

14 TARGETED KILLINGS AND HUMAN RIGHTS LAW

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14.1 INTRODUCTORY REMARKS

As regards international law and specifically international human rights law, the first two decades of the 21st century have been strongly permeated by the issue of counterterrorism. Following the days of shock after the 9/11 attack of 2001, the international community found itself between ‘Scylla and Charybdis’. On the one hand, the universal system of international human rights law obliges states to *secure* the human rights of those living under their effective or other form of control even beyond the various human rights treaties adopted by them, thus they have to protect these individuals from potential terrorist attacks. In the sphere of the present study, this issue manifests in the right to life and the right to security. On the other hand, the same international instruments limit the states’ counterterrorism strategy and practice since they have to *respect* the right to life of every single terrorist suspects and they *secure* that an independent and competent court will rule over these individuals within the framework of rule of law.

Nowadays it is a typical phenomenon that states face threats originating from outside their territory. Terrorist groups plot and operate from the territory of another state or states – mostly which are either unwilling or unable to prevent these attacks from happening. In these scenarios, states which have the opportunity and means will use force against these threats, in order to defend their citizens and indirectly every individual, even if they are only doing so on a *policy* basis. A classic example for this is the targeted killing of Anwar al-Awlaki, an American born Al-Qaeda leader, who was killed in the fall of 2001 by a C.I.A. drone, while traveling in a vehicle in North-Yemen.¹ Another great illustration of the issue on hand is an operation of the Royal Air Force conducted in August 2015, which in the end caused the death of British two nationals, Reyaad Khan, Ruhul Amin and another person in Syria. The operation was also conducted with a

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1 M. Mazetti *et al.*, ‘Two-Year Manhunt Led to Killing of Awlaki in Yemen’, *The New York Times*, 30 September 2011.

remotely controlled combat aircraft.² David Cameron former British prime minister in connection with the airstrike talked about the counterterrorism strategy of the United Kingdom, and self-defense which was the basis for the use of force in this case. Cameron also noted that the targeted killing was conducted under the *law enforcement paradigm*.³

However, these two instances are mere drops in the ocean. Targeted killing operations conducted by states are increasing. The number of casualties in Israeli targeted killings alone has been slowly but surely reaching thousands since the 2000s,⁴ the United States' drone programs have demanded around 4000 victims in each of the different 'areas of hostility', see for example the case of Pakistan or Afghanistan.⁵ Lastly, but certainly not least the United Kingdom's similar actions count up to 2000 missions since 2014.⁶ In light of these examples one can conclude that these are not isolated incidents, much more a pattern, forming a new phenomenon of state practice. In this article I examine the said state practice of targeted killing operations strictly through the lens of international human rights law, which is an essential but not exclusive condition for the determination of legality.⁷

In the above-established framework, this article presents targeted killing as a means of counterterrorism, with special attention to unmanned aerial vehicles – commonly re-

2 L. Brook-Holland, *Overview of military drones used by the UK armed forces*, Briefing Paper, No. 06493, House of Commons Library, 8 October 2015, pp. 23-24. The authorization by the Parliament is now given. See. House of Commons: ISIL in Syria, 2 December 2015 <https://hansard.parliament.uk/Commons/2015-12-02/debates/15120254000002/ISILInSyria>.

3 David Cameron described the strike as part of the United Kingdom's counterterrorism strategy. In his argument which consisted of mixed elements of *ius ad bellum* and human rights law, the former prime minister referred to the right to self-defense to justify the attack, since it was a reaction to a particular and authentic threat, which could only be stopped by a Royal Air Force strike – absence of willing and able Syrian government or a land army in the region. Cameron also highlighted, that the targeted strike was not conducted as part of the Coalition campaign against ISIL. One can conclude, that the British standpoint follows the human rights related, law enforcement argumentation. See House of Lords – House of Commons, Joint Committee on Human Rights: *The Government's policy on the use of drones for targeted killing*, Second Report of Session 2015-16, pp. 13-14.

4 For statistics, see <http://www.btselem.org/statistics/fatalities/before-cast-lead/by-date-of-event> and <http://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event> and <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event>.

5 The Bureau of Investigative Journalism, *Drone Warfare*, <https://www.thebureauinvestigates.com/projects/drone-war>.

6 *Drone Wars UK*, <https://dronewars.net/uk-drone-strike-list-2/>.

7 Examining the legality of targeted killings cannot only consist of a human rights layer. First of all, one has to find an exception to the prohibition on the use of force, which is a *cogens* norm (*ius ad bellum*). See e.g.: G. Kajtár, *A nem állami szereplők elleni önvédelem a nemzetközi jogban*, ELTE Eötvös Kiadó, Budapest, 2015; O. Ben-Naftali & K.R. Michaeli, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings', *Cornell International Law Journal*, 2003, pp. 234-292. Moreover, it is essential to analyze whether the hostilities between a terrorist organization reached a certain level of violence, above which one can determine the existence of an armed conflict, in this regard one of a non-international character. In these circumstances international humanitarian law would apply. See e.g.: Jelena Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye', *International Review of the Red Cross* 2011, pp. 189-225.

ferred to as drones – and the challenges they pose to human rights. After dealing with the definition of targeted killings and placing it in the system of the combat against terrorism (Part 14.2), the article briefly explores the use of drones for counterterrorism purposes, and their human rights- relevant technical details (Part 14.3). Next, the article examines the legality of targeted killing from the point of the right to life, and the *arbitrary* deprivation thereof. The article also deals with the issue of the extraterritorial application of human rights treaties in the context of targeted killing conducted via armed drones (Part 14.4).

