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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**Towards an
EU common position
on the use of
armed drones**

DROI

BRIEFING AND WORKSHOP

Towards an EU common position on the use of armed drones

ABSTRACT

Since the European Parliament (EP) passed a resolution on the use of armed drones in February 2014, it has pointed several times to the need for a common EU position on the matter. It has stressed in particular the importance of ensuring compliance with international human rights and humanitarian law when using armed drones. This publication, which was requested by the EP's Human Rights Subcommittee, includes a briefing with specific recommendations, drawn up from a legal standpoint, on the elements that a future Council decision on the use of armed drones should include. This publication also includes a report on the workshop held on 22 March 2017, at which a first draft of the briefing was presented and discussed with Members and stakeholders. The discussion at the workshop confirmed that there was broad support in Parliament for the development of common European principles governing the use of armed drones, not least in view of the emergence of new risks from non-state actors and the EU's commitment to enhancing security and defence cooperation. While there is currently no agreement between Member States to pursue the matter at EU level, the workshop debate drew attention to the common rules on exports of armed drones and drone technology that already exist. Furthermore, progress has been made recently in agreeing a joint EU position regarding the related matter of lethal autonomous weapons.

This paper was requested by the European Parliament's Subcommittee on Human Rights (DROI).

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Part A:

Medium briefing: Towards an EU common position on the use of armed drones

MEDIUM BRIEFING

Towards an EU common position on the use of armed drones

ABSTRACT

The briefing's main purpose is to propose and elucidate facets of a model Council Decision on the use of armed drones, including the criteria necessary to be taken up at national levels for inclusion in relevant policy and legislation in order to reflect the European Union (EU)'s commitment to the rule of law, human rights and fundamental freedoms. The proposed Council Decision tracks the objectives advanced by the 2016 EU Global Strategy for the European Union's Foreign and Security Policy, 'Shared Vision, Common Action: A Stronger Europe' and is based largely on the elements found in the European Parliament's resolution on the use of armed drones (2014/2567(RSP)) in addition to existing international standards and recommendations, notably at the EU and United Nations (UN) level. This briefing furthermore examines existing academic literature and developments at the international, European and national levels relevant to the EU policy and its evolution regarding the use of armed drones since the issuing of the European Parliament's resolution on armed drones.

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List of Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
CSOs	Civil Society Organisations
CTIVD	Dutch Oversight Committee on Intelligence Services (<i>Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten</i>)
DROI	European Parliament Subcommittee on Human Rights
ECFR	European Council on Foreign Relations
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EDA	European Defence Agency
EEAS	European External Action Service
EFAD	European Forum on Armed Drones
EP	European Parliament
EU	European Union
HR/VP	High Representative of the European Union for Foreign Affairs and Security Policy and Vice President of the European Commission
HRC	Human Rights Council
ICC	International Criminal Court
ICCT	International Centre for Counter-Terrorism – The Hague
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
LAWS	Lethal Autonomous Weapons Systems
MIVD	Dutch Military Intelligence Services (<i>Militaire Inlichtingen- en Veiligheidsdienst</i>)
NATO	North Atlantic Treaty Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
SEDE	European Parliament Subcommittee on Security and Defence
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations

UNC	Charter of the United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNODA	United Nations Office of Disarmament Affairs
US	United States
USA	United States of America
UVA	Unmanned Aerial Vehicle

Executive summary

As noted in the European Parliament (EP) Resolution 2014/2567(RSP), recent years have seen a steep increase of extraterritorial force coupled with an unknown number of civilians having been killed, seriously injured or traumatised by drone strikes outside of recognised areas of armed conflict. Despite arguments that drones are more precise in targeting and therefore reduce civilian casualties, there is some evidence that armed drones may actually lower the threshold for the use of lethal force, especially outside of armed conflict, and encourage their use in a way that challenges relevant legal standards, leading to an increase in the number of individuals affected by drone strikes. Additionally, concerns about the side-effects of drone strikes in increasing the number of recruits to terrorist organisations, the related effects that using armed drones has on long-term military strategy and the continued risk (and reality) of proliferation of armed drones – evidenced by the fact that an increasing number of States as well as non-state actors have acquired or are already using armed drones or related technology to carry out operations – make this ever more an urgent topic in need of comprehensively addressing by the European Union (EU) and other actors.

Parallel to these developments, there have been recent calls for a more robust EU Common Defence and Security Policy as was advanced in the EU Global Strategy for the European Union's Foreign and Security Policy 'Shared Vision, Common Action: A Stronger Europe', including a call to increase investment in remotely piloted systems, though at the time of publication the European Defence Agency (EDA) has only invested in a Medium Altitude Long Endurance drone development project for surveillance purposes. In light of these factors, and in following with the recommendation of High Representative of the European Union for Foreign Affairs and Security Policy and Vice President of the European Commission Federica Mogherini for global rules regulating drones, it could be advantageous for the Council of the EU to heed the urging of the European Parliament in developing and adopting a Council Decision about the use of armed drones before EU States become engaged more deeply in their own use and acquisition of drones or partnering with others in this realm. In light of these issues and developments, especially at this critical juncture in a changing geopolitical framework, a common position on rules governing the use of armed drones is imperative. Such a common position must include criteria based on the rule of law that reflect the most restrictive interpretation of limits to the use of force.

This briefing aims to outline such a common position by first examining existing academic literature and developments at the international, European and national levels relevant to the EU policy and its evolution regarding the use of armed drones since the adoption of the European Parliament resolution on the use of armed drones. The briefing's main purpose is to propose and elucidate facets – such as requirements for Member States with respect to transparency, accountability mechanisms and processes, export controls and restrictions on assistance to other States – of a model Council Decision on the use of armed drones. These parameters include the necessary criteria to be taken up at national levels for inclusion in relevant policy and legislation in order to reflect the EU's commitment to the rule of law, human rights and fundamental freedoms. As the proposed elements of this briefing are based purely on normative considerations, they do not reflect an analysis of political priorities or political positions at this stage. These elements are in line with the objectives advanced by the 2016 EU Global Strategy and are based largely on the elements found in Resolution 2014/2567(RSP) in addition to existing international standards and recommendations, notably at the EU and United Nations (UN) levels.

1 Introduction

As noted in the European Parliament (EP) Resolution 2014/2567(RSP) (European Parliament, 2014), recent years have seen a steep increase of extraterritorial force coupled with an unknown number of civilians having been killed, seriously injured or traumatised by drone strikes outside of recognised areas of armed conflict. Compared to other weapons systems, drones have particular inherent advantages such as the ability to loiter over targets for long periods of time, to strike particular targets and to not place service members in harm's way. It is this capability that lowers the threshold for policymakers to resort to using force (Zenko, 2015). In a policy document, UK's Ministry of Defence claims that the 'increased use [of remote and automated systems] in combat and support functions will reduce the risk to military personnel and thereby potentially change the threshold for the use of force. Fewer casualties may lower political risk and any public reticence for a military response.' (UK Ministry of Defence, 2015: p. 31-2). It is this lowering of the threshold for the use of lethal force, especially outside of armed conflict and the encouragement of their use in a way that challenges relevant legal standards (Walsh & Schulzke, 2015; Heyns, 2013 paragraph 17; Cole, 2016; Pejic, 2015: p. 3) that make the use of armed drones especially worrisome, when compared to other weapons platforms.

