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## **Drones and targeted killings: the need to uphold human rights and international law**

### **Report<sup>1</sup>**

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Arcadio DÍAZ TEJERA, Spain, Socialist Group

### *Summary*

The Committee on Legal Affairs and Human Rights considers that the use of armed drones for targeted killings raises serious human rights and other international law issues. Armed drones allow for the carrying out of attacks remotely, without placing the attacker's own personnel at risk of injury or capture. These advantages have contributed to lowering the threshold for intervention and increasing the number of drone strikes in recent years. At the same time, the increased precision of drone strikes provides the opportunity to improve compliance with international humanitarian and human rights law.

The committee is alarmed at the high number of lethal drone attacks, which have also caused considerable unintended "collateral damage" to non-combatants.

All member and observer States should, in particular, scrupulously respect the limits placed on targeted killings under international law, international humanitarian law and human rights law, lay down clear procedures for authorising strikes, which must be subject to constant supervision by a high-level court and post-strike evaluation by an independent body, avoid widening the notion of "non-international armed conflict", fully and effectively investigate all deaths caused by armed drones, increase transparency in this respect, and refrain from using or assisting in certain particularly problematic types of strikes, in particular automated procedures based on data collected through mass surveillance techniques, so-called "signature strikes" and "double-tap strikes".

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1. Reference to committee: [Doc. 13200](#), Reference 3971 of 24 June 2013.

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## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly considers that the use of armed drones for targeted killings raises serious human rights and other international law issues.
2. The Assembly notes that several member States and States enjoying observer status with the Council of Europe or the Parliamentary Assembly have used combat drones as weapons of war or for carrying out targeted killings of people suspected of belonging to terrorist groups in a number of countries, including Afghanistan, Pakistan, Somalia and Yemen.
3. Several Council of Europe member States have purchased combat drones or are considering doing so, or have shared intelligence with States using combat drones for targeted killings, thus assisting them in carrying out drone attacks.
4. Armed drones allow for the carrying out of attacks remotely, without placing the attacker's own personnel at risk of injury or capture. The ability of drones equipped with powerful sensors to loiter over a potential target for some time enables the decision on launching a strike to be based on particularly precise and up-to-date information. These advantages have contributed to lowering the threshold for intervention and increasing the number of drone strikes in recent years. At the same time, the increased precision of drone strikes provides the opportunity to improve compliance with international humanitarian and human rights law.
5. The Assembly is alarmed at the high number of lethal drone attacks, which have also caused considerable unintended "collateral damage" to non-combatants, in contrast with the "surgical" nature of such strikes claimed by those launching them. The constant fear of drone attacks engendered by strikes hitting schools, weddings and tribal assemblies has disrupted the life of traditional societies in the countries of operation.
6. Drone strikes raise serious legal issues, which differ depending on the circumstances in which the strikes are launched:
  - 6.1. national sovereignty and the respect for territorial integrity under international law forbid military interventions of any kind on the territory of another State without valid authorisation by the legitimate representatives of the State concerned. Military or intelligence officials of the State concerned tolerating or even authorising such interventions without the approval or against the will of the State's representatives (in particular the national parliament) cannot legitimise an attack; exceptions from the duty to respect national sovereignty can arise from the principle of the "responsibility to protect" (for example in the fight against the terrorist group known as "IS");
  - 6.2. under international humanitarian law, which applies in situations of armed conflict, only combatants are legitimate targets. In addition, the use of lethal force must be militarily necessary and proportionate and reasonable precautions must be taken to prevent mistakes and minimise harm to civilians;
  - 6.3. under international human rights law, which generally applies in peacetime, but whose application has permeated also into situations of armed conflict, an intentional killing by State agents is only legal if it is required to protect human life and there are no other means, such as capture or non-lethal incapacitation, of preventing that threat to human life;
  - 6.4. in particular, under Article 2 of the European Convention on Human Rights (ETS No. 5), as interpreted by the European Court of Human Rights, the deprivation of the right to life must be absolutely necessary for the safeguarding of the lives of others or the protection of others from unlawful violence. Article 2 also requires timely, full and effective investigations to hold to account those responsible for any wrongdoing;
  - 6.5. in order to justify a wider use of targeted killings, the notion of non-international armed conflict has been extended by some countries so as to include numerous regions across the world as "battlespaces" of the "global war on terror". This threatens to blur the line between armed conflict and law enforcement, to the detriment of the protection of human rights.

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2. Draft resolution adopted by the committee on 27 January 2015.

7. Despite some recent progress due to successful court challenges, in particular by the American media, attacks by combat drones are still largely shrouded in secrecy. This relates to both the actual outcome of individual attacks, including the extent of any “collateral damage”, and the decision-making process for targeting individuals and balancing potential harm to non-combatants.
8. The Assembly calls on all member and observer States, as well as States whose parliaments have observer status with the Assembly, to:
  - 8.1. scrupulously respect the limits placed on targeted killings under international law and international humanitarian and human rights law, in particular with respect to the use of combat drones;
  - 8.2. lay down clear procedures for authorising strikes, which must be subject to constant supervision by a high-level court and *ex post* evaluation by an independent body;
  - 8.3. to avoid widening the notion of “non-international armed conflict” by continuing to respect established criteria, including the requisite degree of organisation of non-State groups and a certain degree of intensity and localisation of violence;
  - 8.4. fully and effectively investigate all deaths caused by armed drones in order to hold to account those responsible for any wrongdoing and to compensate any victims of wrongful attacks or their relatives;
  - 8.5. publish the criteria and procedures used for targeting individuals and the results of the investigations carried out into deaths caused by the use of combat drones;
  - 8.6. refrain from using, or providing intelligence information or other input for:
    - 8.6.1. any automated procedures for targeting individuals based on communication patterns or other data collected through mass surveillance techniques;
    - 8.6.2. so-called “signature strikes” not based on the precise identification of a targeted person, but on the target’s pattern of behaviour (except in situations of armed conflict, provided the rules of international humanitarian law are respected);
    - 8.6.3. so-called “double-tap strikes”, involving a second strike targeting first responders (for example persons providing medical assistance to the victims of a first strike).

