

# Enhancing the Implementation of the State's Duty to Investigate Targeted Killings In the Case-Law of the European Court of Human Rights and American Court of Human Rights

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«This is not a war on drugs, but a war on the poor. Often on the flimsiest of evidence, people accused of using or selling drugs are being killed for cash in an economy of murder»

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**Summary:** I. INTRODUCTION. II. THE PHENOMENON OF TARGETED KILLINGS IN ITS HISTORICAL DIMENSION. III. THE PHENOMENON OF TARGETED KILLINGS IN ITS LEGAL AND SOCIAL DIMENSIONS. IV. THE INTERNATIONAL LEGAL STANDARDS ON THE INVESTIGATION OF TARGETED KILLINGS. V. The Two Major Human Rights Systems of Adjudication. 1. The ECHR System of Human Rights Protection. A. Right under the ECHR Convention. B. The Duty to Investigate Targeted Killings in the Case-Law of the ECtHR. 2. The ACHR System of Human Rights Protection. A. Rights Under the ACHR. B. The State's Duty to Investigate Targeted Killings in the Case-Law of the ACtHR. VI. THE EUROPEAN AND INTER AMERICAN COURTS OF HUMAN RIGHTS SHOULD USE THE UNITED NATIONS PRINCIPLES AND THE PROTOCOL OF MINNESOTA FOR ASSESSING COMPLIANCE WITH THE STATE'S OBLIGATION TO INVESTIGATE TARGETED KILLINGS. 1. The European and Inter-American Courts Fail to Provide That the State's Duty to Investigate Targeted Killings is Not Necessarily Triggered by a Formal Complaint to the Police. 2. The European and Inter-American Courts' Approach Fail to Provide Practical Guidance on How Crime Scene and Forensic Investigations Should Be Conducted in Cases of Potentially Unlawful Deaths. VII. FURTHER CONCLUDING RECOMMENDATIONS: THE ECtHR SHOULD CHANGE ITS ATTITUDE TOWARDS THE BURDEN OF PROOF IN TARGETED KILLING CASES.

## I. INTRODUCTION

The starting point of this paper is based on a basic assumption and on two observations: the basic assumption is that public international law, since the World War II (WWII), has developed several mechanisms to limit killings in general, including most recently targeted killings by drones.<sup>1</sup>

<sup>1</sup> *Amplius*, see OTTO, R., *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law*, Springer, 2012, 3 et seq; FARER, T. J. and BERNARD, F., «Killing by Drone: Towards Uneasy Reconciliation with the Values of a Liberal State», *Human*

The two observations are that these mechanisms assume the form of vigorous protections for the fundamental right to life under international human rights law and of safeguards against the inter-state use of force while allowing sovereign states to defend themselves where indispensable.<sup>2</sup> But, surprising it may sound, international law has not criminalized targeted killings. And this is notwithstanding: «among human rights violations, no practice is more flagrant, degrading, and irreversible than... the taking of person's life without minimal guarantees of of due process of law».<sup>3</sup> Or, more exactly, it has not done so in as broad a manner as torture, inhuman treatments and forced disappearances.<sup>4</sup> Erin Creegan has explained that in detail in a lengthy work published in 2012.<sup>5</sup> Here the author has also clarified that, given this fact, it would be hard to state more than the obvious, that summary and extrajudicial killings («targeted killings» in legal parlance) are against international law, including international humanitarian and human rights law.<sup>6</sup> Yet, it

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*Rights Quarterly*, 38, 2016, 108-33; RUSCHI, F., «El Derecho, la guerra y la «técnica desatada»: consideraciones acerca del drone warfare», in *Guerra, derecho y seguridad en las relaciones internacionales*, Valencia, Tirant lo Blanch, 2017, 45-76. See also RAMSDEN, M., «Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki», *Journal of Conflict and Security Law*, 16, 2011, 385-406.

- <sup>2</sup> See e.g. GAGGIOLI, G., «A legal approach to investigations of arbitrary deprivations of life in armed conflicts: The need for a dynamic understanding of the interplay between IHL and HRL», *Questions of International Law*, 2017, available at: <http://www.qil-qdi.org/legal-approach-investigations-arbitrary-deprivations-life-armed-conflicts-need-dynamic-understanding-interplay-ihl-hrl/>; GAGGIOLI, G. and KOLB, R., «Le Conseil de sécurité face à la protection des civils dans les conflits armés», in *International Law Conflict and Development. Mélanges Voyame*, Leiden/Boston, Martinus Nijhoff Publishers, 2010, pp. 49-104; TIKHONOV, A.A., «The Interrelationship Between the Right to Life and the Right to Peace», in B.G. Ramcharan (ed.), *The Right to Life in International Law*, Martinus Nijhoff Publishers, 1985, 97 et seq; MARGALIT, A., «The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice», *Yearbook of International Humanitarian Law*, 15, 2012, 155-186.
- <sup>3</sup> See KAUFMAN, E. and FAGEN, P.W., «Extrajudicial Executions: an Insight into the Global Dimensions of a Human Rights Violation», *Human Rights Quarterly*, 3, 1981, p. 81 et seq.
- <sup>4</sup> See also ESTEVE MOLTO, J.E., «Les droits de victimes de desperation forcée devant la Cour Européenne des Droits de l'Homme: La Necessité de La Fertilisation Croisée Avec Le Système Intéraméricain», *Annuaire français de droit international*, LXII, 2010, 405 et seq.
- <sup>5</sup> See CREEGAN, E., «Criminalizing Extrajudicial Killings», *Denver Journal of International Law and Policy*, 41, 2012, 185. But see also DANNENBAUM, T., «Why Have We Criminalized Aggressive Wars?», *The Yale Law Journal*, 126, 2017, 1242-1599, who holds that that aggressive war is a crime because it entails killing without justification.)
- <sup>6</sup> See Erin Creegan, above n. 185. See also the UN Secretary – General's Press Release SG/SM/9210 of 22 March 2004, available at: <https://www.un.org/sg/en/speaker/sg?page=1243> (last accessed 20 January 2018), stating that: «The Secretary – General reiterates that extrajudicial killings are against international law and calls on the Government of Israel to immediately end this practice».

would be difficult, if not impossible, to contest the circumstance that the practice of targeted killings breach the fundamental rights and freedoms promulgated by international multilateral conventions and declarations aimed at ensuring the international protection of human rights and freedoms like the ICCPR, ECHR and ACHR.<sup>7</sup>

After having succinctly reconstructed the origins of the historical path leading to the configuration of the phenomenon of targeted killings as a systematic human rights issue in Part. II and the pragmatic difficulties of prosecuting and criminalizing this phenomenon in Part. III, the paper continues with an exploration of the potentialities offered by the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions («the UN Principles») and by the revised Minnesota Protocol on the Investigation of Potentially Unlawful Death («the Minnesota Protocol») in Part. IV. Part. V (Section 1, A) and Part. V (Section 2, A) provide respectively a background on the European and Inter-American systems of human rights as well as on the concept of the right to life in the Convention for the Protection of Human Rights and Fundamental Freedoms («ECHR») and in the American Convention on Human Rights («ACHR»). Parts V (Sections 1, B) and V (Sections 2, B) examine in turn the approaches of the European and Inter-American Courts towards the state's duty to investigate into targeted killings and other suspicious deaths. Part VI claims that the European Court's and the Inter-American Court's approaches to the investigation of targeted killings, each for its own reasons but also for common reasons, are problematic and overall not workable, and consequently that both the ECtHR and ACtHR would benefit from changing them. Therefore, it concludes through a series of recommendations for making them workable and less problematic. The first set of recommendations concerns the setting up of due diligence criteria and yardsticks inspired by the UN Principles and the newly revised Minnesota Protocol for the state's investigation of peace time and armed conflict targeted

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<sup>7</sup> See also MELZER, N., *Targeted Killing in International Law*, Oxford: OUP, 2008, 58 et seq; RAMSDEN, M., «Targeted killings and international human rights law: the case of Anwar Al-Awlaki», *Journal of Conflict and Security Law*, 16, 2011, 385-406; RUSINOVA, V., «The Duty to Investigate the Death of Persons Arrested and/or Detained by Public Authorities», in Ch. Tomuschat, E. Lagrange and S. Oeter (eds.), *The right to life*, Leiden, Nijhoff, 2010, 65-82. See also ROHT-ARRIAZA, N., «State responsibility to investigate and prosecute grave human rights violations in international law», *California Law Review*, 78, 1990, 49-513; TROTTA, T., «Exécutions pour trafic de drogues: une violation du droit international», available at: <http://www.worldcoalition.org/fr/Executions-for-drug-crimes-a-violation-of-international-law--international-organizations.html> (last accessed 21 January 2018).

killings (Part VI, Sections A and B). Part. VII concludes by making some specific recommendations for the ECtHR on how to change its approach on the standard of proof in its targeted killings case-law.