Additionally, concerns about the side-effects of drone strikes in increasing the number of recruits to terrorist organisations (Abbas, 2013; Pilkington & MacAskill, 2015), the related effects that using armed drones has on long-term military strategy and the continued risk and reality of proliferation of armed drones (Zwijnenburg & Oudes, 2011: pp. 18-22)¹ make this ever more an urgent topic in need of comprehensive address by the European Union (EU) and other actors. At the outset of this briefing, it is important to note that armed drones are not an unlawful weapons platform and EU Member States as well as the EU writ large may have a legitimate interest in procuring such systems in the pursuit of a strong military and defence capacity, a phenomenon even encouraged in the June 2016 EU Global Strategy Document. Therefore, this briefing addresses regulation of said technology rather than its prohibition. Given the possibility of counter-productive consequences arising from any misuse of armed drones and related technology, a strict interpretation of and adherence to the relevant legal framework for using armed drones is in the strategic interest of the EU. It will work to its advantage, as the EU is tasked with upholding relevant international legal principles in its commitment to the rule of law and fundamental freedoms.

Often discussed in parallel to issues surrounding armed drones are those relevant to lethal autonomous weapons systems (LAWS). For example, the EP called for a ban on development, production and use of fully autonomous weapons enabling strikes to be carried out without meaningful human intervention in its 2014 Resolution on armed drones (European Parliament, 2014). Though these two weapons systems have certain areas of overlap, it is imperative to note that the briefing addresses issues relevant to regulating the use of armed drones (controlled by a human in the loop) and not lethal autonomous weapons systems (which lack meaningful human control). However, guidelines adopted to regulate the use of armed drones might offer guidance to understanding what 'meaningful human control' could entail for any kind of future technological development that may occur, and elements of this model Council Decision would be theoretically applicable to any weapons system that incorporates meaningful human control, whereas those without such control would need separate guidelines regulating their use.

Recently, there have been calls for a more robust European Union Common Defence and Security Policy (CDSP) as was advanced in the 2016 EU Global Strategy, including a call to increase investment in remotely piloted systems, though at the time of publication, the European Defence Agency (EDA) has only invested in a Medium Altitude Long Endurance drone development project for surveillance purposes. Additionally,

¹ See e.g. UK Parliament Joint Committee of Human Rights, 2016a: paragraph 1.36, Council of Europe Committee of Ministers, 2015a; Dworkin, 2016; Friese, Jenzen-Jones & Smallwood, 2016; Melzer, 2013; Gibbons-Neff, 2016; and Schmitt, 2017.

High Representative of the European Union for Foreign Affairs and Security Policy and Vice President of the European Commission (HR/VP) Federica Mogherini has called for global rules regulating drones (as reflected in the EU Global Strategy: p. 43, though it is unclear whether this refers to armed or civilian drones). In light of these factors, it could be advantageous for the Council to heed the Parliament's urging to develop and adopt a Council Decision about the use of armed drones before EU Member States become engaged more deeply in their own use and acquisition of drones or partnering with others in this realm.

As for the approach of such a Council Decision, a broader look at the geopolitical context in 2017 is in order. Based in the founding documents of the Union, the EU harnesses a great amount of what commentators have deemed 'civilian power' (Stavridis, 2001) and the ability to advance normative interpretations of fundamental values, acting as a 'norm entrepreneur' (Oliveira Martins & Backhaus, 2015). The global strategy argued that this civilian power must undergo a transformation in the face of a changing world, including increasing the focus on its military response in line with the values of the EU:

'We live in times of existential crisis, within and beyond the European Union. Our Union is under threat. Our European project, which has brought unprecedented peace, prosperity and democracy, is being questioned. [...] Yet these are also times of extraordinary opportunity'. (EU Global Strategy, 2016)

The Global Strategy argues that a more coordinated and pronounced military strategy befits the EU. In light of two recent examples, the British referendum and the latest presidential election in the United States of America (USA), transatlantic relations are also changing, and this may have far-reaching effects on the role of the North-Atlantic Treaty Organization (NATO) and the nature of the EU's relationship with Russia and other neighbouring regions, though at this early stage, the full reach of these changes remains to be seen. The Global Strategy also states: 'A fragile world calls for a more confident and responsible European Union', with the EU's credibility in the balance, a credibility that 'hinges on our unity, [...] the effectiveness and consistency of our policies, and adherence to our values' (EU Global Strategy, 2016). These values are enshrined in long-standing documents forming the foundation of the EU. More recently, the President of the European Council Donald Tusk reaffirmed the need for unity in the face of a changing world when he stated in a press release ahead of the February 2017 Malta Summit:

'In a world full of tension and confrontation, what is needed is courage, determination and political solidarity of Europeans. Without them we will not survive. If we do not believe in ourselves, in the deeper purpose of integration, why should anyone else? In Rome [at the 60th Anniversary celebrations of the Rome Treaty forming the European Economic Community] we should renew this declaration of faith. In today's world of states-continent with hundreds of millions of inhabitants, European countries taken separately have little weight. But the EU has demographic and economic potential, which makes it a partner equal to the largest powers. For this reason, the most important signal that should come out of Rome is that of readiness of the 27 to be united. A signal that we not only must, but we want to be united.' (Tusk, 2017)

And with this, he echoed the EU Global Strategy when he called for a:

'definitive reinforcement of the EU external borders; improved cooperation of services responsible for combating terrorism and protecting order and peace within the border-free area; an increase in defence spending; strengthening the foreign policy of the EU as a whole as well as better coordinating individual member states' foreign policies [...]. We should also firmly defend the international order based on the rule of law. We cannot surrender to those who want to weaken or invalidate the Transatlantic bond, without which global order and peace cannot survive. We should remind our American friends of their own motto: United we stand, divided we fall.' (Tusk, 2017)

The Global Strategy reminds us that the EU is tasked with 'promot[ing] a rules-based global order with multilateralism as its key principle and the United Nations at its core' (EU Global Strategy, 2016). This is strictly in line with the stated objectives of the Common Foreign and Security Policy (CFSP), which include values such as liberty, democracy, the universality and indivisibility of human rights and fundamental freedoms, the rule of law, preserving peace and strengthening international security in accordance with

the UN Charter, and respect for principles of international law (Treaty on the European Union, consolidated version: article 21; see also, Wessels, 1999: pp. 59 et seq.). As summarised by other commentators:

'The EU's Global Strategy is an opportunity for the EU to re-define its role on the global stage in a way that builds on the norms that underpin its own progress, shows leadership and ambition, and takes a decisive stand against regressive regimes that prefer compliant partners that prioritise interest over universal values'. (Open Society European Policy Institute, 2016)

