid taking any action or *extending any aid which might be used* by Israel in its pursuit of the policies of annexation and colonization'.[1436] Morover, the ILC itself chose to exemplify the provision of aid or assistance concerning an international organization under article 14 of the ARIO –which, as will be recalled, is the twin provision of article 16 of the ARSIWA in the ARIO – by quoting a confidential UN memorandum on the collaboration between the UN Mission in the Democratic Republic of the Congo (MONUC) and the Congolese army (*Forces armées de la République démocratique du Congo*; FARDC), which reads as follows:

> If MONUC *has reason to believe* that FARDC units involved in an operation are violating [IHL, IHRL or refugee law] and if, despite MONUC's intercession with the FARDC and with the Government of the [DRC], MONUC *has reason to believe* that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely (…) MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it *has reason to believe* that the FARDC units involved are violating any of those bodies of law (…) This follows directly from the Organization's obligations under customary international law and from the

[1435] ICC, *Bemba* (n 332) [360]-[368].

[1436] UN Commission on Human Rights, 'Resolution 1984/1 – Questions of the violation of human rights in the occupied Arab territories, including Palestine' (20 February 1984) in idem, 'Report on the fortieth Session' (1984) UN Doc E/CN.4/1984/77, 21 para 12 (emphasis added). On the same topic four years earlier see UNSC, 'Resolution 465 (1980)' (1 March 1980) UN Doc S/RES/465 para 7 ('not to provide Israel with any assistance *to be used* specifically in connexion with settlements in the occupied territories'; emphasis added). Quigley (n 156) 114, has interpreted this to potentially include a standard of recklessness.

> Charter to uphold, promote and encourage respect for human rights, [IHL] and refugee law.[1437]

Still, it is doubtful whether article 16 of the ARSIWA indeed stretches that far.[1438] The notions of *dolus eventualis* and recklessness are closely tied to the concepts of due diligence and constructive knowledge, neither of which is specifically provided for by article 16.[1439] More importantly, a standard of *dolus* that accommodates the mere possibility that another State could act unlawfully in the future would transform the general prohibition on complicity into what Helmut Aust has called 'a risk-based form of responsibility'.[1440] In the absence of a general excuse of error in law,[1441] this would put States in constant danger of becoming complicit in the *potentially* unlawful conduct of another State. Such a risk might indeed confirm Aust's fears and undermine valuable inter-State cooperation.[1442]

D. Conclusion

The *mens rea* element is, without a doubt, one of the most contested issues within the general regime of State responsibility for complicity. Many of its uncertainties revolve around the disputed interpretation of the element of wrongful intent, but they do not stop there. Constructive or presumed knowledge, due diligence, and situations of legal ambiguity – each of these issues raises difficult legal questions which have yet to be conclusively answered. This uncertainty over the current state of the law not only troubles judges and legal practitioners alike.[1443] It might also frustrate the expectations of the injured State to obtain redress for the injury suffered as a result of the internationally

[1437] ILC, 'Draft Articles on the Responsibility of International Organizations' (n 1303) 66 para 6 (emphasis added).

[1438] Concurring Jackson (n 151) 161 *et seq*; Luca Ferro, 'Brothers in Arms: Ancillary State Responsibility and Individual Criminal Liability for Arms Transfers to International Criminals' (2015) 54 *Mil L & L War Rev* 139, 148; Moynihan, *Aiding and Assisting* (n 717) para 71; 'Mental Element' (n 756) 468. See also Brian Finucane, 'Partners and Legal Pitfalls' (2016) 92 *Intl L Stud* 407, 417.

[1439] See § 8 B. II and § 8 B. II. 2).

[1440] Aust, *Complicity* (n 30) 240.

[1441] See § 8 B. IV.

[1442] Jackson (n 151) 161 *et seq*; Mackenzie-Gray Scott, 'State Responsibility for Complicity' (n 717) 392. On that aspect see § 8 A.