## **B. Draft recommendation<sup>3</sup>**

1. The Parliamentary Assembly, referring to Resolution ... (2014) on drones and targeted killings: the need to uphold human rights and international law, invites the Committee of Ministers to undertake a thorough study of the lawfulness of the use of combat drones for targeted killings and, if need be, develop guidelines for member States on targeted killings, with a special reference to those carried out by combat drones. These guidelines should reflect the States' duties under international humanitarian and human rights law, in particular the standards laid down in the European Convention on Human Rights (ETS No. 5), as interpreted by the European Court of Human Rights.

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3. Draft recommendation adopted unanimously by the committee on 27 January 2015.

## C. Explanatory memorandum by Mr Díaz Tejera, rapporteur

### 1. Procedure

1. The motion for a resolution entitled “Drones and targeted killings: the need to uphold human rights” (Doc. 13200) was referred to the Committee on Legal Affairs and Human Rights for report in June 2013. On 4 September 2013, the committee appointed Ms Marina Schuster (Germany, ALDE) as rapporteur. I was appointed rapporteur to replace Ms Schuster on 12 November 2013. At its meeting on 3 March 2014, the committee considered my introductory memorandum<sup>4</sup> and authorised me to hold a hearing with experts. On 30 September 2014, the committee had an exchange of views with the following three experts:

- Ben Emmerson, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism;
- Irmína Pachó, Director of Strategic Litigation, Polish Helsinki Foundation for Human Rights;
- Markus Wagner, Associate Professor of Law, University of Miami School of Law.<sup>5</sup>

### 2. Introduction

#### 2.1. Some facts and figures

2. The motion for a resolution underlying the present report focuses on the widening use of unmanned combat aerial vehicles (“combat drones”) for the purpose of carrying out targeted killings.

3. The use of drones as such, and even of armed drones, does not constitute a human rights problem. Armed drones (or more precisely, the weapons carried by drones as carrier systems) are not considered as unlawful weapons.<sup>6</sup> As is the case with all weapons, from handguns to fighter-bomber jets, it is the way they are used, and against whom and for which reasons, which determines whether they pose a human rights problem. There is, however, one consideration which makes the use of drones “special”, in comparison with manned aircraft: the availability of unmanned craft may well reduce the threshold of actually using them, in particular abroad. Democratically elected governments – rightly – place a high value on the lives of their soldiers and abhor the consequences of their being killed or taken prisoner by a foreign power. They may be less hesitant to use a weapon not involving exposure of their own forces to death, injury or capture than, for example, sending in a conventional, manned aircraft or a group of special forces soldiers to intervene on the ground. Also, in view of technological advances,

*“drones can be expected to become more sophisticated and available in more compact form, and also to become less expensive and therefore more accessible. They are likely to form part of the arsenals of an increasing number of States that may be able to deploy such force across international borders in relatively non-intrusive and sometimes non-attributable ways, on the battlefield and to pursue targets far removed from what would traditionally be seen as zones of armed conflict”.*<sup>7</sup>

4. At the same time, the increased precision of drone strikes compared to bombings by conventional aircraft<sup>8</sup> also provides a real opportunity for improving compliance with international humanitarian and human rights law.

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4. Document AS/Jur (2014) 05.

5. For a detailed summary of the hearing, see document AS/Jur (2014) PV 06 (Drones hearing only).

6. See, for example, the Report by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Christof Heyns, to the UN General Assembly (UN GA document A/68/382 dated 13 September 2013), paragraph 13 (“There is broad agreement that drones themselves are not illegal weapons. This is not the case, for example, with lethal autonomous robots”).

7. Ibid., paragraph 14.

8. See Steve Coll, The Unblinking Stare, The drone war in Pakistan, *The New Yorker*, 24 November 2014, p. 100: the ratio of civilian casualties compared to combatants in US wars since Vietnam is conservatively estimated at 1:1; by comparison, according to (albeit disputed) numbers cited by Senator Feinstein, drones killed more than 20 fighters for every civilian – a “huge leap in precision”.

5. The type of weaponry with which combat drones are armed,<sup>9</sup> the widely reported increase in their use by the United States with respect to certain targeted killings also outside of the International Security Assistance Force (ISAF) mission in Afghanistan<sup>10</sup> and the lack of transparency surrounding these operations are worrying from the human rights perspective, with regard to the right to life of combatants and civilians alike – either as intended targets or as “collateral damage”.

6. Furthermore, in countries such as Pakistan, Yemen and Somalia, where the use of combat drones for targeted killings is reported to be commonplace, the enduring threat of drone strikes encroaches on human dignity and other fundamental rights. To minimise the risk of becoming a target of an attack, ordinary inhabitants feel compelled to stay on the move and avoid gathering in groups,<sup>11</sup> including for social, educational and economic purposes and even funerals.<sup>12</sup> This challenges the sustainability of long-standing rural and tribal cultures and the long-term development of societies, which live in constant fear of drones. The “sample strike analysis” by Ben Emmerson, UN Special Rapporteur on Human Rights and Counter-Terrorism, in his final report to the United Nations Human Rights Council<sup>13</sup> provides an impressive account of concrete examples of collateral damage caused by drone strikes in Afghanistan, Pakistan, Yemen, Somalia and Gaza.

7. While the most frequent user of drone strikes has been the United States, Israel has also acknowledged a practice of “targeted killings in self-defence ... because the Palestinian Authority was failing to prevent, investigate and prosecute terrorism and, especially, suicide attacks directed at Israel”;<sup>14</sup> this practice includes the use of combat drones.<sup>15</sup> Some member States of the Council of Europe are also considering the purchase of combat drones.<sup>16</sup>

8. The lack of transparency surrounding the use of combat drones makes it difficult to assess the number of targeted killings using drones. However, as noted by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, civil society has conducted considerable research on drone strikes.<sup>17</sup> The UN Special Rapporteur saw fit to rely on estimates provided by organisations such as the Bureau of Investigative Journalism (BIJ)<sup>18</sup> and the New America Foundation (NAF).

