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### United States' Compliance with the International Covenant on Civil and Political Rights

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**United States' Compliance with the  
International Covenant on Civil and Political Rights**

**Columbia Law School Human Rights Institute  
and**

**American Civil Liberties Union**

**Suggested List of Issues to Country Report Task Force on the United States**

**107<sup>th</sup> Session of the Human Rights Committee, Geneva<sup>1</sup>**

**11-28 March 2013**

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28 December 2012

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<sup>1</sup> Human Rights Committee, *Consideration of reports and country situations in the absence of a report*, <http://www2.ohchr.org/english/bodies/hrc/hracs107.htm> (last visited Dec. 10, 2012).

**Targeted Killings Through Drone Strikes in Pakistan, Yemen and Somalia** (Article 6 (arbitrary deprivation of right to life); Article 4 (non-derogation from, *inter alia*, Article 6); Article 2(3) (right to effective remedy))<sup>1</sup>

## I. Issue Summary

The U.S. government is engaged in targeted killings through drone strikes (and other aircraft) in Pakistan, Yemen, Somalia and elsewhere, which have resulted in the deaths of thousands of people.<sup>2</sup> U.S. practice is characterized by secrecy and an unwillingness even to engage directly with concerns about civilian harm, let alone to provide accountability for civilian deaths and injury. Despite calls for disclosure from UN experts and non-governmental organizations, the U.S. government uses vague and shifting legal standards, and fails to disclose the basis for strikes or the steps it takes to minimize harm to civilians and investigate reported violations of international humanitarian law and human rights law.<sup>3</sup>

The government carries out targeted killings outside of recognized armed conflict largely through the Central Intelligence Agency (CIA) and the military's Joint Special Operations Command (JSOC), two highly secretive organizations that often evade public scrutiny. On the one hand, the government stalls transparency and accountability by claiming in litigation that the CIA's involvement in the drone program is a state secret and that disclosure would cause grave harm to national security. On the other hand, government officials tout the effectiveness of the program in anonymous leaks to the press—a forum in which claims of lawfulness and low civilian casualties cannot be tested meaningfully.<sup>4</sup>

U.S. disclosure about measures to protect civilians and ensure legal compliance is especially crucial in light of troubling reports about civilian casualties from strikes in Pakistan and Yemen. Although there has not been a large-scale study based on ground reporting, several organizations have credibly made civilian casualty estimates that are significantly higher than those the U.S. government has suggested in anonymous leaks.<sup>5</sup>

In some areas, the U.S. government reportedly “counts all military-age males in a strike zone as combatants” who may be targeted — a standard reported by the New York Times in May 2012 and which the U.S. government has never disputed.<sup>6</sup> This standard would lead the government to systematically undercount potential civilian casualties and would violate international law.<sup>7</sup>

Moreover, there are numerous reports of U.S. “double-tap” strikes—those occurring after the initial strike to ensure that all individuals present in a “kill box,” or designated area, are killed.<sup>8</sup> The practice has reportedly resulted in the deaths of rescuers; in the context of armed conflict, deliberate targeting of rescuers would be a war crime, as UN expert Christof Heyns stated in June 2012.<sup>9</sup> Both in and outside of armed conflict, killing of rescuers violates human rights law.<sup>10</sup>

Despite calls by UN experts we describe below, the U.S. government does not disclose whether it conducts effective investigations after strikes to determine the identity of individuals killed, nor does it disclose the results of any such investigations. Moreover, we know of no U.S.-sponsored system of amends, reparation or compensation for strike victims or their families in Pakistan, Yemen or Somalia.

Top U.S. officials invoke both the doctrine of self-defense and international humanitarian law as legal justification for the targeted killing program. But the U.S. legal framework is ambiguous and appears to conflate self-defense principles related to the permissibility of using force (*jus ad bellum*) with humanitarian law principles regarding how force should be exercised in the targeting of particular individuals (*jus in bello*). It also applies international humanitarian law's more permissive regime for the use of lethal force in situations where there is no recognized armed conflict, while refusing to recognize the international human rights standards that properly apply.