14.2 TARGETED KILLING AS A METHOD OF COUNTERTERRORISM

Targeted killing – according to the most cited definition – is the intentional, deliberate and premeditated use of lethal force against individually selected persons who are not in the custody of the attacker, and the conduct is attributable to a subject of international law.⁸ Naturally, there are other interpretations,⁹ but the neutral nature of the definition makes it ideal to describe the above-mentioned state practice, since contrary to assassination,¹⁰ or extrajudicial killing¹¹ it does not presume the *per se* illegality of the action itself.

After determining targeted killing, we should turn to the system of counterterrorism and place targeted killing within this system. Nowadays it is evident that some forms of international terrorism pose a threat to international peace and security.¹² Thus two paradigms compete with each other in order to regulate this territory of international law, which attempts to find answers to this phenomenon: the traditional law enforcement model and the armed conflict model.¹³ The essence of the prior is that terrorism is primarily and essentially a criminal action or a combination of such actions, thus states have

8 N. Melzer, *Targeted killing in International Law*, Oxford University Press, 2008, p. 5.

9 In 2009 Roland Otto, in his monography described targeted killing as intentional killing of a selected person by an agent of a state. See: R. Otto, *Targeted Killings and International Law with special respect to Human Rights and International Humanitarian Law*, Springer, Berlin – Heidelberg 2012, pp. 13-18. Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights uses Melzer's definition, but distinguishes it from law enforcement operations, where the primary goal cannot be the death of the targeted person. See Philip Alston, *Report of the Special Rapporteur on the extrajudicial, summary or arbitrary executions – Study on targeted killings*, United Nations, General Assembly, A/HRC/14/24/Add. 6, 2010, pp. 7-10.

10 In connection with assassination, one can distinguish between the armed conflict and peace time definitions, thus using lethal force against individually selected persons out of political motive, would constitute as a peacetime assassination. In armed conflicts, killing an enemy combatant with perfidy or in treacherous manner would fall within the category of assassination. See: Melzer 2008, pp. 46-47.

11 *Human Rights and Law Enforcement – A Trainer's Guide on Human Rights for the Police, Professional Training Series*, No. 5/Add. 2, New York, Genf, 2002, p. 15. Cf. M.E. O'Connell, 'Unlawful Killing with Combat Drones – A Case Study of Pakistan, 2004-2009', *Notre Dame Law School Legal Studies Research Paper*, No. 09-43. 2010, pp. 1-26.

12 SC Res. 1368 (2001) and SC Res. 2249 (2015).

13 D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence', *European Journal of International Law*, 2005, p. 174, n. 16.

the necessary tools in their national criminal law to solve the issue.¹⁴ This model is the classical interpretation, in which targeted killing can only be used, when *there is no other way* to prevent or stop a terrorist attack in order to *save the lives of others* but to kill the perpetrator of such acts.¹⁵ In other words, this means that the use of force in these situations is governed solely by international human rights law.

Under the latter paradigm, where the hostilities reach the required threshold of violence,¹⁶ states engage in one or more armed conflicts of a non-international nature¹⁷ with terrorist organizations. Consequently, in this case the applicable legal regime is international humanitarian law as *lex specialis*,¹⁸ which will determine what constitutes as an *arbitrary*¹⁹ or *intentional*²⁰ deprivation of life. Nowadays it is commonly accepted that human rights law is also applicable during armed conflicts.²¹ This means that violations of international humanitarian law may constitute a violation of international human rights law as well. For instance, killing a civilian during an international armed conflict, or a civilian *not* directly participating in hostilities²² during a non-international armed conflict will not only be a war crime under the four Geneva conventions and customary international law, but also an *arbitrary* or *intentional* deprivation of life under international human rights law. The greatest proponent of this model is the United States, which operates on the presumption that it is engaged in an armed conflict of a non-interna-

14 D. Statman, 'Targeted Killing', *Theoretical Inquires In Law*, 2004, pp. 179 and 180-182.

15 N. Melzer, *Human Rights Implications of the Usage of Drone and Unmanned Robots in Warfare*, European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, Study, 2013, p. 36.

16 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) See Radin 2013, p. 703. Another approach stems from the jurisprudence of the Israeli Supreme Court. The Court in its 2006 targeted killing judgment described every armed conflict with a transnational element as international armed conflict. HCJ 769/02 *Public Committee against Torture in Israel v. Government of Israel* 2006. 18, (2) PD 459, 2006. This view is also present in the Hungarian literature. See: J. Bruhács, *Nemzetközi jog II. – Különös rész*, Dialóg Campus Kiadó, Budapest Pécs, 2010, 2011. p. 197.