9. Whilst figures on the number of drone strikes and of combatant and civilian casualties vary, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions noted that all sources agreed that there had been a “dramatic increase in their use”<sup>19</sup> in the three years preceding his report on “Follow-up to country recommendations – United States of America”, issued on 30 March 2012. The Bureau of Investigative Journalism estimates the number of deaths since the first reported strike in 2002<sup>20</sup> as up to 4 000 (including up to 1 000 civilians).<sup>21</sup>

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9. The MQ-9 or “Reaper” drone can carry and launch 500-pound bombs – “The International Law of Drones”, Mary Ellen O’Connell, 12 November 2010, *American Society of International Law Insights*, Volume 14, Issue 37.

10. See, *inter alia*, statistics by the [Bureau of Investigative Journalism](#) and the [New America Foundation](#).

11. “[Living Under Drones](#)”, Stanford International Human Rights and Conflict Resolution Clinic.

12. *Ibid.*

13. Ben Emmerson, [Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism](#), Human Rights Council, Twenty-fifth session, Agenda item 3 (A/HRC/25/59). (henceforth referred to as “Ben Emmerson, Final report”), paragraphs 39-69.

14. Philip Alston, [Report, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on Targeted Killings, 28 May 2010 \[A/HRC/14/24/Add.6\]](#), pp. 5-6, paragraph 13; [Press Briefing by Colonel Daniel Reisner](#), Israeli Defense Force Legal Division, 15 November 2000.

15. See B’Tselem, [Statistics related to Israel-Palestinian conflict post-2000](#).

16. France, Russia and Turkey (European Parliament report, p. 8, with reference to the Report of Philip Alston (footnote 14), paragraph 27).

17. Christof Heyns, [UN Special Rapporteur on extrajudicial, summary or arbitrary executions, follow-up to country recommendations – United States of America, 30 March 2012 \[A/HRC/20/22/Add.3\]](#), p. 22, paragraph 80.

18. Including: [Bureau of Investigative Journalism: Covert Drone War](#); [New America Foundation: The Year of the Drone](#); [Drone Wars UK](#); [Living Under Drones](#), Stanford International Human Rights and Conflict Resolution Clinic; [American Security Project](#); [ProPublica: The Drone War](#); [Guardian on Drones](#).

19. Christof Heyns (footnote 17 above), p. 22, paragraph 80.

20. “[CIA missile kills al-Qaida suspects](#)”, Brian Whitaker and Duncan Campbell, *The Guardian*, 5 November 2002; “[US uses drones to target al-Qaeda in the Horn of Africa](#)”, Frank Gardner, BBC, 21 September 2011.

21. See also the report by the Policy Department of the European Parliament’s Directorate General for External Policies on “Human rights implications of the usage of drones and unmanned robots in warfare” (2013) (hereinafter: “EP Report”), refers to estimations according to which in 350 US drone attacks between 2004 and 2012 in Pakistan alone the death toll amounted to 2 000-3 000 individuals.

10. Ben Emmerson indicated, in June 2013, that following a meeting with Central Intelligence Agency (CIA) officials, he expected there to be a significant reduction in global US drone strikes, attributable to the strikes being taken over by the US military (they had previously been carried out under the auspices of the CIA).<sup>22</sup> Yet, a single attack in Pakistan in early June 2013, for example, was alleged to have killed seven people.<sup>23</sup> In 2014, the number of US drone strikes in Pakistan has reportedly decreased considerably, to eight strikes (until September).<sup>24</sup> But at the same time, the number of drone strikes in Yemen increased considerably.<sup>25</sup>

11. Some European States have reportedly contributed to United States drone attacks by providing intelligence or logistics.<sup>26</sup>

12. To conclude this factual introduction, I should like to point out that, as predicted by UN Special Rapporteur Alston, drone technology has also been obtained and used by non-State armed groups.<sup>27</sup>

## **2.2. Related previous work of the Assembly**

13. The legal and human rights issues connected with targeted killing, using drones, concern some themes which the Assembly has addressed previously, in particular, its work on respect for human rights in the fight against terrorism.<sup>28</sup> In particular, the Assembly has highlighted the dangers of treating terrorists as soldiers rather than criminals.

14. Moreover, the lack of transparency surrounding drone strikes resonates with the Assembly's previous work on the "Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations".<sup>29</sup> This is not only the case in respect of States that carry out drone strikes, but also those which refuse to confirm or deny whether intelligence has been shared in furtherance of drone strikes.

## **2.3. Reports of the United Nations Special Rapporteurs on human rights and counter-terrorism and on extrajudicial, summary or arbitrary executions**

15. The UN Special Rapporteur on human rights and counter-terrorism and, Mr Ben Emmerson, has carried out an inquiry into the civilian impact and human rights implications of the use of drones and other forms of targeted killing for the purpose of counter-terrorism and counter-insurgency.<sup>30</sup> After an interim report in October 2013, presented to the UN General Assembly in New York,<sup>31</sup> his final report was published in February 2014.<sup>32</sup> Almost simultaneously, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Christof Heyns, submitted a report to the General Assembly focusing specifically on issues of concern regarding armed drones and the right to life.<sup>33</sup> I have followed both Mr Emmerson's and Mr Heyns' work as best I could and I am indebted to them for the input their work provided for this report. I am particularly grateful to Mr Emmerson for his presentation at the hearing before the committee on 30 September 2014, during which he summed up the results of his study clearly and convincingly.

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22. "UN drone investigator expecting 'dramatic' decrease in US strikes", Spencer Ackerman, *The Guardian*, 7 June 2013.

