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**XXXII**

POLISH YEARBOOK  
OF INTERNATIONAL LAW

**2012**

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2012



Wydawnictwo Naukowe SCHOLAR  
Warsaw 2013

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PL ISSN 0554-498X  
DOI 10.7420/pyil2012

Wydawnictwo Naukowe Scholar Spółka z o.o.  
ul. Krakowskie Przedmieście 62, 00-322 Warszawa  
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e-mail: [info@scholar.com.pl](mailto:info@scholar.com.pl)  
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Printed in Poland

First edition, 250 copies

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*Adam Bodnar, Irmina Pacho\**

## TARGETED KILLINGS (DRONE STRIKES) AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

### Abstract

*More and more Member States of the Council of Europe are becoming interested in drone technology. Currently, a number of them either possess or wish to obtain unmanned aerial vehicles equipped with missiles. Due to the increased number of targeted killing operations committed with the use of drones by countries such as the United States or Israel, there is a probability that Member States might also use them for such operations, especially if their forces will be subject to joint command. Although the issue of targeted killings with the use of drones has not yet been subject to the scrutiny of the European Court of Human Rights, there are two main reasons why this may change in the near future. First, the Court has already ruled on the extraterritorial applicability of the European Convention on Human Rights, and second, the Convention places strict limits on any attempts to carry out targeted killings and leaves only a limited space for their use, even in the context of warfare. In this article we assess whether the Member States of the Council of Europe might be ever justified under the European Convention on Human Rights to carry out targeted killing operations using drones.*

### INTRODUCTION

In recent years the number of targeted killing operations has increased significantly. Taking into account their extensive use by Israel in the Occupied Palestinian Territories and by the United States in Afghanistan, Pakistan and Yemen, targeted killing operations have raised serious concerns on moral, policy, and legal grounds. These controversies

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form an integral part of the issue of the lawfulness of targeted killing operations, especially if conducted outside a state's territory and in countries that are far away from any battlefield. This legal ambiguity results from the absence of transparent domestic and international rules that dictate when, where, and against whom targeted killings can be authorized. States, sometimes clandestinely and sometimes openly or formally, have adopted policies of targeted killing, but have in most instances refused to provide either legal justification or sufficient information on the safeguards applied to such operations.

Different states and security forces have used targeted killings for many years, so the issue as such is not new. However, in contemporary times the question of targeted killings has become much more relevant and important in connection with the use of unmanned aerial vehicles, popularly known as drones. While targeted killings using air missiles dispatched by a typical fighter plane may cause a lot of damage to a civilian population, they are more difficult to carry out and riskier, due to possible attacks on the planes and the potential loss of pilots. Drones are extremely efficient in making surgical strikes with the potential for minimal consequences to a civilian population. Significant interest in the use of drone technology by states for the purpose of, *inter alia*, targeted killings, has also risen among Member States of the Council of Europe that already have or are in the process of seeking or obtaining drones equipped with missiles.

The aim of this article is to assess whether the European Convention on Human Rights (ECHR) can be applied to targeted killings conducted by Member States of the Council of Europe. For this purpose, we would like to first raise the question of the lawfulness of these operations in current asymmetric wartime conditions under international humanitarian law and, subsequently, focus on how the Convention applies to three different situations: times of peace, a state of emergency, and times of armed conflict.

## 1. GENERAL REMARKS ON THE LAWFULNESS OF TARGETED KILLINGS

### 1.1. Background

An analysis of the lawfulness of targeted killing begins with ascertainment of the variety of contexts in which targeted killings may take place. They may be performed by States and their agents in both times of peace or armed conflicts, or by non-state organized armed groups in armed conflicts. The methods by which targeted killings are carried out may also vary. They include, *inter alia*, sniper fire, shooting at close range, missiles from helicopters or gunships, clandestinely planted explosive devices, poison, drones, or any other means in a manner that does not give the targeted victim a realistic opportunity to surrender.<sup>1</sup>

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<sup>1</sup> P. Alston, *Study on targeted killings, UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 28 May 2010, A/HRC/14/24, p. 4; N. Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford: 2008, p. 413.



In recent years, some states have adopted policies of targeted killing as a response to terrorist threats and have deemed them a necessary response to the demands of asymmetric warfare.<sup>2</sup> However, as has been indicated, it is common for states to fail to acknowledge the existence of such policies. They also fail to present transparent rules with respect to the scope and nature of the conflict they are engaged in, who may be targeted, what the legal and policy implications are, or who is conducting the targeting.<sup>3</sup>

At the outset, it is crucial to note that the notion of “targeted killing” has not yet been defined under the international law.<sup>4</sup> Instead, the parameters of the term are provided by commentators, according to whom the term refers to the intentional killing by a state of an individual identified in advance and who is not in the state’s custody.<sup>5</sup> It is often indicated that targeted killing does not fit neatly into any particular international legal framework, and it therefore remains unclear whether such conduct is consistent with international regulations.<sup>6</sup> The question also arises to what extent the international lawfulness of targeted killings operations shall be governed by international humanitarian law (IHL) or human rights law.<sup>7</sup> This dilemma is directly related to the debate on the two competing models for assessing governments’ responses to terrorism: the armed-conflict model and the law-enforcement model.<sup>8</sup> Some authors also indicate that since there is current legal uncertainty concerning targeted killing, international law should draw a sharper line than it does at present between combat during war and conduct outside of war.<sup>9</sup>

## 1.2. Targeted Killing and the Council of Europe Member States

The issue of potential responsibility under the ECHR for targeted killing operations performed by the Member States of the Council of Europe may become crucial in the near future, since more and more European states are becoming interested and involved in drone technology. Some of them, namely the United Kingdom, France, Turkey,

<sup>2</sup> Alston, *supra* note 1, p. 3. P. Alston indicates countries like the United States, Israel and Russia.

<sup>3</sup> *Ibidem*, pp. 5-9.

<sup>4</sup> *Ibidem*.

<sup>5</sup> See Melzer, *supra* note 1, pp. 3-4; see also C. Finkelstein, J. D. Ohlin, A. Altman (eds.), *Targeted Killings. Law and Morality in an Asymmetrical World*, Oxford University Press, New York: 2012, p. 5.

<sup>6</sup> Alston, *supra* note 1, pp. 5-9.

<sup>7</sup> See Melzer, *supra* note 1, p. 56.