[1443] Lanovoy, *Complicity* (n 145) 236.

wrongful act, while, at the same, time providing a dubious sense of security to the State that has aid or assisted in its commission.[1444]

Especially in cases such as the present one, where the State providing aid or assistance only knows that the receiving State *might* put the support to wrongful use, a requirement of wrongful intent, even if interpreted broadly, will often present an insurmountable obstacle. Two possible solutions spring to mind. The first one is to discard the requirement of wrongful intent altogether, leaving only knowledge of the circumstances as the relevant cognitive standard under article 16 of the ARSIWA.[1445] This, however, would be contrary to the language of the ARSIWA General Commentary and the expressed opinion of many States, which appear to establish intent, however interpreted, as an additional element of State responsibility for complicity alongside knowledge of the circumstances. In fact, such an approach might simply shift the problem to the element of knowledge of the circumstances rather than solve it.[1446] A second solution is to include within the requirement of wrongful intent a standard of *dolus eventualis*. Although faint traces of support may be found in the older jurisprudence of the UN Commission on Human Rights and the ILC's general commentary to the ARIO, one should be wary of the potential consequences. More responsibility is not always better. If inter-State cooperation means being at a constant risk of becoming complicit with one another, then States might become too timid to cooperate in the first place.[1447] Non-compliance with the law is certainly not something to be encouraged but neither is isolation or abstention. And if complicit responsibility were to attach to too many situations where it should not, then States might start to disregard the general prohibition on complicity altogether.[1448] Stretching the *mens rea* element too much in the direction of *dolus eventualis* or recklessness might thus provoke what one is trying to avoid in the first place: a general prohibition on complicity without practical significance.

[1444] ibid. cf Aust, *Complicity* (n 30) 249.
[1445] eg Verheyen (n 764) 240. This also appears to be the position of Lanovoy, *Complicity* (n 145) 237-239, 331, but on the basis that the requirement of wrongful intent would be interpreted narrowly.
[1446] Lanovoy, *Complicity* (n 145) 238, also seems to recognize this.
[1447] Aust, *Complicity* (n 30) 427.
[1448] Klein (n 43) 437; Aust, *Complicity* (n 30) 240 *et seq*, 428.

§ 9 Final Conclusion

When in 2004 Nek Mohammad died in the middle of the barren region of South Waziristan, few suspected that this would be the beginning of an unprecedented campaign of targeted killings. One that has been criticized as immoral, strategically foolish, counter-productive, opaque, and, above all, unlawful.[1449] The question of the international legality of US drone strikes has generated a vast amount of responses from legal scholars, politicians, and military experts, some of which have defended their position with almost religious fervour. While the US claims that its actions are carried out in full compliance with domestic and international law, nongovernmental organizations have condemned the use of drones as 'a secret assassination programme that kills scores of civilians each year'[1450] and have protested that drone strikes violate both IHL and IHRL.[1451] However, general claims of illegality seem to be just as out of place as those of legality. Whether or not the use of lethal force complies with international law can only be determined on a case-by-case basis, and so far, virtually all attacks in Pakistan and Yemen have been conducted in absolute secrecy. In fact, even if drone strikes truly killed "scores of" civilians,[1452] then this would still not make them automatically unlawful. Finding a violation of the *ius in bello* is a sophisticated exercise involving a myriad of factors, including, *inter alia*, notions of proportionality, collateral damage, and honest error, and goes far beyond the mere identification of civilian harm. Under IHRL, the situation is arguably similar. The question whether an individual presents an imminent threat for which the use of lethal force would be justified is inherently fact specific, but without knowledge of the facts to which the law can be applied, it will be impossible to reach a

[1449] For a summary of the debate Daniel Byman, 'Do Targeted Killings Work?' (2006) 85(2) *Foreign Affairs* 95, 111; Shah and others (n 221) 69-71; Brooks, 'Counterterrorism Implications' (n 15) 4-8; 'Law of Armed Conflict' (n 303) 14; DeShaw Rae (n 14) 79 *et seqq*; Plaw, Fricker and Colon (n 2) 65 *et seqq*, 167 *et seqq*, and 228-233 for an analysis of public opinion.

[1450] 'Setback in landmark drone case' *Reprieve* (26 November 2020, Statement of Jennifer Gibson) <https://reprieve.org/us/2020/11/26/setback-in-landmark-drone-case/> accessed 18 April 2021.

[1451] eg Amnesty International, 'Deadly Assistance' (n 38) 4 *et seq*; ECCHR (ed), *Litigating Drone Strikes* (n 39).

