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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

OPINION OF THE CAHDI

**on Recommendation 2069 (2015) of the Parliamentary Assembly
of the Council of Europe – “Drones and targeted killings: the need
to uphold human rights and international law”**

50th meeting
Strasbourg, 24-25 September 2015

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OPINION OF THE CAHDI

ON RECOMMENDATION 2069 (2015) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “DRONES AND TARGETED KILLINGS: THE NEED TO UPHOLD HUMAN RIGHTS AND INTERNATIONAL LAW”

1. On 12-13 May 2015, the Ministers' Deputies communicated Recommendation 2069 (2015) of the Parliamentary Assembly of the Council of Europe (see Appendix I) to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments. The Ministers' Deputies also communicated this Recommendation to the Steering Committee for Human Rights (CDDH).
2. The CAHDI examined the abovementioned Recommendation at its 50th meeting (Strasbourg, 24-25 September 2015) and made the following comments which concern aspects of the recommendation which are of particular relevance to the terms of reference of the CAHDI.
3. From the outset, the CAHDI points out that it will use the terms “unmanned aerial vehicle” (UAV) within this Opinion to refer to the so-called “drones”. Furthermore, the CAHDI notes that a distinction has to be made between armed and unarmed UAVs. While the use of unarmed UAVs for intelligence, surveillance, target identification and reconnaissance operations is not a new phenomenon, the use of armed UAVs is more recent and has greatly increased in the past years. Furthermore, the CAHDI notes that another distinction should be made between the use of UAVs during armed conflict and outside an armed conflict. The CAHDI points out that there is a broad agreement that armed UAVs themselves are not illegal weapons and notes that relevant rules of international law regulating the use of force and the conduct of hostilities as well as of international human rights law apply to the use of UAVs. Nevertheless, the CAHDI points out that different views have been expressed in the international community concerning the interpretation or application of these rules.
4. In view of addressing these issues raised by the increasing use of armed UAVs, the CAHDI refers to the efforts of the international community in this regard. It notes that wide academic literature has been developed and that armed UAVs have been debated in various forums of the United Nations, intergovernmental bodies and national Governments and courts.
5. In particular, the CAHDI notes that two reports have been submitted by Mr Ben Emmerson, *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, respectively on 18 September 2013 to the United Nations General Assembly¹ and on 10 March 2014 to the Human Rights Council², in which Mr Emmerson examines the use of armed UAVs in extraterritorial lethal counter-terrorism operations, including in the context of asymmetrical armed conflicts, and allegations that the increasing use of armed UAVs has caused a disproportionate number of civilian casualties. The CAHDI also takes note of the report submitted by Mr Christof Heyns, *Special Rapporteur on extrajudicial, summary or arbitrary executions* on 13 September 2013 to the United Nations General Assembly³, in which Mr Heyns focuses on the use of lethal force through armed UAVs from the perspective of protection of the right to life. In these three reports, the Special Rapporteurs examine the ways in which the constituent regimes of international law, including international human rights law, international humanitarian law and the law on inter-State use of force are applicable to the use of armed UAVs. They make conclusions and recommendations, notably to the United Nations and in particular their

¹ The *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* submitted to the United Nations General Assembly is available at the following link (document [A/68/389](#)).

² The *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* submitted to the Human Rights Council is available at the following link (document [A/HRC/25/59](#)).

³ The *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* submitted to the United Nations General Assembly is available at the following link (document [A/68/382](#)).

Human Rights Council, to States using armed UAVs, States on whose territory armed UAVs are used as well as other actors.

6. Furthermore, the CAHDI notes that the Human Rights Council, in Resolution 25/22 of 24 March 2014 has urged States *“to ensure that any measures employed to counter terrorism, including the use of remotely piloted aircraft or armed drones, comply with their obligations under international law, including the Charter of the United Nations, international human rights law and international humanitarian law, in particular the principles of precaution, distinction and proportionality”*. Pursuant to this Resolution, the Human Rights Council decided to organise on 22 September 2014 an interactive panel discussion of experts in order to examine issues related to ensuring the use of armed UAVs in counterterrorism and military operation in accordance with international law, including international human rights and humanitarian law. In addition, in Resolution 28/3 of 19 March 2015, the Human Rights Council has decided to *“[invite] the United Nations High Commissioner for Human Rights and relevant special procedures of the Human Rights Council and the human rights treaty bodies to pay attention, within the framework of their mandates, to violations of international law as result of the use of remotely piloted aircraft or armed drones”* as well as to remain seized of the matter.