<sup>8</sup> See M. Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict*, Cambridge University Press, Cambridge: 2010, pp. 103-111; Finkelstein et al., *supra* note 5, pp. 5-8. The authors, in the introduction indicate, that “[o]ne of the notable features of the debate over targeted killing is that each side regards the other as proposing an approach that is not merely sub-optimal but unacceptable. The proponents of the law-enforcement model do not simply say that targeted killing is less than the best way to respond to terrorism; rather they reject it as morally and legally impermissible. On the other side, defenders of the armed-conflict model insist that for a state threatened by terrorists to forego the practice, when the state has the requisite means, is an unacceptable abdication of its responsibility to its citizens.”

<sup>9</sup> R. V. Meyer, *The Privilege of Belligerency and Formal Declaration of War*, in: Finkelstein et al., *supra* note 5, pp. 183-221.

Russia, and recently Germany and Poland, already have or are seeking to obtain drones equipped with missiles.<sup>10</sup> For instance, unmanned air vehicles are used by the United Kingdom as part of its official military mission against the Taliban in Afghanistan. According to the respected blog *Drone War UK*, the British Ministry of Defense had carried out 248 drone strikes in Afghanistan as of 29 February 2012. Out of this number, 60% were secret and unreported. Recently, human rights lawyers brought a case in British court on behalf of a Pakistani individual whose father was killed in an American missile strike in 2011. The aim of the case is to force the British government to admit whether or not it has a policy of sharing intelligence with the United States that could be used in drone strikes.<sup>11</sup>

Russian authorities have reportedly been conducting targeted killing operations against Chechens in order to combat terrorism directed against Russia.<sup>12</sup> In 2006, the Russian parliament approved a law that permits the killing of alleged terrorists on the territory of other states if previously authorized by the Russian President.<sup>13</sup>

Moreover, Polish media recently reported that the Ministry of National Defense is going to acquire 41 unmanned aircraft by the year 2018, including two sets of combat drones that are similar to American Predators and equipped with missiles. Poland currently uses drones purely for surveillance purposes, mostly in the Ghazni province of Afghanistan. In its official statement, the Minister of National Defense confirmed that drone technology is currently a priority and that Polish authorities are planning to create a separate military unit to deal with and operate drones, since the technology falls outside the framework of traditional troop deployments.<sup>14</sup>

The possession of drones is not synonymous with their exclusive use for the purposes of targeted killing operations, the legality of which is currently uncertain. Drones might also be used for the purpose of conducting military operations, such as supporting infantry, artillery, or other forces on the ground. However, due to the dramatically increased number of targeted killing operations conducted using drones<sup>15</sup> by, *inter alia*, the United States,<sup>16</sup> one may speak of the possibility, if not probability, that Council

<sup>10</sup> Alston, *supra* note 1, p. 9.

<sup>11</sup> D. Haynes, *Pressure on Britain over deadly drone attacks*, The Times, 26 May 2012, available at: <http://www.theaustralian.com.au/news/world/pressure-on-britain-over-deadly-drone-attacks/story-fn-b64oi6-1226367308557> (last accessed 2 May 2013).

<sup>12</sup> Alston, *supra* note 1, p. 8.

<sup>13</sup> Federal Law No. 35-FZ of 6 March 2006 on Counteracting Terrorism.

<sup>14</sup> Letter of the Ministry of Defense, ref. no. 3403/DPZ, 31.08.2012 in response to a letter of the Helsinki Foundation for Human Rights, ref. no. 1995/2012/PSP/MSZ, 14.08.2012, available at: <http://www.hfhr.pl/mon-polskie-prawo-nie-stoi-na-przeszkodzie-zakupu-dronow> (last accessed 2 May 2013).

<sup>15</sup> Alston, *supra* note 1, p. 9.

<sup>16</sup> E.g. S. Ackerman, *'Unprecedented' Drone Assault: 58 Strikes in 102 Days*, 17 December 2010, available at: <http://www.wired.com/dangerroom/2010/12/unprecedented-drone-strikes-hit-pakistan-in-late-2010> (last accessed 2 May 2013); see S. Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, 24 November 2012, The New York Times, available at: <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html> (last accessed 2 May 2013).

of Europe Member State countries possessing combat drones may use them for such operations, especially if the forces of the European members of NATO will be directed under the joint command. Therefore, the assessment of potential application of the ECHR to targeted killing operations is well justified.

## 2. TARGETED KILLING AND INTERNATIONAL HUMANITARIAN LAW

In order to comprehensively assess the potential application of the ECHR to targeted killings, we would like to first consider some aspects of the lawfulness of these operations in light of international humanitarian law.

The assessment of targeted killings under the international humanitarian law creates a number of significant problems. First of all, targeted killings might not be illegal under international humanitarian law in the context of the world history of military conflicts, which contains numerous examples of targeted killings or assassinations. However, this context changes significantly in times of asymmetric warfare. In the modern world, war has taken the form of a conflict between the regular armed forces of states, on the one side, and the irregular forces of non-state groups and movements on the other. The latter tend to not abide by the requirements concerning uniforms, insignia, and carrying arms openly, and often do not distinguish themselves from civilian populations.<sup>17</sup> Instead, they adopt tactics that are forbidden by international law, namely the deliberate killing of civilians. Additionally, there is a significant technological advantage and organizational strength of one side of the military conflict over the other.<sup>18</sup> Hence the tactics of the “defending side” differ in comparison to historical military conflicts.<sup>19</sup>

According to the First Additional Protocol to the Geneva Conventions, targeted killings may be considered as legal only upon fulfillment of several conditions. First of all, they can be applied during international armed conflicts and must concern only combatants.<sup>20</sup> Second, during non-international armed conflicts targeted killing might be lawful if directed towards civilians directly participating in hostilities.<sup>21</sup>

However, in practice these pre-conditions might be interpreted in a way that contravenes the protective character of the humanitarian norms. It has been pointed out that the most important source of legal uncertainty regarding targeted killings in the context of armed conflict is the question of who determines whether a target qualifies as lawful, and where and when a person may be targeted.<sup>22</sup>

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<sup>17</sup> See Finkelstein, et al., *supra* note 5, p. 2.

<sup>18</sup> *Ibidem*; Gross, *supra* note 8, pp. 109-111.

<sup>19</sup> *Ibidem*, pp. 100-121.

<sup>20</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Art. 48 and Art. 51(2).

<sup>21</sup> *Ibidem*, Art. 50(1) and Art. 51(3).