[1452] On the question whether drones kill more civilians than manned aircraft see Brooks, 'Counterterrorism Implications' (n 15) 2 *et seq*; Spencer Ackermann, 'US drone strikes more deadly to Afghan civilians than manned aircraft – adviser' *The Guardian* (2 July 2013) <www.theguardian.com/world/2013/jul/02/us-drone-strikes-afghan-civilians> accessed 20 September 2019; Micah Zenko and Amelia M Wolf, 'Drones Kill More Civilians Than Pilots Do' *Foreign Policy* (25 April 2016) <http://foreignpolicy.com/2016/04/25/drones-kill-more-civilians-than-pilots-do/> accessed 20 September 2019; Callamard Report (n 27) para 19.

reliable view on a breach of international law. Further complexity is added by the fact that the specific content of many of the core concepts of IHL and IHRL remains disputed. In particular, there is no agreement on who qualifies as a member of an organized armed group; which conduct amounts to a direct participation in hostilities; and what exactly constitutes an imminent threat. Although the US' interpretation thereof does not comport with what the ICRC and many scholars, including this author, consider to be the correct interpretation of international law, there is no authoritative judiciary that could rapidly clarify the issue. Under these circumstances, Rosa Brooks has argued that the adequacy of the theories used by the US to justify its counterterrorism operations must be inferred primarily from the responses of other States.[1453] And even though only a few States have expressed explicit support for the US' interpretation of international law, equally few have condemned its activities as internationally unlawful.[1454] Most have simply remained silent.[1455]

It would not be an exaggeration to argue that the lack of a decisive response from the international community stands to threaten the very rule of law.[1456] Where powerful States are not held accountable, whether domestically or internationally, and do not have to fear the consequences of their own actions, they are encouraged to use their power in whichever way they see fit and for whatever purpose it may serve.[1457] A perfect example of this is the assassination of Qasem Soleimani, an Iranian general and head of the Quds force, a wing of the powerful extremist Islamic Revolutionary Guard Corps. As briefly mentioned earlier in this study, Soleimani was killed by a US drone strike in January 2020

[1453] Brooks, 'Rule of Law' (n 194) 98.

[1454] ibid; see also Joshua Bennett, 'Exploring the Legal and Moral Bases for Conducting Targeted Strikes outside of the Defined Combat Zone' (2012) 26 *Notre Dame J L Ethics & Pub Poly* 549, 550. cf Marauhn, Mengeler and Strobel (n 967) 349.

[1455] Brooks, 'Rule of Law' (n 194) 98; Callamard Report (n 27) paras 70-82. In the context of the Syrian conflict see also Paulina Starski, 'Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility' (2017) 4 *J Use of Force & Intl L* 14, 49-51.

[1456] eg Cavallaro, Sonnenberg and Knuckey (n 41) 140-146; Brooks, 'Counterterrorism Implications' (n 15) 8-15; Melzer, *Human Rights Implications* (n 41) 4; Heyns Report 2013 (n 14) para 97; Moorehead, Hussein and Alhariri (n 252) 106-108; Giegerich (n 1006) 623; Callamard Report (n 27) para 65. See also Brooks, 'Rule of Law' (n 194) 98, arguing that US drone strikes 'present not an issue of law-breaking, but of law's brokenness'.

[1457] UN Institute for Disarmament Research (UNIDIR), 'Increasing Transparency, Oversight and Accountability of Armed Unmanned Aerial Vehicles' (2017) 22-25 <www.unidir.org/files/publications/pdfs/increasing-transparency-oversight-and-accountability-of-armed-unmanned-aerial-vehicles-en-692.pdf> accessed 19 April 2021.

while travelling in a car near Baghdad International Airport, along with nine others.[1458] This attack may very well be the result of the emboldenment created by almost two decades of largely unopposed targeted killings.[1459] It was not directed against some low value target in the Pakistani or Yemeni hinterland, but against a high-ranking military official of another State in the capital of an unsuspecting third State.[1460] Even so, the US did not even try to dispute its responsibility. Instead, it portrayed Soleimani's death as necessary to prevent an imminent attack,[1461] but failed to produce any evidence for its claim.[1462] And when the UN Special Rapporteur Agnès Callamard found the strike to be 'an arbitrary killing for which, under IHRL, the US is responsible',[1463] the US dismissed her report as 'opinions'.[1464] Again, most States, including the Federal Republic of Germany, remained silent.[1465]

[1458] Michael Crowley, Falih Hassan and Eric Schmitt, 'U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces' *New York Times* (9 July 2020) <www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html> accessed 20 April 2021.

[1459] Similar Callamard Report (n 27) paras 62-64.

[1460] Iraq formally protested the strike to the UNSC, see UNSC, 'Identical letters dated 6 January 2020 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General and the President of the Security Council' (6 January 2020) UN Doc S/2020/15.