## II. THE PHENOMENON OF TARGETED KILLINGS IN ITS HISTORICAL DIMENSION

the practice of targeted killings is not novelty.<sup>8</sup> Rather, it is something that occurred over time. In this respect, one can recall, by way of example, that in Soviet Russia since 1918 Cheka was allowed to execute «counterrevolutionaries» without trial.<sup>9</sup> Hostages were also executed by Cheka during the Red Terror in 1918-20.<sup>10</sup> Again, one can also recall that during the Irish war of independence in 1916-21, the British forces organized several secret assassination squads.<sup>11</sup> However, what is relatively new is the view of the phenomenon of targeted killings as a ‘a serious violation of international human rights law’ like slave, forced labour, forced eviction and deliberate targeting of civilians and civilian objects in situations of armed conflict.<sup>12</sup> Importantly to note, this view was only introduced when targeted killings became a

<sup>8</sup> Amplius, see GUNNEFLO, M., *Targeted killing: a legal and political history*, Cambridge, CUP, 2016, ch. I. See also SENN, M. and TROY, J., «The transformation of targeted killing and international order», *Journal of Contemporary Security Policy*, 38, 2017, 175-211.

<sup>9</sup> Amplius, see CHAMBERLIN, W.H., *The Russian Revolution*, vol. I: 1917-1918, Princeton, Princeton University Press, 2014, 335 ff.

<sup>10</sup> See PETROVICH MELGOUNOV, S., «The Red Terror in Russia», available at: <http://www.paulbogdanor.com/left/soviet/redterrorinrussia.pdf> (last accessed 20 January 2018).

<sup>11</sup> See e.g. HART, P., *The I.R.A. and Its Enemies: Violence and Community in Cork, 1916-1923*, Oxford, OUP, 1996, 187-226.

<sup>12</sup> See GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, «What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty», available at: [https://www.geneva-academy.ch/joomlatools-files/docman\\_files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law\\_Academy%20Briefing%20No%206.pdf](https://www.geneva-academy.ch/joomlatools-files/docman_files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf) (last accessed 16 January 2018), also claiming that: «At international level, references related to the notion of ‘serious violation’ can be found in the Optional Protocol to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW), and the Optional Protocol to the 1966 International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). Article 8 of OP-CEDAW allows the UN Committee on the Elimination of Discrimination against Women ‘to initiate a confidential investigation by one or more of its members where it has received reliable information of grave or systematic violations by a state party of rights established in the Convention’».

systematic human rights issue in Sub-Saharan Africa, Guatemala, Venezuela, Uganda and Chile during the 1960s and 1970s, attracting worldwide attention.<sup>13</sup> Reference is here, in particular, to two specific historical events, i.e., the 25,000 politically induced murders occurred in Guatemala in 1966 and the 7,000 murders of males between the ages of 15 and 50 of the Acholi and Langi ethnic groups in Uganda between 1972 and 1977 (out of an estimated 100,000 assassinations in that country).<sup>14</sup> Although different in some ways, all targeted killings share various features and characteristics, including a lack of accountability and impunity for their perpetrators as a direct result of the practical difficulties experienced in investigating these offences and the frequent recourse to these offences against the person as repressive tools of popular groups and for the elimination of criminals and marginals (the «political killings» in the average parlance),<sup>15</sup> which further increase the evidentiary problems in demonstrating that they really occurred.<sup>16</sup> As regards the latter point, it should, however, be pointed out that the above mentioned impunity shall not be perceived as an ineluctable characteristic of targeted killings. And this is mainly because, as international human rights lawyers teach, like other human rights bodies<sup>17</sup> both the ECtHR and ACtHR dispose of instruments, including, in particular, the fact-finding missions and commissions of inquiry to investigate serious human rights violations like forced disappearances, acts of torture, degrading and ill-treatments committed by law enforcement personnel and targeted killings cases, as indirectly confirmed by their case-law on the subject and on the related subjects of torture, degrading and inhuman treatments.<sup>18</sup>

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<sup>13</sup> See e.g. Michael Ramsden, above n. 7, 385–406.

<sup>14</sup> For further references on these events, see e.g. Edy Kaufman and Patricia Weiss Fagen, above n. 3, 81-100.

<sup>15</sup> Amplius, see FRANKLIN, J., «Shame on you: the impact of human rights criticism on political repression in Latin America», *International Studies Quarterly*, 52, 2008, 187-211.

<sup>16</sup> On the subject, see e.g. CRUZ, J.M., «Criminal violence and democratization in Central America: The survival of the violent state», *Latin American Politics and Society*, 2011, 11-33; GREEN P.J. and WARD, T., «State Crime, Human Rights, And the Limits of Criminology», *Social Justice*, 27, 2000, 101-115.

<sup>17</sup> See LEACH, P.; MURRAY, R. and SANDOVAL, C., «The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?», in *Towards convergence in international human rights law: approaches of regional and international systems*, Leiden, Brill Nijhoff, 2017, pp. 33-67.

<sup>18</sup> Amplius, see VARGAS CARRENO, E., «The Experience of the Inter-American Commission on Human Rights», in B. G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights*, Leiden, Brill/Nijhoff, 2014, 137 et seq; LEACH, Ph.; PARASKEVA, C. and

### III. THE PHENOMENON OF TARGETED KILLINGS IN ITS LEGAL AND SOCIAL DIMENSIONS

Although targeted killings are traditionally associated with African and Latin American countries and more generally with countries lacking well-established democratic traditions,<sup>19</sup> an unfortunately growing number of countries, including countries with democratic systems worldwide recur to this technique as well.<sup>20</sup> Undoubtedly, the most recent and noteworthy example of this reality is offered by the Philippines of President Rodrigo Duterte, where targeted killings are so numerous that a recent report from USAID and the ASIA Foundation has rightly qualified them a national epidemic.<sup>21</sup> Pakistan where the majority of more than 2,000 people killed in 2015 by Pakistani police forces in alleged armed encounters may have been staged targeted killings according to Human Rights Watch is another example that is also worthy of being mentioned.<sup>22</sup>

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UZELAC, G., «Human Rights Fact-Finding – The European Court of Human Rights at a Crossroads», *Neth. Q. Hum. Rts.*, 28, 2010, 41 (arguing that though some fact-finding missions have revealed some weaknesses in the past, the very conduct of such missions remains indispensable – in the interests both of litigants and the credibility of the Strasbourg system itself.). See also VILJOEN, F., «Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms», *Max Planck UNYB*, 8, 2004, 49 et seq; GOODMAN, R. and JINKS, D., «Measuring the effects of human rights treaties», *EJIL*, 14, 2003, 171 et seq.

<sup>19</sup> For further references on this issue, see e.g. Edy Kaufman and Patricia Weiss Fagen, above n. ; WOLMAN, A., «Han Kim and North Korean Accountability for Torture and Unlawful Killing», *Journal of East Asia and International Law*, 2017, 273-282.

<sup>20</sup> See POZO SERRANO, P., «Los ataques letales selectivos en la política y la práctica de Estados Unidos: análisis desde el Derecho internacional», *Anuario Español de Derecho Internacional*, 29, 2013, 265-290; WILNER, A., «Targeted Killings in Afghanistan: Measuring Coercion and Deterrence in Counterterrorism and Counterinsurgency», *Studies in Conflict & Terrorism*, 33, 2010, 312-314; GRAY, Ch., «Asesinatos Selectivos: Intentos Recientes de Los Estados Unidos de Crear un Marco Jurídico», *LADI. Revista Latinoamericana de Derecho Internacional*, 2014, available at: <http://www.revistaladi.com.ar/numero1-gray/> (last accessed 21 January 2018); FISHER, J.W., «Targeted Killing, Norms, and International Law», *Columbia Journal of Transnational Law*, 45, 2006-2007, 711-758.