23. Pakistan drone strike kills seven in North Waziristan, BBC, 8 June 2013.

24. According to a study dated 25 September 2014 by the New America Foundation, [Drone Wars Pakistan, Analysis](#).

25. See Ben Emmerson, Final Report (note 13), paragraph 27.

26. For example, Denmark (see Amrit Singh and Jessica Scholes, Denmark, the CIA, and the Killing of Anwar al-Awlaki, 30 April 2014: [www.opensocietyfoundations.org/voices/denmark-cia-and-killing-anwar-al-awlaki](http://www.opensocietyfoundations.org/voices/denmark-cia-and-killing-anwar-al-awlaki)), Germany (see: "Spying Together, Germany's deep cooperation with the NSA, part 2: German aid for US drone attacks?", 8 June 2014: [www.spiegel.de/international/germany/the-german-bnd-and-american-nsa-cooperate-more-closely-than-thought-a-975445-2.html](http://www.spiegel.de/international/germany/the-german-bnd-and-american-nsa-cooperate-more-closely-than-thought-a-975445-2.html)), Netherlands (see Steven Derix and Huib Modderkolk, "The secret role of the Dutch in the American war on terror", *NRC Handelsblad*, 5 March 2014, but Dutch co-operation in drone strikes is officially denied, see "Dutch do not take part in armed drone attacks, minister says", Dutchnews, 24 April 2014, and the United Kingdom (see Jack Serle, "UK complicity in US drone strikes is 'inevitable', Emmerson tells parliament", 5 December 2013).

27. See EP Report (note 21), p. 8 (with reference to the use by Hezbollah, in October 2012, of an Iranian-made combat drone shot down by Israel after flying 25 miles into its territory).

28. See [Resolution 1840 \(2011\)](#) and [Doc. 12712](#).

29. See [Resolution 1838 \(2011\)](#), [Recommendation 1983 \(2011\)](#) and [Doc. 12714](#).

30. Ben Emmerson, UN Special Rapporteur on Human Rights and Counter-Terrorism, [Statement on Inquiry by Special Rapporteur](#), 24 January 2012.

31. Ben Emmerson, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms whilst countering terrorism, UN GA document A/68/389 dated 18 September 2013.

32. Ben Emmerson, final report (footnote 13).

33. Christoph Heyns (footnote 6).



## 2.4. Resolution of the European Parliament

16. On 25 February 2014, the European Parliament adopted a resolution on the use of armed drones<sup>34</sup> calling for the adoption of a common position within the European Union and for the promotion of

*“greater transparency and accountability on the part of third countries in the use of armed drones with regard to the legal basis for their use and to operational responsibility, to allow for judicial review of drone strikes and to ensure that victims of unlawful drone strikes have effective access to remedies”.*

17. The European Parliament also finds that

*“drone strikes outside a declared war by a State on the territory of another State without the consent of the latter or of the UN Security Council constitute a violation of international law and of the territorial integrity and sovereignty of that country”,*

and recalls that

*“in the event of allegations of civilian deaths as a result of drone strikes, States are under the obligation to conduct prompt, independent investigations and, if the allegations are proved correct, to proceed to public attribution of responsibility, punishment of those responsible and provision of access to redress, including payment of compensation to the families of victims”*

and that

*“international human rights law prohibits arbitrary killings in any situation; whereas international humanitarian law does not permit the targeted killing of persons who are located in non-belligerent States”.*

## 3. The legal regime for targeted killings

### 3.1. Definition

18. According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, a targeted killing is “the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organised armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator”.<sup>35</sup> This definition comprises all key legal elements: intention to kill; pre-planning; identification of specific targets who are not detained; and, fundamentally, the “accordance with law” requirement (actual or purported).

### 3.2. Legal regime: international humanitarian or human rights law

19. Although criteria as to when States take life are in the first instance laid down in national law, these are subject to far-reaching limitations in treaty law<sup>36</sup> and customary international law. These include the absolute prohibition of the arbitrary deprivation of life as well as fundamental principles of legal certainty, transparency and proportionality when life is taken in accordance with the law.

20. International humanitarian law applies to situations of armed conflict, whereas international human rights law principally applies in times of peace, including situations where “violence exists, but falls short of the threshold for armed conflict”.<sup>37</sup> That said, it is today widely accepted that international human rights law also applies in situations of armed conflict (whether of an international or non-international character).<sup>38</sup> Thus, international humanitarian law and international human rights law form two complementary and mutually reinforcing bodies of law creating obligations for States in armed conflict, with the rules of international humanitarian law taking precedence as *lex specialis*.<sup>39</sup>

34. [Resolution 2014/2567](#) (RSP) dated 25 February 2014.

35. Philip Alston (footnote 14), p. 3, paragraph 1.

36. [International Covenant on Civil and Political Rights](#), Article 6.

37. Philip Alston (footnote 14), pp. 10-11, paragraph 31.

38. See, for example, International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* 1996, p. 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports* 2004, paragraph 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports* 2005 paragraph 216.

21. In an armed conflict, which can be international (between States) or non-international (typically between States and organised non-State armed groups, or between such groups), deadly force can legitimately be used against enemy combatants, provided certain well-established principles are respected such as that of distinction (between combatants and non-combatants), proportionality (between the expected military gain and the “collateral damage” to civilians) and precaution (reasonable care taken to minimise unavoidable and proportionate “collateral damage”).

22. Outside of an armed conflict, the principles governing law enforcement (prevention or punishment of crimes) apply, under which the use of deadly force by State agents is legal only in very rare circumstances. For State Parties to Protocol No. 6 to the European Convention on Human Rights (ETS No. 114), even the execution of a person found guilty of a capital crime by a court of law is not permissible, and for States Parties to Protocol No. 13 (ETS No. 187) this even applies in times of war.