17 Armed conflict between states and non-state actors or just between the latter, which is traditionally linked to the territory of a state. Nowadays, usually one can find 'international non-international armed conflicts' as well. See e.g.: S. Radin, 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts', *International Law Studies*, 2013, pp. 697-698.

18 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 25. Cf. C. Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review*, 2007, pp. 310-355.

19 "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." (emphasis added) Art. 6 1. ICCPR.

20 "Everyone's right to life shall be protected by law. No one shall be deprived of his life *intentionally* save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." (emphasis added) Art. 2 1. ECHR.

21 See: Á. Mohay, 'A humanitárius jog alkalmazási határainak egyes kérdései – európai bírói fórumok szemszögéből', *Jura*, 2017/2. pp. 135-136.

22 N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, 2009.

tional character with Al-Qaeda and associated forces,²³ but this is also the case in Iraq and Syria between the Islamic State of Iraq and the Levant and the Coalition Forces.²⁴

This article explores targeted killings under the law enforcement paradigm, thus it only considers pure human rights implications in connection with using lethal force against terrorist suspects.

14.3 DRONES AS MEANS OF COMBAT AGAINST INTERNATIONAL TERRORISM

“Very frankly, [drones are] the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership” said Leon Panetta, former C.I.A. director, in one his speeches.²⁵

The introduction of unmanned combat aircraft to military operations isn't as new as it would seem at first glance, since even in the 19th century, balloons filled with explosives which later fell from the sky into the assaulted cities were in use.²⁶ After a long evolution, the modern drones emerged in the 1990s, which could be controlled by human pilots from the ground or another moving vehicle.²⁷ The first military operation conducted by a contemporary unmanned aerial vehicle, the Predator took place in Afghanistan after the 11 September 2011 terror attacks.²⁸ In the past nearly two decades first the Predator, then its ‘big brother’, the Reaper drones became the almost exclusive instruments of American and British targeted killings.²⁹ The Reaper platform can stay in the air for 14-28 hours straight, and it carries four surface-to-air Hellfire missiles, which are capable of destroying their targets by precision air strikes.³⁰ Thus, the appropriately named Reaper can potentially follow its target all day long, and the operator of the drone has the power to decide whether or not and when to kill the targeted person. In the opinion of the author, it is the ultimate power over a person. Naturally, the Reaper which has been used since

23 Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law, 14. <http://www.state.gov/documents/organization/179305.pdf>.

24 T.D. Gill, ‘Classifying the Conflict in Syria’, *International Law Studies*, 2016, pp. 373-377.

25 ‘U.S. airstrikes in Pakistan called ‘very effective’ CNN Politics, 18 May 2009. <http://edition.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/>.

26 22 August 1849 the Austrian army used this technique in the siege of Venice. See: M. Palik (szerk.), *Pilóta nélküli repülés profiknak és amatőröknek*, második javított kiadás, Nemzeti Közszerkesztési Egység, Budapest, 2013, pp. 25-26.

27 See e.g.: Zs. Csapó, ‘Drónok harca- kérdések kereszttüzében, Van-e szükség új nemzetközi szabályozásra’, in: Zs. Csapó, *Emlékkötet Herczegh Géza születésének 85. évfordulójára – A ius in bello fejlődése és mai problémái*, Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Pécs, 2013, p. 39.

28 Palik 2013, p. 48.

29 See notes 5-6.

30 Palik 2013, p. 50.

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2007 also has competitors, like the Chinese CH-5 remotely controlled aircraft, which exceeds the American Reaper in every aspect.³¹

14.4 HUMAN RIGHTS AND TARGETED KILLING

14.4.1 *The Substantive Component of the Right to Life in Light of Targeted Killings*

When one aims to describe the human rights legality of targeted killings, one has to examine the right to life. The right to life is a natural and unalienable right of men.³² From the point of view of its subjects, the right to life requires that no man shall be killed *arbitrarily*, thus it ensures the life of the individual.³³ From the relevant international conventions a two-folded obligation seems to flow: On the one hand, states have to *respect* the right to life of individuals, and in certain situations – based on the level of control the state has – they have to ensure those rights as well.³⁴ The respect of the right to life is founded upon customary international law, moreover *ius cogens*, which allows no derogation from the rule, regardless of any international agreements states may have.³⁵

Following the above-painted train of thought, one can argue that no man can be deprived of his or her life, no matter the circumstances, but this does not follow from the rule,³⁶ although the killing cannot be *arbitrary*. The *non-arbitrary* nature of a killing is not easy to describe, which was mostly done by human rights courts and quasi-judicial bodies.³⁷ Consequently, use of intentional lethal force against a person can only be an *ultima ratio* solution, it has to be the last resort, and necessary in order to *protect the right to life of others*.³⁸

Every law enforcement operation has to be conducted in line with three principles: necessity, proportionality and precaution.³⁹ The principle of necessity in this sense means

31 S. Chen, 'China unveils its answer to US Reaper drone – how does it compare?', *South China Morning Post*, 18 July 2017. <http://www.scmp.com/news/china/diplomacy-defence/article/2103005/new-chinese-drone-overseas-buyers-rival-us-reaper>.