To interpret notions advanced by the EU Global Strategy with respect to armed drones, it is necessary to first recognise that the state of affairs regarding the regulation of the use of armed drones in the EU is unsystematic — with one Member State (the United Kingdom) at the time of writing using armed drones, but a number of Member States in various stages of having developed, acquired and/or used the technology themselves or cooperated with States that have, or that have plans to develop, acquire and/or use such technology in the future. The fact that there still is no common EU position on the use of armed drones risks leading to fragmentation and disagreement among Member States, and has the potential to undermine the unity implored by the EU Global Strategy (Dorsey & Paulussen, 2015). However, it is important to note that this fragmentation and lack of a Council Decision do not mean that the call for a Council Decision on armed drones has not resounded; in fact, it has formed the basis for policy discussions. Acting Director Francois Rivasseau of the Security Policy and Conflict Prevention Directorate of the European External Action Service (EEAS) reiterated this in his statements made during a 2016 joint hearing of the EP Human Rights and Security and Defence (DROI/SEDE) subcommittees on the use of armed drones, and made two things clear in this regard: 1) the absence of a Council Decision on armed drones does not mean that there is an absence of the principles of international law guiding discussion² and 2) the 2014 EP Resolution informs and inspires actions by the EEAS in trying, via informal meetings, to advance ideas and consensus regarding the use of armed drones.³

Over the past several years, the United States in its role as the global leader in armed drone use has taken an expansive and flexible view of its legal obligations when using armed drones or carrying out lethal targeting operations to counter terrorism. While unmanned targeting operations raise certain unique strategic and moral questions discussed above, the applicable law is the same as that governing manned targeting operations. These far-reaching and flexible interpretations undermine the long-standing international legal framework regarding the use of force. Particularly worrying areas of note would be the confusion concerning the scope of application of rules of International Humanitarian Law (IHL) and International Human Rights Law (IHRL), including denial of the extraterritorial application of human rights law (Dorsey & Paulussen, 2013); the expanded and vague interpretation of 'imminence' with respect to self-defence uses of force; the overly-expansive assertion of geographic and temporal scope of an armed conflict with non-state actors and the overly-expansive assertion of ability to target individuals who do not meet the relevant legal criteria. Largely, the EU Member States have stayed silent with respect to such expansive or blurred legal interpretations advanced by the United States (Dorsey & Paulussen, 2015).

Additionally, with the exception of the United Kingdom (UK Parliament Joint Committee on Human Rights, 2016b; Wright, 2017)⁴ and the Netherlands (Dorsey & Paulussen, 2015)⁵, EU Member States are less

² See hearing video, Rivasseau statement starting at 1:02:45, <http://www.europarl.europa.eu/news/en/news-room/20160622IPR33351/subcommittee-on-human-rights-and-subcommittee-on-security-and-defence>, last accessed on 24 May 2017

³ See *ibidem*, starting at 1:32:30.

⁴ These steps toward transparency are welcomed; however, pronouncing a Member State's position does not necessarily reflect that that position is fully compliant with the obligations a Member State has under international law. See discussion below on the relationship between transparency and accountability.

⁵ To elicit public discourse on State positions and policies around the use of armed drones, Dorsey and Paulussen conducted a survey of all 28 EU Member States' departments of foreign affairs, defence, justice and intelligence services. The Netherlands'

transparent than even the United States when it comes to their positions on legal issues implicated by the use of armed drones (Dorsey & Paulussen, 2015). Transparency and accountability are paramount in the increasing use of armed drones, given that without the ability to access justice it impedes the enjoyment of fundamental rights where drone strikes occur (for more on transparency and accountability, see below).

Without a common basis for informing policy, and the current *lacunae* of published positions by Member States, there is a risk that the EU or its Member States may begin to adopt the kinds of broader interpretations of law as advanced by the United States, for example, in conducting their own counterterrorism operations, a shift that commentators have recently described (Dworkin, 2016; Wright, 2017)⁶. The United Kingdom's interpretation of international norms in extraterritorial operations, while not fully embracing the expanded and flexible understanding the USA promotes, has begun to bleed into the acceptance of some of those expansive notions (Wright, 2017).

If EU Member States choose to continue in silence and not pronounce themselves on a policy regulating the use of armed drones, the risks are potentially grave. As a 2013 study commissioned by the EP forewarned:

'In conjunction with the rapid development and proliferation of drone technology and the perceived lack of transparency and accountability of current policies, this legal uncertainty has the potential of polarizing the international community, undermining the rule of law and, ultimately, of destabilizing the international security environment as a whole.' (Melzer, 2013: p. 44)

The European Council on Foreign Relations (ECFR) pointed out in a 2013 policy briefing:

'Perhaps the strongest reason for the EU to define a clearer position on drones and targeted killing is to prevent the expansive and opaque policies followed by the US until now from setting an unchallenged global precedent. [...] The US assertion that it can lawfully target members of a group with whom it declares itself to be at war, even outside battlefield conditions, could become a reference point for these and other countries. It will be difficult for the EU to condemn such use of drones if it fails to define its own position more clearly at this point.' (Dworkin, 2013)

Despite the USA's recent attempts at more transparency⁷, perhaps the policies are now less opaque than when Dworkin published his piece, but certainly no less vague. All that has been published continues to leave ambiguity about US legal interpretations, and to the extent that they resolve remaining ambiguities, the US legal publications confirm the use of legal interpretations that are still widely expansive and flexible (Dorsey, 2016).

Aside from the discussion on the USA's expansive interpretations of the law, HR/VP Mogherini and other EU officials have noted that the aforementioned shift in the geopolitical landscape offers potential opportunities and an obligation for the EU to promote its fundamental values of transparency, accountability and the rule of law. In preventing further erosion of international legal principles, a Council Decision on the use of armed drones would contemporaneously act as a safeguard for the rule of law (and the established interpretation of international legal principles) and assist in clarifying and distilling the applicable legal frameworks for using armed drones. Furthermore, the Decision could offer guidance to Member States in forming or articulating policies and positions at the national level related to the use of

Ministry of Foreign Affairs was the only respondent to fill out the questionnaire on the legal framework on armed drones in its entirety and allow public attribution of the responses (Dorsey & Paulussen, 2015).

⁶ The United States has, up until now, been the most active user of this kind of technology, but certainly some EU Member States have been active in the acquisition or use of armed or surveillance drones, often sharing data with the United States or carrying out their own missions in Syria, Iraq, Mali and a number of other locations around the world. The United States has put forth a robust interpretation of international legal frameworks applicable to the use of such technology, some of which runs afoul of the established interpretation of the applicable areas of law: IHL, IHRL and *jus ad bellum* principles (the laws regulating the use of force between/among States) in order to justify its use of lethal force in carrying out its counterterrorism objectives.

⁷ These attempts can be found in White House, 2016a; Director of National Intelligence, 2016; and White House 2016b. For analysis, see Hussein & Moorehead, 2016.

this technology, which would further the setting of positive precedents in line with the concept of the EU as a champion of advancing rights within a rules-based international order and comport with the ideas advanced in the Global Strategy about principled pragmatism guiding the EU's external action going forward.

Some may consider the topic of armed drones to fall solely within national competencies relating to security policy, rendering a Council Decision regulating them unnecessary, or at the least undesirable (Dworkin, 2014).

The procedures of CFSP and CSDP are not supranational nor intergovernmental in nature, but rather *sui generis* in character. Because of this, and in accordance with Article 24(1) TEU (which essentially explains the scope of CFSP and does not function as a legal basis for Decisions), the EU cannot use CFSP and CSDP to adopt legislation⁸. However, the Council can issue a Decision on this subject⁹. Furthermore, the EP is competent to address questions or make recommendations to the Council on the basis of article 36 TEU. This does not necessarily indicate that Decisions adopted are not binding, but it signifies that under the CFSP and CSDP the EU cannot regulate armed drones in terms of production specification as this falls outside its scope. Because of the ability to issue Decisions, the EU can still have influence regarding Member States' behaviour with respect to armed drones: for example, when adopting a Decision via Article 25 TEU, the EU would be competent to authorise or prohibit and regulate the use of armed drones in the framework of collective EU actions (see, e.g., Articles 42 and 43 TEU).