<sup>22</sup> Alston, *supra* note 1, p. 19.

The first issue is thus the definition of armed conflict. In light of the lack of an international standard, states tend to provide different justifications to target and kill individuals, some of which would not necessarily be willingly followed by other countries. A situation therefore arises where states create a personalized legal framework, depending on their own interpretation of international law.<sup>23</sup> For instance, the current position of the United States administration is that the United States is engaged in an armed conflict against al Qaeda, the Taliban, and associated forces, a conflict which is not connected with a particular battlefield. This line of reasoning is used to provide a justification for the American forces' resort to targeted killings outside the typical zone of conflict.

US State Department Legal Advisor Harold Hongju Koh stated, in March 2010, that:

as a matter of international law, the U.S. is in armed conflict with al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day... that 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.<sup>24</sup>

Koh's description of the conflict against al Qaeda, the Taliban, and associated forces represents the Obama Administration's departure from President George W. Bush's "global war on terror." First, it limits the scope of the conflict to one against particular entities and their representatives, or persons associated therewith. Second, it refers to a non-international armed conflict, which finds support in terms of humanitarian law. What is significant about Koh's statement is the assumption that the use of lethal force can be justified on alternative legal grounds: armed conflict and self-defense.

In this manner the question, or dilemma, arises as to who defines what qualifies as an "armed conflict". It is asserted by some that the United States' case is an example where the definition of "armed conflict", within the context of terrorist groups' activities, is currently abused.<sup>25</sup> At the very least it must be said that the United States unilaterally adopts its own definition of the term, which is not subject to review by outside judicial bodies.

The second dilemma is the geographical scope of the armed conflict. It is well known that the United States performs targeted killing operations outside the borders of its military intervention zone, in countries such as Pakistan, Somalia and Yemen.

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<sup>23</sup> *Ibidem*, p. 3.

<sup>24</sup> H. Koh, *Legal Advisor U.S. Department of State, Speech at the Annual Meeting of the American Society of International Law*, 25 March 2010, available at: <http://www.state.gov/s/l/releases/remarks/139119.htm> (last accessed 2 May 2013).

<sup>25</sup> Alston, *supra* note 1, p. 18.

It is probable that drone attacks will be used in Mali. What is crucial for the United States is the fact that a person is named in a list of targets. Actual location, which might be far away from the current theater of military activities, is less important. As some commentators have pointed out, targeted killings are openly designated as killings. In asymmetric warfare, putting certain names on a target list serves the same function as traditional uniforms or insignias which allowed soldiers to identify one another. Therefore, such a list replaces the traditional way of determining affiliation, allowing the identification and tagging of named, listed persons as combatants.<sup>26</sup>

The third dilemma refers to the potential victims of targeted killings. According to the humanitarian law requirements, targeted killings should not be used with respect to civilians, as opposed to combatants. However, in asymmetric armed conflicts, it can be difficult to identify a combatant according to the traditional distinction between combatants and civilians. In some countries where targeted killings are carried out, potential victims may change “costumes”. One day they are combatants, while the next day they may blend into the civilian population. They usually do not wear uniforms, which was the technique used in past war conflicts as an identification sign for combatants. Also, whether or not person is armed is not necessarily the distinguishing factor between civilian and non-uniformed combatants.<sup>27</sup> In some cultures, carrying arms is a part of a tradition of self-defense, and does not necessarily mean an intention to participate in military conflict. Arms might also be necessary to use against local guerrillas or insurgents, and not necessarily against a party (e.g. NATO forces) in conditions of asymmetric warfare. In such situations, those states with the capacity to implement targeted killings may encounter difficulties in determining whether an individual’s status is combatant or civilian.

This dilemma, although present in international humanitarian law, was resolved by the United States by using an extensive definition of unlawful combatants or unprivileged combatant/belligerents. As a consequence, the United States authorities created for themselves a broad authorization to use targeted killings. The Israeli High Court of Justice, on the other hand, carefully analyzed the practice of conducting targeted killing operations and rejected the statement that terrorists are unlawful combatants subject to attacks at any time.<sup>28</sup>

The fourth dilemma focuses on the requirement that targeted killings should meet the test of necessity and proportionality. As the Israeli High Court of Justice underlined, states are not allowed to carry out targeted killings if less harmful means are available, and such operations must be absolutely necessary and proportional. The Court stated that if a terrorist taking direct part in hostilities can be arrested, interrogated, and tried, such means should be employed.<sup>29</sup> It is also indicated that although international

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<sup>26</sup> Gross, *supra* note 8, pp. 107-109.

<sup>27</sup> *Ibidem*.

<sup>28</sup> Israel High Court of Justice, *The Public Committee Against Torture et al. v. The Government of Israel et al.*, HCJ 769/02, Judgment of 14 December 2006 (PCATI).

<sup>29</sup> *Ibidem*, para. 40; *but see* Gross, *supra* note 8, p. 106.

humanitarian law does not expressly regulate proportionality and necessity, it envisages the use of less-than-lethal measures.<sup>30</sup>

It should be also noted that there are also domestic law dilemmas connected with the use of drones for targeted killings. While under European standards it does not matter whether a potential victim (target) is a citizen of a given country, in the United States it might be a serious concern. Put simply, human rights, including (perhaps especially) right to life, should be enjoyed by “every” person, and not only by citizens of a particular country. In the United States it is argued that only US citizens who may be potentially subjected to a targeted killing enjoy the due process rights guaranteed in the US constitutional system.<sup>31</sup>

The above dilemmas make the debate over the legality of use of drones for purposes of targeted killing extremely complex. The development and use of this technology calls for the need to adopt an international treaty (maybe a new generation of the Geneva Conventions). The United States takes advantage of the lack of precise norms in this area, and there is no clear international law authority to control such abuses. However, this does not mean that the Member States of the Council of Europe can follow such an approach. First of all, they are bound by the norms of international humanitarian law and should not abuse these norms, nor interpret them in a similar fashion to the US. Secondly, they are parties to international human rights conventions and treaties, most notably the European Convention on Human Rights, and must abide by the agreed upon laws and regulations inherent in the Treaty and their membership in the Council of Europe.