7. As it also appears in the abovementioned reports and resolutions, the CAHDI agrees that given the fact that the number of States with the capacity to use armed UAVs is likely to increase, a greater consensus on the terms of their use should be reached in order to ensure compliance with public international law. In this regard, the CAHDI underlines that for a particular armed UAV strike to be lawful under international law, it must satisfy the relevant and applicable requirements under the law applicable for the use of inter-State force, international humanitarian law and international human rights law.

8. Concerning the law applicable for the use of inter-State force, the CAHDI recalls that under the United Nations Charter and customary international law, States are prohibited from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

9. With regard to the applicable legal regimes, the CAHDI underlines that even if there is a valid legal basis for the use of force, a UAV strike may, depending on the circumstances, still be deemed unlawful under international humanitarian law and/or international human rights law.

10. Concerning international humanitarian law applicable during armed conflict, the CAHDI recalls that all attacks on persons and/or objects are subject to the rules on conducting hostilities. In particular, in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. More specifically, those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives. Furthermore, precautions should also be taken in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

11. Concerning international human rights law, the CAHDI recalls the case-law of the European Court of Human Rights, according to which, consistently with the case-law of the International Court of Justice, *“even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law”*⁴.

12. In conclusion, the CAHDI finds that many legal issues raised by the increasing use of armed UAVs need to be addressed. The CAHDI considers that the subsequent examination of these issues within the Council of Europe should take into account the work of the United Nations

⁴ *Eur. Court HR, Hassan v. the United Kingdom*, judgment of 16 September 2014, application no. 29750/09, para. 104.

as well as of the International Committee of the Red Cross (ICRC). The CAHDI is willing to examine these issues in greater depth and keep the issue on its agenda, but the CAHDI considers that the drafting of guidelines would not be the best way forward.

APPENDIX I**RECOMMENDATION 2069 (2015) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “DRONES AND TARGETED KILLINGS: THE NEED TO UPHOLD HUMAN RIGHTS AND INTERNATIONAL LAW”^{1 2}**

1. The Parliamentary Assembly, referring to Resolution 2051 (2015)³ on drones and targeted killings: the need to uphold human rights and international law, invites the Committee of Ministers to undertake a thorough study of the lawfulness of the use of combat drones for targeted killings and, if need be, draft guidelines for member States on targeted killings, with special reference to those carried out by combat drones. These guidelines should reflect States' obligations under international humanitarian and human rights law, in particular the standards laid down in the European Convention on Human Rights (ETS No. 5), as interpreted by the European Court of Human Rights.

¹ Adopted by the Parliamentary Assembly of the Council of Europe on 23 April 2015 (Second part-session).

² The report of the Rapporteur of the Parliamentary Assembly of the Council of Europe, Mr Arcadio Díaz Tejera is available at the following [link](#).

³ Resolution 2051 (2015) appears as Appendix II to the present document.

APPENDIX II

RESOLUTION 2051 (2015) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “DRONES AND TARGETED KILLINGS: THE NEED TO UPHOLD HUMAN RIGHTS AND INTERNATIONAL LAW”¹