23. The question whether an armed conflict exists in territories where drone strikes have occurred depends on the factual circumstances on the ground and not only the subjective declarations of States.<sup>40</sup> As Philip Alston says, “the situation in each country should be assessed on a case-by-case basis in order to determine the existence or not of armed conflict”.<sup>41</sup> A related question arises when a combatant participates in hostilities in an armed conflict from the territory of a non-belligerent State, or moves into such territory after participating in an ongoing armed conflict. Which legal framework (international humanitarian law or international human rights law) applies to the use of lethal force against such a person?

24. In order to justify the application of international humanitarian law, which allows for a wider use of targeted killings than international human rights law, the notion of non-international armed conflict has been given such a wide interpretation by some States as to include numerous regions across the world as “battlefields” of the “global war on terror”. In my view, this threatens to blur the line between armed conflict and law enforcement to the detriment of the protection of human rights and should therefore be resisted. In the extreme, “[a]dvising otherwise would mean that the whole world is potentially a battlefield and that a person moving around the globe could be lawfully targeted under international humanitarian law in the territories of States not party to any armed conflict”.<sup>42</sup>

25. This said, I would have little doubt that the fight against the terrorist group known as “IS”<sup>43</sup> or against organised guerilla groups acting under the banner of Al Quaida is warfare and not police work, so the use of armed drones would be assessed under international humanitarian law. The same is true for many regions of Afghanistan, where a fully fledged war against the Taliban is being waged.

### **3.3. International human rights law standards**

26. Under international human rights law the standard is that: “A State killing is legal only if it is required to protect life ... and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life.”<sup>44</sup>

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39. See the UN Note on “[International Legal Protection of Human Rights in Armed Conflict](#)”, November 2011, HR/PUB/11/01, pp. 5-6; as well as the Human Rights Committee’s General Comments No. 29 (2001) on states of emergency (Article 4), paragraph 3, and No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, paragraph 11.

40. Philip Alston (footnote 14), p. 15, paragraph 46.

41. Christof Heyns (footnote 19), p. 21, paragraph 77.

42. Statement by the representative of the International Committee of the Red Cross at the Panel discussion on “Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law”, Geneva, 22 September 2014 (available from the committee secretariat).

43. Variations in translation have caused the same group to be termed “Islamic State in Iraq and Levant” (ISIL) and “Islamic State in Iraq and Syria” (ISIS) among others. Recently, the group renamed itself simply “Islamic State” (IS). Thus for the purposes of this document, but in no way conferring recognition of any State status, the group will be referred to as “IS”.

44. Philip Alston (footnote 14), p. 11, paragraph 42.

27. The European standard for the lawfulness of State-occasioned or endorsed deprivation of life, under Article 2 of the European Convention of Human Rights (ETS No. 5, “the Convention”) is that it must be no less than “absolutely necessary”<sup>45</sup> for the safeguarding of the lives of others or protection of others from unlawful violence, which is a higher threshold for State action than that placed on most rights protected by the Convention, namely that of being “necessary in a democratic society”:

*“149. In this respect the use of the term ‘absolutely necessary’ in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society’ under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention. In particular, the force used must be strictly proportionate ...”*<sup>46</sup>

28. The European Court of Human Rights has laid down this high threshold for intentional killings by the authorities in a case involving the intentional killing by SAS operatives of three IRA terrorists in Gibraltar who had been suspected of planting a car bomb to be detonated by a remote control device they carried with them.

29. The Court, in interpreting Article 2, stressed the paramount importance of the right to life in a democratic society and held that:

*“150. In keeping with the importance of this provision (art. 2) in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.”*

30. Following a meticulous analysis of the planning of the operation, the information available to the authorities, the instructions given to the SAS operatives and their actions, the Court concluded:

*“213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 paragraph 2 (a) (art. 2-2-a) of the Convention.”*

31. By comparison, the American understanding of the requirement that lethal force be used only in response to an imminent threat seems to be far more expansive, encompassing “considerations of the relevant window of opportunity to act, the possible harm that missing the window could cause to civilians, and the likelihood of heading off future disastrous attacks”.<sup>47</sup>

### **3.4. International humanitarian law standards**

32. Under international humanitarian law:

*“Targeted killing is only lawful when the target is a ‘combatant’ or ‘fighter’ or, in the case of a civilian, only for such time as the person “directly participates in hostilities”. In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in the light of the expected harm to civilians in the vicinity, and everything must be done to prevent mistakes and minimize harm to civilians.”*<sup>48</sup>

33. Treaty law, in particular the [Additional Protocol 1 to the Geneva Conventions](#), enshrines principles protecting civilians caught up in armed conflict, such as distinction, proportionality and precaution,<sup>49</sup> which also form part of customary international law. These principles apply, in particular, to the type of weapons that can be used and their actual use.

45. [McCann and others v. the United Kingdom](#), Application No. 18984/91, judgment of 27 September 1995, paragraph 149.

46. *Ibid.*

47. Eric Holder, US Attorney General, [speech at NWU School of Law](#), 5 March 2012.

48. Philip Alston (footnote 14), p. 10, paragraph 30; see also the [ICRC’s 2009 Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law](#).

49. “The Law That Applies to Autonomous Weapon Systems”, Jeffrey S. Thurnher, 18 January 2013, *American Society of International Law Insights*, Volume 17, Issue 4.

34. Article 51.4.b of Additional Protocol 1 provides that attacks must not be indiscriminate by nature, in that they are not able to avoid civilian damage when targeting combatants. Further, Article 48 obliges States “at all times” to “distinguish between the civilian population and combatants”.

35. The doctrine of proportionality, as it applies to armed conflict, requires States to “examine whether the expected collateral [civilian] damage from an attack would be excessive in relation to the anticipated military gain”. Article 51.5.b provides that attacks that would be excessive in this manner are classed as indiscriminate and are thus prohibited.