### 3. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND LAWFULNESS OF TARGETED KILLING OPERATIONS

The permissibility of targeted killing operations in the context of the right to life has to be examined under main international human rights conventions and the jurisprudence of their implementing bodies.<sup>32</sup> Additional guidance might be also found in the practice of the United Nations Charter-based institutions.<sup>33</sup> However, the analysis in this paper

<sup>30</sup> Alston, *supra* note 1, pp. 22-24.

<sup>31</sup> This issue was discussed in the context of targeted killing of the US citizen and alleged Senior Officer of Al-Qa’ida Anwar Al-Awlaki: M. Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16(2) *Journal of Conflict and Security Law* 385 (2012). See also Department of Justice White Paper, *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*, disclosed in February 2013. The White Paper is available at <http://www.guardian.co.uk/commentisfree/2013/feb/05/obama-kill-list-doj-memo> (last accessed 2 May 2013).

<sup>32</sup> Melzer, *supra* note 1, p. 58; until now, there were pronouncements by UN officials regarding the assessment of targeted killings under the International Covenant for Civil and Political Rights, see Alston, *supra* note 1.

<sup>33</sup> Melzer, *supra* note 1, p. 59.

of the compliance of targeted killings with international standards will focus exclusively on the standards of the European Convention on Human Rights.

Importantly, until now this issue has not been the subject of assessment by the European Court of Human Rights. However, in the near future it may become crucial for the Court to rule on the issue in light of the ECHR. For instance, Poland is currently engaged in missions in Afghanistan, and several European NATO members are part of the International Security Assistance Force (including the United Kingdom, which uses lethal drone technology). Similarly, Turkey might potentially use drones in their territory or in Northern Iraq in their conflict with Kurdistan Workers' Party, and Russia may use them for the purpose of killing alleged terrorist suspects.

### 3.1. The Scope of Jurisdiction

The assessment of targeted killing operations by Member States of the Council of Europe is inevitably linked to the question of the scope of the jurisdiction under the ECHR. The prevailing opinion is that the temporal and territorial scope of the applicability of human rights law is one of the central preliminary questions to be addressed in the judicial discussion on the permissibility of targeted killing operations.<sup>34</sup>

Interventions or possible interventions made by Council of Europe Member States in the territories of other countries have raised previously unknown issues. This, consequently, has forced the European Court of Human Rights (ECtHR) to develop new interpretations under the European Convention of Human Rights regarding states' accountability.<sup>35</sup> In 2011, the Grand Chamber of the ECtHR delivered two milestone judgments regarding the conduct of ECHR Member States during the occupation and armed conflict in Iraq: *Al-Skeini and others v. The United Kingdom* and *Al-Jedda v. The United Kingdom*. In the first judgment the ECtHR clarified the issue of the extraterritorial application of the ECHR; in the latter, the ECtHR expanded the application of ECHR to acts of Member States operating under multi-national forces.

#### 3.1.1. Extraterritorial Application of the ECHR

The case of *Al-Skeini and others v. The United Kingdom* constitutes a comprehensive summary of the previous ECtHR jurisprudence on jurisdictional issues. In this respect, the ECtHR began by pointing out that according to Art. 1 of the ECHR, it is presumed that the states' jurisdiction is exercised normally throughout the state's territory,<sup>36</sup>

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<sup>34</sup> *Ibidem*, p. 58.

<sup>35</sup> See M. A. Nowicki, *Al-Skeini i inni przeciwko Wielkiej Brytanii (orzeczenie – 7 lipca 2011 r., Wielka Izba, skarga nr 55721/07)* (Al-Skeini and others against United Kingdom (judgment – 7 July 2011, Grand Chamber, application no. 55721/07), available at: [http://www.hfhr.pl/wp-content/uploads/2011/07/omowienie\\_orzeczenia\\_Al\\_Skeini\\_przeciwko\\_Wielkiej-Brytanii.pdf](http://www.hfhr.pl/wp-content/uploads/2011/07/omowienie_orzeczenia_Al_Skeini_przeciwko_Wielkiej-Brytanii.pdf) (last accessed 2 May 2013).

<sup>36</sup> *Soering v. United Kingdom* (14038/88), ECHR 7 July 1989, para. 86; *Banković and Others v. Belgium and Others* (52207/99) Grand Chamber (dec.), ECHR 12 December 2001, paras. 61, 67; *Ilaşcu and Others v. Moldova and Russia* (48787/99) Grand Chamber, ECHR 8 July 2004, para. 312.

and only in exceptional circumstances might acts performed overseas amount to extraterritorial jurisdiction under the ECHR.<sup>37</sup>

The ECtHR went on to present several justifications for extraterritorial jurisdiction. First of all, the Court underlined that the acts of state authorities which produce effects outside the state's own territory, such as acts of diplomatic and consular agents, may constitute examples of exceptions to the territorial principle of Article 1 of the ECHR. Furthermore, extraterritorial jurisdiction appears when a state exercises all or some of the public powers usually exercised by the government of a particular territory, whether on the basis of the previous consent of such government consent, invitation, or acquiescence. The ECtHR also underlined that when, according to a custom, treaty or other agreement, a Member State of the Council of Europe carries out executive or judicial functions overseas, such state might be held responsible for ECHR violations.<sup>38</sup> Another exception to territorial jurisdiction might be justified by the principle of "effective control" over another state's territory, as a result of either lawful or unlawful military action.<sup>39</sup>

Importantly, in *Al-Skeini* the Grand Chamber moved away from the *Banković v. Belgium* case, which had previously been the leading authority on the extraterritorial application of the ECHR. The Court evoked the doctrines of personal and state agent authority and the control model of jurisdiction,<sup>40</sup> which refer mainly to situations where an individual is arrested and taken into a state's custody overseas.<sup>41</sup> The Court underlined 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. In this sense, therefore, the Convention rights can be divided and tailored.<sup>42</sup>

In the particular case of *Al-Skeini v. the UK*, the ECHR underlined that the United Kingdom exercised, in the occupied city of Basrah in Iraq, some public powers normally reserved to a sovereign government. It was deemed that the United Kingdom had authority for maintenance of security in South East Iraq in difficult security conditions.

<sup>37</sup> See *Al-Skeini and Others v. United Kingdom* (55721/07) Grand Chamber, ECHR 7 July 2011, paras. 131-132.

<sup>38</sup> *Ibidem*, paras. 133-135.

<sup>39</sup> *Ibidem*, paras. 138-139.

<sup>40</sup> See M. Zgonec-Rozej, *Al-Skeini v. United Kingdom*, 106(1) American Journal of International Law, 131 (2012).