1. The Parliamentary Assembly considers that the use of armed drones for targeted killings raises serious questions in terms of human rights and other branches of international law.
2. The Assembly notes that several member States and States enjoying observer status with the Council of Europe or the Parliamentary Assembly have used combat drones as weapons of war or for carrying out targeted killings of people suspected of belonging to terrorist groups in a number of countries, including Afghanistan, Pakistan, Somalia and Yemen.
3. Several Council of Europe member States have purchased combat drones or are considering doing so, or have shared intelligence with States using combat drones for targeted killings, thus assisting them in carrying out drone attacks. Furthermore, the United States of America is provided with transmission stations in the territories of Council of Europe member States that play an indispensable role in the execution of drone attacks.
4. Armed drones allow for the carrying out of attacks remotely, without placing the attacker's own personnel at risk of injury or capture. The ability of drones equipped with powerful sensors to loiter over a potential target for some time enables the decision on launching a strike to be based on particularly precise and up-to-date information. These advantages have contributed to lowering the threshold for intervention and increasing the number of drone strikes in recent years. At the same time, the increased precision of drone strikes provides the opportunity to improve compliance with international humanitarian and human rights law.
5. The Assembly is alarmed at the high number of lethal drone attacks, which have also caused considerable unintended collateral damage to non-combatants, in contrast with the “surgical” nature of such strikes claimed by those launching them. The constant fear of drone attacks engendered by strikes hitting schools, weddings and tribal assemblies has disrupted the life of traditional societies in the countries of operation.
6. Drone strikes raise serious legal issues, which differ depending on the circumstances in which the strikes are launched:
 - 6.1. national sovereignty and the respect for territorial integrity under international law forbid military interventions of any kind on the territory of another State without valid authorisation by the legitimate representatives of the State concerned. Military or intelligence officials of the State concerned tolerating or even authorising such interventions without the approval or against the will of the State's representatives (in particular the national parliament) cannot legitimise an attack; exceptions from the duty to respect national sovereignty can arise from the principle of the “responsibility to protect” (for example in the fight against the terrorist group known as “IS”), in accordance with the principles of the Charter of the United Nations and international law;
 - 6.2. under international humanitarian law, which applies in situations of armed conflict, only combatants are legitimate targets. In addition, the use of lethal force must be militarily necessary and proportionate and reasonable precautions must be taken to prevent mistakes and minimise harm to civilians;
 - 6.3. under international human rights law, which generally applies in peacetime, but whose application has permeated also into situations of armed conflict, an intentional killing

¹ Adopted by the Parliamentary Assembly of the Council of Europe on 23 April 2015 (Second part-session).

by State agents is only legal if it is required to protect human life and there are no other means, such as capture or non-lethal incapacitation, of preventing that threat to human life;

6.4. in particular, under Article 2 – Right to life – of the European Convention on Human Rights (ETS No. 5), as interpreted by the European Court of Human Rights, the deprivation of the right to life can only be justified if absolutely necessary for the safeguarding of the lives of others or the protection of others from unlawful violence. Article 2 also requires timely, full and effective investigations to hold to account those responsible for any wrongdoing;

6.5. in order to justify a wider use of targeted killings, the concept of “non-international armed conflict” has been extended by some countries so as to include numerous regions across the world as “battlespaces” of the “global war on terror”. This threatens to blur the line between armed conflict and law enforcement, to the detriment of the protection of human rights.

7. Despite some recent progress due to successful court challenges, in particular by the American media, attacks by combat drones are still largely shrouded in secrecy. This relates to both the actual outcome of individual attacks, including the extent of any collateral damage, and the decision-making process for targeting individuals and balancing potential harm to non-combatants.

8. The Assembly calls on all member and observer States, as well as States whose parliaments have observer status with the Assembly, to:

8.1. scrupulously respect the limits placed on targeted killings under international law and international humanitarian and human rights law, in particular with respect to the use of combat drones;

8.2. lay down clear procedures for authorising strikes, which must be subject to constant supervision by a high-level court and ex post evaluation by an independent body;

8.3. avoid broadening the concept of “non-international armed conflict” by continuing to respect established criteria, including the requisite degree of organisation of non-State groups and a certain degree of intensity and localisation of violence. Also, US drone strikes facilitated by transmission co-operation on the territory of member States must be investigated by the member States themselves, so as to ensure compliance with Article 2 of the European Convention on Human Rights;

8.4. fully and effectively investigate all deaths caused by armed drones in order to hold to account those responsible for any wrongdoing and to compensate any victims of wrongful attacks or their relatives;

8.5. publish the criteria and procedures used for targeting individuals and the results of the investigations carried out into deaths caused by the use of combat drones;

8.6. refrain from using, or providing intelligence information or other input for:

8.6.1. any automated (robotic) procedures for targeting individuals based on communication patterns or other data collected through mass surveillance techniques;

8.6.2. “signature strikes” not based on the precise identification of a targeted person, but on the target’s pattern of behaviour (except in situations of armed conflict, provided the rules of international humanitarian law are respected);

8.6.3. “double-tap strikes”, involving a second strike targeting first responders (for example persons providing medical assistance to the victims of a first strike).

9. The Assembly urges the Secretary General of the Council of Europe to initiate a procedure under Article 52 – Inquiries by the Secretary General – of the European Convention on Human Rights to request information on the manner in which State Parties implement the provisions of the Convention concerning the right to life, with particular reference to their own drone weaponising programmes, and their co-operation with American programmes through the sharing of information, and the facilitation of targeted killings by drones.