What one official has termed a “flexible understanding of imminence” appears to have replaced the strict limitations on the use of lethal force under both international human rights and humanitarian law (assuming humanitarian law were properly to apply).<sup>11</sup> This interpretation appears to have enlarged the scope of who the U.S. views as lawfully subject to direct attack, with officials variously saying that they target individuals who pose a “significant threat” or “an actual ongoing threat,” and incorporate in imminence “the relevant window of opportunity to act.”<sup>12</sup> Thus, even if imminence were the relevant standard, these malleable and shifting partial definitions are so broad as to rob the term of meaning.

## **II. Concluding Observations by the Human Rights Committee**

The Human Rights Committee has not previously addressed U.S. targeted killings through drone strikes (or other aircraft). U.S. drone strikes in Pakistan began in 2004 and in Yemen the first reported strike was in 2002, but the government accelerated these strikes dramatically starting in 2008.<sup>13</sup> In its first review of Yemen since then, in March 2012, the Human Rights Committee addressed questions to Yemen about targeted killings through drone strikes conducted by the U.S. on its territory. One Committee member asked “how the Government was engaging in that matter, which was clearly a violation of the right to life.”<sup>14</sup> Yemen’s Minister of Human Rights responded, describing the “lack of transparency” and “the current situation, whereby civilians had been killed by unmanned vehicles.”<sup>15</sup>

In 2006, the Committee recommended the United States acknowledge the applicability of the Covenant to actions taken with respect to individuals under its jurisdiction but outside U.S. territory, as well as its applicability in times of war.<sup>16</sup>

## **III. U.S. Government Report**

The Human Rights Committee has not previously asked the government to address U.S. targeted killings through drone strikes (or other aircraft).

Regarding extraterritorial application of the ICCPR, the government's position is that article 2(1) of the Covenant only applies to individuals both within the territory and jurisdiction of the State Party.<sup>17</sup> The U.S. does not take the position that the Convention is suspended in times of war.<sup>18</sup>

#### **IV. Other UN Body Recommendations**

In March 2012, UN Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns called on the United States to “clarify the rules that it considers to cover targeted killings”; the “procedural safeguards in place to ensure in advance that targeted killings comply with international law”; and “the measures taken after such killing to ensure that its legal and factual analysis is correct.” Heyns emphasized: “Disclosure of these killings is critical to ensure accountability, justice and reparation for victims or their families.”<sup>19</sup> He called on the U.S. to disclose data on civilian casualties from drone strikes; “the measures or strategies applied to prevent casualties”; “the measures in place to provide prompt, thorough, effective and independent public investigation of alleged violations” of international humanitarian law and human rights.<sup>20</sup>

These comments echoed recommendations made by Heyns' predecessor Philip Alston, who issued a major study on targeted killings in May 2010 that examined the practice of the United States and other States.<sup>21</sup> Alston's report specified requirements for targeting operations under human rights law (applicable in and outside armed conflict) and humanitarian law (applicable in armed conflict).<sup>22</sup>

Moreover, in June 2012 U.N. High Commissioner for Human Rights Navi Pillay expressed “serious concern” over drone strikes in Pakistan, noting that it is “unclear that all persons targeted are combatants or directly participating in hostilities.”<sup>23</sup> She reminded States of their obligations to “take all necessary precautions to ensure that attacks comply with international law” and to “conduct investigations that are transparent, credible and independent, and provide victims with effective remedies.”<sup>24</sup>

Ben Emmerson, U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has also expressed strong concern about the legality of the targeted killing program and will examine the legality of drone strikes this year.<sup>25</sup>

#### **V. Recommended Questions**

1. Describe with specificity the legal framework the U.S. government applies to targeting operations occurring outside the context of armed conflict in Afghanistan. Clarify U.S. legal standards for who may be targeted, including whether the U.S. presumes that all military-age males in a strike zone are lawfully subject to direct attack.

