

Towards a European Position on the Use of Armed Drones?

A Human Rights Approach

This paper presents and builds on the outcomes of an April 2016 expert meeting on human rights implications of the use of armed drones, at which a number of issues highlighted in a previous [ICCT paper](#) surveying European Union Member States' positions on armed drones and targeted killing were discussed. This paper examines targeted killings in light of human rights law; the precise requirements of transparency, oversight and accountability; and European countries' human rights obligations when assisting other countries in drone strikes, e.g., through intelligence sharing. The authors' conclusions include observations on the need for and possible ways to obtain information, challenges for the use of armed drones generally, and legal challenges and recommendations.

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About ICCT

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1. Introduction¹

In April 2015, ICCT published the research paper 'Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counter-Terrorism Perspectives'.² This paper gauged the extent to which European Union (EU) governments share the US' position on armed drones and targeted killing and, in doing so, aimed to assist in distilling a Common EU position³ on the use of armed drones and a legal framework for counter-terrorism-related uses of force. The authors concluded that a unified EU voice is still elusive with respect to drones and targeted killings and noted that it may also be very difficult to achieve this unified EU voice in the future. The EU rarely speaks with one voice in the context of foreign policy, security and defence, and the issue of the use of armed drones is perhaps even more sensitive than many other topics in this context. Moreover, the paper showed that there is still a lack of agreement among EU Member States concerning, for instance, the customary international law status or scope of certain concepts. Notwithstanding this observation, the authors were and remain convinced it is worthwhile to strive toward as much of a consensus within the EU as possible. A solid EU position based on the rule of law is necessary as a counterweight to the current US position, which still raises serious questions under international law.⁴

It was therefore decided to organise a closed expert meeting to discuss a limited number of pertinent issues that came to the fore in the 2015 research paper, namely: 1) under which circumstances could one lawfully engage in targeted killings under international human rights law; 2) what do we mean exactly by transparency, oversight and accountability and 3) how can human rights obligations be breached by European countries that assist other countries in executing drone strikes (for example, through the sharing of intelligence or by letting these countries use their air force bases)?

In choosing this focus, the organisers continue their quest for more clarity regarding the contours of a possible European position in the future. This could assist in distilling an EU Common Position on the use of armed drones, which the European Parliament called for in February 2014, when it "[e]xpress[ed] its grave concern over the use of

¹ The authors would like to thank Kate Pitcher and Wim Zimmermann, interns at the T.M.C. Asser Instituut, and Matteo Besana, intern at the ICCT, for their assistance in the preparation of this report. Of course, it goes without saying the authors are very grateful for all the input and ideas of the experts who contributed to the closed expert meeting, whose findings constitute the basis of this report. Finally, it should be acknowledged that the meeting was supported in part by Open Society Foundations. The organisers of the meeting would like to thank Open Society Foundations again for its assistance in making the event possible.

² See J. Dorsey and C. Paulussen, 'Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counter-Terrorism Perspectives', *ICCT Research Paper*, April 2015, <http://icct.nl/wp-content/uploads/2015/05/ICCT-Dorsey-Paulussen-Towards-A-European-Position-On-Armed-Drones-And-Targeted-Killing-Surveying-EU-Counterterrorism-Perspectives.pdf> (hereinafter: Dorsey and Paulussen 2015).

³ Since the EU itself does not have its own armed drones, this mainly refers to the position of EU Member States. However, if there is a shared view by all these Member States on the use of armed drones, one could argue there is a Common EU position on this matter. Not because the EU has a position of itself, but because a certain position on the use of armed drones is the same in all the different EU Member States. Nonetheless, having said that, also (parts of) the EU as such, even if it does not have armed drones of itself, is involved in this discussion and venting opinions on this matter, see for instance the call by the European Parliament on the next page of this report.

⁴ In the words of Dworkin: "Perhaps the strongest reason for the EU to define a clearer position on drones and targeted killing is to prevent the expansive and opaque policies followed by the US until now from setting an unchallenged global precedent. [...] The US assertion that it can lawfully target members of a group with whom it declares itself to be at war, even outside battlefield conditions, could become a reference point for these and other countries. It will be difficult for the EU to condemn such use of drones if it fails to define its own position more clearly at this point. [...] Committed as it is to the international rule of law, the EU must do what it can to reverse the tide of US drone strikes before it sets a new benchmark for the international acceptability of killing alleged enemies of the state." A. Dworkin, 'Drones and targeted Killing: Defining a European Position', *ECFR Policy Brief*, July 2013, http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf, pp. 3 and 10.

armed drones outside the international legal framework”⁵ and when it “urge[d] the EU to develop an appropriate policy response at both European and global level which upholds human rights and international humanitarian law”.⁶

The focus of the expert meeting, whose main findings are presented in this ICCT report, was international human rights law (IHRL) – a topic that has been increasingly put on the international agenda. This also meant that other interesting and very topical issues related to the subject of armed drones, such as targeted killing principles under international humanitarian law (IHL) and the interaction between IHL and IHRL, were not addressed. Instead, the experts were invited to discuss the contours of the law surrounding the three topics in the context of a situation *outside* an armed conflict, to which human rights law applies.⁷ It should, however, be explained from the outset that the report’s and meeting’s focus on IHRL – and hence not on IHL – is not in any way meant to contribute to the further fragmentation of international law. Indeed, international law should be viewed holistically. However, given that discussions in meetings need to be focused in order to achieve tangible results at the end of the day, and given that the IHL framework was already discussed at length by experts in a comparable meeting organised by the T.M.C. Asser Instituut and ICCT in 2013,⁸ the organisers opted to remove certain themes from the current debate and concentrate on one specific legal field: IHRL. However, it goes without saying that for a complete picture of the legal framework when it comes to targeted killings, the authors refer to the reader to both the 2013 paper and the current report. The same can be said about the delimitation to Europe. Of course, this is not meant to contribute to a ‘geographical’ fragmentation of international law; it was a deliberate choice by the organisers to keep the discussion focused, and to build upon the 2015 paper entitled ‘Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counter-Terrorism Perspectives’.⁹

This report will follow the structure of the expert meeting, by presenting some of the discussions and the main findings related to the topics of ‘Targeted killings under international human rights law’ (Section 2), ‘Transparency, oversight and accountability’ (Section 3) and ‘Assistance in carrying out drone strikes’ (Section 4). Section 5 will conclude this report with a few final observations and policy recommendations.

