



**Declassified**

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**Committee on Legal Affairs and Human Rights**

**Declassified Minutes of the hearing on “Drones and targeted killings: the need to uphold human rights”**

**held in Strasbourg (Palais de l'Europe)  
on 30 September 2014 at 2.15 pm**

**Hearing started at 2.15pm:**

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

*Rapporteur: Mr Arcadio Díaz Tejera, Spain, SOC*

[AS/Jur (2014) 05]

Hearing with the participation of:

Mr Ben Emmerson, UN Special Rapporteur on the promotion & protection of human rights and fundamental freedoms while countering terrorism, London

Ms Irmina Pacho, Head of Strategic Litigation Programme, Polish Helsinki Foundation for Human Rights, Warsaw

Mr Markus Wagner, Associate Professor, School of Law, University of Miami, Florida, USA

The **Chair** and the **rapporteur** welcomed the three experts. The **rapporteur** recalled that the Committee had had a first round of discussions on the matter of drones and targeted killings at its meeting in March 2014.

**Mr Emmerson** noted at the outset that the use of the term “targeted killing” was problematic, since the meaning of that notion was determined by the legal regime applying to the act in question. In an armed conflict – for example in the current situation in Iraq and Syria – drawing up target lists was a paradigm application of the principle of distinction between combatants and civilians, which constituted a cornerstone of international humanitarian law (IHL). Outside situations of armed conflict, international human rights law (IHRL) prohibited almost any operation which had the use of lethal force as its prime or sole purpose. The crucial threshold question was therefore whether the act in question had occurred within or outside a situation of armed conflict. Mr Emmerson stressed that the primary functions of drones were intelligence, surveillance, target acquisition, and reconnaissance (ISTR). Since 1999, drones had been used in a direct combat role for target acquisition, using laser markers to designate a target that would then be attacked by precision-guided missiles discharged from conventional aircraft. In February 2001, a missile had been remotely test-fired for the first time from a remotely piloted aircraft. He explained that the tactical military advantage of arming drones, rather than using them simply for the purposes of ISTR, was the speed of response from the moment of sighting a target to the delivery of deadly force. Modern drones could provide near-real-time video feeds around the clock. This ability of long-term surveillance, coupled with the use of precision-guided munitions, was a positive advantage from a humanitarian law perspective: if used in strict compliance with IHL principles, drones could reduce the risk of civilian casualties by significantly improving overall situational awareness. Mr Emmerson quoted a finding by the International Committee of the Red Cross (ICRC), which had noted that “any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimise incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not.” Still, there was considerable uncertainty as regarded

both the facts and the law. Regarding factual uncertainties, Mr Emmerson considered that the greatest obstacle to assessing the civilian impact of drone strikes and claims of precision targeting was the prevailing lack of transparency. Whereas the law on investigations required under IHRL was nowadays well-settled – with the Strasbourg Court having laid down detailed principles relating to the need for a prompt, independent and impartial investigation in Article 2 and 3 cases – the rules governing investigations under IHL were more rudimentary. A February 2013 report by the so-called Turkel Commission had concluded that the principles derived from international human rights law should apply, with appropriate modifications, to the investigation of alleged violations of international humanitarian law, as well. That meant that whenever there appeared to have been unexpected civilian casualties, there was a need for a fact-finding investigation by a body independent of and not subject to the same chain of command than those under investigation. Mr Emmerson recalled that he had recommended, in his first UN report, that this should be applied to all drone strikes leading to civilian casualties. Moreover, the principle of transparency should apply to such fact-finding inquiries, for it not only led to better observance of the objectives of humanitarian law (namely increasing compliance with the principles of distinction, proportionality and precaution), but also enhanced public scrutiny and contributed to accountability. Turning to the considerable uncertainty about the applicable international legal framework, especially outside of armed conflict, Mr Emmerson stated that the controversies engaged core principles of IHL and IHRL. Certain incidents when the US had used drones had given rise to questions regarding the principles of general international law. The US authorities considered that they were entitled under the law of self-defence to engage in non-consensual military operations on the territory of another state against armed groups that posed a direct and immediate threat of attack, even where those groups had no operational connection with their host State. Mr Emmerson noted that this gave rise to a number of questions, including: Under what conditions does the right to self-defence arise? If self-defence is permissible, could a state invoke the right to anticipatory self-defence? How imminent must the threat be to give rise to such a right to anticipatory self-defence? And, more generally, how should one determine whether there was a situation of armed conflict? In this respect, Mr Emmerson outlined the US Supreme Court's position, namely that the United States were involved in a non-international armed conflict with non-state actors operating transnationally. In such a situation, it was difficult to determine whether an individual was a combatant or not.