<sup>41</sup> *Al-Skeini and Others v. United Kingdom*, para. 136; see also *Öcalan v. Turkey* (46221/99) Grand Chamber, ECHR 12 May 2005, para. 91; *Al-Saadoon and Mufidhi v. United Kingdom* (dec. no. 61498/08), ECHR 2 March 2010, paras. 86-89, *Medvedyev and Others v. France* (no. 3394/03) Grand Chamber, ECHR 29 March 2010, para. 67. All cases available at: <http://www.echr.coe.int>.

<sup>42</sup> *Al-Skeini and Others v. United Kingdom*, para. 137. This statement was previously confirmed in *Banković and Others v. Belgium and Others*, para. 75.



Due to these circumstances, the ECtHR assumed that the United Kingdom, when performing public powers, was obliged to respect the provisions of the ECHR.<sup>43</sup>

Some commentators underscore that although this judgment constitutes a major development in the concept of extraterritorial jurisdiction, the ECtHR did not provide clear and consistent basis for this concept. For instance, the ECtHR has not explained yet the term “public powers”. Therefore, extraterritorial jurisdiction must be still determined on a case-by-case basis, with reference to the particular facts of a given case.<sup>44</sup>

Equally important, when considering the extraterritorial application of the Convention’s provisions and rights arising therefrom, it is crucial to take into account the concurring opinion of Judge Bonello to this judgment. According to Judge Bonello, the proper test should be the “functional jurisdiction” test, based on two questions. The first question is: Was the issue whether the alleged violation would or would not be committed dependant on the agents of the state? The second question is: Was it within the power of the state to punish the perpetrators and to compensate the victims? If the answers to both these questions are positive, it means that a state was exercising its jurisdiction.

As Judge Bonello underlined, applying doctrines other than the above may in practice lead to some absurdities. The jurisdiction should not be seen solely as territorial or extraterritorial, but should be mainly functional.<sup>45</sup> Judge Bonello’s concurring opinion is of a significant nature with respect to disputes relating to issues of extraterritorial jurisdiction. It clearly defines the kinds of situations where a state may be held accountable for human rights infringements. It provides a direction which the future line of case law may follow.

### 3.1.2. ECHR application to Member States’ operations within multi-national forces

In the attempt to answer the question regarding the potential application of the ECHR to targeted killing operations, it is crucial to take into consideration the Grand Chamber judgment in *Al-Jedda v. United Kingdom*. This case clearly expands the application of the ECHR to the conduct of the Council of Europe Member States which act under the auspices of multi-national forces.

In the *Al-Jedda* case, the ECtHR focused primarily on the question of extraterritorial jurisdiction of the ECHR with respect to detention operations carried out by the United Kingdom in Iraq. The ECtHR stated that the internment of an Iraqi civilian for more than three years in a detention centre in Basrah, Iraq, run by British forces acting as part of the Multi-National Force, may not be attributable to the United Nations, nor to the nations contributing troops.<sup>46</sup> Countries whose military forces are part of the multi-national forces remain accountable for the actions of their soldiers.

<sup>43</sup> *Ibidem*, para. 149.

<sup>44</sup> E.g., Zgonec-Rozej, *supra* note 40, p. 137.

<sup>45</sup> *Al-Skeini and Others v. United Kingdom*, paras. 10-11, 16.

<sup>46</sup> *Al-Jedda v. United Kingdom* (27021/08) Grand Chamber, ECHR 7 July 2011, para. 80, available at: <http://www.echr.coe.int>.

The ECtHR ruled that the United Kingdom may not rely on the argument that the United Nations Security Council's resolutions, delivered at the time of American and British occupation in Iraq, imposed an obligation to conduct internments. The ECHR stated that, due to the purposes of the United Nations, clear and explicit language would be required in resolutions if the Security Council intended for states to undertake actions that are contrary to their obligations under international human rights law.<sup>47</sup>

Additionally, the ECHR carried out a deep examination of the implications of international humanitarian law. Its conclusion was that in the situation of the United Kingdom's occupation in Iraq, the Geneva Convention relative to the Protection of Civilian Persons in Time of War did not constitute an independent legal basis for internment for imperative reasons of security. The ECtHR expressed the argument that international humanitarian law imposed no obligation on an occupying power to use indefinite internment without trial. It stated that such internment should be perceived as a measure of last resort.

Taking into consideration the arguments described above, there was no specific legal basis for conducting internment which would exclude the application of the ECHR. Therefore, in the *Al-Jedda* case, such indefinite detention conducted in armed conflict overseas under the auspices of the Multi-National Force was in breach of Article 5.1 of the ECHR (the right to liberty), as none of the exceptions allowing for such detention listed in the article were applicable.

### 3.2. Protection from Intentional Deprivation of Life

The prevailing opinion is that human rights law, apart from specifically permitted derogations, is applicable and protects all human beings at all times, including in times of armed conflict or other national emergency.<sup>48</sup> However, in order to assess targeted killings under the ECHR, a differentiation must be made between various circumstances: times of peace, a state of emergency, and lawful acts of armed conflict.

#### 3.2.1. Time of Peace

In general, in time of peace the general norms of the ECHR apply. According to Art. 2 of the ECHR, the High Contracting Parties have an obligation to protect life. Further, no one shall be deprived of his life intentionally. However, Art. 2(1) of the ECHR provides for the possibility to deprive one of life in the execution of a death penalty adjudicated by the court on the grounds of a sentence following conviction. In this respect, it should be mentioned that Protocol No. 6 to the European Convention on Human Rights, ratified by all member states of the Council of Europe, provides for abolition of the death penalty, hence the original text of Art. 2(1) of the ECHR has become moot.

<sup>47</sup> *Ibidem*, para. 102.

<sup>48</sup> Melzer, *supra* note 1, p. 58.