A final point that should be made before delving into the substance is that a modified version of the Chatham House Rule applied, that is: the discussions and main findings are presented anonymously, although the names and affiliations of the participants and observer can be found in the annex to this report. When the report states that the experts or participants agreed on a certain statement, this does not mean that there was a clear unanimous agreement amongst all the individual participants, but rather that the majority of the participants in the room (seemed to) agree(d) with that statement. However, it goes without saying that such statements do not bind in any way the individual participants or their organisations listed in the annex.

⁵ The joint motion for a resolution on the use of armed drones (2014/2567 (RSP)), dated 25 February 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P7-RC-2014-0201+0+DOC+PDF+V0//EN> was adopted two days later by 534 votes to 49 with 10 abstentions, see: <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1340215&t=e&l=en>.

⁶ Ibid.

⁷ This also meant that another interesting question, namely to what extent human rights obligations have extraterritorial force, was not considered, but assumed.

⁸ See J. Dorsey and C. Paulussen, ‘The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism’, *ICCT Research paper*, April 2013, http://www.icct.nl/download/file/ICCT-Dorsey-Paulussen-Boundaries-of-the-Battlefield-Report-April-2013_docx.pdf.

⁹ See Dorsey and Paulussen 2015.

2. Targeted Killings under International Human Rights Law

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.”¹⁰ Although this definition immediately shows that targeted killings can occur in both armed conflict as well as peacetime situations, this report, like the expert meeting on which it is based, only looks at targeted killing outside of armed conflict situations, in the context of IHRL.

Targeted killing under IHRL can take place in basically two situations: inside a state’s territory (for instance, when snipers take out a hostage-taker) or outside a state’s territory (for instance, when a drone takes out a suspected terrorist in a state outside the context of an armed conflict).

The targeted killing process itself needs to be in conformity with the principles of necessity, proportionality and precaution (this will be explained in greater detail below), but before looking at the process itself, it should also be clarified that a legal *basis* to take action is needed first. In the domestic context, a national legal provision will constitute the basis of using deadly force. However, when the targeted killing takes place outside of a state’s own territory, a legal basis to use force under international law (under the *jus ad bellum*) is also required. There are three legal bases: via authorisation from the UN Security Council, where there is consent from the state where the attack takes place, and in self-defence. Hence, if a targeted killing takes place on the basis of self-defence, for instance, there must be conformity not only with the self-defence requirements pursuant to Article 51 of the UN Charter and customary international law (which includes its own principles of necessity and proportionality) – the legal basis – but also with the principles of necessity, proportionality and precaution – the requirements under the legal regime applicable to the targeted killing process (IHRL).¹¹

It should be stressed from the start that targeted killing under IHRL – whether in or outside a state’s own territory – is only possible in extraordinarily limited situations, and only after other means have proven unsuccessful. However, what are these exact conditions? What do the principles of necessity, proportionality and precaution mean in practice? For this, a useful analysis¹² can be found in the report on armed drones by the Advisory Committee on Issues of Public International Law (*Commissie van Advies Inzake Volkenrechtelijke Vraagstukken* or CAVV), an independent body that advises the government, the House of Representatives and the Senate of the Netherlands on international law issues. In its report, the CAVV noted:

The targeted killing of an individual outside the context of an armed conflict is prohibited in all but the most exceptional situations and is subject to strict conditions. These situations are limited to the defence

¹⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston (Addendum), 28 May 2010, UN Doc A/HRC/14/24/Add.6,

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> para. 1.

¹¹ See: M. Milanovic, “Drones and Targeted Killings: Can Self-Defense Preclude Their Wrongfulness?”, *EJIL: Talk!*, 10 January 2010, <http://www.ejiltalk.org/drones-and-targeted-killings-can-self-defense-preclude-their-wrongfulness/>.

¹² Another useful analysis can be found here: Directorate-General for External Policies of the Union, Directorate B, Policy Department, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, May 2013, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET%282013%29410220_EN.pdf.

of one's own person or a third person from a direct and immediate threat of serious violence, the prevention of the escape of a person who is suspected or has been convicted of a particularly serious offence, or the suppression of a violent uprising where it is strictly necessary to employ these means (i.e. targeted killing) in order to maintain or restore public order and public safety and security. In situations of this kind, lethal force is always a last resort which may be used if there are no alternatives and only for as long and in so far as strictly necessary and proportionate. [...] The deployment of an armed drone in a law enforcement situation will hardly ever constitute a legal use of force. The principle of proportionality as it applies within the human rights regime is considerably stricter than under IHL, in particular to prevent innocent people falling victim to such attacks.¹³

The CAVV explained in more detail on this latter point that “injuring or killing third persons when using force is in principle prohibited under IHRL, other than in exceptional situations, and then only to the extent that this is strictly necessary and proportionate, subject to the (...) precautionary principle.”¹⁴ This latter principle has been formulated in international case law and “requires that the question of whether lethal force is strictly necessary must be considered at each moment of the action.”¹⁵ In that sense, the precautionary principle appears to constitute a constant assessment of the necessity principle. As to this latter principle, as well as the principle of proportionality, the CAVV noted that

[t]he necessity principle has qualitative, quantitative and temporal dimensions. Qualitatively, the force must be strictly necessary in relation to the objective to be attained. Quantitatively, the force used must not be excessive. Temporally, the use of force must still be necessary at the time of the action. The proportionality principle prescribes that use of force be justified in the light of the nature and seriousness of the threat.¹⁶

To concretise that under IHRL, targeted killing – which involves the use of deliberate, planned lethal force – is hard to reconcile with the precautionary principle, the CAVV provided as conceivable examples “hostage rescues, perhaps the arrest of armed, highly dangerous suspects posing a high level of risk to the arrest team or third persons, or the shooting-down of a ‘renegade’ aircraft that has been taken over by terrorists and may be about to be used as a flying bomb.”¹⁷ In this context, the CAVV also noted:

It has been suggested that the requirement of an ‘immediate’ threat of serious violence should be interpreted differently in the case of extraterritorial antiterrorist operations, since in such situations there is usually no available alternative to arrest by the operating state. The suggestion is then to exceptionally permit targeted killing if there is a

¹³ Advisory Committee on Issues of Public International Law, *Advisory Report on Armed Drones*, Advisory Report No. 23, July 2013, http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf (hereinafter: CAVV Report), pp. 4-5.