<sup>21</sup> On this issue, see e.g. MERCADO, C.A., «Extrajudicial Killings in the Philippines: Is the Situation Really Improving?», available at: <https://asiafoundation.org/2011/10/12/extrajudicial-killings-in-the-philippines-is-the-situation-really-improving/> (last accessed 13 December 2017); LANFER, A., «Extrajudicial killings – a human rights crisis», *A Journal on threatened Human Rights Defenders in the Philippines*, 2, 2010, available at: [http://www.iponphilippines.info/fileadmin/user\\_upload/Observer\\_Vol.2\\_Nr.2/Observer\\_Vol.2\\_Nr.2\\_PoliticalKillings\\_4.pdf](http://www.iponphilippines.info/fileadmin/user_upload/Observer_Vol.2_Nr.2/Observer_Vol.2_Nr.2_PoliticalKillings_4.pdf) (last accessed 20 January 2018).

<sup>22</sup> See BOONE, J., «Pakistan police accused of illegally killing hundreds of suspects a year», available at: <https://www.theguardian.com/world/2016/sep/26/pakistan-police-accused-of-illegally-killing-hundreds-of-suspects-a-year> (last accessed 13 December 2017).

Legal definitions of targeted killings vary and are often vague.<sup>23</sup> This can be easily perceived if one compares, for instance, the definition of 'extra judicial killings («targeted killings») in the United States Torture Victim Protection Act of 1991 («TVPA»)<sup>24</sup> with the corresponding definition contained in volume 1 of the 'Customary International Humanitarian Law' of Henckaerts, Doswald-Beck and Alvermann.<sup>25</sup> Section 3 (a) of the TVPA defines extrajudicial killing as: 'a deliberate killing not authorized by a previous judgement pronounced by a regular constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.<sup>26</sup> Volume 1 of the Customary International Humanitarian Law defines more narrowly 'extra-judicial killings' as: «executions or deaths caused intentionally by the attacks or killings by State security forces or paramilitary groups, death squads or other private forces cooperating with the State or tolerated by it.»<sup>27</sup> Experts observe, nevertheless, that there are various common features to targeted killings.<sup>28</sup> First, individuals who are killed unlawfully are often subjected to torture or to cruel, inhuman or degrading treatment.<sup>29</sup> (Second, the killers are well organized, armed, and generally members of the police or military forces, as the two above examples indirectly confirm. Third, the practice of targeted killings is generally a deliberate governmental policy purported at eradicating perceived threats from individuals who oppose the government.<sup>30</sup> The killings, thus, are generally carried out by government agents or with the authorities' tacit consent.<sup>31</sup> Fourth, the targeted killings has normally the scope

<sup>23</sup> See STEPHENS, P.J., «Beyond Torture: Enforcing International Human Rights in Federal Courts», *Syracuse L. Rev.*, 51, 2001, 941 et seq.

<sup>24</sup> The United States Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73. On the TVPA, see recently SEATZU, F., «Speculating on the future of the Torture Victim Protection Act (TVPA) after Mohamad and Kiobel», *Inter-American and European human rights journal*, 8, 2015, 23-37.

<sup>25</sup> See HENCKAERTS, J.-M.; DOSWALD-BECK, L. and ALVERMANN, C. (eds.), *Customary International Humanitarian Law*, vol. I: Rules, Cambridge, CUP, 2005, 161 to 163 and 594.

<sup>26</sup> See BRADLEY, C.A., «The ATS, the TVPA, and the Future of International Human Rights Litigation», *Proceedings of the annual meeting*, 108, 2014, 45-147.

<sup>27</sup> See HENCKAERTS, J.-M.; DOSWALD-BECK, L. and ALVERMANN, C. (eds.), above n. 25, 161 to 163 and 594.

<sup>28</sup> See ROHT-ARRIAZA, N., «State responsibility to investigate and prosecute grave human rights violations in international law», *California Law Review*, 78, 1990, 449-513.

<sup>29</sup> See e.g. WOOD, R. and GIBNEY, M., «The Political Terror Scale (PTS): A re-introduction and a comparison to CIRI», *Human Rights Quarterly*, 32, 2010, 367-400.

<sup>30</sup> See BRUCE, D., «A Provincial Concern?: Political Killings in South Africa», *South African Crime Quarterly*, 45, 2013, 13 et seq.

<sup>31</sup> See e.g. SCHATZ, S., *Murder and Politics in Mexico*, New York/Dordrecht/London, 2011, 2 et seq.

of intimidating the society alike in order to discourage participation in groups or activities considered dissident by the government.<sup>32</sup> Fifth, the definitions of ‘targeted killings», including the two above-named definitions of extra-judicial killings, do not cover any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

Demonstrating governmental involvement in the targeted killing is hard because the killers usually conceal their personal identities.<sup>33</sup> Additionally, family members or witnesses of these crimes are generally afraid to testify or to speak out publicly.<sup>34</sup> Participants in the killing also may be intimidated if suspected of disclosing information to outsiders. Moreover, the core piece of evidence in a targeted killing case, the body, is often concealed.<sup>35</sup> Targeted killing victims often simply vanish, giving governments the chance to avoid the application of normative rules and standards that guarantee individual rights and freedoms.<sup>36</sup>

#### IV. THE INTERNATIONAL LEGAL STANDARDS ON THE INVESTIGATION OF TARGETED KILLINGS

to ascertain and critically evaluate the strict nexus between the right to life articles of the ECHR and ACHR and the international rules and standards on the investigation of targeted killings, it is useful to consider those rules

<sup>32</sup> See e.g. HEDMAN, E.L., «State of Siege: Political Violence and Vigilante Mobilization in the Philippines», in B. B. Campbell, A.D. Brenner (eds.), *Death Squads in Global Perspective*, New York, Palgrave Macmillan, 2000, 125-151.

<sup>33</sup> Extrajudicial Killings in the Philippines: Strategies to End the Violence, Hearing Before the Subcomm. on East Asian and Pacific Affairs of the Comm. on Foreign Relations of the S. Comm. on Foreign Relations, 110th Cong. 2 (2007), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg40811/pdf/CHRG-110shrg40811.pdf> (last accessed 13 December 2017).

<sup>34</sup> AMNESTY INT’L, CRIMES UNSEEN: EXTRAJUDICIAL EXECUTIONS IN BANGLADESH 2 (Aug. 2011), available at <http://www.amnesty.org/en/library/asset/ASA13/005/2011/en/c18ad74b-75fe-4b15-b043-5982eebdb27d/asa130052011en.pdf> (last accessed 13 December 2017).

<sup>35</sup> See e.g. RADSAN, A.J. and MURPHY, R., «Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing», *U. ILL. L. REV.*, 11, 2011, 1201 et seq; HASSON, N., «Israel Police Refused to Release Body of Killed Palestinian to Family for Autopsy Before Burial», *Haaretz*, 2015, available at: <http://www.haaretz.com/israel-news/premium-1.67983> (last accessed 13 December 2017).

<sup>36</sup> See OMER-MAN, E.S., «Extrajudicial Killing with Near Impunity: Excessive Force by Israeli Law Enforcement against Palestinians», *B.U. Int’l L.J.*, 35, 2017, 115 et seq. See also KRETZMER, D., «Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?», *EJIL*, 16, 2005, 171-212.



and standards which have succeeded in clarifying the often complex issues surrounding the state's obligation to investigate and prosecute these offences and its enforcement. A broad and rather heterogeneous range of international rules and standards on the investigation of targeted killings has existed for the international community since the late 1980s. The historical origins and main features of the standards and rules that, are objectively speaking, the most useful for interpreting the state's obligation to investigate targeted killings are briefly outlined below.

The first modern (non-legally binding) international standards for proper investigation of targeted killings were adopted in 1988 after several years of study by the United Nations Special Rapporteur on summary or arbitrary executions.<sup>37</sup> One year after their adoption these standards were incorporated into the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, endorsed by the UN General Assembly through the resolution 44/162 in December 1989.<sup>38</sup> The most noteworthy aspect of these standards is their significant expansion and detailed elaboration of a wide range of preventive measures of targeted killings.<sup>39</sup> The reference is, in particular, to Article 4 of the UN Principles, granting: «effective protection through judicial and other means... to individuals and groups who are in danger or extra-legal, arbitrary or summary executions, including those who receive death threats». Moreover the reference is to Article 15 of the UN Principles, which states that: «Complainants, witnesses, those conducting the investigation and their families shall be protected from violence; threats of violence or any other form of intimidation» and also provides that: «Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as over those conducting investigations.» Another aspect that is worthy of note is that, according to the UN Principles,

<sup>37</sup> References are found in *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017, available at: <http://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf> (last accessed 20 January 2018).