[1461] See DoD, 'Statement on the killing of Qasem Soleimani' (2 January 2020) <www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense> accessed 19 April 2021; Mark Hosenball, 'Trump says Soleimani plotted 'imminent' attacks, but critics question just how soon' *Reuters* (3 January 2020) <www.reuters.com/article/us-iraq-security-blast-intelligence/trump-says-soleimani-plotted-imminent-attacks-but-critics-question-just-how-soon-idUSKBN1Z228N> accessed 19 April 2021.

[1462] Marc Polymeropoulos, 'How to Think About the Soleimani Strike in Four Questions' *Just Security* (17 January 2020) <www.justsecurity.org/68094/how-to-think-about-the-soleimani-strike-in-four-questions/> accessed 19 April 2021; Deutscher Bundestag (Wissenschaftliche Dienste), 'Völkerrechtliche Aspekte des Konflikts zwischen Iran und den USA' (13 January 2020) WD 2 – 3000 – 001/20, 19-21, 26; Philip Rucker and others, '"Four embassies": The anatomy of Trump's unfounded claim about Iran' *Washington Post* (14 January 2020) <www.washingtonpost.com/politics/four-embassies-the-anatomy-of-trumps-unfounded-claim-about-iran/2020/01/13/2dcd6df0-3620-11ea-bf30-ad313e4ec754_story.html> accessed 24 April 2021; Callamard Report (n 27) Annex para 48.

[1463] Callamard Report (n 27) Annex para 82. cf Stefan Talmon and Miriam Heipertz, 'The U.S. killing of Iranian General Qasem Soleimani: of wrong trees and red herrings, and why the killing may be lawful after all' *GPIL – German Practice in International Law* (23 January 2020) <https://gpil.jura.uni-bonn.de/2020/01/the-u-s-killing-of-iranian-general-qasem-soleimani-of-wrong-trees-and-red-herrings-and-why-the-killing-may-be-lawful-after-all/> accessed 24 April 2021.

[1464] Jamey Keaten, 'Pompeo slams UN report on deadly US drone strike on Iranian' *Washington Post* (10 July 2020) <www.washingtonpost.com/world/middle_east/pompeo-slams-un-report-on-deadly-us-drone-strike-on-iranian/2020/07/10/d1d813b4-c2bb-11ea-8908-68a2b9eae9e0_story.html> accessed 20 April 2021, quoting US Secretary of State Mike Pompeo.

[1465] For a compilation of State reactions see Mehrnusch Anssari and Benjamin Nußberger, 'Compilation of States' Reactions to U.S. and Iranian Uses of Force in Iraq in January 2020' *Just Security* (22 January 2020) <www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020> accessed 20 April 2021.

The difficulties of assessing the US' compliance with international law have direct bearing on the question of complicity in one of its acts under article 16 of the ARSIWA. This, however, is far from the only challenge that the general framework on State responsibility for complicity faces. Already back in 1961, member of the ILC Paul Reuter remarked that '[t]he truth is that the question of responsibility is a huge laboratory',[1466] and his statement still seems to hold true today. Having been neglected for decades, so far, no coherent State practice as to the specific content of most of the requirements of article 16 has emerged, leaving their application *in concreto* fraught with uncertainty. For instance, it remains unclear what exactly constitutes aid or assistance; to what extent the assisting State's support must have contributed to the commission of the principal wrongful act; and what is the requisite *mens rea* element, and how is it to be interpreted. At the same time, unrealistically high procedural hurdles have prevented international courts and tribunals from adjudicating cases of State responsibility and hence from providing some guidance on the correct interpretation of the law.[1467] All this makes finding complicit responsibility under article 16 an incredibly complex and challenging undertaking. It is therefore not surprising that in search for more accessible prohibitions of complicity, some courts have turned to an expansive interpretation of specific treaty obligations. This has reduced the practical significance of article 16 even further.

But things might not be as bleak as they appear. While there is no denying that the current significance of article 16 lags behind the scope of its potential application,[1468] it represents a big step forward in the development of the international law on State responsibility for complicity, which not even 100 years ago Roberto Ago had considered inconceivable. In fact, one cannot expect all issues to be resolved in the 20 years that have passed since the ARSIWA were adopted. As Vladyslav Lanovoy has put it, 'international law is not a hard science in the same sense as physics, chemistry or astronomy'.[1469] Its rules develop organically over time and article 16's relative novelty means that it will still

[1466] Paul Reuter, 'Principes de Droit International Public' (1961) 103 *Recueil des Cours* 423, 596 ('La vérité est que la matière de la responsabilité tient la place d'un immense laboratoire'; translation by Lanovoy, *Complicity* (n 145) 92 fn 1).