¹⁴ *Ibid.*, p. 23.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

very high risk of the person being directly involved in serious future terrorist activities [original footnote omitted].¹⁸

However, the CAVV was of the opinion that

[i]n most such scenarios, [...] the deployment of a military weapon such as an armed drone would be a suitable method only in highly exceptional cases. [...] [T]he use of such a relatively heavy military weapon for attacks on ground targets outside the context of an armed conflict would in most cases almost automatically conflict with the strict requirements of necessity and proportionality that apply under IHRL – especially if there were a risk that innocent civilians would also be victims of the drone attack.¹⁹

During the session, the CAVV's considerations were generally shared, but the point was also raised by an expert that if IHL is not applicable and if IHRL only allows for targeted killing in an extremely limited number of situations, this could undermine the utility, value and effectiveness of IHRL in practice. How can states then respond to the security issue of the Islamic State in Libya, for example?

In response, another expert noted, referring to the *Jaloud* case in which the European Court of Human Rights (ECtHR) also looked at exceptional circumstances,²⁰ that it appears that the ECtHR gives states a greater degree of latitude in how they implement certain obligations under the Convention when faced with various practical difficulties and exceptional circumstances, some of which are likely to arise while operating extraterritorially. If so, would the ECtHR then also give greater latitude when it comes to extraterritorial use of force against an “imminent” threat to life? The expert was of

¹⁸ Ibid., pp. 23-24.

¹⁹ Ibid., p. 24. Cf. also Human Rights Watch, using the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: “International human rights law provides every person with the inherent right to life. It permits the use of lethal force outside of armed conflict situations only if it is strictly and directly necessary to save human life. In particular, the use of lethal force is lawful only where there is an imminent threat to life and less extreme means, such as capture or non-lethal incapacitation, are insufficient to address that threat. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that the “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.” This standard permits using firearms only in self-defense or defense of others “against the imminent threat of death or serious injury” or “to prevent the perpetration of a particularly serious crime involving grave threat to life” and “only when less extreme means are insufficient to achieve these objectives.” Under this standard, individuals cannot be targeted for lethal attack merely because of past unlawful behavior, but only for imminent or other grave threats to life when arrest is not a reasonable possibility. If the United States targets individuals based on overly elastic interpretations of the imminent threat to life that they pose, these killings may amount to an extrajudicial execution, a violation of the right to life and basic due process [original footnotes omitted].” Human Rights Watch, “*Between a Drone and Al-Qaeda: The Civilian Cost of US Targeted Killings in Yemen*, 2013, http://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload_1.pdf, pp. 87-88. Cf. finally Melzer, again using a slightly different wording: “[A]rmed drone attacks directed against persons other than legitimate military targets can be permissible only in very exceptional circumstances, namely where they fulfil the following cumulative conditions: (a) they must aim at preventing an unlawful threat to human life; (b) they must be strictly necessary for achieving this purpose; (c) they must be planned, prepared and conducted so as to minimize, to the greatest extent possible, the use of lethal force. Moreover, national law must regulate such operations in line with international law.” Directorate-General for External Policies of the Union, Directorate B, Policy Department, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, May 2013, http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2013/410220/EXPO-DROI_ET%282013%29410220_EN.pdf, p. 36. Melzer therefore concludes that the bar is set “extremely high” (ibid.): “Not only will it be difficult to prove that the targeted person actually does pose a threat to human life requiring immediate action, but also that this threat is sufficiently serious to justify both the killing of the targeted person and the near certain infliction of incidental death, injury and destruction on innocent bystanders. As a result, the use of armed drones and other robotic weapons outside military hostilities may not be categorically prohibited, but their international lawfulness is certainly confined to very exceptional circumstances.” (Ibid.)

²⁰ ECtHR, Grand Chamber, *Case of Jaloud v. The Netherlands (Application no. 47708/08)*, ‘Judgment’, Strasbourg, 20 November 2014, <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-148367&filename=001-148367.pdf&TID=qeikrbadtm>.

the opinion that it should not, but would not be surprised if it did. This might be particularly true as regards the Court's assessment of whether a state fairly and reasonably interpreted the threat at hand. In other words: the expert would not be surprised if the Court were to give the state the benefit of the doubt when it comes to the state's interpretation of the threat. However, if that were indeed to be the Court's position, then there also has to be, according to this expert, an equal responsibility for the Court to make sure states 'get it right' – there has to be a compensation factor. When asked for concrete examples, the expert referred to transparency and oversight mechanisms that can adjudicate those issues, and noted that strong safeguards should be required to increase the certainty a state has when it assesses the nature of the threat, that is: whether the threat is imminent or not.

However, in this context, the point was also made by another expert that we should realise that the ECtHR is only a regional human rights body. This may be interesting for the current exercise, but when striving for international standards, one should also take into account the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.²¹

Also, one could argue that the last quotation from the CAVV looked at targeted killings via drones, which, in principle, does not rule out that the possibility of a targeted killing via another way, such as special forces, might be assessed more favourably in for example the context of the principle of proportionality.

However, regardless of the weapon/method used, questions surrounding necessity and thus precaution will always remain paramount. In this context, one expert wondered: how specifically does necessity need to be tied to a particular attack? Does it need to be a precise attack, or the regular planning of attacks? Are bomb makers who train and send individuals to engage in violence legitimate targets? The authors of this paper realise that these are difficult questions and that much will depend on the exact circumstances of the case, but they feel there is a discrepancy between using force in these latter kinds of situations and the situations described by the CAVV, one of which was the defence of one's own person or a third person from a *direct and immediate threat* of serious violence. The planners or bomb makers, who can of course be arrested for their alleged criminal behaviour, do not pose a direct and immediate threat of serious violence to themselves or a third person that must be thwarted immediately.²²

²¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>, see n. 19.

²² Also when looking in the UN Basic Principles at the possibility to prevent serious crimes, which of course encompasses terrorism, from happening ("Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives [emphasis added]."), the sentence ("In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.") makes clear that action must be strictly unavoidable. Arguably, this would allow a targeted killing of the bomber himself, if he or she is on the verge of detonating his/her device, but not the bomb maker or the planner. Cf. also Council of Europe, Parliamentary Assembly, 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, available at: <http://www.assembly.coe.int/CommitteeDocs/2014/ajpv06-2014.pdf> (last accessed 5 June 2016): "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 [one of the three experts participating in the hearing] opinion, such a broad concept of 'imminence' stretched too far, as it would allow

However, this is of course different for the person who will detonate the bomb himself and who can no longer be arrested. Hence, there is and should always be a last-resort possibility to use targeted killing in IHRL, but there must be a clear emergency situation if and when it is employed. In that sense, it is argued that there is no vacuum here and that IHRL can in fact be effective in practice and able to respond to urgent security issues.