The material scope of Art. 2(1) of the ECHR is further developed by the jurisprudence of the European Court of Human Rights. Of crucial importance with respect to the subject matter of this article is the practice of the Court relating to intentional extra-custodial killings carried out during law enforcement operations in conditions not amounting to hostilities.<sup>49</sup>

Under the jurisprudence of the European Court of Human Rights, it is clear that any arbitrary deprivation of life by the state is prohibited. Art. 2 of the ECHR clearly states that “no one shall be deprived of his life intentionally.” In consequence, any targeted killing, being an example of an extrajudicial killing, would be found to be contrary to the absolute prohibition of the intentional deprivation of life. A Member State of the Council of Europe may not create a list of persons who present a danger to the state and order the extrajudicial killings of those persons. Member States cannot use targeted killings as a form of retaliation.<sup>50</sup>

Although targeted killings would be prohibited under Art. 2 of the ECHR in times of peace, one cannot exclude the possibility that missiles fired from drones could be found justified in certain situations. In particular, Art. 2(2) of the ECHR stipulates exceptions to the absolute protection of life. One of these exceptions provides that the deprivation of life could be justified when it happens “in action lawfully taken for the purpose of quelling a riot or insurrection” (Art. 2(2)(c) ECHR). One can imagine a situation when the state authorities (e.g. police) would use lethal drones in order to protect themselves from possible riots or other forms of mass violence. At present, law enforcement authorities are using drones for the purposes of surveillance activities.<sup>51</sup> However, one may not exclude that in the future they could be used for similar purposes as police helicopters or other armed aerial vehicles. For instance, in the case of *Isayeva, Yusupova and Bazayeva v. Russia*, the ECtHR stated that in circumstances of riots states may undertake measures that

could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2.<sup>52</sup>

In such cases, the question whether a deprivation of life is arbitrary will depend on certain conditions. There must be a sufficient legal basis in the member states' domestic

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<sup>49</sup> *Ibidem*, p. 102.

<sup>50</sup> For example, one cannot imagine a situation whereby the Polish state would order its secret services to operate a targeted killing of the murderers of the Polish engineer, located in Pakistan. *Cf.*, case of Piotr Stańczak, who was murdered by Pakistani Taliban. As a follow up to this Minister of Foreign Affairs of Poland made a statement that it is fortunate that murderers will be adjudicated in Pakistan, since the death penalty is valid there. See also statement of the Helsinki Foundation for Human Rights of 18 July 2009.

<sup>51</sup> For example, in London during the Olympic Games 2012.

<sup>52</sup> *Isayeva, Yusupova and Bazayeva v. Russia* (57947/00, 57948/00 and 57949/00), ECHR 24 February 2005, para. 178, available at: [available at: http://www.echr.coe.int](http://www.echr.coe.int).

laws for acts of lethal force, and the deprivation of life must be absolutely necessary and proportional. Generally speaking, having in mind the above-mentioned circumstances, it seems that the potential execution of targeted killings in light of Art. 2 is strictly connected with a reaction to extreme circumstances constituting a serious threat to public order.<sup>53</sup>

Thus, according to the first requirement, the terms and conditions of such a use of force must be precisely regulated in domestic legal provisions. And such law(s) must abide by international regulations such as the United Nations' Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and must also provide for regulations that control and limit the circumstances of deprivation of life.<sup>54</sup> National law should be publicly available and must provide an obligation to carry out certain procedures when making the decision to use lethal force.<sup>55</sup>

Any deprivation of life, in order to be in compliance with Art. 2 of the ECHR, must be "absolutely necessary". Accordingly, the use of lethal force must be proportionate to the achievement of one of the legitimate purposes described in Art. 2(2) of the ECHR,<sup>56</sup> and it must be indispensable.<sup>57</sup> This means that any deprivation of life would need to be justified using a higher threshold of necessity and proportionality than in the application of other provisions of the ECHR.<sup>58</sup> The requirement of necessity might be evaluated under three different aspects. First, qualitative necessity means that the legitimate aim(s) of the operation cannot be achieved without resorting to potentially lethal force; second, quantitative necessity refers to the fact that the degree and the manner in which lethal force is applied must not exceed that absolutely necessary to achieve a legitimate aim; and third, temporal necessity indicates that the use of potentially lethal force must be absolutely necessary at the time of its application in order to achieve the legitimate aim.<sup>59</sup>

Finally, the proportionality requirement directs that the nature of the threat must justify putting human life at risk.<sup>60</sup> Thus, deprivation of life might be justified solely when it serves to achieve aims stipulated in Art. 2(2) of the ECHR, and these

<sup>53</sup> L. Garlicki, *Komentarz do Art. 2 EKPCz* (Commentary to Art. 2 of the ECHR), in: L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Vol. 1, CH Beck, Warszawa: 2010, pp. 73-4; *McCann and Others v. United Kingdom* (18984/91) Grand Chamber, ECHE 27 September 1995, para. 148.

<sup>54</sup> *Ayetkin v. Turkey* (22880/93), ECHR 23 September 1998, para. 108; *Makaratzis v. Greece* (50385/99) Grand Chamber, ECHR 20 December 2004, para. 59, 67 and 70; *Nachova and Others v. Bulgaria* (43577/98 and 43579/98) Grand Chamber, ECHR 6 July 2005, para. 90. All cases available at: <http://www.echr.coe.int>.

<sup>55</sup> *Nachova and Others v. Bulgaria*, paras. 96-97.

<sup>56</sup> *Ibidem*, para. 94; *McCann and Others v. United Kingdom*, para. 149.

<sup>57</sup> *Handyside v. United Kingdom* (5493/72), ECHR 7 December 1976, para. 48, available at <http://www.echr.coe.int>.

<sup>58</sup> Garlicki, *supra* note 53, p. 78.

<sup>59</sup> See Melzer, *supra* note 1, p. 116; *Nachova and Others v. Bulgaria*, para. 108.

<sup>60</sup> Melzer, *supra* note 1, p. 116; *Nachova and Others v. Bulgaria*, para. 95, *McCann and Others v. United Kingdom*, para. 192.

exceptions must be interpreted narrowly. Furthermore, lethal force may be used only for preventive purposes, not as a sanction for past offenses. Also, it is never permissible that the foremost purpose of the use of lethal force is the deprivation of life. According to ECtHR jurisprudence, all circumstances of intentional killing, either in mass scale or of individuals, clearly constitute a violation of Art. 2 of the ECHR.<sup>61</sup>

Finally, Art. 2 of the ECHR also contains a procedural obligation to investigate any deprivation of life. This means that in the case of death by intentional killing, the state has a due process obligation to explain the circumstances of the deprivation of life. Such an investigation shall be broad so that it may enable the investigating authorities to analyze the conduct of state agents and the overall circumstances in order to determine whether the use of lethal force was necessary and proportionate. During such an examination it should be assessed whether there were any alternative tools for achieving a state's particular goal, and whether the use of force constituted an arbitrary killing.<sup>62</sup> What is crucial is that this obligation applies to any acts of extrajudicial and arbitrary killings.<sup>63</sup>