**Ms Pacho** elaborated on the possible implications of the use of armed drones on the protection of the right to life in the light of the European Convention on Human Rights (the Convention). She noted that Poland intended to spend, until 2022, 2.5 billion Polish zloty [almost € 600 million] on the development of unmanned technology for the army, including both reconnaissance and combat drones, although information regarding precise numbers of drones was classified. According to the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, some 40 states – including Council of Europe member States such as France, Germany, Poland and the United Kingdom – had already acquired or were planning to acquire armed drone technology. It appeared that these states perceive drones as indispensable in future armed conflicts, especially asymmetric ones. Ms Pacho noted that the European Court of Human Rights (the Court) might in the future be called upon to assess the Convention compatibility of combat drones operations, because Council of Europe member States would possibly – or even probably – use drones for overseas targeted killing operations, for instance within the framework of a NATO operation. She referred to two judgments issued in 2011 which illustrated the Court's approach regarding the extraterritorial applicability of the Convention: in [Al Skeini and others v. the United Kingdom](#), the Court had maintained that performing public powers in South East Iraq had created an obligation for the UK to respect the Convention; and in [Al-Jedda v. the United Kingdom](#), it had expanded the application of the Convention, finding that countries whose military forces were part of the multinational forces remained accountable for the actions of their soldiers. Ms Pacho stressed that human rights law was commonly regarded as applying at all times. In a situation of armed conflict, the prohibition of arbitrary killings under human rights law continued to apply, but the test of whether a deprivation of life was arbitrary had to be determined by reference to the rules of international humanitarian law. Determining the lawfulness of a killing using drones was therefore contingent on whether it took place within or outside a situation of armed conflict. The intentional, premeditated killing of an individual with combat drones in times of peace would generally be contrary to Article 2 of the Convention, which stipulated that everyone's right to life shall be protected by law and no one shall be deprived of his life intentionally. From this it transpired that it was not permissible under the Convention for a member State to draw up a list of persons targeted for killing by the use of drones. The use of drones could, however, be lawful if it fell within the scope of the exceptions set out in Article 2, paragraph 2 of the Convention, i.e. if lethal force was absolutely necessary in defence of any person from unlawful violence, in order to effect lawful arrest or to prevent the escape of a person lawfully detained, or in action lawfully taken for the purpose of quelling a riot or insurrection. Potential drone strikes were thus strictly connected with reaction to most exceptional circumstances constituting a threat to public order. However, in such a case a state would have to justify reference to a lethal measure and to demonstrate its proportionality and absolute necessity, which might prove difficult in practice. These rules continued to apply during states of emergency

threatening the life of the nation – which, according to the Court's case law, may cover situations where a State needed to respond to serious and constant terrorist operations – although it was possible for States to derogate from the obligation to protect the right to life. Still, armed drone strikes could be justified only if they were carried out within the scope of lawful acts of war, i.e. if they were strictly connected with the lawful military operation and in compliance with the principles of international humanitarian law, such as distinction (between civilians and lawful targets), precaution (in planning an operation), and proportionality (of the use lethal measure to achieve military goals). Ms Pacho highlighted the need for States to overcome the legal controversies regarding the use of armed drones in today's asymmetric conflicts, for instance in terms of the territorial and temporal boundaries of non-international armed conflicts. Some commentators underlined that the practice of the USA and Israel showed that this notion tended to be interpreted too broadly, contrary to humanitarian law. She highlighted the need for States to find a consensus on this matter. Lastly, she recalled that Article 2 of the Convention also imposed a procedural obligation on Contracting Parties to effectively investigate cases of deprivation of life with a view to determining whether the use of lethal force was strictly necessary. Ms Pacho concluded that the Convention put strict limits on possible targeted killing operations using drones. The use of armed drones by member States could be subject to the scrutiny of the Strasbourg Court in times of peace, during states of emergency and in times of lawful war.