Finally, and this constitutes a good bridge to the next session of the expert meeting and next Section of this paper, it was observed by yet another expert that the main overarching issue is really the lack of transparency. All of the above questions are difficult to answer if no clarity is provided about the process in the first place. It is difficult to assess what the actual practice of targeted killings (by armed drones) consists of and whether it is unlawful.

3. Transparency, Oversight and Accountability

The second session turned to the topic ‘Transparency, oversight and accountability’. In almost any report on armed drones, transparency, oversight and accountability are called for, but what do these concepts entail *exactly*? This session addressed such questions as: how can transparency in targeted killing procedures be achieved while respecting security concerns? To which information are the public and affected individuals entitled? As to oversight: What is required at the minimum? What is the appropriate forum to review the legality of a certain drone strike? Are the existing fora well-equipped to review such strikes or should new bodies be established? Regarding accountability: in which cases should there be an investigation? What kind of redress do alleged victims of drone strikes have? What does the right of a person to have an effective remedy entail and when must access to such a remedy be provided? When is criminal prosecution required and who is to be prosecuted? Are there any criminal cases out there from which other states can learn? This long list of questions formed the context for this session and though there were some areas of agreement, many grey areas still exist.

3.1. Transparency

The experts argued that the lack of transparency makes it incredibly difficult to discuss the other issues of oversight and accountability. This hurdle must first be cleared in order to get to any kind of assessment of the (lack of) legality of particular strikes. But the exact requirements of transparency were not easy to identify. In order to give a starting point to the discussion, one expert suggested the right to life under Article 2 of the European Convention on Human Rights (ECHR), which carries both a positive and an investigative duty.²³ The publication of the results of such investigations could then serve as an attempt at obtaining sufficient transparency. Indeed, under the ECtHR case law, Article 2, taken together with Article 13, requires states to conduct effective

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 attacks on individuals as a deterrent on or punishment of those that had engaged in prior attacks, but were not in the process of carrying out renewed attacks.”

²³ Article 2 of the European Convention on Human Rights states: “Right to life. 1. 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. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection,” http://www.echr.coe.int/Documents/Convention_ENG.pdf.

investigations into violations and to provide an effective remedy.²⁴ In the words of the Court, “the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”²⁵ This case law can be constructive in improving transparency by clarifying the terms of when an investigation must occur, what questions it must answer, how the family can meaningfully participate and what follow-ups can and must occur.

The secrecy with respect to where strikes are carried out, against whom, and for what (legal) reason highlights the second main point addressed in the expert group’s discussion: the lack of transparency, which has become a tool to evade accountability. Experts noted that it has become difficult to obtain information from governments, as requests are often being rejected on national security grounds. One expert’s perspective was that, in practice, it is not that the information ultimately released (via legal actions like Freedom of Information Act requests) has been covered because of reasons that have to do with state security but rather has been found to be a representation of a source of embarrassment for the government involved. Whichever tack is taken – whether it is national security or preventing national embarrassment – it still precludes information relevant to investigations from coming to the fore.

Within IHRL, a requirement exists to investigate whenever there is an allegation of death, serious injury or any other grave consequences resulting from use of force.²⁶ When looking at the requirements of such an investigation, effectiveness requires independence, impartiality, being expeditious and carried out with due diligence. The process should be open to public scrutiny and allow next-of-kin to participate in proceedings and everything should be done in order to gather evidence. One expert put forth a few touchstones for requirements such as: the legal framework with respect to the use of lethal force must be specified at the domestic level (i.e., the courts or the legislature) and specifically, there is a need for a sufficient legal basis for the use of force as well as for any potential deprivation of life and these laws must be made publicly available for purposes of scrutiny and access to justice. One expert pointed to the Global Principles on National Security and the Right to Information,²⁷ in which there was an overriding public interest expressed for disclosure in cases of deprivation of life. Disclosure is a precursor to accountability, and key elements of this would be disclosure with respect to the following: location of remains, identity of victim, military and intelligence units involved, law and regulations applicable to those involved, oversight, internal accountability chains (including officials

²⁴ See, for example, ECtHR, Grand Chamber, *Case of El-Masri v The Former Yugoslav Republic of Macedonia (Application No. 39630/09)*, ‘Judgment’, 13 December 2012.

²⁵ *Ibid.*, para. 255

²⁶ United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Arts. 22-26; United Nations Code of Conduct for Law Enforcement Officials, adopted by the United Nations General Assembly resolution 34/169, 17 December 1979 Code of Conduct, Art. 3 Commentary. “Human rights law imposes a duty on States to investigate alleged violations of the right to life ‘promptly, thoroughly and effectively through independent and impartial bodies.’” Report of the Special Rapporteur, Philip Alston, on extrajudicial, summary and arbitrary executions, 2006 (United Nations document E/CN.4/2006/53) paras. 35- 36, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/116/84/PDF/G0611684.pdf?OpenElement> (hereinafter: Alston Report).

²⁷ This refers to the Tshwane Principles, on which the Open Society Foundations’ website notes: “These Principles were drafted by 22 organizations and academic centres [...] in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, facilitated by the Open Society Justice Initiative. This process culminated in a meeting in Tshwane, South Africa, which gives them their name.” Avai <https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>.

responsible) and a need to have an independent oversight mechanism. Additionally, two participants mentioned the fact that the burden of proof is on the state to demonstrate that any killing that takes place was legal.

In one final note on transparency, one participant mentioned the Study by the United Nations Office of Disarmament Affairs (UNODA) on Armed Unmanned Aerial Vehicles in which the Alston report was cited in noting “Even situations of armed conflict and occupation will ‘not discharge the State’s duty to investigate and prosecute human rights abuses,’²⁸ although certain modalities of the investigation may vary according to the circumstances and practical constraints.”²⁹

3.2. Oversight

When turning to the discussion about oversight, the experts found it important to distinguish between judicial and non-judicial oversight with respect to target selection. In the case of the former, discussion arose about the potential for a warrant-based system with judicial oversight but most agreed that to review the legality of a strike before it takes place would pose several obstacles, especially with respect to threats that reach the “imminent” threshold. Additionally, when the discussion turned to the need for a warrant, experts did not agree that this was necessary if for no other reason than logistics during an operation planned against someone posing an imminent threat. One oversight mechanism already built in, according to one expert, was that military lawyers always give their advice about questions related to legality to the commanding office of an operation. The flip-side to this was that military lawyers are not independent bodies, and that can skew the independence or impartiality of any kind of review or target selection. The main discussion and agreement of experts about where the focus should lie revolved around *ex post facto* oversight (except for the situations in which someone is placed on a ‘kill list’, which could lead to an injunction or a request to be removed from the list), and identifying remedies that may exist after a particular strike or use of lethal force takes place.