It is important to note that under the ECHR the obligation to protect life (and thus to prohibit any targeted killings) would also extend to situations of internal war, which is not recognized by the international community as a legitimate armed conflict. This is best illustrated by the cases concerning Russia's responsibility for its acts during the Chechnya war. In the case *Isayeva v. Russia*, the ECtHR critically evaluated the dropping of a high-explosion aviation bomb on a village located outside the zone of conflict. According to the ECtHR, although the army planned the action earlier, it did not warn the civilian population and should have foreseen the consequences of dropping the bomb. Interestingly, the ECtHR made a statement concerning potentially different standards in times of war, a state of emergency, and times of peace, stating that:

The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no State of emergency has been declared in Chechnya, and no derogation has

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<sup>61</sup> See *Khashiyev and Akayeva v. Russia* (57942/00 and 57945/00), ECHR 24 February 2005, paras. 140-142; *Issak v. Turkey* (44587/98), ECHR 28 September 2006, paras. 115 and 119; *McCann and Others v. United Kingdom*, paras. 174-84; *Mahmut Kaya v. Turkey* (22535/93), ECHR 28 March 2000, para. 9. All cases available at: <http://www.echr.coe.int>.

<sup>62</sup> *Al Skeini v. United Kingdom*, para 163; *McCann and Others v. United Kingdom*, para. 161.

<sup>63</sup> As observed by the ECtHR: "The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State (*McCann and Others v. United Kingdom*, para. 161).

been made under Article 15 of the Convention (...). The operation in question therefore has to be judged against a normal legal background.<sup>64</sup>

To conclude this part of our analysis, in times of peace and non-engagement in military conflict, one cannot imagine the lawfulness, under the European Convention on Human Rights, of the use of targeted killings, including those carried out with the use of drone technology. The only possibility to legalize such use would be to refer to the exceptions provided in Art. 2 of the ECHR. However, in such a case it would be extremely difficult for the state to justify reference to such measures and to demonstrate their proportionality.

### 3.2.2. State of Emergency

Another perspective that needs to be taken into account when examining the potential performance of targeted killing operations by Council of Europe Member States are the circumstances which could constitute a state of emergency. Art. 15 of the ECHR provides for a possibility to derogate from the obligations arising under the ECHR in times of war or other public emergency threatening the life of the nation. In order for such a derogation to be justified, certain conditions must be fulfilled (Art. 15(1) ECHR). First, such a derogation must be applied strictly and only to the extent required by the exigency of the situation. Second, measures undertaken by the states must be compatible with other obligations under international law (such as, for instance, international humanitarian law). Third, formal requirements concerning the obligation to notify the Council of Europe about the introduction of a state of emergency must be fulfilled (Art. 15(3) ECHR).

Art. 15(2) of the ECHR provides that the so-called “core” rights under the Convention are not subject to derogation even in times of emergency (i.e. the right to life, prohibition of torture, inhuman or degrading treatment, prohibition of slavery, *nullum crimen sine lege*). However, with respect to the right to life, Art. 15(2) of the ECHR introduces an exception from this general non-derogation clause, which is “deaths resulting from lawful acts of war.”

This indicates that even in a state of emergency, which is not a state of “lawful war”, any targeted killing would be found to be contrary to the Convention, since the general principles would still apply.<sup>65</sup> This means that, under the European Convention for Human Rights, states may not intentionally deprive anyone of life in times of civil war, rebellion, or war on terror, because the general principles under Art. 2 of the ECHR will still apply.<sup>66</sup> It should also be noted that there is no possibility to derogate from Art. 2 of the Convention in circumstances where there is only a state of “imminent

<sup>64</sup> *Isayeva v. Russia* (57950/00), ECHR 24 February 2005, available at: <http://www.echr.coe.int>.

<sup>65</sup> B. Latos, *Klauzula derogacyjna i limitacyjna w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności* (Derogation and limitation clauses in the European Convention on Human Rights and Fundamental Freedoms), Wydawnictwo Sejmowe, Warszawa: 2008, p. 112.

<sup>66</sup> L. Garlicki, *Komentarz do Art. 15 EKPCz* (Commentary to Art. 15 of the ECHR), in: Garlicki (ed.) *supra* note 54, pp. 802-803.

threat of war.” The notion of “lawful acts of war”, as used in Art. 15(2) of the ECHR, should be distinguished from the wording used in Art. 3 Protocol No. 6 of the ECHR, which concerns abolition of the death penalty and creates an exception from its application in “time of war and imminent threat of war.”<sup>67</sup>

### 3.2.3. Armed Conflict

As it was previously mentioned, Art. 15(2) of the ECHR provides for the possibility to derogate from the ban on the deprivation of life in the context of deaths resulting from lawful acts of war. This provision should be read broadly, as also encompassing the possibility to apply the death penalty in times of war. Protocol No. 6 to the Convention abolishes the death penalty, but only in times of peace (by not excluding the application of such penalty with respect to acts committed in time of war or of imminent threat of war). This deficiency of the Council of Europe’s human rights system was supposed to be repaired by Protocol No. 13 to the Convention, which abolishes the death penalty “in all circumstances”. However, this Protocol has not yet been ratified by four member states of the Council of Europe – Armenia, Azerbaijan, Poland,<sup>68</sup> and Russia.

This means that, with respect to most of the Council of Europe Member States, in situations of war or imminent threat of war targeted killings, for example with the use of drones, or any other form of arbitrary deprivation of life, cannot replace the death penalty. In fact, the only possibility for such states to carry out intentional killings legally is to rely on the derogation provided in Art. 15(2) of the ECHR, as this is the only provision that allows for the deprivation of another person’s life, and is applicable in times of “lawful act of war.”

This provision creates a connection between the European Convention on Human Rights and international humanitarian law. During military conflicts which could be considered as “lawful acts of war”, killing enemies is a natural consequence of using force. However, this does not mean that military actions incurring resultant deaths can be carried out with impunity. Quite the opposite. The limits of proportionality and necessity, as previously indicated, although not expressly regulated by international humanitarian law, seem to be envisaged by these regulations. Additionally, in cases of the exercise of control over a certain territory by a given Member State of the Council of Europe, the limits on their actions might be also established by Art. 2 of the ECHR.<sup>69</sup>

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<sup>67</sup> *Ibidem*, p. 803.