32 G. Halmai & G. Tóth (eds.), *Emberi jogok*, Osiris, Budapest, 2008, pp. 285-286.

33 Id., pp. 288-289.

34 M. Milanovic, *Extraterritorial Application of Human Rights Treaties – Law, Principles and Policy*, Oxford University Press, 2011, p. 209.

35 Otto 2009, p. 398.

36 Halmai & Tóth 2008, pp. 288-289.

37 Note that the European Convention on Human Rights lays down a list of the permissible occasions, when a personal can be deprived from his or her life, but the interpretation of this article has been done by the European Court of Human Rights See: Art. 2 2. ECHR.

38 C. Heyns *et al.*, 'The International Law Framework Regulating the Use of Armed Drones', *International and Comparative Law Quarterly*, 2016, p. 819. Cf. UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9.

39 Melzer 2013, p. 30.

that the desired goal, the protection of others cannot be reached by any other means less harmful to human life. Above this, the operation has to be proportionate as well, thus it can be conducted in situations where the life of others is endangered by the targeted person, and its annihilation is unavoidable. Last, but certainly not least, the principle of precaution requires states to plan these law enforcement operations in a way which minimizes the use of lethal force with regards not only to the targeted person, but as regards the 'collateral damage', *i.e.* innocent bystanders as well.⁴⁰

To illustrate the above-mentioned, we can cite the *McCann and others v. the United Kingdom* case of the European Court of Human Rights, which was decided on 27 September 1995. In the judgement the Court stated that the killing of IRA terrorists by state agents violated the victims' right to life, since in the given situation it would have been a possibility to use less harmful means to address the threat, namely they could have been arrested.⁴¹ The British and Spanish authorities were informed that certain members of IRA plot a terrorist attack in Gibraltar with the involvement of explosives. When the three suspects have arrived, members of the *Special Air Services* (SAS) called upon them to surrender, but the terrorists' sudden movements led to the shooting of the IRA members, since the authorities assumed that the terrorists are going to use their weapons. Later on, it was obvious that the IRA members did not have any weapon or bomb, although the Spanish authorities later found a vehicle filled with explosives.⁴²

What does this mean in connection with targeted killings conducted by unmanned aerial combat vehicles? First of all, it means that the legality of these strikes has to be examined on a case-by-case basis. To determine that such an operation had been conducted lawfully, several difficult conditions need to be met: one has to examine the alternative means to the use of lethal force and has to prove that these methods are inadequate to solve the issue (*necessity*). Moreover, one has to show that the targeted persons are directly threatening the lives of others (*proportionality*).⁴³

Another question which needs to be addressed is the issue of 'collateral damage'. This has to be examined in light of the substantive side of the right to life. It is universally accepted, that in times of armed conflict one has to distinguish between combatants and civilians, in international armed conflict and between civilians and those who directly participating in hostilities in non-international armed conflict. The principles of international humanitarian law, *viz.* distinction,⁴⁴ necessity,⁴⁵ proportionality,⁴⁶ humanity⁴⁷ and

40 C. Heyns *et al.*, 2016, pp. 819-820. *Cf.* Melzer 2013, pp. 30-34.

41 *McCann and others v. the United Kingdom*, ECtHR, Appl. No. 18984/91, Judgment of 27 September 1995. 203-214.

42 Halmai & Tóth 2008, pp. 290-291.

43 C. Heyns *et al.*, 2016, p. 820.

44 IHL Database, Customary IHL, Rule 1.

45 Art. 54(5) of the 1977 Additional Protocol I of the Geneva Conventions.

46 IHL Database, Customary IHL, Rule 14.

47 N. Melzer, 'International Humanitarian Law – A comprehensive introduction', *ICRC*, 2016, p. 24.

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precaution,⁴⁸ require states to evaluate both during planning and execution that the civilian casualties of a certain operations do not exceed the military advantage they expect from the strike. Consequently, international humanitarian law, standing on the grounds of reality does not preclude the killing of ‘innocents’ even if it is only allowed in a limited scope.⁴⁹

In lack of an armed conflict, the whole situation is governed exclusively by international human rights law. The question is what the evaluation of collateral damage is in this case. Some authors, like Roland Otto argue that in law enforcement situations collateral damage is unacceptable, thus innocent bystanders shall never fall victim to such operations.⁵⁰ In contrast, Nils Melzer suggests that although the international human rights regime is less permissive with collateral damage than international humanitarian law, this does not mean that it cannot tolerate it at all. Thus, there are situations in which a state may kill innocent bystanders regardless of the existence of an armed conflict.⁵¹