3.3. Accountability

This notion, according to experts at the meeting, should be seen as wider than responsibility in courts. One participant examined the aims of accountability and redress, and contributed the following: providing answers to prevent the re-occurrence of mistakes or misconduct, allowing remedies for the victims and their families and providing punishment of those responsible for criminal behavior. Within a human rights framework, investigations must always be carried out when there is an alleged violation of the right to life.³⁰ One of the main problems lies within the difficulties of fact-finding. As one participant noted, the UNODA Study can be instructive to concretise steps that may be of assistance in establishing accountability frameworks. The UNODA recommended a non-exhaustive list of examples of what could be required were states to aim for a mechanism to increase accountability, transparency and oversight. Those were the following:

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²⁸ Alston Report, para. 36.

²⁹ United Nations Office of Disarmament Affairs, Study on Armed Unmanned Aerial Vehicles, October 2015, available at: <https://www.un.org/disarmament/publications/more/drones-study/> (hereinafter: UNODA Study), p. 53.

³⁰ See for instructional purposes on the explicit investigation requirements under Article 2 ECHR, ECtHR, Grand Chamber, *Case of McCann and Others v. The United Kingdom (Application No. 18984/91)*, ‘Judgment’, 27 September 1995, available at: <http://hudoc.echr.coe.int/eng?i=001-57943>. See also the CAVV report, p. 23: “[A]ny alleged violation of the right to life by the security services or other state organs must be investigated at national level.”

- a. Information regarding the legal framework, national laws and policies that a State applies to specific situations in which an armed UAV may be used. This information could include interpretations of key legal terms.
- b. Information regarding processes for accountability in place to ensure that a State can undertake appropriate investigation into allegations of violations to the right to life and credible allegations of war crimes. This information could be provided by States conducting and facilitating targeted strikes, as well as by States affected by them.
- c. Information regarding the legal basis for each use of force, including a determination as to whether a strike conformed to applicable international law, national laws and policies and rules of engagement.
- d. Operational information for targeted strikes, including without prejudice to national security:
 - i. The location of the strike, identity and affiliation of the intended target;
 - ii. Information regarding the criteria used to select targets and a description of evidence used as a basis for authorising the use of force;
 - iii. Disaggregated information on the number of casualties, including civilians;
 - iv. Information on the weapon system used in the attack.
- e. Publication of the results of investigations or fact-finding assessments pertaining to allegations of violations to the right to life and credible allegations of war crimes. This information could also specify the steps taken to remedy violations, including compensation to victims, and to assist affected civilians.³¹

4. Assistance in Carrying Out Drone Strikes

During the third session, experts discussed issues surrounding scenarios where a state aids or assists in carrying out the drone strikes of another state. Indeed, a number of EU Member States have refrained from using armed drones to carry out targeted killings yet have shared intelligence or otherwise provided assistance that helped others to conduct drone strikes.

Notably, a number of EU Member States have used unarmed drones to gather intelligence during surveillance or reconnaissance missions, and thereby provided assistance to the targeted killings of individuals by the US and others. For example, with respect to the ongoing aerial campaign against the so-called “Islamic State” (IS), Italy

³¹ UNODA Study, pp. 58-59. Additionally, the UNODA study states: “To increase accountability and oversight for any use of UAVs to conduct targeted strikes outside areas of active hostilities resulting in credible allegations of violations of the right to life or allegations of war crimes, a mechanism could provide means for cooperation between States conducting strikes and States affected by strikes. Such cooperation could include the establishment of terms of reference, which could provide for, inter alia, adequate access to the locations of strikes for the purpose of conducting investigations as well as the provision of reparations and other forms of assistance to victims and survivors.” Ibid., p. 59.

has reportedly contributed two unarmed Predator drones with the purpose of gathering intelligence and identifying possible targets,³² while Germany sent Tornado jets for the same purpose.³³ Another example of intelligence gathering and sharing has been given by Denmark. In October 2012, it was revealed that Morten Storm, a Danish double agent who had infiltrated al Qaeda, had been sharing intelligence with the CIA. Storm had notably collected and shared information on the whereabouts of Anwar al-Awlaki, who was later killed by a US drone strike in Yemen in 2011.³⁴ Additionally, other EU Member States have reportedly facilitated drone strikes by allowing other states to use their air bases or air space.³⁵

The session focused on clarifying how international law, and in particular human rights law and the law of state responsibility, can address these scenarios of providing assistance to carrying out drone strikes. The experts noted that, to their knowledge, there had been no successful victim-related claim against an assisting state,³⁶ but mentioned that a number of cases were currently ongoing. For instance, in the Netherlands, a claim has been brought by victims of a US drone strike in Somalia for which intelligence collected by the Dutch was reportedly used.³⁷

As a starting point, experts referred to Article 16 of the ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, which provides that “[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”³⁸ The commentaries to the Draft articles specify that responsibility is only engaged if the State providing assistance “intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct”³⁹ of the other State. As explained by the CAVV, “third states that assist armed drone operations that contravene international law may be held

³² G. Di Feo, ‘Cosi i droni italiani spiano i covi del Califfo’, *L’Espresso*, 10 December 2015, <http://espresso.repubblica.it/plus/articoli/2015/12/10/news/esclusivo-espresso-cosi-droni-italiani-spiano-il-califfo-1.242989>.

³³ ‘German Tornado jets begin mission against “IS”’, *Deutsche Welle*, 8 January 2016, <http://www.dw.com/en/german-tornado-jets-begin-mission-against-is/a-18967667>.

³⁴ P. Cruickshank and T. Lister, ‘Fallout so far from Danish spy’s dramatic revelations’, *CNN*, 19 September 2014, <http://edition.cnn.com/2014/09/17/world/agent-morten-storm/>; O. Borg, ‘The Double Agent Who Infiltrated Al Qaeda’, *Newsweek*, 10 February 2013, <http://www.newsweek.com/double-agent-who-infiltrated-al-qaeda-63259>.