<sup>38</sup> United Nations, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, 24 May 1989, available at <http://www.unhcr.org/refworld/docid/3ae6b39128.html> (last accessed 5 January 2018).

<sup>39</sup> See e.g. PROBERT, Th., «The Role of the UN Human Rights Council Special Procedures in Protecting the Right to Life in Armed Conflicts», in D. Kuwali, F. Viljoen (eds.), *By all means necessary: Protecting civilians and preventing mass atrocities in Africa*, Pretoria, Pretoria University Press, 2017, 255 et seq.

there must be a thorough, prompt and impartial investigation of all suspected cases of targeted killings, including cases where complaints by relatives or other reliable reports suggest unnatural death in the circumstances.<sup>40</sup> The UN Principles, as they are called above, were implemented by the Minnesota Protocol on the Investigation of Potentially Unlawful Death (the Minnesota Protocol) with whom evidently they share the same purpose (i.e. to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death).<sup>41</sup> It is a consolidated view that the UN Principles were mainly meant for governments and professionals directly involved in the investigation of targeted killings.<sup>42</sup> Indirectly, but decisively, this is confirmed by the fact that the UN Principles have been used by states, international governmental organizations (IGOs) and NGOs around the world, becoming an influential touchstone for investigations of alleged suspicious killings. As they were solidly founded on previous works on the subject by a number of distinguished scholars and practitioners, the UN Principles were not therefore created *ex nihilo*. They include twenty articles setting out the general rules and principles on the prevention and investigation of allegedly extra-judicial and summary killings. These principles are divided into two main parts concerning respectively: a) measures for the prevention of extra-judicial and summary executions; b) measures for the investigation of these crimes.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death – adopted in 1991 – was originally entitled the ‘Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions’. Like the UN Principles, the Protocol of Minnesota sets a common standard of performance in investigating potentially unlawful killing or suspected enforced disappearance and a shared set of guidelines and general principles for sovereign states, as well as for individuals and organizations (including the UN, regional organizations and institutions, civil society and victims’ families) who play a role in the investigation. However the Minnesota Protocol, not even in its new and wholly revised edition of 2016,<sup>43</sup> is neither a comprehensive manual

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<sup>40</sup> Amplius, see Edward H. Lawson, Mary Lou Bertucci (eds.), *Encyclopedia of Human Rights*, Taylor & Francis, London, 2005, 468 et seq.

<sup>41</sup> See Edward H. Lawson, Mary Lou Bertucci, above n. 40, 486 et seq.

<sup>42</sup> See HANNUM, H.; SHELTON, D.L.; ANAYA, S.J. and CELORIO, R., *International Human Rights: Problems of Law, Policy, and Practice*, Wolters Kluwer, 2017, p. 378 et seq.

<sup>43</sup> On the subject, see HESSBRUEGGE, J., «Minnesota Protocol on the Investigation of Unlawful Death Gets a New Life», *EJIL Talk!*, May 26, 2017, available at: <https://www.ejiltalk.org/minnesota-protocol-on-the-investigation-of-unlawful-death-gets-a-new-life/> (last accessed 16 January 2018).

of all aspects of investigations, nor a step-by-step handbook for practitioners. Nevertheless, it does encompass detailed guidelines on crucial aspects of the investigation process such as on the collection and use of the material located at a crime scene.<sup>44</sup> The Protocol applies to the investigation of all «potentially unlawful death» and, *mutatis mutandis*, suspected enforced disappearance. For the purpose of the Minnesota Protocol, this primarily includes situations where: (a) The death may have been caused by acts or omissions of the State, its organs or agents, or may otherwise be attributable to the State, in violation of its duty to respect the right to life.<sup>45</sup> This includes, for instance, all killings possibly caused by law enforcement personnel or other agents of the state; deaths caused by paramilitary groups, militias or «death squads» suspected of acting under the direction or with the permission or acquiescence of the State; and deaths caused by private military or security forces exercising State functions;<sup>46</sup> (b) death occurred when a person was detained by, or was in the custody of, the State, its organs, or agents. This encompasses, for instance, all killings of persons detained in prisons, in other places of detention (official and otherwise) and in other facilities where the State exercises heightened control over their life; (These include psychiatric hospitals, institutions for children and the elderly and centres for migrants, stateless people, or refugees.) (c) the death occurred where the State may

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<sup>44</sup> See e.g. para. 61 of the Minnesota Protocol which states that: «All material located at a crime scene should be considered potentially relevant to the investigation» and also that: «Material that may be found at a crime scene includes, but is not limited to, the following: (a) Documentary evidence, such as maps, photographs, staffing records, interrogation records, administrative records, financial papers, currency receipts, identity documents, phone records, letters of correspondence, and passports; (b) Physical evidence, such as tools, weapons, fragments of clothing and fibres, keys, paint, glass used in an attack, ligatures, and jewellery; (c) Biological evidence, such as blood, hair, sexual fluids, urine, fingernails, body parts, bones, teeth and fingerprints; (d) Digital evidence, such as mobile phones, computers, tablets, satellite phones, digital storage devices, digital recording devices, digital cameras and closed-circuit television (CCTV)».

<sup>45</sup> (See, e.g. Art. 6(1) of the International Covenant on Civil and Political Rights (ICCPR); Art. 6 of the Convention on the Rights of the Child (CRC); and Art. 1 of the Convention on the Prevention and Punishment of the Crime of Genocide; Arts. 12 and 13 of the UN Convention against Torture; Art. 10 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED); Principles 6, 22 and 23 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Principle 9 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; and Principle 34 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In situations of international armed conflict, see Art. 121, 1949 Geneva Convention III (with respect to prisoners of war); and Art. 131 of the Geneva Convention IV (with respect to civilian internees).

<sup>46</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the UN Commission on Human Rights, UN doc. E/CN.4/2005/7, 22 December 2004, paras. 70–71.

have failed to meet its duties to protect life. This includes, for instance, any situation where a state fails to exercise due diligence to protect an individual or individuals from foreseeable external threats or violence by non-state actors.<sup>47</sup> There is also a general obligation on the state to investigate any suspicious killing, even where it is not alleged or suspected that the state caused the death or unlawfully failed to prevent it. Importantly to note is also that though some States may not yet be in a position to follow all of the guidance set out within the Minnesota Protocol, nothing in it must be interpreted in such a manner as to relieve or excuse any State from full compliance with its duties and obligations under international human rights law.<sup>48</sup>

## V. THE TWO MAJOR HUMAN RIGHTS SYSTEMS OF ADJUDICATION

The IACHR and ECHR are chronologically the world's first two regional human rights systems and also the most established.<sup>49</sup> Both treaty systems indicate substantive rights that Contracting States shall guarantee. Additionally, monitoring bodies defend fundamental rights and freedoms in both systems.

### 1. *The ECHR System of Human Rights Protection*

The ECHR system of human rights protection consists of two organs. The ECHR codifies the fundamental freedoms and rights that Contracting States undertake to guarantee to their nationals.<sup>50</sup> Until the entry into force of Protocol No 11 in 1998, also the European Commission of Human Rights examined allegations of human rights breaches.<sup>51</sup> After the European Com-

<sup>47</sup> See, also Human Rights Committee, *General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8.

<sup>48</sup> Amplius, see Jan Hessbruegge, above n. 43.

<sup>49</sup> Amplius, see CAVALLARO, J.L. and BREWER, S.E., «Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court», *American Journal of International Law*, 102, 2008, 768-827.

<sup>50</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> (last accessed 20 January 2018).

<sup>51</sup> Council of Europe, Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, 11 May 1994, ETS 155, available at: <http://www.refworld.org/docid/42ef8c812.html> [accessed

mission found a complaint admissible, it considered the merits of the case and elaborated a report giving its view as to whether the ECHR was breached. The ECtHR then ruled if a breach occurred. Although not legally bound by the European Commission's reports and findings, the ECtHR had only rarely rejected them, and this is for a number of reasons.<sup>52</sup> Of these, the most important to be recalled is that because the ECtHR could only examine cases that were referred by the European Commission, an individual applicant who had previously lodged a complaint with the Commission, or a Contracting State. With the entry into force of Protocol 11, the supervisory machinery under the ECHR was restructured to provide for a single European Court of Human Rights, combining the previous functions of the ECtHR and the European Commission.<sup>53</sup>

After WWII, the Council of Europe adopted the ECHR in an attempt to unify Europe and to enhance democratic values and freedoms. Articles 2 to 18 of the ECHR encompass the substantive freedoms and rights that Contracting States aim to guarantee to their citizens.<sup>54</sup> The ECHR also established the European Court and the European Commission and set out their competence, composition and essential procedures for their functioning. Since the ECHR's entry into force, seventeen additional protocols have changed its provisions or added further substantive freedoms and rights.