2. Provide an accounting of all casualties resulting from targeting operations occurring outside of Afghanistan, including a breakdown of the number of people targeted and injured or killed as well as collateral civilian deaths and injuries.
3. Describe with specificity the measures or strategies the U.S. government applies to mitigate civilian harm in targeting operations.
4. Describe the measures in place to provide prompt, thorough, effective and independent public investigation of alleged violations of international humanitarian law and human rights resulting from targeting operations outside of Afghanistan.
5. Clarify whether a system of compensation, reparation or making amends exists in Pakistan, Yemen, Somalia or other States where targeting operations have taken place, similar to those the U.S. put in place in Iraq and Afghanistan. If no such system exists, describe what measures are being taken to expeditiously establish and implement such a system.

## VI. Suggested Recommendations

1. **Identify the rules of international law the government considers to provide a basis for targeting operations outside of the armed conflict in Afghanistan.** Specify the procedural safeguards in place to ensure in advance of targeted killings that they comply with international law, and the measures taken after any such killing to ensure that the government's legal justification and factual analysis was accurate.
2. **Officially acknowledge drone strikes and other targeting operations in Pakistan, Yemen, Somalia and other States,** including the role of the CIA and Joint Special Operations Command. Do not invoke state secrets as barriers to judicial review of targeted killings in U.S. courts.
3. **Disclose all casualties** resulting from targeting operations outside of Afghanistan, including a breakdown of the number of people targeted and injured or killed as well as collateral civilian deaths and injuries. Disaggregate data to identify the number of casualties resulting from the use of armed drones as well as other aircraft.
4. **Disclose with specificity measures or strategies** the U.S. government applies to mitigate civilian harm in targeting operations.
5. **Establish a system to ensure prompt, thorough, effective and independent public investigation** of alleged violations of international humanitarian law and human rights law resulting from drone strikes outside of Afghanistan.
6. **Clarify whether a system of compensation, reparation or making amends exists** in Pakistan, Yemen, Somalia or other States where targeting operations have taken

place, similar to those the U.S. put in place in Iraq and Afghanistan. If no such system exists, expeditiously establish and implement such a system.

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<sup>1</sup> In General Comment 6 and General Comment 14, the Human Rights Committee described the right to life in ICCPR Article 6 as “the supreme right from which no derogation is permitted even in time of public emergency.” Human Rights Comm., General Comment No. 6, ¶2, (April 30, 1982), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument); Human Rights Comm., General Comment No. 14, ¶2, (November 9, 1984). Moreover, the Human Rights Committee emphasized: “The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”<sup>1</sup> Human Rights Comm., General Comment No. 6., ¶3.

<sup>2</sup> The Columbia Law School Human Rights Institute has published three studies that examine the impact of drone strikes on civilians, government accountability and legal standards. See Columbia Law School Human Rights Clinic & Center for Civilians in Conflict, *The Civilian Impact of Drones* (Sept. 2012); Columbia Law School Human Rights Clinic, *Counting Drone Strike Deaths* (Oct. 2012); Columbia Law School Human Rights Institute, *Targeting with Drone Technology: Humanitarian Law Implications* (Mar. 2011). These studies are available at <http://web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes>. See also *Covert War on Terror – The Data*, The Bureau of Investigative Journalism, <http://www.thebureauinvestigates.com/category/projects/drone-data/> (last visited Dec. 28, 2012).

<sup>3</sup> Jamil Dakwar, American Civil Liberties Union, Intervention at the 2<sup>nd</sup> Plenary Meeting, 20<sup>th</sup> Session of the United Nations Human Rights Council (June 18, 2012) *available at* <http://www.unmultimedia.org/tv/webcast/2012/06/aclu-gd-item-2-2nd-meeting-20th-session-human-rights-council.html>.

<sup>4</sup> See *The Civilian Impact of Drones*, *supra* note 2, at 59.