In a 2011 judgement, the European Court of Human Rights held that the use of poisonous gas in a Moscow theatre which took the lives of 125 hostages did not violate the right to life of the victims, since it was not disproportionate in the given situation.⁵² To briefly summarize the case, 40 armed Chechen separatists seized the Dubrovka Theatre in Moscow in October 2002 taking nearly 1000 hostages in the process. In the end, the ‘siege’ ended when Russian authorities intervened using opiate-fentanyl-based gas to disable the terrorists before entering the theatre.⁵³

Although this judgment cannot be regarded as a ‘precedent’, since the Court notes that despite the fact the gas was dangerous to human life, it should not have been lethal, contrary to, for instance, bombs or surface-to-air missiles. Consequently, in those cases where the innocent bystanders have a reasonably good chance to survive, the counter-terrorist operation remains legal, even if it caused the death of several not-targeted persons.⁵⁴ The Strasbourg court referenced in its decision the *Isayeva* case, where Russian authorities bombed a whole Chechen village where a separatist group was hiding. The operation caused enormous collateral damage.⁵⁵ Moreover, the Court in the judgement of *Finogenov* used a very interesting formula. It stated that the potentially lethal weapons

48 IHL Database, Customary IHL, Rule 15.

49 See e.g.: W. Heintschel von Heinegg, ‘Proportionality and Collateral Damage’, *Max Planck Encyclopedia of Public International Law*, 2015.

50 Otto 2009, p. 200.

51 Melzer 2013, p. 32.

52 *Finogenov et al. v. Russia*, ECtHR, No. 18299/03, 27311/03, 20 December 2011, para. 236.

53 Although the European Court of Human Rights did not find a violation of the right to life in connection with the use of opiate gas, but it awarded a high amount of compensation for the applicants, since the medical care provided after the operation was not sufficient in the situation on hand. See e.g.: M. Milanovic, ‘Important Cases Against Russia before the European Court’, *EJIL: Talk!*, 4 January 2012. <https://www.ejiltalk.org/important-cases-against-russia-before-the-european-court/>.

54 *Finogenov et al. v. Russia*, para. 232.

55 *Isayeva v. Russia*, ECtHR, No. 57950/00, 24 February 2005.

were not used indiscriminately by the Russian authorities, which resulted in a high chance of survival, and in the end, this was the reason for the lack of a violation regarding the right to life.⁵⁶

In the view of the author, based on the above mentioned, one can form the hypothetical opinion of a human rights court in this situation, concerning targeted killings via drones and the issue of ‘collateral damage’. Bombs and surface-to-air missiles – in case they hit their target – usually deliver the expected result as they kill the targeted person or destroy the selected object. It is characteristic of drone strikes that they attack moving vehicles⁵⁷ in which many people can travel – or they hit an open field gathering.⁵⁸ In these circumstances, it is almost unavoidable, that the attacks on hand will affect ‘peaceful bystanders’ as well. The question is, how can one describe a precision air strike in terms of the expected results. Will the non-targeted persons certainly die in these situations, or is their death only accidental? Targeted killing operations can and should be conducted in a precise manner, but one can find arguments for and against both above-mentioned scenario. In case of certain death, according to the European Court of Human rights, the violation of the rights laid down the Convention can be found, in contrast, when the death of the persons simply *might occur*, the determination is not that clear. In case one looks at precision missile strikes which *potentially but not certainly* cause the death of innocent bystanders, one might conclude that the targeted operations can be legal, since these strikes by the nature of things *cannot be conducted indiscriminately*.

Although in hypothetical situations one can imagine a lot of things and scenarios, in real life, one has to see that targeted killings in light of the substantive side of the right to life are somewhat questionable, and they can be lawfully conducted only under very strict and narrow circumstances. It is incredibly hard to demonstrate that a person constitutes a threat which demands an immediate and lethal action in order to save the lives of others, not to mention endangering peaceful bystanders.⁵⁹

56 *Finogenov et al. v. Russia*, paras. 231-232. Cf. It is not unimaginable that international human rights law would tolerate the death of innocent bystanders, but only in extreme circumstances. For instance, it might be permissible to shoot down an airplane with hundreds of passengers, in order to save the lives of much more. See Melzer 2013, pp. 32-33. In contrast, the German Constitutional Court in its decision considering the *Luftsicherheitsgesetz*, stated that shooting down an airplane in those circumstances contradicts the German basic law, the *Grundgesetz*. See BVerfG, Urteil des Ersten Senats vom 15. Februar 2006 – 1 BvR 357/05 – Rn. (1-156).

57 See notes 1-2.

58 S. Masood & P.Z. Shah, ‘C.I.A. Drones Kill Civilians in Pakistan’, *The New York Times*, 17 March 2011, <https://www.nytimes.com/2011/03/18/world/asia/18pakistan.html>.