36. Article 57 provides for a precautionary approach that requires taking all feasible precautions before attacking a target, including the verification of a target as military and not civilian. “Feasible”, in this context, generally means “that which is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations”.<sup>50,51</sup>

37. It should be noted that neither the US nor Israel is a party to Additional Protocol 1. However, given the peremptory nature of the protection of civilians in armed conflict, the International Committee of the Red Cross (ICRC) has stated that such protection is reflective of customary international law,<sup>52</sup> which applies also to the United States and Israel. This includes Articles 48,<sup>53</sup> 51.4.b,<sup>54</sup> 51.5.b<sup>55</sup> and 57.<sup>56</sup> In the same vein, the International Court of Justice has characterised the principles of distinction and proportionality as “intransgressible principle[s] ... of international customary law”.<sup>57</sup>

38. The general standards under international human rights law and international humanitarian law apply independently from the weapon used for the killing. They apply to the specific issues related to the legality of using combat drones for targeted killings, procedures for the verification of the identity of targets, the imminence and credibility of threats posed by targets, the assessment of the necessity, the existence of other means to quell such threats, the efforts made to co-operate with territorial authorities, and the proportionality of carrying out targeted killings, with particular regard to collateral civilian damage.

### **3.5. Sovereignty issues under international law**

39. The use of drones to target persons located in another State must also comply with the rules on the use of inter-State force. Christoph Heyns points out in his report on extrajudicial, summary or arbitrary executions<sup>58</sup> that

*“[w]hile international humanitarian and human rights law are aimed at protecting the individuals concerned, the law on the use of inter-State force serves primarily to protect the legal rights of States, including the right and interest of the State to have the lives of its citizens and inhabitants protected from aggressive acts”.*

40. The general prohibition of the threat or use of inter-State force is laid down in Article 2.4 of the United Nations Charter, subject to limited exceptions, including consent of the State concerned, action taken in self-defence and authorisation by the United Nations Security Council.

41. Consent must actually be expressed rather than merely presumed; it must be given freely and clearly by the State’s highest government authorities rather than by regional authorities or particular agencies, and States cannot validly consent to violations of international humanitarian or human rights law on their territory.<sup>59</sup> Ideally, national parliaments should monitor any authorisations given by the executive.

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50. Harvard Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare, With Commentary*, p. 4, paragraph (q).

51. “The Law That Applies to Autonomous Weapon Systems”, Jeffrey S. Thurher (footnote 49).

52. *Study on Customary International Humanitarian Law: summary article and list of rules*, International Committee of the Red Cross, pp. 198-199.

53. *Ibid.*, Rule 7.

54. *Ibid.*, Rule 12.b.

55. *Ibid.*, Rule 14.

56. *Ibid.*, Rules 15-21.

57. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* 1996, 226, paragraph 79. See also the 1968 United Nations General Assembly resolution on the subject (predating the additional protocols): United Nations General Assembly, “*Respect for Human Rights in Armed Conflicts*”, G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 1748, U.N. Doc. A/7433, 50 (19 December 1968).

58. Christoph Heyns (footnote 19), chapter D, paragraphs 80-94.

59. Christoph Heyns (footnote 19), paragraphs 82-84, with further references.

42. Self-defence is also subject to stringent limitations under Article 51 of the United Nations Charter and customary international law. The International Court of Justice held that for an attack to enable the State to exercise its right to use force in self-defence, the scale and effects of the attack must reach a certain threshold of gravity.<sup>60</sup> A State relying on self-defence must also satisfy the requirements of necessity and proportionality under customary international law. As Mr Heyns points out,

*“[t]hese requirements ... are closely linked to the aim of a lawful act of self-defence. Thus, necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack”.*<sup>61</sup>

43. Controversy surrounds the notion of anticipatory self-defence.<sup>62</sup> While the use of lethal force in anticipation of a threat, including a threat emanating from non-State actors, will usually be unlawful, there may be exceptional circumstances in which it could be lawful. Anticipatory self-defence can only be permissible, however, if an attack is imminent and could not be averted by any other means, and where the anticipatory military action is proportionate.<sup>63</sup> The problem is that, as with the notion of anticipatory self-defence itself, the concept of imminence is likewise vague and there currently exists no consensus on the threshold to be applied when determining imminence.<sup>64</sup>

44. It would appear that many drone attacks documented by the two UN Special Rapporteurs fall well short of these principles governing the use of inter-State force. As regards drone strikes on Pakistani territory, it should be noted that the President of Pakistan publicly opposed drone strikes after secret agreements between the CIA and Pakistani security services authorising such strikes were made public in October 2013.<sup>65</sup>

45. In exceptional cases, exceptions from the rule that national sovereignty must be respected can also be justified by the responsibility to protect.<sup>66</sup>

#### 4. Legal basis put forward for targeted killings using combat drones (the US approach)

46. On 23 May 2013, President Obama made a speech on the US counter-terrorism strategy, simultaneously releasing a document entitled “[U.S. Policy Standards and Procedures for the Use of Force in Counter-Terrorism Operations Outside the United States and Areas of Active Hostilities](#)”. This marks some measure of progress in terms of transparency, as we now know at least the purported legal basis for drone attacks. However, there remain two issues in the report which should be subject to analysis:

- a. whether the legal criteria set out comply with international human rights law and international humanitarian law;
- b. whether the legal criteria set out is adhered to in practice.

47. The following is a summary of the legal basis outlined by President Obama:

- a. US policy is to capture targets, rather than use lethal force, where “feasible”;
- b. Lethal force is not pursued as a substitute for punishment or prosecution; it is only used when there are no reasonable alternatives and the following preconditions are met:
  - i. There must be a legal basis;

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60. See references in Heyns (footnote 19), footnote 79.

61. Christof Heyns (footnote 19), paragraph 86.

62. Christof Heyns (footnote 19), paragraph 92.

63. For a detailed assessment, see Noam Lubell, “Extraterritorial Use of Force Against Non-State Actors”, *Oxford Monographs in International Law* (Oxford University Press, 2010), pp. 55-63.