³⁵ See, for instance, S. Kirchgassner, ‘Italy to allow US drones to fly out of Sicily air base for attacks on Isis’, *The Guardian*, 22 February 2016 <http://www.theguardian.com/us-news/2016/feb/22/italy-us-military-drones-isis-libya-sicily-base>; ‘A War Waged From German Soil: US Ramstein Base Key in Drone Attacks’, *Spiegel Online*, 22 April 2015, <http://www.spiegel.de/international/germany/ramstein-base-in-germany-a-key-center-in-us-drone-war-a-1029279.html>.

³⁶ See for instance, the case brought before German courts by Faisal bin Ali Jaber and other relatives of victims of a US drone strike in Yemen, alleging that Germany assisted in the strike by allowing the US to relay drone data via the Ramstein airbase (K. Connolly, ‘Court Dismisses Claim of German Complicity in Yemeni Drone Killings’, *The Guardian*, 27 May 2015, <http://www.theguardian.com/world/2015/may/27/court-dismisses-yemeni-claim-german-complicity-drone-killings>); and the case brought before British courts by Noor Khan, the son of a victim of a US drone strike in Pakistan, alleging that the UK assisted in the strike by providing the US with intelligence concerning the location of individuals targeted (‘Judges Reject Case over UK Role in US Drone Strikes’, *BBC News*, 20 January 2014, <http://www.bbc.com/news/uk-25809756>).

³⁷ H. Modderkolk and M. Eftting, ‘Somali Victims of US Drone Strike Take Legal Action against The Netherlands’, *De Volkskrant*, 28 November 2015, <http://www.volkskrant.nl/buitenland/somali-victims-of-us-drone-strike-take-legal-action-against-the-netherlands~a4196845/>.

³⁸ ILC, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts’ (2001) General Assembly Resolution 56/83 of 12 December 2001, Annex, UN Doc A/RES/56/83; Report of the ILC on the Work of its fifty-third Session (2001) UN GAOR 56th Session Suppl. no 10 (A/56/10).

³⁹ ILC, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001) Report of the ILC on the Work of its fifty-third Session (2001), UN GAOR 56th Session Suppl no 10 (A/56/10), commentary to Art. 16, para. 5.

responsible”⁴⁰ under this provision, but “[t]he requirements of article 16 are strict.”⁴¹ Under the requirement of knowledge, “[t]he information-sharing state must be aware of the fact that the operating state is pursuing a policy of targeted killing that contravenes international law”.⁴²

Experts debated the precise contours of Article 16, which – participants agreed – are unclear. First and foremost, the requirement of intent was seen as particularly problematic. Several experts considered that it poses a significant impediment to holding assisting states responsible, as it is close to impossible to demonstrate such subjective intent with regard to the acts of a state. Besides, participants suggested that, as a matter of policy, the threshold of intent was too high, and that situations where an assisting state did not have the specific intention to facilitate a targeted killing should not be excluded.

Further, experts debated the extent to which Article 16 reflected customary law, with some agreeing with the International Court of Justice (ICJ) that it does,⁴³ while others expressed reservations as to whether the particular requirements of Article 16 could be grounded in practice and *opinio juris*.⁴⁴ In any case, participants agreed that, due to the difficulty to prove that its strict requirements are met, the provision could hardly be relied on for litigation. It was noted that, in practice, specific primary rules are often referred to, in addition to, or instead of, Article 16.⁴⁵ Overall the discussion pointed to a relatively limited practical value of Article 16 to address aid or assistance to states carrying out drone strikes.⁴⁶

The debate then turned to IHRL, and in particular to the framework of the ECHR, by which all EU Member States are bound. Indeed, the ECtHR developed case law under which a state party to the ECHR that facilitated the wrongful act of another state can be found to be in breach of its human rights obligations.⁴⁷ The case of *El-Masri*⁴⁸ was presented as a typical illustration of this jurisprudence. The case concerned an individual who had been tortured by the CIA with the complicity of Macedonia. Although the main wrongful conduct had been committed by the US, the ECtHR held that Macedonia had breached its own obligations under the ECHR by “fail[ing] to take reasonable steps to avoid a risk of ill-treatment [by the US] about which they knew or ought to have known”.⁴⁹ The reasoning of the ECtHR is as follows:

The obligation on Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with [substantive rights

⁴⁰ CAVV Report, p. 5.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ‘Judgment’, 26 February 2007, para. 420. See also: H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2013).

⁴⁴ See also: V. Lanovoy, ‘Complicity in an Internationally Wrongful Act’, in: A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014), pp. 134-168.

⁴⁵ See also: O. Corten, ‘La Complicité Dans Le Droit de La Responsabilité Internationale: Un Concept Inutile?’ (2011) 57 *Annuaire français de droit international* 57.

⁴⁶ See also: N. Nedeski, ‘Facilitating Drone Strikes: Sharing Responsibility for Sharing Intelligence’, *SHARES Blog*, 3 April 2014, <http://www.sharesproject.nl/facilitating-drone-strikes-sharing-responsibility-for-sharing-intelligence/>.

⁴⁷ See: M. den Heijer, ‘Shared Responsibility Before the European Court of Human Rights’ 60(3) *Netherlands International Law Review* 411 (2013).

⁴⁸ ECtHR, Grand Chamber, *Case of El-Masri v The Former Yugoslav Republic of Macedonia (Application No. 39630/09)*, ‘Judgment’, 13 December 2012.

⁴⁹ *Ibid.*, para. 198.

such as] Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to [human rights violations such as] torture or inhuman or degrading treatment.⁵⁰

In other words, under the ECHR, the obligation of states to secure human rights within their jurisdiction, taken in conjunction with the rights guaranteed by the ECHR, includes the obligation not to facilitate human rights violations committed by others and of which the state is or should be aware.

Experts discussed how this line of case law would apply to situations of aid or assistance to carrying out drone strikes. As a preliminary remark, it was noted that such human rights provisions addressing complicity qualify as *lex specialis* that can be used in alternative to the general rule enshrined in Article 16.⁵¹ Further, experts pointed out that, under the ECHR case law, it is sufficient to demonstrate constructive knowledge, that is, to show that a state “should have known” that its assistance was used for unlawful acts. This condition is significantly lower than the threshold of Article 16, as it neither requires demonstrating an intent to assist in a drone strike, nor proving actual knowledge that the assistance was used to commit unlawful drone strikes.