59 Melzer 2013, p. 33.

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14.4.2 *Extraterritorial Applicability of Human Rights Treaties and Targeted Killings*

Targeted killing operations have been conducted in the name of counterterrorism, since 2000 and as such they usually involve extraterritorial use of force.⁶⁰ It is universally accepted that states have the obligation to respect and ensure the human rights of those under their jurisdiction.⁶¹ Since usually this jurisdiction is linked to the territory of a state, the question arises whether these obligations bind states when they act outside their national territory, let it be a military or a law enforcement operation. As it was mentioned above, the extraterritorial applicability of a human rights treaty is not relevant from the point of whether a state has the obligation to respect the rights of people – since for instance in the case of the right to life state are obligated to do so, based on customary international law, moreover a *ius cogens* norm – but the question is rather to which judicial or *quasi*-judicial body the victims of such violations or the relatives of those who lost their lives in such an act of can state turn with their reparation claims.

Perhaps it is not surprising that most of the human rights conventions use similar terms in their jurisdiction clause, moreover the judicial or *quasi*-judicial bodies which are responsible for overseeing the enforcement of said treaties use similar methods when they determine the extraterritorial applicability of their respective treaties.⁶²

First, the International Covenant on Civil and Political Rights stipulates:

“Each State Party to the present Covenant undertakes to *respect and to ensure* to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶³

60 See notes 5-6.

61 See e.g.: M. Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’, *Human Rights Law Review*, 2008. pp. 415-416.

62 O. Hathaway *et al.*, ‘Human Rights abroad: When do Human Rights Treaty Obligations Apply Extraterritorially?’, *Arizona State Law Journal*, 2011, pp. 389-390.

63 Art. 2 1. ICCPR.

After carefully reviewing the rich literature⁶⁴ of the topic, the following statements can be made. Firstly, based on the *travaux préparatoires*⁶⁵ and the text of the jurisdiction clause it seems self-explanatory that it is a conjunctive rule, thus the Covenant applies to those, who are on the territory of a State Party *and* under its jurisdiction at the same time.⁶⁶ This approach is represented by the United States, which will not take human rights responsibility for its extraterritorial targeted killings.⁶⁷ Contrarily, the ICCPR contains rights, which exclude the conjunctive interpretation by their nature,⁶⁸ and the Human Rights Committee in its General Comment No. 31. reinterpreted the ‘and’ as an ‘or’.⁶⁹ Besides all this, the Committee in its 1981 *Burgos* case stated: jurisdiction is not referring to the place, where the alleged violation has happened, rather to the relationship between the individual and the state based solely on the fact of the violation, independently of its whereabouts.⁷⁰ With this, the Committee established the personal model of extraterritorial jurisdiction.⁷¹ In case of drones strikes this means that the relatives of those who were *arbitrarily* deprived of their lives could act before this treaty body with success, since the violation of the right to life creates the necessary jurisdictional link between the state and the individual.

One can find a similar jurisdiction clause in the two major regional human rights systems,⁷² the Inter-American Convention on Human Rights and the European Convention on Human Rights. The prior stipulates as follows:

“The States Parties to this Convention undertake to *respect* the rights and freedoms recognized herein and to *ensure to all persons subject to their jurisdiction*

64 See e.g.: R. Frau, ‘Unmanned Military Systems and Extraterritorial Application of Human Rights Law’, *Goringen Journal of International Law*, 2013, pp. 1-18; B. Van Schaack, ‘The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change’, *International Law Studies*, 2014, pp. 20-65; K. da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, Martinus Nijhoff Publishers, 2012, pp. 15-92; D. McGoldrick, ‘Extraterritorial Application of the International Covenant on Civil and Political Rights’, in: F. Coomans & M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004, pp. 41-72. Cf. T. Meron, ‘Extraterritoriality of Human Rights Treaties’, *American Journal of International Law*, 1995, pp. 78-82.

65 Van Schaack 2014, pp. 25-31. See, e.g.: M.J. Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’, *American Journal of International Law*, 2005, pp. 123-124.

66 Otto 2009, p. 371. Cf. Van Schaack 2014, pp. 25-28.

67 Van Schaack 2014, pp. 24-25.

68 See e.g.: Art. 12 4. ICCPR “No one shall be arbitrarily deprived of the right to enter his own country.”

69 General Comment No. 31 [80], UNHRC, *The Nature of the General Legal Obligation Imposed on States Parties of the Convention*, 29 March 2004, CCPR/C/21/Rev.1/Add.13. 10.

70 Melzer 2008, p. 124. Cf. *Sergio Euben Lopez Burgos v. Uruguay*, UNHRC, Comm. No. R.12/52, UN Doc. Supp. No. 40 (A/36/40), 29 July 1981. 176.

71 See in detail Milanovic 2011, pp. 173-209.

72 Naturally, other regional human rights systems exist, for example the African Charter on Human and Peoples’ Rights and the Arab Charter on Human Rights. Since state parties to those conventions usually do not conduct targeted killings, they are out of the scope of the present paper.

the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”⁷³ (emphasis added)

One can see that, this time the reference to territory is missing from the clause, and it is important to note that the text separates the issue of *respecting and ensuring rights*.