#### a) Right under the ECHR Convention

The three core rights implicated in target killings cases are set forth in the ECHR. Article 1 provides that each State to the ECHR shall secure to everyone within its jurisdiction the rights and freedoms defined in the ECHR. Article 2, the right to life, imposes Contracting States to undertake both negative and

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20 January 2018]. For a commentary, see ex multis FRIBERGH, E., «From Protocol No. 11 to 2025: a Court in constant change», in L. López Guerra *et al.* (eds.), *El Tribunal Europeo de Derechos Humanos : una visión desde dentro: en homenaje al Juez Josep Casadevall*, Valencia, Tirant lo Blanch, 2015, 493-507; RAIMONDI, G., «Il protocollo n° 11 alla Convenzione europea dei diritti dell'uomo: Una Corte unica per la protezione dei diritti dell'uomo in Europa + Traduzione non ufficiale di Protocollo n° 11», *Rivista internazionale dei diritti dell'uomo*, 7, 1994, 58-63, 72-85.

<sup>52</sup> For further references on this issue, see e.g. CHRISTIE, I., «Divergent views of the European Commission and Court of Human Rights», *European Human Rights Law Review*, 5, 2001, 541-553.

<sup>53</sup> On the topic, see e.g. BATES, E., «The Birth of the European Convention on Human Rights – and the European Court of Human Rights», in *The European Court of Human Rights between law and politics*, Oxford, Oxford University Press, 2011, 17-42.

<sup>54</sup> See e.g. MOWBRAY, A., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, Hart publishing, 2004, 1 et seq.

positive obligations to protect the lives of their nationals.<sup>55</sup> Article 3 prohibits ‘torture and degrading treatment’. The right to life is the first right codified in the ECHR. Article 2 prescribes Contracting States to protect the right to life by law. Article 2 protects individuals from the arbitrary deprivation of life by the state.<sup>56</sup> The ECtHR and the European Commission have interpreted Article 2 not only to prohibit the intentional deprivation of life by states, but also to prescribe certain positive duties on states to defend life.<sup>57</sup> It then follows that, under Article 2, Contracting States shall establish and maintain normative devices to prevent the taking of life by any state entity, and guarantee that its agents, including its security forces, do not breach the right to life of its citizens.<sup>58</sup> The ECtHR have asserted the existence of a procedural provision under Article 2 to further defend the right to life.<sup>59</sup> This demands Contracting States to undertake effective, official investigations into alleged breaches of the right to life. The failure of a government, thus, to undertake an adequate investigation into an alleged breach of the right to life may itself be a breach of the right to life.<sup>60</sup>

Article 3 of the ECHR prohibits torture and inhuman or degrading treatment. The ECtHR has set a high threshold for conduct prohibited by this provision as indirectly confirmed by several judicial decisions.<sup>61</sup> In *Ireland v. United Kingdom* the ECtHR indicates that: «The Convention prohibits in absolute terms

<sup>55</sup> See e.g. MATHIEU, B., *The Right to Life in European Constitutional and International Case-law*, Strasbourg, Council of Europe Publishing, 2006, 11 et seq; BESTAGNO, F., «Diritto alla vita – Art. 2 della Convenzione europea dei diritti dell’uomo», in G. Bartole, P. de Sena, V. Zagrebelsky (ed.), *Commentario breve alla Convenzione europea dei diritti dell’uomo*, Padova, Cedam, 2012, 36-63. See also LAVRYSEN, L., *Human Rights in a Positive State*, Antwerp: Intersentia, 2016, p. 45 ff, 213 ff.

<sup>56</sup> See RUSSELL, H., «Striving for ‘never again’: a European Convention for the Protection of All Persons from Enforced Disappearance and the veiled protection of Article 2 of the ECHR», *Inter-American and European human rights journal*, 9, 2006, 470-499.

<sup>57</sup> ECtHR, *McCann and others v. United Kingdom*, Judgment (Grand Chamber), 27 September 1995, para. 149.

<sup>58</sup> *Ibid.*, paras. 149-50.

<sup>59</sup> *Ibid.*, para. 149.

<sup>60</sup> *Ibid.*, para. 161.

<sup>61</sup> Amplius, see e.g. RODLEY, N.S., «The Prohibition of Torture: Absolute Means Absolute», *DENV. J. INT’L. L. & POLY*, 34, 2006, 145, 159; GENTILI, G., «European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-treatment is a Genuine Risk», *INT’L. J. CONST. L.*, 8, 2010, 311, 314; ADDO, M.K. and GRIEF, N., «Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?», *EJIL*, 9, 1988, 510; LANCIOTTI, A. and VITIELLO, D., «L’articolo 3 della Cedu come strumento di tutela degli stranieri contro il rischio di refoulement», in L. Casseti (a cura di), *Diritti, principi e garanzie sotto la lente dei giudici di Strasburgo*, Napoli, Jovene editore, 2012, 223 et seq.

torture and Inhuman and degrading treatment or punishment, irrespective of the victim's conduct». <sup>62</sup> Moreover, and equally importantly, it further states that: «unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and, under Article 15(2), there can be no derogation therefore even in the event of a public emergency threatening the life of the nation». Furthermore, and more recently, in the *Gäfgen* case the ECtHR held among other things that the seriousness of the offence was irrelevant to the questions of the threshold for inhuman and degrading treatment. <sup>63</sup>

#### b) The Duty to Investigate Targeted Killings in the Case-Law of the ECtHR

In the *McCann* case, concerning the killing in Gibraltar of IRA terrorist members by British Armed Forces personnel, Strasbourg's judicial institutions first articulated the claim that within the terms of Art. 2 of the ECHR is implicit a duty to carry out some form of effective official investigation into deaths where lethal force had been employed against individuals by agents of the state. <sup>64</sup> This is a noteworthy claim for various reasons. First, because the ECtHR's expanded interpretation of the bare text of Article 2 was an application of, at that time, still relatively recent living instrument doctrine that, as formulated in the landmark case of *Tyrer v. United Kingdom*, describes the ECHR as 'a living instrument to be interpreted in the light of present-day conditions'. <sup>65</sup> Secondly, and perhaps even most significantly here, because the *McCann*'s judgment introduced the need for an 'upstream and downstream' application of Article 2 of the ECHR in lethal force that was confirmed in the subsequent pertinent case-law of the ECtHR as Jonathan Cooper correctly notes. <sup>66</sup>

<sup>62</sup> ECtHR, *Ireland v. United Kingdom*, Judgment, 18 January 1978 (1978) 2 EHRR 25, para. 162.

<sup>63</sup> Amplius, see e.g. SIMONSEN, N., «'Is torture ever justified?': The European Court of Human Rights decision in *Gäfgen v Germany*», *EJIL Talk!*, June 15 2010, available at: <https://www.ejiltalk.org/'is-torture-ever-justified'-the-european-court-of-human-rights-decision-in-gafgen-v-germany/> (last accessed 21 January 2018).

<sup>64</sup> ECtHR, *McCann and others v. United Kingdom*, Judgment (Grand Chamber), 27 September 1995, para. 161.

<sup>65</sup> ECtHR, *Tyrer v. The United Kingdom*, 5856/72, Council of Europe: European Court of Human Rights, 15 March 1978, available at: <http://www.refworld.org/cases,ECHR,402a2cae4.html> (last accessed 17 December 2017).

<sup>66</sup> See COOPER, J., «Lethal Force, Policing and the ECHR: *McCann and Others v UK* at Twenty», available at: [https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialscience-sandinternationalstudies/lawimages/news/pdf/Lethal\\_Force\\_Policing\\_and\\_the\\_ECHR\\_Workshop\\_Summary.pdf](https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialscience-sandinternationalstudies/lawimages/news/pdf/Lethal_Force_Policing_and_the_ECHR_Workshop_Summary.pdf) (last accessed 21 January 2018).