[1467] See Lanovoy, *Complicity* (n 145) 338 *et seq*, who criticizes that in its current form, article 16 might have only systemic and symbolic value.

[1468] Aust, *Complicity* (n 30) 427.

[1469] Lanovoy, *Complicity* (n 145) 340.

need time to grow.[1470] Moreover, the true value of article 16 possibly lies in its potential to contribute to what Vaughan Lowe has called a 'bureaucratization of monitoring compliance with international law'.[1471] If States interact with one another under the impression of a general prohibition of complicity, then they might routinely check whether the actions of their counterpart comply with international law before providing assistance thereto. This, in turn, might contribute to some much needed strengthening of the rule of law.[1472]

Notwithstanding the difficulties in reaching a reliable view on the existence of an internationaly wrongful act and the uncertainties surrounding the interpretation of the constituent elements of article 16, this study has explored the different ways in which the Federal Republic of Germany might have incurred complicit responsibility for its involvement in US drone strikes in Pakistan and Yemen. For that purpose, it has considered the provision of intelligence, the granting of Ramstein Air Base, and a failure to protect the fundamental right to life abroad as a possible basis for complicity. However, each was found to have its own legal pitfalls, and it is questionable whether any of the three would be capable of triggering complicit responsibility. In particular, there is no evidence, whether direct or indirect, that the provision of intelligence has made even a single drone strike at least somehow easier, thus failing to meet the requirement of factual causality. Granting US forces the use of Ramstein Air Base, on the other hand, may have made an unlawful drone strike factually easier, but it is doubtful whether it could also be considered a normative cause thereof. One might be tempted to assert that a possible failure of the Federal Republic to comply with its protective obligations under the German Basic Law offers the most promise for establishing German complicit responsibility, but this would be an exaggeration. More than the other two, this option is riddled with uncertainty. For instance, it is unclear whether aid or assistance can also consist of an omission; whether the necessary duty to act may also be derived from domestic law; whether such a duty to protect the right to life under the Basic Law had arisen in the present case; and whether an omission to protect could be causally linked to an internationally wrongful drone strike. While this study has shown that there are good reasons to answer these questions in the affirmative, it has done so with several caveats.

[1470] Aust, *Complicity* (n 30) 427; Jackson (n 151) 175; Lanovoy, *Complicity* (n 145) 340.
[1471] Lowe (n 42) 14.
[1472] ibid; Jackson (n 151) 171 *et seq*. Similar Aust, *Complicity* (n 30) 84-86, 426.

For example, although the Federal Republic may very well be obliged to protect the right to life against a potential violation by an internationally unlawful drone strike, in Pakistan, such an obligation existed only until the end of 2016. Moreover, while an omission to do so may constitute a sufficiently proximate cause of such an attack, one is faced with good reasons to assume that this is the case only for those drone strikes that took place in Pakistan between 2008 and 2011. And even though German authorities may have positively known about the (upcoming) role of Ramstein Air Base in US counterterrorism operations since April 2010, construction of its SATCOM relay station allegedly was not finished until late 2013. On top of that, two further issues call very much into question whether complicit responsibility may successfully be established on the basis of an omission to protect. For one, a strong case can be made for the fact that the Federal Republic's protective obligation was successfully discharged by its diplomatic and political consultations with the US. And secondly, it is highly doubtful whether German authorities possessed the requisite element of wrongful intent, ie, that they had been aware that an internationally wrongful drone strike would occur in the ordinary course of events.

In sum, it is this author's view that there are no sufficient grounds to conclude that the Federal Republic of Germany has incurred international complicit responsibility under article 16 of the ARSIWA. Although several activists, nongovernmental organizations and human rights advocates continue to claim the opposite, these allegations should be viewed from a strategic perspective. Fighting for hearts rather than minds, their aim is to trigger a public debate on the issue of complicity and to bring about lasting political change by raising the pressure on the Federal Government to respond.[1473] If successful, this might not only break the silence of the Federal Government, but it might also contribute to filling in the gaps of the current legal framework and help develop the law on State responsibility for complicity as a whole.