A few months ago, one could summarize the Inter-American Court’s jurisprudence in this manner extremely simply, since the Court with one exception – in the *Fairén-Garbi*⁷⁴ case, where the San José court left the question open⁷⁵ – has not dealt with the question of extraterritorial application.⁷⁶ The situation has changed on the 7 April 2018, when the Court published its advisory opinion concerning the wider Caribbean region’s environmental protection.⁷⁷ The Court regarded not only extraterritorial state actions, but those which create effects outside their territory as the affected person is under the jurisdiction of the said state in case the state exercises authority over the individual or the person is under its effective control.⁷⁸ In the end, the Court created a new jurisdictional link for extraterritorial action, which can be invoked independently. The new link is based on the cause and effect notion,⁷⁹ which was denied several times by its European counterpart.⁸⁰

To understand the Inter-American human rights system, one has to examine the jurisprudence of Inter-American Commission on Human Rights as well.⁸¹ The quasi-judicial treaty body, based in Washington has been dealing with issues similar to targeted killings for a long time. For instance, one can cite the assassination of Letelier, former American ambassador to Chile in 1976, and another case from Chile, concerning the

73 Art. 1 I. IACHR.

74 Case of *Fairén Garbi and Solís Corrales v. Honduras*, IACtHR, Judgment of March 15th 1989, Series C No. 6.

75 Otto 2009, pp. 378-379.

76 The reason behind this, is that the Inter-American Commission on Human Rights is a filter body for the Court, which deals with most of the cases. See in Hungarian: A. Raisz, *Az Emberi Jogok Európai és Amerikai Bíróságának Egymásra Hatása*, PhD thesis, 2009, p. 20.

77 IACtHR, *Opinión Consultiva Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos* (Obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal – interpretación y alcance de los artículos 4.1 y 5.1. en relación con los artículos 1.1 y 2 de la Convención Americana Sobre Derechos Humanos) OC-23/17 de 15 de Noviembre de 2017. Cf. G. Vega-Barbosa & L. Aboagy, ‘Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights’, *EJIL: Talk!*, 26 February 2018, <https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/>.

78 Opinión Consultiva Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, 81.

79 A. Berkes, ‘A New Extraterritorial Jurisdictional Link Recognised by the IACtHR’, *EJIL: Talk!*, 28 March 2018, <https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr>.

80 See e.g.: *Bankovic and others v. Belgium and 16 other Contracting States*, ECtHR, App. No. 52207/99, Admissibility Decision of 12 December 2001.

81 Report on the Situation of Human Rights in Chile, IACommHR, 9 September 1985, Chapter III, pp. 89-91.

assassination of Prats, former vice president of the republic in 1974,⁸² or the *Coard*⁸³ and *Salas*⁸⁴ cases connected to the United States. To summarize, one can conclude that the Commission used the personal model of jurisdiction in case of the Convention or in some instances – in the case of the U.S. – the American Declaration of the Rights and Duties of Man.

Targeted killing via unmanned combat aerial vehicles is almost analogous to the *Alejandro and others v. Cuba* case from 1995. The Commission had to deal with a case in which a Cuban MIG-29 shot two smaller civilian airplanes in international airspace. The Commission declared the application admissible on the grounds that Cuba exercised *authority and control* over the four victims of the incident, whose death was direct consequence of Cuba's actions.⁸⁵

In a very similar situation to drone strikes, the Commission founded its decision upon the obligation of the state parties to respect the right to life of others in their extraterritorial actions as well. This means that in the Inter-American system, it is unambiguously determinable, that a state conducting extraterritorial targeted killings will be responsible for its actions.

The other significant regional human rights system and convention is the European Convention on Human Rights, which was created under the aegis of the Council of Europe. The judicial body responsible for overseeing the enforcement of Convention is the European Court of Human Rights, which makes judgments binding upon the states parties. The European model of jurisdiction is similar, but also somewhat different from the American one: "The High Contracting Parties shall *secure to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention."⁸⁶ (emphasis added)

One can see that the jurisdiction part is the same in the two regional systems, but the European system does not differentiate between the obligations of *respect and ensure*, since it only stipulates the latter.

In its jurisprudence, the European Court of Human Rights essentially applied the territorial model of jurisdiction, which is only subject to derogation in extreme circumstances, where the Court used the personal model instead, although almost always coupled with some level of physical control over the individual. Contrary to the ECtHR, the former European Commission on Human Rights used the personal model in the *M v. the United Kingdom and Ireland*⁸⁷ case already in 1985, however, ten years later, the

82 Report on the Situation of Human Rights in Chile, pp. 81-88.

83 *Coard and others v. United States*, IACommHR, 10.951, Report No. 109/99, 29 September 1999.

84 *Salas and Others v. United States*, IACommHR, No. 10.573, Report No. 31/93, 14 October 1993.

85 Melzer 2008, pp. 127-128. *Alejandro and Others v. Cuba*, IACommHR, No. 11.589, Report No. 86/99, 29 September 1999. 23.