Three years later, the same line of arguments were adopted by the Court in the *Ergi* case, which further provides that the duty to investigate: «is not confined to cases where it has been established that the killing was caused by an agent of the State».<sup>67</sup> Moreover, in *Kaya v. Turkey* concerning the intentional killing of a Turkish civilian by the security forces the ECtHR reiterated its previous case-law on the duty to investigate extra-judicial executions, holding that that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.<sup>68</sup> In *Salman v. Turkey*<sup>69</sup> the ECtHR made clear that the duty on the state to carry some form of effective official investigation into deaths applied where an individual dies in detention or custody, even where it is evident that no agent of the state was directly involved in the incident that led to the injury or death. In the same sense, it is also worthy recalling the ECtHR's judgment on the Edwards case of the same year,<sup>70</sup> which concerns the killing of an individual in custody by his cellmate.<sup>71</sup>

However it was only in 2003 with the decision on the *Finucane* case that the ECtHR developed a structured, though not complete, discussion of the state obligation to investigate summary and extra-judicial killings.<sup>72</sup> Here the Court clarified, in particular, that the essential purpose of the official investigation when individuals have been killed as a result of the use of force is to secure the effective enforcement of the domestic laws which protect the fundamental right to life and, in those cases involving State bodies or agents, to ensure their accountability for deaths occurring under their direct responsibility.<sup>73</sup> Even if evidence of direct governmental involvement in a extra-judicial killing is weak or impossible to obtain or if the complainant fails to demonstrate that the government actively participated in a case of extra-judicial killing, a government may still be held liable for omitting to investigate allegations of a specific extra-judicial killing. The ECtHR found United Kingdom liable for the failure

<sup>67</sup> ECtHR, *Ergi v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 28 July 1998, available at: <http://www.refworld.org/cases,ECHR,3ae6b6291c.html> (last accessed 17 December 2017).

<sup>68</sup> ECtHR, *Kaya v. Turkey* (1999) 28 EHRR 1.

<sup>69</sup> ECtHR, *Salman v. Turkey* (2002) 34 EHRR 425 at para 99.

<sup>70</sup> ECtHR, *Edwards v. United Kingdom* (2002) 35 EHRR 487.

<sup>71</sup> See, accordingly, also the non-admissibility decision in *Menson and others v. United Kingdom* (2003) 37 EHRR CD 220, which provides that: «the absence of any direct state responsibility for the death» of an individual who was not in the state's custody or detention did «not exclude the applicability of article 2».

<sup>72</sup> ECtHR, *Finucane v. United Kingdom* [2003] All ER (D) 25.

<sup>73</sup> Amplius, see DICKSON, B., *The European Convention on Human Rights and the Conflict in Northern Ireland*, Oxford, 2012, 271 et seq.



to provide a prompt and effective investigation into the allegations of collusion by security personnel and that the State had violated his right to life.

Again, in its landmark decision in *Nachova and Others v. Bulgaria* concerning a police officer's arbitrary killing of two people, the ECtHR, sitting in its Grand Chamber composition, unanimously held a violation of the right to life on account of the shortcomings of the investigation into the deaths of Mr Angelov and Mr Petkov.<sup>74</sup> It is significant to observe that the Court here motivated this conclusion also on the basis of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the 'Minnesota Protocol').<sup>75</sup>

## 2. *The ACHR System of Human Rights Protection*

The Organization of American States («OAS») established the Inter-American system of human rights in 1969 to monitor human rights protection in the Americas.<sup>76</sup> The system encompasses three organs. The ACHR codifies the substantive freedoms and rights Contracting States undertake to guarantee.<sup>77</sup> The Inter-American Commission investigates allegations of fundamental rights breaches. The IACtHR interprets the rights set forth in the ACHR and establishes whether a breach has occurred.<sup>78</sup> The structure of the ACHR is analogous to the ECHR. The ACHR encompasses a long catalogue of civil and political freedoms and rights in its first twenty-five articles. The ACHR also established the IACtHR and Inter American Commission.

The Inter-American Commission has a twofold task: the drafting of country reports on the general state of human rights in a specific country and the consideration of petitions by private individuals alleging breaches of fundamen-

<sup>74</sup> ECtHR, *Nachova and Others v. Bulgaria* (2006) 42 EHRR 43.

<sup>75</sup> See U.N. MANUAL ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS, pt. I.A.1., U.N. Doc. E/ST/CSDHA.12 (1991).

<sup>76</sup> See *ex multis* MICUS, A., *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions*, Brill, 2005, p. 50 et seq; REINALDA, B., *Routledge History of International Organizations: From 1815 to the Present Day*, Abingdon, London, Routledge, 2009, 536 et seq; BUERGENTHAL, Th., «The American and European Conventions on Human Rights: Similarities and Differences», *AM. U. L. REV.*, 30, 1981, 155.

<sup>77</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>78</sup> *Amplius*, see PASQUALUCCI, J.M., *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, CUP, 2003, p. 50 et seq.

tal freedoms and rights.<sup>79</sup> As soon as the Commission receives a petition, it shall decide on its admissibility. If the petition is admissible, the Commission starts to investigate the allegations. The Commission subsequently drafts a report, consisting of its recommendations, which it can send to the IACtHR.

The ICAtHR has the power to adjudicate contentious cases relating to claims that a Contracting State has breached the ACHR, provided that the Commission has previously considered the case.

#### a) Rights Under the ACHR

Article 4 of the ACHR protects the arbitrary taking of life by the state.<sup>80</sup> Article 5 prohibits torture and cruel or inhuman treatment. Article 4 of the ACHR imposes states to defend the right to life by law. According to the ACtHR, this requirement, along with the general duty in Article 1 that states must act positively to guarantee the rights encompassed in the ACHR, means that states shall adopt adequate steps to protect human existence.<sup>81</sup> States, thus, should make the taking of life by the State illegal and investigate, prosecute, and reward victims or their relatives for the taking of life. Article 5 of the ACHR protects the right to humane treatment.

#### b) The State's Duty to Investigate Targeted Killings in the Case-Law of the ACtHR

The starting point here is the case of *Baldeón García v. Peru* where the ACtHR has derived the existence of a state's obligation to prevent its officials, or private individuals, from breaching the right to life from the inalienable and fundamental character of this right.<sup>82</sup> The case of *Huilca Tecse v. Peru* concerning the extra-judicial execution of the Peruvian trade union leader Pedro Huilca Tecse in 1992<sup>83</sup> and the subsequent case of the *Ituango Massacres v. Colombia* concerning the killings

<sup>79</sup> Amplius, see BURGORGUE-LARSEN, L. and Ubeda de Torres, A., *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford, OUP, 2011, 5 et seq.

<sup>80</sup> See *ex multis* PASQUALUCCI, J.M., «The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System», *Hastings Int'l & Comp. L. Rev.*, 31, 2008, 1; TRAMONTANA, E.M., «Assessing the right to a 'dignified life' in the context of social and cultural rights protection: judicial success or failure?», *Inter-American and European human rights journal*, 2016, 358-376.

<sup>81</sup> For a thorough exposition of these issues, see e.g. PAUL, A., «Controversial Conceptions: The Unborn and the American Convention on Human Rights», *Loyola University Chicago International Law Review*, 9, 2012, 214-218.

<sup>82</sup> IACtHR, *Baldeón García v. Peru*, Judgment, 6 April 2006, para. 205.

<sup>83</sup> IACtHR, *Huilca-Tecse v. Peru*, Judgment 3 March 2005, paras. 69, 77 and 78.

of unarmed civilians by members of law enforcement and paramilitary groups in districts La Granja and El Aro have further consolidated this approach.<sup>84</sup>

The case of *Massacres of El Mozote and nearby places v. El Salvador* has also embraced the above-mentioned approach,<sup>85</sup> but has additionally pointed out that the state's duty to investigate summary and extra-judicial killings is only a 'due diligence' obligation and not an absolute one. Nevertheless, because the States must: «adopt the necessary measures, not only at a legislative, administrative and judicial level, by the enactment of criminal laws and the establishment of a justice system to prevent, eliminate and punish the deprivation of life as a result of criminal acts, but also to prevent and protect the individual from the criminal acts of other individuals and to investigate these situations effectively», it is a due diligence obligation that has to be defined in a broad sense.