Relevant for decision-making by the Council in the field of CFSP is Article 29 TEU, which stipulates that the Council shall adopt Decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature and that Member States shall ensure that their national policies conform to the Union positions¹⁰. For example, Article 29 can form a feasible legal basis upon which to base stipulations on the use of armed drones, addressed to the Member States¹¹. Additionally, there might be a subsidiary role to be played by the EDA via Article 45 (1) of TEU in making suggestions and recommendations for EU and national policy purposes and identifying, promoting and coordinating activities and best practices regarding armed drones operations under the CSDP.

One example of how the CFSP broadly has the competence to influence issues such as these can be found in Council Decision 2011/168/CFSP on EU support for the International Criminal Court (ICC) in which it directs all 28 Member States to advance universal support for the Rome Statute of the ICC while at the same time preserving the integrity, smooth functioning and independence of the Court. In doing so, the Decision spells out a common position for international humanitarian law and human rights and Article 1 reflects, directly or indirectly, the cornerstones of Article 21 TEU (Council Decision 2011/168/CFSP, Article 1). Additionally, Articles 5 and 8 of this Decision require implementation of the Rome Statute of the ICC at the national level and recall the principle of consistency between internal and external action with regard to the crimes outlined in the Rome Statute, providing an example of when the CFSP prescribes competence to regulate thematic issues.

⁸ Article 24, paragraph 1, TEU.

⁹ Article 25, under b, under ii, TEU; article 29 TEU.

¹⁰ On this issue, under Article 24, paragraph 3, TEU, 'Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council and the High Representative shall ensure compliance with these principles.' Also from article 31, paragraph 1, TEU follows that a Member State is obliged to follow a Decision from the Council; only when they lodge a formal declaration they are not obligated to apply the Decision.

¹¹ Given the complexities of the issue regarding the EU's competence and the legal basis for a Council Decision on armed drones, it is the author's suggestion that this area would require further assessment.

Similar to the Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, establishing a Council Decision with respect to the use of armed drones would increase information sharing and transparency among Member States. It would also provide greater clarity, contribute to a unified position and can provide a platform for meaningful discussion with the aim of uniformity achieving the highest standards of Member States' national policies and stricter implementation of and adherence to relevant criteria. And much like the formation of the 2008 Arms Export Common Position, which was the result of a ten-year long endeavour, made possible by the interaction of Member States and civil society actors, the formulation of a Council Decision on armed drones could benefit greatly from the participation of civil society actors in the drafting process. On this issue, there is already an active body of civil society organisations (CSOs) working toward such a position: the European Forum on Armed Drones (EFAD), a coalition of more than 20 European civil society organisations that advocates a common European position on armed drones, and calls upon EU Governments to articulate clear policy on the use of armed drones, prevent complicity in unlawful drone operations, ensure transparency and accountability and control proliferation (EFAD, 2016)¹².

This briefing examines existing academic literature related to forming EU policy and its possible evolution regarding the use of armed drones since the issuance of the EP Resolution 2014/2567(RSP). It also discusses subsequent developments in the international and European context on issues related to the use of armed drones, in order to inform and explain facets of a model EU position on the use of armed drones. As the proposed elements of this briefing are based purely on normative considerations, they do not reflect an analysis of political priorities or political positions at this stage. The proposed model elements of an EU Council Decision presented below are based on the elements found in the 2014 Resolution, in international standards, legal obligations and the author's recommendations.

2 Overview of literature and institutional developments

The preceding 15 years have been met with a surge of commentary from a range of authors and institutions around the world, not surprisingly increasing parallel to the rate of growth and use of armed drone technology. However, in the interest of brevity, this overview will be limited to the most relevant academic and policy publications and institutional developments (including at the EU and the UN level) since the EP's 2014 Resolution. These help trace developments of policy and law, which ultimately aids in formulating a model Council Decision on the use of armed drones.

2.1 2014

2.1.1 European Parliament Resolution on the use of armed drones

In February 2014, the EP adopted Resolution 2014/2567(RSP) on the use of armed drones, which expressed concern over the use of such technology outside the recognised legal framework and called on the Council to set forth a Common Position (now referred to as Council Decision) on the use of armed drones, called on the HR/VP, Member States and Council to oppose and ban extrajudicial targeted killings, encouraged follow-up on the two reports by UN Special Rapporteurs Christof Heyns and Ben Emmerson¹³, and called for more transparency and accountability in the use of armed drones (European Parliament, 2014). The Parliament passed the Resolution with cross-party support in a vote of 534 in favour, 49 against and 10 abstentions (European Parliament Legislative Observatory, 2014b).

¹² Disclosure: author is the Coordinator of the EFAD. However, this briefing is drafted by the author in her independent capacity as Associate Fellow at the International Centre for Counter-Terrorism – The Hague.

¹³ Disclosure: author consulted on legal issues for this report.

2.1.2 UN Special Rapporteur Emmerson's report

In March 2014, Ben Emmerson, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, released his final report, incorporating findings published in September 2013 with additional recommendations for States on the civilian impact of drone strikes. Through several case studies, wherein compiled evidence was analysed in light of the relevant legal framework, Emmerson specifically recommended that the United Kingdom (UK), the USA and Israel release more information about strikes outlined in the report and called for a panel of experts to further investigate and report on the issue. Additionally, he highlighted a number of areas of law that needed clarification and agreement with respect to using armed drones, clarification on self-defence uses of force, a number of questions related to the interpretation of notions of IHL on targeting, threshold of armed conflict, and whether there exists an obligation to capture rather than kill in IHL. Furthermore, he urged States to comply with obligations under relevant international frameworks while countering terrorism, and in cases where allegations of civilian harm arose, to 'conduct prompt, independent and impartial fact-finding inquiry and provide a detailed public explanation.' Additionally, he urged States to clarify their position on issues raised by this and other relevant reports, and to release

'to the maximum extent possible, information relevant to lethal extraterritorial counter-terrorism operations; to make public the results of all fact-finding investigations into alleged civilian casualties resulting from such operations; and to release their own data on the level of civilian casualties inflicted through the use of remotely piloted aircraft, together with information on the evaluation methodology used.' (Emmerson, 2014: paragraph 36)

2.1.3 Human Rights Council Resolution A/HRC/25/L.32 and discussion panel

On 28 March 2014, the UN Human Rights Council (HRC) passed Resolution A/HRC/25/L.32 entitled *Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law* (UN Human Rights Council, 2014b). One key substantive element in the Resolution is the provision on transparency and investigations, which '[c]alls upon states to ensure transparency in their records on the use of remotely piloted aircraft or armed drones and to conduct prompt, independent and impartial investigations whenever there are indications of a violation to international law caused by their use'. As a follow-up to the Resolution in March, in September 2014, the HRC hosted a panel discussion on the use of armed drones¹⁴. Though space constrains extensive discussion in this briefing, it is useful to mention that the International Committee of the Red Cross (ICRC) also made a statement during this panel discussion, many useful elements of which inform the formation and analysis of elements found in the Model Council Decision below.