(The full text of the intervention is available from the Secretariat.)

**Mr Wagner** underlined that more than 50 states had drones in their arsenals. Any data available should, however, be treated with caution. The oftentimes secretive nature of targeted killings did not allow for definitive statements regarding the extent to which drones were used either as intelligence, surveillance, targeting and reconnaissance (ISTR) platforms or as weapons' platforms. Still, the number of countries deploying or planning to deploy drones, the number of drones, and the extent to which drones were used had risen significantly. Between 2004 and 2007, the US military had carried out eleven drone strikes in Pakistan; that number had increased to a maximum of 122 strikes in 2010 and had since decreased to eight strikes so far in 2014. Mr Wagner highlighted that the large majority of drones were not used as weaponised platforms. He expected that the overall number of drones' deployments – in both ISTR and weaponised versions – would increase in the future, including in Council of Europe member States.

Mr Wagner agreed with the previous speakers that drones were not illegal as such, insofar as they were used in accordance with the principles of distinction and proportionality derived from international humanitarian law. There was nothing inherent in drones' technology that would preclude such use in accordance with these principles, but there were ethical and political questions surrounding them that might caution against their use.

Mr Wagner likewise concurred with the other experts that the assessment of the lawfulness of a targeted killing depended on the applicable legal regime covering the act, and that the legal threshold imposed by international human rights law was generally higher than that under IHL. Commenting on the situation in the United States, he noted that the debate had undergone considerable change over the years. Initially, the so-called 'war on terror' had served as a potent expression for the Bush Administration to justify military action in Afghanistan and elsewhere. The US had invoked both a self-defence and armed conflict paradigm, which had led to an extension of the battlespace to countries such as Yemen. Mr Wagner explained that a number of commentators, relying on the self-defence and armed conflict paradigms against terrorist networks that were not territorially bound, had argued that targeted killing was permitted anywhere – the idea being that, otherwise, safe havens would allow suspected terrorists to evade pursuit. If one accepted the IHL paradigm, the principles of distinction and proportionality – which were recognised by the International Court of Justice as "intransgressible principle[s] ... of customary international law" – became relevant. The US had claimed adherence to these principles. What was problematic, however, was the extent to which the existing rules had been interpreted to allow for the use of targeted killing through the extension of the battlespace and the expansive interpretation the principles of distinction and proportionality. Mr Wagner further noted that, in May 2013, US President Obama had updated and explained the rules applicable to the use of force in counterterrorism operations. These rules stipulated that the policy of the United States was not to use lethal force when it was feasible to capture a terrorist suspect. The use of lethal force could only be allowed if (1) there was a basis in law, (2) the target posed a "continuing and imminent threat", (3) capture was not feasible at the time of the operations, (4) the relevant governmental authorities of the state where the operation was contemplated were unable or unwilling to address the threat to US persons, and (5) there were no other reasonable alternatives. The US authorities had claimed that such use of force was compatible with national sovereignty and international law. Mr Wagner stressed two points in this respect. First, that the use of opaque notions such as "feasible", "reasonable alternatives", "continuing and imminent threat", "inability or unwillingness" or "effectively" allowed for an extensive interpretation of the rules for the use of force in counter-terrorism operations. The Council of Europe could promote strict adherence to long-

established interpretations of the applicable norms of IHL, taking due account of the changed nature of modern-day conflicts. Second, that an increased proceduralisation had taken place in the context of targeted killings over the years. Proceduralisation was claimed to help state officials shape the decision-making process. However, there was a danger of 'false legitimacy' because proceduralisation was highly dependent on the proper determination over what type of conflict existed, which legal framework was applicable and how principles such as distinction, proportionality and precaution were interpreted.