The practical consequences of this way of thinking of the Court are evident if one considers the ACtHR line of cases dealing with the extrajudicial executions of minors. Exemplary is in this respect the case of *Gomez Paquiyauri Brothers v. Peru*<sup>86</sup> where the Court, after having affirmed that the obligation to protect the fundamental right to life: «has special modes regarding to minors, taking into account the rules on protection of children set forth in the American Convention and in the Convention on the Rights of the Child (CRC)», underlines that: «as guarantor of this right, the State is under the obligation to forestall situations that might lead, by action or omission, to abridge it» and that: «cases in which the victims of human rights are children are especially grave, as their rights are reflected not only in the American Convention, but also in numerous international instruments, broadly accepted by the international community – notably in the United Nations' Convention on the Rights of the Child (CRC)<sup>87</sup> that 'establish the duty of the State to adopt special protection and assistance measures in favor of children under their jurisdiction».<sup>88</sup> Equally exemplary is also the case of the *Roche-*

<sup>84</sup> IACtHR, *Ituango Massacres v. Colombia*, Judgment 1 July 2006, available at: <http://www.refworld.org/cases,IACRTHR,4f5a28e62.html> [last accessed 19 January 2018].

<sup>85</sup> IACtHR, *The Massacres of El Mozote and nearby places v. El Salvador*, Judgment 25 October 2012, available at: <http://www.refworld.org/cases,IACRTHR,564ecfee4.html> (last accessed 19-01-2018).

<sup>86</sup> IACtHR, *Gomez Paquiyauri Brothers v. Peru*, Judgment 8 July 2004, available at: <https://www.crin.org/en/library/legal-database/gomez-paquiyauri-brothers-v-peru> (last accessed 19 January 2018).

<sup>87</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> (last accessed 23 January 2018).

<sup>88</sup> In the same regard, see also IACtHR, Case of *Bulacio v. Argentina*, Judgment of 18 September 2003, available at: <https://www.crin.org/en/library/legal-database/bulacio-v-argentina> (last accessed 19 January 2018), para. 138; IACtHR, Case of the «Street Children» (*Villagran-Morales et al.*) v. Guatemala, Judgment 19 November 1999, available at: <http://www.refworld.org/cases,IACRTHR,4b17bc442.html> (last accessed 19 January 2018), para. 146.

*la Massacre v. Colombia* where the Court in relation to the different context of the execution of judicial officers by members of the military and paramilitaries observed that these extrajudicial executions: «were particularly serious, as they were designed to thwart the investigation and punishment of gross violations of human rights, and in which the execution of the judicial officers was committed in the most inhuman manner.»<sup>89</sup> And so is also the ACtHR case-law on the extrajudicial executions of human rights activists, in particular the case *Nogueira de Carvalho et al. v. Brazil*, which claims that: «the threats and attempts on the safety and life of human rights defenders and the impunity of those responsible for such actions are particularly grave because they have an impact that is not only individual, but also collective» and also, and most significantly, that: «when such things happen, society is prevented from learning the truth about whether the rights of persons are being respected or violated under the jurisdiction of a given State.»<sup>90</sup>

#### VI. THE EUROPEAN AND INTER AMERICAN COURTS OF HUMAN RIGHTS SHOULD USE THE UNITED NATIONS PRINCIPLES AND THE PROTOCOL OF MINNESOTA FOR ASSESSING COMPLIANCE WITH THE STATE'S OBLIGATION TO INVESTIGATE TARGETED KILLINGS

Our allegation here is that both the ECtHR and ACtHR's approach to the state's duty to investigate targeted killings is problematic and in need of change. And this is for a number of important reasons.

Firstly, and in general terms, this is because it is an approach that is too flexible, in the sense that it fails to set out in detail and with sufficient clarity and precision what these two human rights courts consider to be proper and acceptable standards for the investigation of extra-judicial executions. In this respect, one can recall as emblematic the leading case of *Kaya*, where the ECtHR merely holds that that there should be some forms of effective official

<sup>89</sup> IACtHR, *Case of the Mapiripán Massacre v. Colombia*, Judgment 15 September 2005, available at: <http://www.refworld.org/cases,IACRTHR,4f5a2b962.html> (last accessed 19 January 2018), para. 103. See also: IACtHR, *Case of Valle Jaramillo et al. v. Colombia*, Judgment 27 November 2008, available at: <http://www.refworld.org/cases,IACRTHR,4f5a2f352.html> (last accessed 19 January 2018), para. 96.

<sup>90</sup> IACtHR, *Nogueira de Carvalho et al. v. Brazil*, Judgment 27 November 2008, available at: [https://iachr.ils.edu/sites/default/files/iachr/Cases/tripodes\\_nogueira\\_de\\_carvalho\\_et\\_al.\\_v.\\_brazil.pdf](https://iachr.ils.edu/sites/default/files/iachr/Cases/tripodes_nogueira_de_carvalho_et_al._v._brazil.pdf) (last accessed 19 January 2018), para. 76. For a commentary, see SEIBERT-FOHR, A., *Prosecuting Serious Human Rights Violations*, Oxford, OUP, 2009, 86 ff.

investigation when individuals have been killed as a result of the use of force.<sup>91</sup> Again, one can also recall the case of *Tas v. Turkey*, where the ECtHR, starting from the premise that it is not enough for domestic authorities to simply commence an investigation rapidly, held that they should also pursue their inquiries with determination and avoid undue delays.<sup>92</sup> Moreover, one can also recall the case *Garibaldi v. Brazil*, where the ACtHR rather laconically holds that the rights to life and to an effective remedy are breached when investigations into potentially unlawful death are not conducted promptly.<sup>93</sup> Furthermore, one can recall the case of *Mapiripán Massacre v. Colombia*, where the ACtHR merely stated the obvious by indicating that investigative mechanism charged with conducting the investigation must have sufficient financial and human resources, including qualified investigators and relevant experts.<sup>94</sup>

Secondly – and not less importantly – this is also because it is an approach that fails to indicate clearly and systematically that the duty to investigate these criminal offenses against the person is triggered where the State knows or should have known of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made.<sup>95</sup> Thirdly, this is also because it is an approach that leads to an often inadequate protection of the individual rights of the relatives of the victims of the killings. However, the latter observation is only correct if referred to the ECtHR's approach, but not also to the ACtHR's approach to the investigation of targeted killings.<sup>96</sup> Fourthly and lastly, this is also because the lack of a widely agreed-on and comprehensive set of yardsticks in the ECtHR and ACtHR's pertinent case-law for the evaluation of the State's compliance with the duty to investigate targeted killings objectively facilitates the avoidance of international responsibilities by the ECHR and ACHR states in this specific context. Though only indirectly a confirmation of this claim

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<sup>91</sup> ECtHR, *Kaya v. Turkey*, Judgment 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 324, § 101. For a commentary, see CZEPEK, J., «The Development of State's Positive Obligations Under Articles 2 and 3 of the European Convention on Human Rights», in GAETANO, D.; BRONISLAW, S. and ANTONIO, U. (eds.), *Integrazione e politiche di vicinato: Nuovi diritti e nuove economy*, Bari, Cacucci Editore, 2012, p. 513 et seq.

<sup>92</sup> ECtHR, *Tas v. Turkey*, Judgment, 14 November 2000, para. 71.

<sup>93</sup> IACtHR, *Garibaldi v. Brazil*, Judgment, 23 September 2009, para. 39.

<sup>94</sup> IACtHR, «*Mapiripán Massacre*» v. *Colombia*, Judgment of the 15 September 2005, para. 224.

<sup>95</sup> But see IACtHR, *Anzualdo Castro v. Peru*, Judgment, 22 September 2009, para. 134, holding that officials with knowledge of a potentially unlawful death should report it to their superiors or proper authorities without delay.

<sup>96</sup> See below Section VII.

is found in the relatively scarcity of judgments of both the ECtHR and ACtHR that acknowledge the breach of the state's duty to investigate targeted killings.

The proposed solution here for alleviating these and other related problems including the lack of a body of jurisprudence constante' on the investigation of targeted killings is that both the ECtHR and ACtHR will reverse their approach and start making constant use and reference of the UN Principles and of the revised Minnesota Protocol as yardsticks for assessing States' international responsibilities in relation to the investigations of targeted killings, without being prejudiced against the lack of legal force of these instruments.<sup>97</sup>

1. *The European and Inter-American Courts Fail to Provide That the State's Duty to Investigate Targeted Killings is Not Necessarily Triggered by a Formal Complaint to the Police*

Both the ECtHR and ACtHR fail to acknowledge the principle that a formal complaint to the police should not be considered as an indispensable condition for commencing a national criminal investigation of certain serious crimes against the persons like targeted killings and forced disappearances – and yet so it is notwithstanding the existence of some (few) judicial decisions of both the ECtHR and ACtHR that claim that the state's duty to investigate targeted killings is triggered where the state knows or should have known of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made.<sup>98</sup> However the above-named principle has been explicitly acknowledged by the UN Stand-

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<sup>97</sup> See also CHINKIN, Ch., «Normative Development in the International Legal System», in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford, OUP, 2000, 21, 23 (stressing that, «drawing a formal distinction between hard and soft obligations is less important than understanding the processes at work within the law-making environment and the products that flow from it.»); see also, CANTÚ-RIVERA, H., «The Expansion of International Law Beyond Treaties», *American Society of International Law*, available at: <http://www.asil.org/blogs/expansion-international-law-beyond-treaties-ago-ra-end-treaties> (stressing that, «[s]oft law has established itself as a form of international law that serves as a driving vehicle to adopt standards, resolutions, and principles that might not be ripe enough for adoption as a conventional text, that is, of a formally binding nature for the ratifying States.») (last visited 21 January 2018).