<sup>5</sup> See *The Civilian Impact of Drones*, *supra* note 2, at 19-21.

<sup>6</sup> See *The Civilian Impact of Drones*, *supra* note 2, at 32 (discussing Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, May 29, 2012).

<sup>7</sup> See *The Civilian Impact of Drones*, *supra* note 2, at 73.

<sup>8</sup> See *Civilian Impact of Drones*, *supra* note 2, at 74.

<sup>9</sup> “Reference should be made to a study earlier this year by the Bureau of Investigative Journalism... If civilian ‘rescuers’ are indeed being intentionally targeted, there is no doubt about the law: those strikes are a war crime.” Christof Heyns, Remarks at “The Human Rights Implications of Targeted Killings,” Geneva, Switzerland (June 21, 2012) *reported in* Jack Searle, *UN expert labels CIA tactic exposed by Bureau ‘a war crime,’* Bureau of Investigative Journalism (June 21, 2012), *available at* <http://www.thebureauinvestigates.com/2012/06/21/un-expert-labels-cia-tactic-exposed-by-bureau-a-war-crime/>.

<sup>10</sup> Under human rights law, a State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force *necessary*). See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on Targeted Killings, ¶32, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

<sup>11</sup> John O. Brennan, *Strengthening our Security by Adhering to our Values and Laws*, Speech at Harvard Law School (Sept. 16, 2011) *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

<sup>12</sup> Eric Holder, U.S. Attorney General, Speech at Northwestern University School of Law (Mar. 5, 2012) *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; John O. Brennan, *The Efficacy and Ethics of U.S. Counterterrorism Strategy*, Speech at Woodrow Wilson International Center for Scholars (Apr. 30, 2012) *available at* <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>; Jeh Johnson, *National Security Law, Lawyers and Lawyering in the Obama Administration*, Speech at Yale Law School (Feb. 22, 2012) *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

<sup>13</sup> *The Civilian Impact of Drones*, *supra* note 2, at 14-16.

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<sup>14</sup> Human Rights Comm., 104<sup>th</sup> Sess., Yemen Ready for Dialogue About Human Rights After 2011 Protests Demand Government That Respects ‘Freedom, Equality and Dignity,’ U.N. Doc. HR/CT/741, *available at* <http://www.un.org/News/Press/docs/2012/hrct741.doc.htm>.

<sup>15</sup> *Id.*

<sup>16</sup> Human Rights Comm., 87<sup>th</sup> Sess., July 10-28, 2006, Concluding Observations of the Human Rights Committee: United States of America, ¶10, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>.

<sup>17</sup> Human Rights Comm., Fourth Periodic report: United States of America, ¶505, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement> (“Fourth Periodic Report”).

<sup>18</sup> *Id.*, ¶506.

<sup>19</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Follow-up to country recommendations – United States of America, ¶82, U.N. Doc. A/HRC/20/22/Add.3 (March 30, 2012) (by Christof Heyns), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/125/43/PDF/G1212543.pdf?OpenElement>.

<sup>20</sup> *Id.*, ¶81-82.

<sup>21</sup> *See* Report of the Special Rapporteur on extrajudicial, summary or arbitrary Executions, Interim Report, ¶¶11-16; U.N. Doc. A/65/321 (Aug. 23, 2010) (by Philip Alston); Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6, *supra* note 10.

<sup>22</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6, *supra* note 10, ¶93.

<sup>23</sup> 20<sup>th</sup> session of the U.N. Human Rights Council, Opening Statement by Navi Pillay, United Nations High Commissioner for Human Rights, Geneva, June 18, 2012, *available at* <http://www.unhcr.org/refworld/pdfid/5007f7f62.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> Owen Bowcott, *UN to investigate civilian deaths from US drone strikes*, The Guardian (Oct. 25, 2012), *available at* <http://www.guardian.co.uk/world/2012/oct/25/un-inquiry-us-drone-strikes>.