2.1.4 UN Special Rapporteur Heyns' report

The former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, also outlined relevant issues in his Report to the HRC in April 2014. Most noteworthy in terms of a model Council Decision on armed drones were his arguments contained in the following paragraphs, including highlighting the EU position announced at the 2013 Third Committee's 27th meeting at the 68th UN General Assembly:

¹⁴ Panelist Dapo Akande summarised: 'In this context there was discussion of the substantive legal issues relating to the determination of the applicable legal framework – such as the classification of situations of violence (for the purpose of determining the applicability of IHL) and the extraterritorial application of the right to life. However, perhaps the most significant disagreement between States related to the question of institutional competence for discussing and monitoring compliance with the law. In a divide which appeared to mirror the range of views as to whether norms of human rights or IHL constitute part of, or the main applicable legal framework, some States (like the USA, the UK and France) insisted that the Human Rights Council was not an appropriate forum for discussion of the use of armed drones whereas many other States, observers and panellists insisted that the Council was such a forum.' (Akande, 2014) See also Dorsey & Paulussen, 2015.

‘137. Legal uncertainty in relation to the interpretation of important rules on the international use of force presents a clear danger to the international community. To leave such important rules open to interpretation by different sides may lead to the creation of unfavourable precedents where States have wide discretion to take life and there are few prospects of accountability. Such a situation undermines the protection of the right to life. It also undermines the rule of law, and the ability of the international community to maintain a solid foundation for international security.

138. To contribute towards a stronger global consensus on the regulation of armed drone strikes (by international law), it is proposed that the Council, among other relevant bodies, consider expressing its views on the applicable legal framework on drones, as has to some extent already been done by the General Assembly.

139. The intervention by the European Union (EU), with which the United Kingdom aligned itself, during the debate in the Third Committee of the General Assembly, in October 2013, on the report by the Special Rapporteur, provides an important point of reference. The EU expressed its view that:

- (a) The current international legal framework is adequate to govern drone strikes;
 - (b) The right to life can only be adequately protected if all constraints on the use of force set out by international law are complied with;
 - (c) International central norms on the use of force must not be abandoned to suit the current use of drones;
 - (d) There should be transparency surrounding all drone operations to enhance accountability.’
- (Heyns, 2014 [original footnotes omitted])

Heyns stated that the above-mentioned position proffered by the EU was a minimum standard and provided that the following clarifying language ought to be considered in order to delimit the boundaries of the debate: ‘Outside of the narrow confines of armed conflict, any killing must meet the requirements of human rights law, and be strictly necessary and proportionate.’ (Heyns, 2014: paragraphs 137-140)

2.2 2015

2.2.1 Council of Europe’s Parliamentary Assembly drone report and Resolution

After hosting several debates before the Committee responsible (outlined in Dorsey & Paulussen, 2015), the Parliamentary Assembly of the Council of Europe unanimously adopted a resolution on 27 January 2015 recognising several legal issues still needing to be addressed with respect to the use of armed drones. From the ICCT’s summary (Dorsey & Paulussen, 2015: pp.57-58) [original footnotes omitted]:

‘The Parliamentary Assembly called on States to undertake several obligations in order to bring about more clarity and conformity with legal questions raised by the use of armed drones. The legal issues that the Assembly identified were: national sovereignty and the respect for territorial integrity with respect to military interventions without consent where only combatants are targetable (and force must be necessary and proportionate, with precautions taken) to minimise harm to civilians; under IHRL, targeted killing is only legal in narrow instances in protecting human life, and in situations where there is no other option; under Article 2 of the ECHR (right to life), the strict requirement stands of absolute necessity when deciding to deprive one of his life; and the fact that some countries have used an extended interpretation of NIAC to encapsulate a larger ‘battlespace’ and to justify a wider use of targeted killings, which ‘threatens to blur the line between armed conflict and law enforcement, to the detriment of the protection of human rights’. Therefore, the Assembly called on States to respect the limits under international law on targeted killing (including both international humanitarian and human rights law); establish clear procedures for the authorisation of strikes (and stated they must be subject to a supervisory high-level court as well as evaluation in an ex-post investigation by an independent body); avoid expanding the established notion of non-international armed conflict (including organisation and intensity criteria); investigate all deaths caused by drone strikes for accountability purposes and for compensation to victims’ relatives; openly publish procedures used for targeting (and the investigations mentioned above); not use intelligence for targeting based on communication pattern of the suspect, including for so-called ‘signature strikes’ (pattern of behaviour monitoring), except in armed conflict, and to avoid so-called ‘double-tap strikes’ involving ‘a second strike targeting first responders’. Additionally, the [Parliamentary Assembly of the Council of Europe’s Committee on Legal Affairs and Human Rights] would in essence remain seized of the matter by calling for a thorough study on the lawfulness of combat drone use.’

2.2.2 Human Rights Council Resolution A/HRC/28/L.2

On 19 March 2015, the HRC passed Resolution A/HRC/28/L.2 entitled *Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law*, which welcomed the 2014 interactive panel of experts, invited the United Nations High Commissioner for Human Rights (UNHCHR) and special procedures of the Council to bring violations of international law as resulting from the use of armed drones into the framework of their mandates and remained seized of the matter.

2.2.3 United Nations Office of Disarmament Affairs report

In September 2015, the United Nations Office of Disarmament Affairs (UNODA) released its *Study on Armed Unmanned Aerial Vehicles* (UAVs, in this publication, are synonymous with drones) which examined how international law applied to using armed drones in conducting strikes and offered concrete recommendations on issues related to oversight, accountability and transparency (UNODA, 2015). The study provides a comprehensive overview of distinctions between civilian and military drones and the relevant international law that applies. Exceptionally relevant to the discussion around an EU Council Decision was the chapter devoted to formulating measures for increased transparency, accountability and oversight with respect to the use of armed drones. Furthermore, on transparency in the development, acquisition, stockpiling and transfer of drones, the UNODA study offered several relevant suggestions with respect to developing a European position on these issues, which have been taken up in the model Council Decision below.

2.2.4 International Centre for Counter-Terrorism – The Hague research paper

Another relevant publication is the International Centre for Counter-Terrorism – The Hague (ICCT)'s 2015 *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives* (Dorsey & Paulussen, 2015). In this, the authors, triggered by the EP's 2014 Resolution, sent questionnaires to various ministries of all 28 EU Member States and compiled governmental statements from various fora that assisted in evincing Member States' official positions on legal issues related to the use of armed drones. Based on their research, the authors concluded that a unified EU voice was still elusive given the sensitive nature of the technology and the potential lack of agreement among EU Member States regarding the status of customary international law or the scope of particular concepts. One determination made is that public silence on the issue of drone use by other states may not necessarily signify acquiescence or consent, as it may indicate a lack of information about particular drone use or perhaps the existence of diplomatic discussions taking place privately. The authors concluded:

'A solid EU position based on the rule of law is necessary as a counterweight against the current US position, which still raises serious questions under international law. The EU will be stronger in its criticism of the US if it speaks with a unified voice. Several EU Member States have already critiqued the US' approach [...] but in order to be most effective in engagement with the US, additionally, a single EU voice, or at least a chorus of a larger number of EU Member States, is preferable.' (Dorsey & Paulussen, 2015: p. 71)

2.3 2016

2.3.1 European Parliament Resolution 2016/2662(RSP) and joint DROI/SEDE hearing

Following earlier work by the DROI Subcommittee of the European Parliament on the IHRL and IHL aspects of the use of drones, in April 2016, the EP adopted a Resolution on attacks on hospitals and schools as violations of IHL (European Parliament, 2016b). In the 2016 Resolution, it recalled Resolution 2014/2567(RSP), and specifically reiterated its grave concern over the use of armed drones outside the international legal framework and insisted on its call on the Council to adopt an EU common position (now termed Council Decision) on the use of armed drones. Additionally, the EP Subcommittees on Human Rights and on Security and Defence jointly held a hearing on the use of drones and the fight against

terrorism on 30 June 2016, focusing on the grave impact that the use of drones has on human rights, inviting a range of speakers to inform the Parliament about issues in assessing whether drone use complies with relevant international legal frameworks, civilian casualties and the effect drone strikes have on communities, notions of transparency and accountability and the necessity of establishing meaningful compensation mechanisms¹⁵.