[1473] See Sarah E Kreps and Geoffrey PR Wallace, 'International law, military effectiveness, and public support for drone strikes' (2016) 53 *JPR* 830.

Appendices

US Drone War in Numbers

The Bureau of Investigative Journalism:[1474]

		Pakistan			Yemen		
		ATK	**PPL**	**CIV**	**ATK**	**PPL**	**CIV**
George W Bush[1475]	**2002**	-	-	-	1	6	0
	2003	-	-	-	-	-	-
	2004	1	7	2	-	-	-
	2005	3	16	8	-	-	-
	2006	2	99	85	-	-	-
	2007	5	46	29	-	-	-
	2008	38	327	116	-	-	-
	TOTAL	49	495	240	1	6	0
Barack Obama	**2009**	54	612	155	1	0	0
	2010	128	932	143	-	-	-
	2011	75	514	102	19	94	39
	2012	50	311	38	69	378	33

[1474] See Jack Serle and Jessica Purkiss, 'Drone Wars: The Full Data' *The Bureau of Investigative Journalism* (1 January 2017) <www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data> accessed 28 May 2021.

ATK = no of drone strikes; PPL = no of casualties; CIV = no of civilian casualties. Where the BIJ's data of ATK, PPL, and CIV is given as a range, this table uses the average between the minimum and maximum figure (rounded mathematically). Note that the maximum ATK is not inferred from the designation of an entry as "1" (drone) or "0" (not drone) in the 'Drone strike' category. This is because the BIJ describes some attacks as 'possible US drone strike' but marks them differently as "1" or "0" without transparent explanation. Instead, this table uses the BIJ's description (eg 'possible US drone strike', 'drone or air strike', or 'weapon: unknown') to determine whether it was possibly a drone strike. Attacks other than (possible) drone strikes, whether in total or in part, are not reflected in the table.

[1475] The presidential term ends 20 January.

	2013	27	152	2	27	126	27
	2014	25	151	1	26	149	17
	2015	13	73	4	27	116	4
	2016	3	12	1	35	109	0
	TOTAL	375	2757	446	204	972	120
Donald Trump	**2017**	5	19	2	68[1476]	118	20
	2018	1	2	0	19	49	15
	2019	-	-	-	4	1	0
	TOTAL	6	21	2	91	168	35
OVERALL		430	3273	688	296	1146	155

[1476] In the BIJ's datasheets, two entries are contradictory: YEM265 (9-4) and YEM278 (8-6). In the above table, both have been integrated in reversed order.

Initiative for the Study of Asymmetric Conflict and Counterterrorism:[1477]

		Pakistan[1478]				Yemen[1478]			
		ATK	**MIL**	**CIV**	**UNK**	**ATK**	**MIL**	**CIV**	**UNK**
George W Bush	**2002**	-	-	-	-	1	6	0	0
	2003	-	-	-	-	-	-	-	-
	2004	1	6	1	1	-	-	-	-
	2005	3	9	5	1	-	-	-	-
	2006	3	8	42	60	-	-	-	-
	2007	5	32	8	15	-	-	-	-
	2008	36	212	26	71	-	-	-	-
	TOTAL	48	267	82	148	1	6	0	0
Barack Obama	**2009**	56	479	39	89	1	0	21	0
	2010	136	701	22	160	1	0	4	0
	2011	76	397	17	100	18	84	37	20
	2012	49	283	3	20	54	360	24	4
	2013	27	141	2	10	31	112	21	7
	2014	24	147	0	6	29	136	5	15
	2015	14	66	5	6	29	109	0	1
	2016	2	5	0	0	30	91	0	3

[1477] For the methodology see n 1474. MIL = no of militant casualties; UNK = no of unknown-identity casualties.

[1478] Initiative for the Study of Asymmetric Conflict and Counterterrorism, 'Database' <https://isacc.umassd.edu/operations/results> accessed 30 May 2020, according to the yearly breakdowns. Entries possibly relating to a drone strike (eg 'air' or 'unknown') have been included in the above table.

	TOTAL	384	2219	88	391	193	892	112	50
Donald Trump	**2017**	5	18	0	0	93	99	15	5
	2018	2	3	0	0	16	42	0	12
	2019	-	0	0	0	-	-	-	-
	TOTAL	7	21	0	0	109	141	15	17
OVERALL		439	2507	170	539	303	1039	127	67

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