<sup>68</sup> According to Grażyna Bernatowicz, under-secretary of state in the Ministry of Foreign Affairs, the lack of ratification of Protocol No. 13 to the European Convention on Human Rights by Poland is a result of a conflict of competences and visions between the Ministry of Foreign Affairs and the Ministry of Justice – see Minutes of the meeting of the Sejm Commission on Foreign Affairs of 13 December 2012, available at [http://orka.sejm.gov.pl/Zapisy7.nsf/0/D1C6B9293A16DB0DC1257AE2004F246D/\\$file/0133307.pdf](http://orka.sejm.gov.pl/Zapisy7.nsf/0/D1C6B9293A16DB0DC1257AE2004F246D/$file/0133307.pdf) (last accessed 2 May 2013). See also K. Sękowska-Kozłowska, R. Wieruszewski, *Zaległości ratyfikacyjne Polski w dziedzinie praw człowieka* (Poland’s ratification backlog in the area of human rights), 3 Europejski Przegląd Sądowy 4 (2013).

<sup>69</sup> See *Al-Skeini and Others v. United Kingdom*.

Additionally, it is worth noting that in a situation where international humanitarian law does not provide a regulation, the rule is unclear, or its meaning cannot be determined, human rights law may still be applied.<sup>70</sup> In such a situation, human rights law shall be treated as a guideline and complementary system that influences humanitarian law.<sup>71</sup> Human rights law and humanitarian law may thus reinforce one another.<sup>72</sup>

Accordingly, targeted killings would be justified under the ECHR only if they were, firstly, carried out within the scope of “lawful acts of war”, with the norms of international law applied to determine whether a given military conflict could be regarded as a “lawful war”, e.g. on the basis of a resolution of the Security Council. Secondly, the targeted killing operations would have to be strictly connected with lawful military operations. Thirdly, the targeted killings must meet the criteria of absolute necessity.

Principles that would be applicable in cases of acts of war and the use of weapons have been expressed in an opinion of the International Court of Justice, which stated that:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.<sup>73</sup>

In this place, the traditional dilemmas connected with the targeted killings appear, such as concerns regarding the definition of combatants and geographical scope of the conflict. As has been mentioned, these notions tend to be overly broadly interpreted by, for instance, the practice of the United States authorities. It is certain that Member States of the Council of Europe cannot use similar justifications as those posited by the United States, as they are bound by international agreements setting higher standards of human rights’ protection, such as the ECHR, and could possibly be the subject of scrutiny by the ECtHR.

<sup>70</sup> See also the International Court of Justice’s *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons* of 1996 and the *Advisory Opinion the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004, which states the rules of international humanitarian law and human rights law apply in the context of both non-international and international armed conflict.

<sup>71</sup> See also Alston, *supra* note 1, p. 10.

<sup>72</sup> C. Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, The Hebrew University of Jerusalem Faculty of Law, December 2007, available at: <http://www.icrc.org/eng/assets/files/other/interplay-article-droegge.pdf> (last accessed 10 April 2013), pp. 343-4.

<sup>73</sup> *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons*, para. 78.



In passing, it should be noted that in *Al-Skeini v. the United Kingdom*, the ECtHR underlined that with respect to the positive obligation to protect life, states shall conduct an investigation which is broad enough to allow the investigating authorities to analyze the conduct of state agents and the overall circumstances in order to determine whether the use of lethal force was necessary and proportionate. In the course of the investigation, it shall be assessed whether there were any other alternative tools for achieving the particular state's goal, and whether the use of force constituted an arbitrary killing. Importantly, the ECtHR indicated that the obligation to conduct an investigation under Art. 2 of the ECHR also applies in difficult security conditions, including the context of armed conflict.

With respect to potential consequences for a civilian population, the use of drones for the purposes of targeted killing raises concerns. There are no standards in this sphere yet, but some instruction may flow from the judgment of the ECtHR in the case of *Isayeva v. Russia*.<sup>74</sup> In that case, the ECtHR critically evaluated the dropping of a high-explosion aviation bomb on a village located outside the zone of conflict. According to the ECtHR, although the army had planned the action earlier, it did not warn the civilian population and should therefore have foreseen the consequences of dropping the bomb.<sup>75</sup>

It should be noted that this case was assessed by the ECtHR against the background of a time of peace. As was mentioned earlier, the Chechnya war did not have any international authorization and therefore Russia could not justify its actions by derogating from its general obligations under the ECHR. Nevertheless, one may argue that the rationale used by the ECtHR in this case could be presented in the case of targeted killings even when a state is at war, participates in non-international armed conflict, or is participating in a military intervention. Once again, the proportionality principle appears in this context. Even if the state decides to conduct such an operation (and would find it to be justified under laws of war), the state should still take into account the consequences to the civilian population of a projected air strike. Ignoring concerns with respect to the potential fate of a civilian population could be one more factor contributing to a violation of the ECHR in this context.

## CONCLUSIONS

Targeted killings carried out with the use of drones currently constitutes one of the most challenging problems for international humanitarian law and international

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<sup>74</sup> *Isayeva v. Russia*.

<sup>75</sup> "Even when faced with a situation where, as the Government submits, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents" (*Ibidem*, para. 176).

human rights law. Due to the ease with which they may be used, their extensive present use, and the growing potential for their future use in asymmetric warfare, the need for international regulation becomes ever more urgent and pertinent. It should be noted that this problem is not only a matter of the practice of states such as the United States or Israel. Member States of the Council of Europe are not immune from potential violations of human rights as a consequence of the use of drones. As has been demonstrated, the major human rights instrument for Europe – the ECHR – puts strict limits on any attempted targeted killings and leaves only a limited scope or area where they could be acceptable. Even in the case of targeted killings in the context of a conflict amounting to a legal state of war, the Member States of the Council of Europe should be aware that their activities could be subject to scrutiny by the European Court of Human Rights. As of now there are no judgments of the ECtHR specifically concerning targeted killings with the use of drones, but we should expect such cases soon, taking into account the scope of extraterritorial applicability of the Convention laid out by the ECtHR. Also, the standards of the ECHR should be taken into account when the Council of Europe Member States regulate and supervise their involvement in international military interventions or participate in decisions determining the kinds of weapons that can be used. It may also appear that some states prohibit any use of drones in their armed forces, due to moral, ethical, and legal constraints.