Regarding so-called 'signature strikes', Mr Wagner remarked that such killings were planned and executed not on the basis of the identity of a targeted person, but based on their behaviour. Signature strikes were said to have been the most common form of drone strikes in Pakistan during the first years of the Obama Administration. He highlighted the disruptive effect of signature strikes on the lives of the population in the affected area and stated that these actions were hard to reconcile with the IHL principle of distinction between combatants and civilians. A legal assessment of signature strikes was rendered difficult by the lack of transparency as to what these signatures consisted of. While he conceded that some information would need to remain classified, he did see room for improvement in this respect. Mr Wagner mentioned that some argued that such strikes were illegal *per se*, whereas others considered that they could, in narrow categories of cases, be compliant with international human rights and humanitarian law. Signatures that might be legal under IHL included planning attacks, transporting weapons, handling explosives for military purposes, a quasi-military compound as well as training facilities. These targets would be legal under IHL if the opposing side consisted of regular military forces. Signatures that were not permissible included being a military-age male, consorting with known militants, being armed in areas where this is usual behaviour, or attacks on suspicious camps in areas controlled by terrorist groups. Mr Wagner underscored the crucial importance of distinguishing between individuals in a continuous combat function and individuals directly participating in hostilities: the former may be targeted as long as that status persisted, while the latter may not be targeted outside of their status as directly participating in hostilities. He further stressed that, in the absence of a non-international armed conflict, IHRL applied, but even then, there were situations in which signature strikes could be permissible. The right to life was not absolute, but limitations were subject to the requirement that a killing not be arbitrary, i.e. that it satisfy the requirements of necessity and proportionality. When assessing the US Administration's claim that it would only use lethal force if there was an imminent threat to someone else's life and no other means available, it was clear that the question as to the necessity of the use of lethal force was contingent on the underlying understanding of 'imminence'. According to the US understanding, that notion was rather expansive, encompassing "considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attack". In Mr Wagner's opinion, such a broad concept of 'imminence' stretched too far, as it would allow attacks on individuals as a deterrent or punishment of those that had engaged in prior attacks, but were not in the process of carrying out renewed attacks. All other signatures would fail either the proportionality or the necessity test.

Concluding his presentation, Mr Wagner reiterated that drones as such were not illegal. The challenge was to regulate states' political desire to project force without risk to the life of one's own soldiers. The US had been extending the scope of what it perceived as permissible in grappling with these legal and political challenges, and the Council of Europe could contribute to rebalancing the debate.  
(The full text of the intervention is available from the Secretariat.)

A debate ensued with the participation of **Mr Cruchten** (who was not convinced by the argument advanced by Mr Emmerson that the use of drones could reduce civilian casualties), the **rapporteur** (who enquired whether the use of drones for targeted killings had changed in the last years), **Mr McNamara** (who wondered about the psychological effect of repeated drone strikes on the civilian population and asked whether this could possibly amount to inhuman or degrading treatment) and **Mr Mahoux** (who considered that the recent Israeli military intervention in Gaza had shown that operations using drones were very problematic because they could be used in order to intentionally inflict, rather than avoid, collateral damage; he also wondered whether an issue could arise under Article 3 of the Convention if there was a lack of due diligence on the part of a state using drones, and questioned the criteria used for determining whether a situation constituted an armed conflict).

In response to the questions posed by Mr Cruchten, **Mr Emmerson**, by reference to the characteristics of the US *Reaper* drone, underlined that the question of precision was less problematic than that of distinction between combatants and non-combatants, since loitering drones with sophisticated camera systems and radars for target designation allowed commanders to observe the target and to build up a composite picture of the risk of civilians being killed. He also explained that both the US and the UK had committed themselves to the strictest standard of tolerating zero civilian casualties. Replying to the rapporteur, **Mr Wagner** noted that there had been a slight change in the criteria for the use of drone strikes. Some of these criteria were