64. See the landmark judgment of the Israeli Supreme Court in [Public Committee Against Torture in Israel v. Government of Israel \(PCATI\)](#); see also the critical comments by Kristen E. Eichensehr “[On Target? The Israeli Supreme Court and the Expansion of Targeted Killings](#)”.

65. See Greg Miller and Bob Woodward, [Secret memos reveal explicit nature of U.S., Pakistan agreement on drones, Washington Post, 24 October 2013](#). BBC News Asia, 24 October 2013, “[Secret memos 'show Pakistan endorsed US drone strikes'](#)”.

66. See Assembly [Resolution 1832 \(2011\)](#) “National sovereignty and statehood in contemporary international law: the need for clarification”, [Doc. 12689](#) (rapporteur: Marina Schuster, Germany, ALDE); see also Office of the Special Adviser on the Prevention of Genocide, *The Responsibility to Protect: [www.un.org/en/preventgenocide/adviser/responsibility.shtml](http://www.un.org/en/preventgenocide/adviser/responsibility.shtml)*, with further references to relevant UN documents.



- ii. The target must pose a “continuing and imminent” threat; and
- iii. The following criteria must be met:
  - 1. “Near certainty” that the target is present;
  - 2. Near certainty that non-combatants will not be injured or killed;
  - 3. An assessment has been made that capture is not feasible at the time of the operation;
  - 4. An assessment that the relevant governmental authorities in the relevant territory cannot or will not effectively address the threat to US persons; and
  - 5. There are no reasonable alternatives to address the threat to US persons.
- iv. That the use of force is compatible with national sovereignty and international law.

48. It can be observed that some of the terms used in these criteria are inherently subjective and indeterminate, such as “feasible”, “effective”, “reasonable”, “continuing and imminent” and “near certainty”. Mr Wagner, in his presentation before the committee on 30 September 2014, pointed out that there is currently considerable disagreement over the international humanitarian law interpretation of the principles of distinction and proportionality. Modifiers such as those used in the US policy do appear to allow for expansive interpretation, and there is thus a need for strict adherence to well-established interpretations of international human rights law. A second issue pointed out by Mr Wagner is the increased “proceduralisation” of the decision-making of targeted killings. The danger lies in so-called “false legitimacy” resulting from proceduralisation when substantive improvements do not actually take place. I agree with Mr Wagner’s analysis that the key is the quality of the inputs – both in terms of knowledge of the facts (presence of a legitimate target, danger for civilians, etc.) and the appropriateness of the legal rules applied to the given situation.

49. The publication, by President Obama, of this policy document is a significant step forward in terms of transparency and accountability surrounding drone attacks, also in the eyes of the UN Special Rapporteur on Human Rights and Counter-Terrorism.<sup>67</sup> But in the words of Ben Emmerson:

*“... important questions remained unanswered. On a close reading of the text of the speech and of the guidelines, some key questions remain obscure. Some information will of course always have to remain classified in the interests of national security, such as information that might put sources at risk or reveal intelligence methodology.*

*However, I am confident that more information about the drone program can safely be put into the public domain. I will be engaging with the Administration over the coming months in an effort to further narrow the transparency gap. I very much hope that this engagement will bear fruit, and I will be reporting the results of the process in due course to the UN General Assembly.”<sup>68</sup>*

50. The focus of further efforts to increase transparency should be on providing more details concerning the justifications for individual strikes, as far as possible without violating legitimate national security interests. The publication of abstract legal criteria on its own is of limited practical use in terms of accountability for killings.

## 5. Implications for Council of Europe member States

51. As noted above, most drone strikes, to date, appear to be carried out by the United States and Israel (the former is an observer State to the Council of Europe, the latter’s parliament has observer status with the Parliamentary Assembly). But the United Kingdom, Italy and more widely ISAF participants, which include a number of Council of Europe member States, have also used drones in the armed conflict with the Taliban in Afghanistan.<sup>69</sup> France reportedly intends to purchase drones from the United States to use in its military action in Mali.<sup>70</sup> It has also been reported that Russia, Turkey, Germany and Poland are considering the acquisition

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67. Ben Emmerson, UN Special Rapporteur on Human Rights and Counter-Terrorism, [UN expert in human rights and counter-terrorism welcomes US President’s speech](#), 24 May 2013.

68. Ben Emmerson, UN Special Rapporteur on Human Rights and Counter-Terrorism, [UN Special Rapporteur urges more clarity on Obama’s counter-terrorism policies](#), 7 June 2013.

69. Jamal Akhtar, “Italy may also launch drone attacks on Pak-Afghan border area”; see also *Le Monde* of 29 May 2012, “Les Etats-Unis prêts à armer les drones italiens”.

70. “La France veut acheter douze drones américains pour 670 millions d’euros”, *Le Monde*, 11 June 2013.

of combat drones. Member States of the Council of Europe may also be accused of aiding and abetting unlawful drone strikes by third States, for example through sharing intelligence.<sup>71</sup> In such a case, a State that does not carry out targeted killings itself may be accountable for aiding and abetting human rights violations by other States.<sup>72</sup> Responsibility depends on whether the aiding State is aware of the circumstances of the violation of international law by the aided State, and whether the action in question would be a violation of international law if committed by the aiding State itself.<sup>73</sup>

52. Adam Bodnar and Irmina Pacho of the Polish Helsinki Foundation for Human Rights have analysed whether Council of Europe member States' use of drones for targeted killing can ever be lawful under the European Convention on Human Rights, in light of the extra-territorial application thereof and the Convention's strict limits on targeted killings, even within warfare.<sup>74</sup>