<sup>98</sup> See above para. III.

ard Minimum Rules for the Treatment of Prisoners (the «Nelson Mandela Rules»)).<sup>99</sup> The Nelson Mandela Rules, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in 1977, provide, at Rule 71 (1), that: «Notwithstanding the initiation of an internal investigation, the prison director shall report, without delay, any custodial death, disappearance or serious injury to a judicial *or other competent authority* that is independent of the prison administration and mandated to conduct prompt, impartial and effective investigations into the circumstances and causes of such cases». Rule 71 (1) also states that: «The prison administration shall fully cooperate with that authority and ensure that all evidence is preserved».

That a formal complaint to the police is indirectly envisaged by the ECtHR and ACtHR as a *sine qua non* condition for starting a criminal investigation is certainly a shortcoming of their pertinent case-law. And this is for a number of important reasons. Of these the most important is certainly that this condition regrettably introduces the chance for the ECHR and ACHR Contracting states to escape their international responsibility for failures in properly investigating unlawful and summary killings whenever these crimes are reported informally, i.e. without a formal complaint to the police authorities. Nevertheless, it is true that this is a shortcoming that could easily be resolved by the two above mentioned human rights courts by using Rule 71 (1) of the Nelson Mandela Rules as a benchmark for the interpretation of the state's obligation to investigate targeted killings.

With that said, it is also worth noting that the ECtHR' and ACtHR's approach to the investigation of sudden unexpected deaths leaves unclarified whether international humanitarian law (IHL) breaches that fall short of a war crime and are not subject to specific duties and obligations to investigate, should still be subject to «further inquiry». Referring either to the Minnesota Protocol or the UN Principles as a due diligence yardsticks, these two courts would be able to positively resolve this delicate issue and adjudicate a violation of the state's duty to investigate targeted killings whenever a criminal investigation is not carried out on IHL violations.

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<sup>99</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 30 August 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. This version has been superseded by the 2016 Nelson Mandela Rules.

2. *The European and Inter-American Courts' Approach Fail to Provide Practical Guidance on How Crime Scene and Forensic Investigations Should Be Conducted in Cases of Potentially Unlawful Deaths*

Both the ECtHR and ACtHR fail to provide adequate guidance on how the state's obligation to investigate targeted killings should be applied in practice. Unsurprisingly this is another (if not perhaps the most important) shortcoming of these two human rights courts' pertinent case-law on the subject. Yet, that this is so is made quite evident as follows. Both the courts found breaches of the state's duty to investigate potentially unlawful deaths only in very extreme cases, i.e. when the violations of this duty is very clear and manifest.<sup>100</sup> It then follows that, in order for the ECHR and ACHR Contracting States not to too easily incur in international responsibilities for breaches of their obligation to investigate targeted killings, this shortcoming has to be eliminated.

The newly Revised Minnesota Protocol that, in its second Part, contains exhaustive guidance on how crime scene and forensic investigations should be conducted in cases of potentially unlawful deaths constitutes, indeed, a valid tool for achieving this result.<sup>101</sup>

VII. FURTHER CONCLUDING RECOMMENDATIONS: THE ECTHR SHOULD CHANGE ITS ATTITUDE TOWARDS THE BURDEN OF PROOF IN TARGETED KILLING CASES

The ECtHR fails to acknowledge that circumstantial, presumptive or indirect evidence is of critical importance in allegations of targeted killings and forced disappearances. And this is so notwithstanding the objective difficulties of obtaining direct evidence of these crimes against the person including and especially of the state-sponsored targeted killings, as indirectly proven by the recent tragic

<sup>100</sup> Amplus, see Jan Hessbruegge, above n. 43; ID., *Human rights and personal self-defense in international law*, Cambridge, CUP, 2017, pp. 206 et seq.

<sup>101</sup> On this point, see Jan Hessbruegge, above n. who also observes that: «Certain investigative techniques identified as good practices by the Revised Minnesota Protocol may, however, be beyond the means of many developing countries» or instance, many states will be unable to deploy «satellite/aerial image analysis or hyperspectral image analysis, and geophysical survey equipment such as ground-penetrating radar» in order to locate hidden mass graves». See also CORDNER, S. and MCKELVIE, H., «Developing standards in international forensic work to identify missing persons», available at: <https://www.icrc.org/eng/resources/documents/article/other/5hvj3p.htm> (last accessed 22 January 2018).



experience of the targeted killings in the Philippines.<sup>102</sup> Moreover, and equally significantly, this is also so notwithstanding the ECtHR has recognized that a certain degree of speculation is inherent in the preventive purpose of Article 3 of the ECHR (prohibition of torture, inhuman and degrading treatments) and that applicants are not required to provide clear proof of their claim.<sup>103</sup>

Interestingly to observe here is that this omission has indeed a major negative impact on the position of the individual plaintiff. And this is for the simple reason that the ECtHR's resulting imposition of a burden of direct proof in state-sponsored targeted killing and forced disappearance cases unavoidably leads in protection of the state's interest to the detriment of the individual plaintiff's interest. Surprisingly it may be, this is despite the fact that the preference so accorded to the state's interest runs counter to an underlying aim of the ECHR – namely, to guarantee fundamental rights and freedoms to individuals.<sup>104</sup> By imposing an inappropriately high burden of evidence (that is the burden of direct evidence) to the individual plaintiff in cases relating to allegedly targeted killings, the ECtHR does not guarantee in particular the fundamental right to life under Article 2 of the ECHR and its application. And this is essentially because in doing so it makes the enforcement of this fundamental right visibly more difficult and uncertain in a number of crucial cases. On the contrary, the ACtHR, by supporting the use of a different (lower) standard of evidence for targeted killing, torture and forced disappearance cases, namely the standard of indirect evidence, has given better meaning and sense to the fundamental right to life.<sup>105</sup> This and other similar considerations lead us to conclude that the ECtHR should follow the ACtHR's case law on extra-judicial killings and forced disappearances and align its own jurisprudence to the latter's favoring the plaintiff's legal situation.

<sup>102</sup> On the topic, see e.g. OMER-MAN, E.S., «Extrajudicial Killing with Near Impunity: Excessive Force by Israeli Law Enforcement against Palestinians», *B.U. Int'l L.J.*, 35, 2017, 115; KESSLER, O. and WERNER, W., «Extrajudicial Killing as Risk Management», 2008, 39 *Security Dialogue*, 289 ff.

<sup>103</sup> See ECtHR, *Tomasi v. France*, Judgment of 27 August 1992, paras. 108-111; ECtHR, *F. G. v. Sweden*, Judgment of 23 March 2016, para. 109.

<sup>104</sup> On this aim of the ECHR see, *ex multis*, GERARDS, J., «Judicial Deliberations in the European Court of Human Rights», in N. Huls, M. Adams & J. Bomhof (eds.), *The Legitimacy of Highest Court's Rulings*, The Hague, T. M. C. Asser Press, 2008, 407-436; LETSAS, G., «The Truth in Autonomous Concepts: How To Interpret the ECHR», *EJIL*, 15, 2004, 279-305.

<sup>105</sup> See IACtHR, *Rodríguez Vera and others (The Disappeared from the Palace of Justice) v. Colombia*, Judgment, 14 November 2014, para. 489; IACtHR, *Manuel Cepeda Vargas v. Colombia*, Judgment of May 26, 2010, para. 130. See also IACtHR, *Espinoza Gonzalez v. Peru*, Judgment, 20 November 2014, para. 242; IACtHR, *La Cantuta v. Peru*, Judgment, 29 November 2006, para. 160; IACtHR, *Baldeón García v. Peru*, Judgment, 6 April 2006, para. 146.