very vague and could be interpreted either permissibly or non-permissibly, and the US Government had consistently used the most permissive interpretation for its own operations. **Ms Pacho** reiterated that Council of Europe member States would be impeded from adopting such broad interpretations because they were subject to the scrutiny of the Strasbourg Court. **Mr Emmerson** qualified Mr Wagner's observation that there had been a change in the use of drone strikes by adding that this change was difficult to generalise because it was context-specific. Regarding Afghanistan, the statistics suggested that, until the end of 2012, drones had appeared to have inflicted significantly lower levels of civilian casualties than aerial attacks carried out by other aircraft. In 2013, that situation had flipped and drones had accounted for the highest number of civilian deaths. In respect of Pakistan, one could see that the situation had been significantly affected by the political context: whereas the US Government had initially been able to assert that they were not infringing the territorial sovereignty of Pakistan because, according to reliable reports, the former authorities had given consent to drone strikes, this situation had changed in April 2012, when the Pakistani parliament passed a resolution making it impossible to give consent to the use of drones without parliamentary approval (a procedure which had not been undergone in relation to US drone strikes). There had subsequently been a marked drop both in reported drone strikes and resulting civilian casualties, a trend which persisted until the end of 2013. There had been no reports of civilian casualties in 2013. But in June and July 2014, the drone strikes appeared to have been resumed. Lastly, there had been a steady rise in the frequency of drone strikes in Yemen. In 2014, drones had played a significant role in Israel's attacks on Gaza and they continued to play an important role in the fight against the IS. In terms of the psychological impact of drone strikes on the civilian population, Mr Emmerson referred to a report entitled "Living under drones" based on research conducted by NYU, and said that during one of his visits to Pakistan, representatives of the civilian population had explained to him the fracturing effect the knowledge of the permanent threat of drone strikes had on the tribal communities. He mentioned examples of drone strikes on a school which had led many parents to stop sending their children to school, and on a tribal *Jirga* of a group of anti-Al-Qaida and anti-Taliban tribal elders – a gathering that had been misinterpreted. He added that there was evidence of a radicalisation effect and reprisals of tribal communities (usually directed against Pakistani military targets), although these effects were not easily quantifiable. As regards the question of whether the psychological repercussions of drone strikes could amount to inhuman and degrading treatment, Mr Emmerson recalled that the US Government did not accept the concept of extraterritorial applicability of human rights norms, notwithstanding that the UN High Commissioner for Human Rights had clearly stated that international human rights law was applicable in the described circumstances. The military argument in this respect was that drones were probably not more psychologically damaging than other aircraft, maybe even less so. In response to Mr Mahoux, **Mr Wagner** reiterated the crucial distinction between situations of armed conflict and situations outside armed conflict as well as the problematic lack of agreement as to which legal framework was applicable in a given situation. He stressed that there existed considerable controversy regarding the official US position that the country was engaged in a world-wide non-international armed conflict with Al-Qaida and various of its sub-groups. **Ms Pacho** repeated that creating a list of persons for the purposes of targeted killings would be contrary to the European Convention of Human Rights in times of peace, but possibly permissible under IHL. In respect of the war in Gaza, **Mr Emmerson** noted the significant difference between the rules of engagement adopted by the UK and US governments when comparing them with that of the Israeli Government. Whereas the UK had committed itself to zero civilian casualties in Afghanistan and the US had indicated that it would adopt a policy of zero civilian casualties outside situations of armed conflict, Israel invoked the latitude in international humanitarian law concerning civilian casualties which were proportionate to the military aims pursued, and asserted its right to make use of that margin. He found that it was highly debatable whether the death toll in Gaza could meet any proportionality standard and that the real problem was not the use of drones, but Israel's military strategy.

Summing up the debate, the **rappporteur** recalled that sophisticated weapons such as drones did not *per se* pose any human rights problems, as long as they were used in accordance with the rule of law. The question was whether there was a need for additional laws or whether what was needed was a particular interpretation of existing laws. Both the **rappporteur** and the **Chair** thanked the experts for their interventions, which greatly contributed to the Committee's understanding of the issues at stake.