53. As explained by Ms Pacho during the committee hearing on 30 September 2014, the European Court of Human Rights has illustrated its approach to the extra-territorial applicability of the Convention in two judgments issued in 2011, namely *Al Skeini and others v. the United Kingdom*<sup>75</sup> and *Al-Jedda v. the United Kingdom*.<sup>76</sup> In the first case, the Court had maintained that the exercise of public authority in south-east Iraq had created an obligation for the United Kingdom to respect the Convention. In the second case, it held that countries whose military forces were part of multinational forces remained accountable for the actions of their soldiers. Referring to the duality of legal regimes potentially applicable (international humanitarian or human rights law), Ms Pacho confirmed that human rights law was generally regarded as applying at all times. The prohibition of arbitrary killings under human rights law continued to apply in a situation of armed conflict. But the test of whether a deprivation was arbitrary had to be determined by reference to the rules of international humanitarian law, as summed up above.<sup>77</sup>

54. Ms Pacho rightly recalled that Article 2 of the Convention also imposed a strict procedural obligation upon Contracting Parties to effectively investigate cases of deprivation of life with a view to determining whether the use of lethal force was strictly necessary. In sum, the use of armed drones by States Parties to the Convention – wherever this occurs – could be subject to the scrutiny of the European Court of Human Rights in times of peace, during states of emergency and in times of armed conflict.

## 6. Issues of particular concern

55. There have been reports of drone strikes possessing certain characteristics which would be almost certainly illegal, regardless of the context and legal regime in which they occur:

- a. "Signature strikes",<sup>78</sup> where individuals are targeted based on mere locational intelligence and/or suspicious behaviour or movement, and where their identities are unknown (except when used against combatants in situations of armed conflict, provided the requirements of international humanitarian law are respected);
- b. Strikes with ulterior purposes (other than counter-terrorism or self-defence),<sup>79</sup> such as securing intelligence pacts or co-operation;
- c. Successive strikes at the same location, to target "first responders",<sup>80</sup> otherwise known as "double-tap" strikes, which would have the effect of endangering and deterring neighbours and bystanders as well as professional humanitarian workers who provide emergency medical relief;<sup>81</sup>

71. See above, note 26.

72. See International Law Commission (2008), [Draft Articles on Responsibility of States for Internationally Wrongful Acts](#), with commentaries, pp. 66-67.

73. See Wolfgang S. Heinz, "Wann hat der Staat das Recht zu töten?", Policy Paper No. 23, Deutsches Institut für Menschenrechte, March 2014, pp. 11-12 (in German).

74. Adam Bodnar and Irmina Pacho, [Targeted Killings \(Drone strikes\) and the European Convention on Human Rights](#), 10 February 2013, *Polish Yearbook of International Law*, Vol. 32 (2013).

75. <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001105607#>.

76. <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-105613#>.

77. See above, paragraphs 32-38.

78. ["The Drone War Doctrine We Still Know Nothing About"](#), Cora Currier and Justin Elliott, ProPublica, 26 February 2013.

79. ["A Secret Deal on Drone, Sealed in Blood"](#), Mark Mazzetti, *New York Times*, 6 April 2013.

80. ["Outrage at CIA's deadly 'double tap' drone attacks"](#), Jerome Taylor, *The New Zealand Herald*, 27 September 2012.

81. ["Living Under Drones"](#), Stanford International Human Rights and Conflict Resolution Clinic.

d. Autonomous weapons systems (AWS) currently under development would have the ability to operate independently from human input and engage targets without being programmed to specifically target an individual object or person.

56. Such strikes or weapons systems would not appear to fulfil the conditions of legality for drone strikes either in the context of an ongoing armed conflict, or under the law-enforcement paradigm.

57. As shown by the experts during the hearing on 30 September 2014, signature strikes have, in the past, caused much havoc by hitting unintended targets such as wedding parties or tribal assemblies. Unless the “signature” is defined very cautiously in such a way as to pinpoint only legitimate targets – signature strikes cannot fulfil the principles of distinction and precaution required under international humanitarian law. “Signatures” that would not be permissible are, for example, the fact of being a military-age male, “consorting with known militants”, or being armed in areas where this is usual behaviour.<sup>82</sup>

58. Strikes with ulterior purposes would appear to lack any legitimate military objective at all; and double-tap strikes targeting first responders are likely, in my view, to qualify as war crimes. Outside of an armed conflict, these types of drone strikes would be even less likely to be legal under international human rights law, as the absolute necessity of such killings for preventing violence threatening loss of life can hardly be justified.

59. Autonomous weapons systems are not capable of observing the principles of distinction and proportionality in a way that would satisfy the requirements of either international humanitarian law or international human rights law. Whilst technology is expected to progress further,<sup>83</sup> it is too early to even consider the legality of the use of such systems. The combination of mass surveillance practices such as those disclosed by Edward Snowden, of “signature strikes” and of autonomous weapons systems is enough to make me shudder.

## 7. Conclusions

60. As we have seen, targeted killings using armed drones raise a number of serious issues, regarding both facts and applicable law.

61. In terms of facts, the use of armed drones for killings in remote places with little or no risk to one’s own forces raises the issue of lowering the threshold to the point of trivialising such interventions and of accountability for the actual outcome of each strike.

62. In terms of law, the main issue is not the use of armed drones as such, but the fact of targeting individuals for intentional killing. The decision-making process leading to such strikes must not be allowed to deteriorate into a routine procedure leading to death sentences passed by members of the executive without “the accused” even being informed of the grounds for suspicion against him or her, let alone given a chance to defend him or herself. I am not convinced that the procedure and substantive criteria indicated by the Obama administration satisfy the requirements under international law and international human rights and humanitarian law.

63. The Assembly should therefore recall the basic principles governing the use of lethal force under international law, in particular international humanitarian and human rights law, and urge all Council of Europe member and observer States to respect these principles, and to provide sufficient transparency to ensure that adherence to these principles can be independently monitored. The Committee of Ministers should be invited to lay down relevant guidelines. This is the purpose of the draft resolution and draft recommendation preceding the present report.

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82. Markus Wagner, written contribution to the hearing on 30 September 2014, p. 8; text available from the secretariat.

83. See, for example, [Department of Defense, Directive 3000.09, Autonomy in Weapon Systems](#), 2 November 2012.