86 Art. 1. ECHR.

87 *M v. the United Kingdom and Ireland*, ECommHR, No. 9837/82, 4 March 1985.

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Court ruled on the *Loizidou*⁸⁸ case on the basis of the territorial model, which was reaffirmed in the 2001 *Bankovic*⁸⁹ judgment. In the latter case, the Strasbourg Court declared the application inadmissible based on the lack of jurisdiction on the grounds that the NATO aerial campaign and bombardment of the former Yugoslavia did not create the necessary jurisdictional link between the countries taking part in the killing and injuring 32 persons, since they did not exercise effective control over the territory in question. In its reasoning the Court determined that the 'cause and effect' concept will not establish jurisdiction, moreover it denied the 'tailoring' of positive and negative obligations laid down in the Convention.⁹⁰ One can conclude that the Court decided not to accept an application in a very similar situations to extraterritorial targeted killings. Although the Court in its subsequent jurisprudence (see *Issa*,⁹¹ *Öcalan*,⁹² *Pad*,⁹³ *Al-Skeini*⁹⁴ and *Jaloud*⁹⁵) has been loosening its strict and rigorous territorial approach step-by-step, the Strasbourg court did not overrule the fundamentals of the *Bankovic* judgement. The personal jurisdictional model has been used only secondary to the main territorial approaches, moreover, the ECtHR's approach to jurisdiction almost always requires some degree of physical control as well.⁹⁶

Concerning drone strikes one can conclude that in case the ECtHR will not change its current, essentially territorial model, – be it the personal or the mixed solution suggested by Milanovic,⁹⁷ – some level of territorial control will always be necessary in order to declare an application admissible, even in cases of extraterritorial targeted killings.⁹⁸

14.5 CONCLUDING REMARKS

Nowadays a shift in the methods of combating terrorism is perceivable, namely a shift from the *law enforcement model* to the *armed conflict model*. Thus, one can see a rise in the number of targeted killings conducted each year, which might be the only solution to a situation which threatens the international peace and security. In these circumstances, it

88 *Loizidou v. Turkey*, ECommHR, No. 9837/82, 4 March 1985.

89 *Bankovic and Others v. Belgium and 16 other Contracting States*, 52207/99, Decision of 12 December 2001.

90 Melzer 2008, p. 130. Cf. Otto 2009, pp. 385-389.

91 *Issa and others v. Turkey*, ECtHR, 31821/96, 16 November 2004.

92 *Öcalan v. Turkey*, ECtHR, 46221/99, 12 March 2003; *Öcalan v. Turkey*, ECtHR, 46221/99, 12 May 2005.

93 *Pad and Others v. Turkey*, ECtHR, 60167/00, 28 June 2007.

94 *Al-Skeini and Others v. United Kingdom*, ECtHR, 55721/07, 7 July 2011.

95 *Jaloud v. The Netherlands*, ECtHR, 47708/08, 20 November 2014.

96 M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', *European Journal of International Law*, 2012, p. 139. Cf. A. Sari, 'Jaloud v. Netherlands: New Directions in Extra-Territorial Military Operations', *EJIL: Talk!*, 24 November 2014. <https://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/> and M. Milanovic, 'The Bottom Line of Jaloud', *EJIL: Talk!*, 26 November 2014, <https://www.ejiltalk.org/the-bottom-line-of-jaloud/>.

97 See: Milanovic 2011, pp. 209-222.

98 Physical custody in these circumstances is irrelevant since targeted killing *per definitionem* excludes those cases. See. II. part.

is essential for states involved in counterterrorism operations to know the exact limits of their use of force and their international evaluation regardless of the existence of an armed conflict between the terrorist organization and the state. In lack of an armed conflict, the use of lethal force can only be an *ultima ratio* solution to the situation and it has to adhere to very strict conditions, this is the case naturally with targeted killing operations. When it comes to the reparatory needs of the victims (or relatives thereof) of an (alleged) violation of rights occurring in a targeted killing situation, an applicant might successfully submit a petition against the United States, whereas the United Kingdom for instance can successfully argue for the inadmissibility of such a claim. The reason behind this is the different understanding of the extraterritorial application of the regional human rights treaties.

In the opinion of the present author, one has to look differently at targeted killing operations conducted via armed drones, since their technical characteristics differentiate them from a regular airstrike or a land operation. A Reaper and newer UCAVs can stay in the air all day long and can follow their victims, who seems to be incapable of escaping their almost certain death. In situations where the operator of the drone can decide any-time when to take the targeted person's life, one cannot logically argue a lack of jurisdiction, regardless of the effective control over that territory, where the attack takes place. Although according to the view of the present author the capability of extraterritorial killing creates jurisdiction in every case, one can and has to differentiate between individually conducted strikes, and a traditional air campaign or bombardment. In the latter case one can observe a certainly lower level of control than in case of a targeted drone strike. Indifferent to the applicability of the two models, the respect of the right to life certainly binds all state in the same manner.