2.3.2 EU Global Strategy

As mentioned above, the EU Global Strategy was published in June 2016. The most important elements relevant for the discussion on armed drones include the areas identified as extraordinary opportunity for the EU to become stronger and more united in the face of emerging challenges. These opportunities include building a more coordinated and pronounced military strategy in order for the EU to profile itself as a more confident and responsible global player and increasing its credibility in the face of a changing global order. In achieving these objectives, the Global Strategy concurrently outlines the importance of staying true to the EU's rules-based identity with multilateralism as its key principle and the UN at its core (EU Global Strategy, 2016).

2.3.3 UK Parliament's Joint Committee on Human Rights report

In April 2016, The UK Parliament's Joint Committee on Human Rights published its report on *The Government's policy on the use of drones for targeted killing* as a response to new kinds of uses of force carried out by drone strikes by the British Government in Syria. In their own words, they inquired into this issue given the

'extraordinary seriousness of the taking of life in order to protect the lives of others, which raises important human rights issues; the fact that the Government announced it as a "new departure" in its policy; and because of the importance we attach, as Parliament's human rights committee, to the rule of law.' (UK Parliament Joint Committee on Human Rights, 2016a: Summary).

The inquiry covered such topics as the Government's policy, an analysis of the UK's legal basis for carrying out strikes, the decision-making process preceding any use of force, issues of accountability and of international consensus before making conclusions and recommendations.

The Joint Committee reached several relevant conclusions to shaping a Council Decision. Despite the UK's position that international law governs the use of force extraterritorially, the report urged more clarity of the contours of this understanding. This includes an explanation of how the Government interprets concepts such as imminence and why the UK Government takes the view that IHL rather than human rights applies to uses of lethal force extraterritorially outside the context of an armed conflict, and on the final point that standards laid out in the European Convention on Human Rights (ECHR) must be met with respect to taking life when the UK is not in a recognised armed conflict.

The Joint Committee encouraged this clarification so the public could be satisfied that the rule of law was being upheld in addition to providing

'absolute clarity for all those involved in the chain of command for such actions (intelligence personnel, armed forces, officials, Ministers et al) so they have a legal defence against any possible future criminal prosecution for murder from within or outside of the UK.' (UK Parliament Joint Committee on Human Rights, 2016a: Scope of Report)

Furthermore, the Joint Committee highlighted issues relevant to the decision-making process in targeting and accountability, including the need for robust processes that enshrined 'sufficient safeguards' making sure that operations involving lethal uses of force outside of armed conflict would be compliant with

¹⁵ European Parliament joint SEDE/DROI public hearing on 'The use of drones and the fight against terrorism - the impact on human rights', 30 June 2016, <http://www.europarl.europa.eu/committees/en/droi/events-hearings.html?id=20160623CHE00021>, last accessed on 24 May 2017.

domestic and ECHR obligations. A number of policy recommendations were also made in urging the UK to take the lead in international dialogue advancing and building consensus with respect to using lethal force outside of armed conflicts.

2.3.4 The Netherlands' Oversight Committee on Intelligence Services targeting report

In September 2016, the Dutch oversight committee on intelligence services (*Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten*, CTIVD) published its report about allegations that the Netherlands shared data with the United States that was reportedly used to target and kill terrorist suspects by the USA. The report concluded that the legal framework used by the military intelligence services (*Militaire Inlichtingen- en Veiligheidsdienst*, MIVD) insufficiently addressed the risk that information that the Dutch intelligence services shared with partners could be used to contribute to or assist in unlawful uses of force; the MIVD deliberately contributed to targeting in two particular military missions (in which the Netherlands was a partner) and the sharing of information in these two missions was in accordance with the law; the MIVD did not give any information to foreign intelligence services outside military missions of which Netherlands was a part, with the conscious goal of contributing to targeting; and finally despite that the MIVD did not intend to contribute to targeting, in principle intelligence can be used by foreign intelligence services for that purpose.

Based on the foregoing, the CTIVD proposed that the MIVD adopt the following clarified legal framework for the conduct of the MIVD:

- 1) The MIVD must assess the risks of contributing to an unlawful use of force when weighing potential cooperation with foreign intelligence services through written notices;
- 2) The MIVD must offer written evidence of the considerations in weighing these risks for every individual provision of intelligence information that may reasonably risk contributing to an unlawful use of force;
- 3) For each piece of shared information, a written guarantee must be made that the intelligence is not to be used or contribute to violations of international rights; and
- 4) After any intelligence sharing, the MIVD must be vigilant about indications that the information may be used for unlawful uses of force (feedback loop)¹⁶. (Dutch Review Committee on the Intelligence and Security Services, 2016)

The report itself outlines a scheme for incorporating this into the framework employed by the MIVD. After publication of this report, the Minister of Defence indicated she would respect and incorporate the CTIVD's recommendations, though the extent to which this has been done remains to be seen (Dutch Review Committee on the Intelligence and Security Services, 2016).

2.3.5 US Joint Declaration on the Export and Subsequent Use of Armed or Strike-Enabled Unmanned Aerial Vehicles (UAVs)

In October 2016, the USA released a document for signature on the export and subsequent use of armed drones (the text of which can now be found only on the archived website of the US Department of State¹⁶). This document's stated aim is to increase transparency measures and ensure responsible export and use given the rapidly proliferating technology. It outlines five principles for export but has received critical attention specifically due to the lack of clarity in terminology, with Rachel Stohl of the Stimson Center calling it 'a hollow shell of what could have been a powerful tool to ensure the lawful and responsible use of armed drones' (Stohl, 2016) and further commenting that "The standards in the joint declaration are lower than those that the United States maintains for its own export and there is little incentive for countries to strive for higher standards [...]". What's more, once countries have signed on to this

¹⁶ The archived website can be found at <https://2009-2017.state.gov/r/pa/prs/ps/2016/10/262811.htm>, last accessed on 6 March 2017.

declaration “they can tick a box that they have committed to high standards and are acting responsibly. The joint declaration could be seen as a blank check for future exports and use” (Stohl in Rawnsley & McLeary, 2016). In the transition period between the Obama and Trump presidential administrations, it has become unclear what the USA’s role will be with respect to this Joint Declaration, and it remains to be seen if another signatory State will take up the cause. At the time of writing, all Member States have signed the Joint Declaration with the exceptions of Croatia, Cyprus and France.