Experts insisted that this was particularly relevant, given that in practice states accused of complicity in drone strikes have often advanced the argument that they were not aware of whether and how their assistance was used to carry out drone strikes, or that they did not possess enough information to determine that they were facilitating unlawful strikes. For instance, Germany stated that it had “no reliable information” on whether the US carried out drone strikes via German soil.⁵² It was later revealed that Germany could not have ignored that the US military base of Ramstein – located in Germany – was used to relay data to the drones, and in this respect was essential to the strikes.⁵³ The Dutch case was also mentioned, where the Netherlands claimed it had no evidence that Dutch information was used to carry out acts contrary to international law.⁵⁴ It appears that, before the ECtHR, states cannot simply put forward a lack of knowledge in order to escape responsibility.

From there, experts discussed the extent to which there exists a duty of due diligence for third states. Indeed, if constructive knowledge can engage responsibility, it can be implied that states have a duty to obtain information. In the view of several participants, states must take steps to request information on how their assistance is used, and cannot merely turn a blind eye and claim ignorance.

In the same vein, experts mentioned that in practice a number of states have asked for guarantees and developed conditional policies on the modalities under which their assistance is to be used. For instance, in February 2016, Italy allowed US drones engaged in operations in Libya to depart from one of its military base, but only for

⁵⁰ Ibid.

⁵¹ ILC, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001), *supra* n. 39, Art. 55 and accompanying commentary, and commentary to Art. 16, para. 2.

⁵² K. Biermann, ‘Wie die Regierung Parlament und Bürger täuscht’, *Zeit Online*, 26 April 2015,

<http://www.zeit.de/politik/deutschland/2015-04/drohnen-krieg-ramstein-toetung-bundesregierung/komplettansicht>

⁵³ ‘A War Waged From German Soil: US Ramstein Base Key in Drone Attacks’, *Spiegel Online*, 22 April 2015,

<http://www.spiegel.de/international/germany/ramstein-base-in-germany-a-key-center-in-us-drone-war-a-1029279.html>

⁵⁴ ‘Hennis herhaalt: Nederland werkt niet mee aan illegale drone-aanvallen’, *Trouw*, 24 April 2014,

<http://www.trouw.nl/tr/nl/4500/Politiek/article/detail/3640863/2014/04/24/Hennis-herhaalt-Nederland-werkt-niet-mee-aan-illegale-drone-aanvallen.dhtml>

“defensive missions and not offensive action”.⁵⁵ Under this conditional agreement, “Italy will decide whether to authorise drone departures from the Sigonella air base in Sicily case by case, and only if each mission’s aim is to protect personnel on the ground.”⁵⁶ Some experts however submitted that providing assistance on the somehow general condition that it should not be used to carry out unlawful acts might not be enough, and that transparency was there again key. Other participants considered that this increasing practice pointed at a laudable move towards accountability of European states for their assistance, an issue that can be brought to court more easily than allegations directed at states carrying out drone strikes, like the US.

It was mentioned that, beyond the ECHR and Europe, a similar framework exists under other human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), which contains the obligation to ensure respect for human rights.⁵⁷ Further, a parallel was drawn with common Article 1 to the Geneva Conventions, which also provides for the obligation to ensure respect for humanitarian law, and has also been interpreted as including an obligation not to assist in violations of humanitarian law by other states.⁵⁸ With regards to assistance under common Article 1, a US government recognised that “[a]s a matter of international law, we would look to the law of State responsibility and our partners’ compliance with the law of armed conflict in assessing the lawfulness of our assistance to [...] those military partners.”⁵⁹

Experts agreed that the ECHR framework could be a step forward towards accountability for third states, yet noted that difficulties remained due to the lack of transparency. In the view of many participants, the limited information available regarding operations entrenched in secrecy remains a big hurdle. On the other hand, following up on the discussion in Session 2 (Section 3 of this report) of the duty to investigate and the right to an effective remedy, experts noted that, in *El-Masri*, the ECtHR alluded to the idea that victims, and possibly the general public, have a right to truth, whereby states cannot invoke concepts such as state secrets to “obstruct the search for the truth” when prosecuting violations.⁶⁰ In that case, the ECtHR noted “the great importance of the [...] case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.”⁶¹ At the same time, participants recalled that the ECHR framework comes with a significant limitation: it only applies if the state assisting in carrying out a drone strike can be said to have jurisdiction over the territory or person concerned, which might be difficult to establish in scenarios where assistance is provided from a distance, such as by information sharing.

⁵⁵ ‘Italy agrees to let anti-ISIS drones depart from Sicily’, *Al Arabiya*, 23 February 2016, <http://english.alarabiya.net/en/News/middle-east/2016/02/23/Italy-agrees-to-let-anti-ISIS-drones-depart-from-Sicily.html>.

⁵⁶ *Ibid.*

⁵⁷ Article 2 ICCPR.

⁵⁸ ICRC, ‘Commentary to Article 1’, Updated Commentary on the First Geneva Convention, 2016, available at: <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD> (last accessed 6 June 2016), para. 154: “High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict.”

⁵⁹ US Legal Adviser Brian J. Egan Remarks to the American Society of International Law, ‘International Law, Legal Diplomacy, and the Counter-ISIL Campaign’, 1 April 2016, <http://www.state.gov/s//releases/remarks/255493.htm>. See: O. Hathaway and Z. Manfred, ‘The State Department Adviser Signals a Middle Road on Common Article 1’, *Just Security*, 12 April 2016, <https://www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/>.

⁶⁰ ECtHR, Grand Chamber, *Case of El-Masri v The Former Yugoslav Republic of Macedonia (Application No. 39630/09)*, ‘Judgment’, 13 December 2012, para. 191.

⁶¹ *Ibid.*

In conclusion, experts suggested that specific primary rules such as enshrined in the ECHR are not without difficulties yet could be easier to apply than Article 16, and that domestic courts and norms could also have a role to play.

5. Final Observations and Policy Recommendations

The authors would like to conclude this report by sharing the following final observations and policy recommendations.

Need for information and possible ways to obtain it:

- Even though IHL was not the focus of the expert meeting and of this report, there is still an important link between IHRL and IHL. For instance, states may claim the existence of an armed conflict situation, including its more permissive legal framework in terms of targeted killing (IHL), whereas especially human rights organisations may challenge this, arguing that no armed conflict is present, and thus that targeted killings are regulated by the very strict IHRL standards (and legally fairly impossible). Hence, before even looking at the IHRL processes in the context of targeted killings, it is important to obtain more clarity first on the geographical and temporal limitations of the concept of armed conflict, since this will determine the applicable legal frameworks. Although one may not agree with it, the US is clear that it uses an expansive understanding of the application of IHL, and does not accept that IHRL governs its use of force for counter-terrorism operations.⁶² However, many other countries remain completely silent on this issue. What is needed therefore are the views from other states, whose legal analyses and their compliance with international law subsequently have to be assessed.
- In addition to a lack of legal analyses and positions, there is also a lack of basic factual information regarding drone strikes. More should be done to allow for access to facts, including access to strike areas and other relevant information.⁶³
- The EU, for instance via the European Parliament, could assist in bringing states together to discuss these matters.⁶⁴ This could elicit the much wished-for information and perhaps even a Common Position. As posited before,⁶⁵ the authors also feel there is also a role for the Netherlands and The Hague, the International City of Peace and Justice, in this context.
- Another way to elicit information, besides reports from Parliamentary Committees, such as the recent UK Parliament Joint Committee on Human

⁶² More clarity has been provided on 1 July 2016, when the US Government issued an Executive Order on the 'United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force', <https://www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>. Nevertheless, criticism has already been voiced by human rights organisations, see e.g., J. Dorsey, 'Obama drone order falls short', *PAX*, 15 July 2016, <http://www.paxforpeace.nl/stay-informed/news/obama-drone-order-falls-short>.

⁶³ In this context, the 'Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities', <https://www.dni.gov/index.php/newsroom/reports-and-publications/214-reports-publications-2016/1392-summary-of-information-regarding-u-s-counterterrorism-strikes-outside-areas-of-active-hostilities>, also issued on 1 July 2016, should be mentioned.

⁶⁴ See e.g., the European Parliament Subcommittee on Security and Defence's public hearing 'The use of drones and the fight against terrorism - the impact on human rights', 30 June 2016, <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20160630-0900-COMMITTEE-SEDE>.

⁶⁵ Dorsey and Paulussen 2015, p. 69.

Rights' report,⁶⁶ is through litigation against states. Indeed, when challenged in court, states *must* take a position and provide information. Moreover, this can serve to give a face to the victims of drone attacks, who have often been forgotten. This avenue should be explored further at the domestic level.

- At the same time, it may also be that states may not have developed any position at all. States are urged to publicly take a position, firmly grounded in international law, instead of waiting to interpret the legal framework until a later moment.

Challenges for the discussion on the use of armed drones itself:

- Once the first and main hurdle of obtaining information about drone strikes has been overcome, the application of the law to the facts is the next challenge. In this discussion and application, there is a pressing need to be precise. Terms and definitions do matter, as this paper has also shown.
- Much of the discussion will also revolve around understanding the technical aspects of the use of drones. The input of private companies is indispensable in this process. In general, there is a need for a multifaceted approach and a bundling of expertise.

Legal challenges and recommendations:

- There is a general consensus that IHRL only allows for targeted killing in an extremely limited number of cases, but the question was raised whether this might not lead to IHRL undermining its own utility. However, it appears that the ECtHR gives states a greater degree of latitude in how they implement certain obligations under the Convention when faced with various practical difficulties and exceptional circumstances. This could even be the case in the context of extraterritorial use of force against an "imminent" threat to life. The authors feel this might be a dangerous path to walk; it runs the risk of further eroding a system which is for very good reasons as strict as it is. However, if the ECtHR nonetheless adopts such a stance in the context of extraterritorial use of force against an "imminent" threat, the authors agree with the expert mentioned earlier that there then has to be a compensation factor in terms of more transparency and oversight mechanisms, as well as strong safeguards to increase the certainty a state has when assessing the nature and imminence of the threat. However, the authors would like to stress again that this should not be necessary in the first place. IHRL will always allow to take action in the real emergency situations, when there is a direct and immediate threat of serious violence. Hence, the authors feel IHRL can in fact be effective, useful, and able to respond to urgent security issues and should thus remain untouched as much as possible.
- When there is an alleged violation of the right to life, an effective investigation should be carried out, regardless of whether there is a complainant. An effective investigation requires that the investigation be thorough, independent and

⁶⁶ See UK Parliament, Joint Committee on Human Rights, 'Government must clarify legal case for lethal drone strikes outside armed conflict', 10 May 2016, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/drones-report-published-15-16/>.

impartial, prompt and expeditious, accessible to family participation and open to public scrutiny, and capable of identifying the perpetrator. There is a lack of an overall picture of relevant actors in order to thoroughly carry out investigations, but this can be remedied by putting a list – such as that suggested by the UNODA Study – in place to standardise and streamline the process of investigation.

- Human rights have a role to play in scenarios of assistance to the carrying out of drone strikes. The duty to secure human rights includes the obligation not to facilitate unlawful drone strikes, therefore European states participating indirectly in targeted killings can be held responsible for human rights violations.
- States should carefully consider information sharing and other forms of assistance. In the ECHR framework, states cannot merely turn a blind eye and pretend not to know anything. The more details of the US' targeted killings program and the role of European states become public knowledge, the more it will be presumed that states could not have not known (constructive knowledge).⁶⁷
- A progressive move towards the emergence of a duty of due diligence can be observed. States not only have the negative duty not to actively facilitate drone strikes, but also the positive duty to take steps to make sure that they do not indirectly assist in targeted killings.

⁶⁷ ECtHR, Grand Chamber, *Case of El-Masri v The Former Yugoslav Republic of Macedonia* (Application No. 39630/09), 'Judgment', 13 December 2012, para. 218.

Annex

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3. Ian Seiderman, International Commission of Jurists
4. Christian Behrmann, European External Action Service
5. Terry Gill, University of Amsterdam/Netherlands Defence Academy
6. Marcel Brus, University of Groningen
7. Lisa Klingenberg, Open Society Foundations
8. Srdjan Cvijic, Open Society Foundations
9. Jonathan Horowitz, Open Society Foundations
10. Jelena Pejic, ICRC (observer)
11. Arcadio Díaz Tejera, former rapporteur, Council of Europe
12. Irmina Pacho, Helsinki Foundation for human Rights
13. Avner Gidron, Amnesty International
14. William Schabas, Middlesex/Leiden University
15. Kat Craig, Reprieve
16. Jennifer Gibson, Reprieve
17. Göran Sluiter, Prakken d'Oliveira
18. Harriet Moynihan, Chatham House
19. Wim Zwijnenburg, PAX
20. Jessica Dorsey, PAX /ICCT
21. Eva Entenmann, ICCT
22. Marco de Swart, ICCT
23. Bérénice Boutin, T.M.C. Asser Instituut/ICCT
24. Onur Güven, T.M.C. Asser Instituut
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