2.3.6 ICCT report

In October 2016, the ICCT published a report on *Towards a European Position on the Use of Armed Drones? A Human Rights Approach* (Paulussen, Dorsey & Boutin, 2016), which examined the use of armed drones in light of human rights law; the precise requirements of transparency, oversight and accountability, and European countries’ human rights obligations when assisting other countries in drone strikes (e.g. through intelligence sharing, infrastructure, or providing intelligence, infrastructure or any other kind of logistical support, including through satellite communication facilitation). Conclusions included observations on the need for and possible ways to obtain information, challenges for the use of armed drones generally, and legal challenges and recommendations.

2.3.7 European Council on Foreign Affairs policy brief

The European Council on Foreign Affairs published a policy brief on *Europe’s New Counterterrorism Wars* in October 2016. A summary of this paper highlights that over the past several years, several EU Member States have embarked upon military operations abroad in their fight against terrorist threats. The author provided policy recommendations about the likelihood of success of such operations and noted the following relevant items to the use of armed drones and forming a model Council Decision:

‘European countries are at risk of setting damaging legal precedents for the expansive use of force if they do not articulate clearer standards for when attacking terrorists overseas is permissible, both outside and within armed conflict.

There has been an unnoticed convergence in the military practice of European countries and the US. Both are conducting operations that mix attempts to recapture ground from armed groups with direct counter-terrorist strikes.

Even though ISIS [the so-called Islamic State of Iraq and Syria] is now on the defensive, the threat of jihadist groups in regions surrounding Europe will persist. EU member states should develop tighter guidelines for deciding when military force should be used against them.’ (Dworkin, 2016)

Furthermore, the following policy recommendations reiterated a call for a clearly defined policy for extraterritorial uses of force against non-state actors and the reiteration ‘that a rules-based international order that restricts the resort to force as far as possible is in keeping with Europe’s interests and values.’ Therefore, Member States

‘should act with a view to minimising any precedent of the use of force in a state’s territory without its consent and without the approval of the UN Security Council. They should define and articulate a set of restrictive standards under human rights law to govern strikes outside theatres of armed conflict that would prevent a slide towards acceptance of action based on a loose definition of threat. Finally, they should consider framing a standard of necessity as the basis for all use of lethal force against non-state armed groups where there is no effort to recapture territory.’ (Dworkin, 2016)

2.3.8 Chatham House research paper

In November 2016, Chatham House published *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Moynihan, 2016). As summarised on the *Just Security* blog:

‘The Paper prompts us to consider a central issue in international affairs: the pursuit of “enforceable accountability” of States — where they aid or assist others in the commission of an internationally wrongful act. One of the most valuable parts of the Paper is to point us toward norms in international human rights

law (IHRL) which determine whether a State can provide assistance, for example, to a foreign military force. The Paper also considers limitations on another body of legal rules that apply generically as background rules norms when States provide assistance to another State — Article 16 of the ILC's [International Law Commission's] Articles on Responsibility of States for Internationally Wrongful Acts.' (Shaheed, 2016)

More detail on the specific provisions and recommendations can be found in the analysis section related to the proposed model Council Decision below.

2.4 2017

2.4.1 Attorney General of the United Kingdom's speech

In January 2017, Jeremy Wright, QC, the UK Attorney General, gave a speech outlining the Government's position on its interpretation of the notion of imminence, which, he argued, though based in the notions put forth by the *Caroline* case, was in need of an update given the new kinds of threats that the UK now faced (Wright, 2017). He essentially accepted the unable/unwilling standard that the USA uses and noted that the basis of the UK's current interpretation of the concept of imminence was found in a law journal article (Bethlehem, 2012), and includes the following considerations when assessing the imminence of a threat:

- '(a) The nature and immediacy of the threat;
- (b) The probability of an attack;
- (c) Whether the anticipated attack is part of a concerted pattern of continuing armed activity;
- (d) The likely scale of the attack and the injury, loss or damage likely to result there from in the absence of mitigating action; and
- (e) The likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss or damage.' (Wright, 2017)

3 Elements of a model Council Decision on the use of armed drones

In October 2016, Federica Mogherini asserted that despite not having a Council Decision on armed drones, 'the EU has consistently argued the case internationally that the fight against terrorism must be conducted in full respect of international law and human rights law' (European Parliament, 2016a), a framework that firmly echoes the 2014 and 2016 EP Resolutions that called for a common position (now known as a Council Decision) on armed drones. It should thus fully respect international law, including IHL and IHRL in addition to the rules regulating State sovereignty based in the UN Charter. The Council Decision could be based on Article 29 of the Treaty on European Union (TEU). Where interpretation on key terms is possible, Member States should follow the most restricted reading, so that the use of force is restrained as much as possible (see, e.g., African Commission's General Comment 3, discussing the obligation on States to interpret the right to life broadly, which may offer assistance in interpretation in a European context [African Commission on Human and Peoples' Rights, 2015]). The following section describes the contours of the preambular text and the subsequent sections propose elements for possible articles of the model Council Decision outlined below.

3.1 Preambular text

MODEL PREAMBULAR ELEMENTS

WHEREAS:

- (1) *The Council recalls relevant documents such as the 'Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign And Security Policy and the implementation thereof', the Council's conclusions on implementing the EU Global Strategy in the area of Security and Defence (14149/16) and the Implementation Plan on Security and Defence (14392/16).*

- (2) *The Council adopted on 8 December 2008 Common Position 2008/944 defining common rules governing control of exports of military technology and equipment.*
- (3) *The Council recalls the European Parliament's Resolutions 2014/2567(RSP) and 2016/2662(RSP), insisting that the Council adopt a common position (now known as a Decision) on the use of armed drones.*
- (4) *The Council recalls the European Parliament's expression of its grave concern over the use of armed drones outside the international legal framework; and its urging the EU to develop appropriate policy responses at both the European and global level which uphold human rights and international humanitarian law.*
- (5) *The Council notes that the European Parliament called on the EU to promote greater transparency and accountability on the part of third countries in the use of armed drones with regard to the legal basis for their use and to operational responsibility, to allow for judicial review of drone strikes and to ensure that victims of unlawful drone strikes have effective access to remedies.*
- (6) *The Council notes that the European Parliament called further on the Commission to keep the European Parliament properly informed about the use of EU funds for all research and development projects associated with the construction of drones, and called for human rights impact assessments in respect of further drone development projects.*
- (7) *The use of armed drones in extraterritorial operations has increased exponentially over the past 15 years.*
- (8) *Bystanders and civilians have been killed, seriously injured or otherwise harmed by drone strikes.*
- (9) *Drone strikes may increase the number of individuals joining terrorist groups, thereby implying heightened security risks for the EU.*
- (10) *Member States are determined to set high common standards in full compliance with their international legal obligations, which shall be regarded as the minimum for the use of armed drones or the assistance in their use by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency, oversight and accountability.*
- (11) *The strengthening of a European defence technological and industrial base, which contributes to the implementation of the Common Foreign and Security Policy, in particular the Common European Security and Defence Policy as outlined by the EU Global Strategy, should be accompanied by cooperation and uniformity with respect to the use of armed drones.*
- (12) *The wish of Member States to maintain a defence industry as part of their industrial base as well as their defence effort is acknowledged.*
- (13) *Member States intend to strengthen the EU's position on these issues through adoption of this Council Decision.*
- (14) *This Decision respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union.*

The first section outlines an overview of relevant documents to the model Council Decision in order to set the scene, as it were, in the context of the 2016 Global Strategy, recalling documents including the EP's Resolutions. The introductory language used in the 2014 Resolution bears repeating, given the magnitude of the potential harm associated with using drones outside of a recognised legal framework. These contextual reminders of the 2014 Resolution's language coupled with the notions that, with an increase in armed drone use, there has been an increase in civilian harm (Emmerson, 2013) specifically reflect the urgency of adopting the Council Decision with the commitment to the international rule of law and fundamental human rights that shape the remainder of the text.

3.2 Operative text / General principles

ELEMENTS FOR ARTICLES DEFINING GENERAL PRINCIPLES AND UNDERSTANDINGS

(the exact formulation and ordering of the items below remains to be refined in view of the rules prescribed in the Joint Practical Guide of the EP, the Council and the Commission for persons involved in legislative drafting¹⁷)

1. *Member States agree to oversight by an independent body of the use of armed drones, targeting decisions and missions, as well as the provision of assistance to a strike by another State.*
2. *Member States that use armed drones or assist in their use shall do so in full compliance with the UN Charter, international human rights law and international humanitarian law. To 'assist' in the use of armed drones for purposes of this Decision includes (but is not limited to): providing intelligence, infrastructure or any other kind of logistic support, including through satellite communication facilitation to another State or non-state actor.*
3. *Member States, in conformity with their legal obligations, shall not perpetrate unlawful uses of armed drones or assist in such unlawful use by other States.*
4. *Where self-defence forms the basis of extraterritorial operations, Member States shall report to the UN Security Council and outline all measures taken pursuant to Article 51 of the UN Charter. In an operation based on self-defence, when targeting is based on the imminence of the threat, the necessity of the strike must be predicated on a threat of an armed attack that is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.*
5. *Where consent forms the basis to use force extraterritorially, Member States shall publicly explain that consent was provided, from which part of the host government this consent was obtained, that the consent was valid and was given by the recognised government of a State.*
6. *In a situation where a State may be 'unwilling or unable' to address on its own territory what is perceived by another State as an imminent threat, this justification alone is insufficient in international law to carry out a response through an extraterritorial use of force.*
7. *A Member State's human rights treaty obligations apply extraterritorially as long as the Member State exercises effective control over the area, and are applicable to drone strikes carried out on the territory of another State in these situations.*
8. *International humanitarian law is only applicable in a situation of armed conflict, which is whenever there is a resort to armed force between States (international armed conflict) or when there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. To be sufficiently organised for these purposes, a group must demonstrate indicative factors such as having a centralised command structure with logistical and operational capacity and the ability to internally implement international humanitarian law (non-international armed conflict).*
9. *Member States are under an obligation to conduct prompt, thorough, effective, independent, impartial and transparent investigations into all incidents resulting in death or serious injury as a result of the use of force, including by armed drone strikes. In situations of armed conflict, Member States are under the same obligation to investigate credible allegations of violations of international humanitarian law, including where unanticipated civilian casualties occurred as a result of drone strikes.*
10. *Member States agree to permit ex post facto judicial review at the national level of armed drone strikes. Where allegations of violations are substantiated, Member States shall publicly acknowledge the responsibility of the State, prosecute those responsible for criminal offences related to the violations of human rights and/or humanitarian law, and ensure access to justice and reparations and redress, including payment of compensation, for survivors and families of those killed.*
11. *Each Member State that uses armed drones or assists in their use shall develop and publish a transparent set of national rules and guidelines, including clear rules about when drone strikes are permissible. These rules and procedures must fully comply with obligations under international law, including preventing, mitigating, investigating, providing accountability and remedy in all cases of unlawful deaths, and more broadly harm caused by unlawful conduct in accordance with the criteria outlined in the transparency elements below. Even in situations where action is considered lawful, Member States shall strive to redress grievous harm to civilians.*

The principles proposed for the first article(s) establish a minimum standard for all Member States to follow, aiming at coherence in Member States' approaches for regulating the use of armed drones. Clarification on what it means to 'assist' (in the use of armed drones) (principle 2) is important as an indicator of a non-exhaustive list of relevant acts that may implicate State responsibility, mostly framed in terms of Article 16 of the Articles on State Responsibility¹⁸. More analysis is provided below as the criteria for Member States on this issue are spelled out in-depth. Regarding the understanding on *ex post facto* oversight (10), this is meant to demand a minimal willingness by Member States to subject themselves to a judicial review at the national level of any drone strikes they may carry out or assist in doing so. This element is also further elaborated below. With respect to independent oversight (1), any independent body given this task should be a separate and neutral agency with expertise in the domain of drones and weapons. Only a subsidiary role for the European Parliament could be explored (though given the EP's political nature, this role would be relegated to exercising parliamentary scrutiny within the context of its right to be kept informed on issues of CFSP rather than exercising any official oversight function). Regarding oversight of the implementation of any Council Decision, on the basis of article 24, paragraph 3, last sentence, TEU, the High Representative and the Council shall ensure compliance with the principle that EU Member States shall support the Union's external and security policy actively and that they shall refrain from any action which is contrary to interest of the Union (and therefore common decisions).

An EU Council Decision should be clear about having a two-step legal justification for using armed drones in the territory of another State: a first one concerning the legal basis for the use of force in the territory of another State (consent, mandate from the UN Security Council or self-defence), and a second one concerning the applicable legal framework setting out the rules governing how force is used (IHL and IHRL in situations of armed conflict and IHRL always). As for understandings under (7) and (8), the importance of the legal standards under IHRL and IHL centre around the notion that

'Legal uncertainty in relation to the interpretation and application of the core principles of international law governing the use of deadly force in counter-terrorism operations leaves dangerous latitude for differences of practice by States. This runs counter to the obligation identified in paragraph 6 (s) of General Assembly resolution 68/178 [where 'States are urged to ensure that any measures taken or means employed to counter terrorism, including the use of remotely piloted aircraft, comply with their obligations under international law, including the Charter of the United Nations, human rights law and international humanitarian law, in particular the principles of distinction and proportionality']; fails to provide adequate protection for the right to life; poses a threat to the international legal order; and runs the risk of undermining international peace and security.' (Emmerson, 2014: paragraph 70).

As the UK's Joint Committee noted in a more specific context for EU Member States:

'Compliance with the rule of law is vital to maintaining international peace and security and is a prerequisite of the effective protection of human rights [...]. Member States' domestic systems are 'augmented and interwoven with the European Convention on Human Rights and compliance with obligations sends an important message to the rest of the world about the importance of abiding by international obligations. If one Member State appears to be selective in its approach to international obligations, this would be seized upon and invoked by other States and non-state actors as an excuse for a record of disrespect for international law.' (UK Parliament Joint Committee on Human Rights, 2016a: paragraph 1.31)¹⁹

¹⁷ See: <http://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf>, last accessed on 14 April 2017. Although similar rules apply to drafting, Council Decisions do not have the status of legislation.

¹⁸ Article 16 of the International Law Commission's Articles on responsibility of States for internationally wrongful acts prescribes: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.' (International Law Commission, 2001).

¹⁹ Additionally, written submissions to the Joint Committee echo these notions: UK Parliament Joint Committee on Human Rights, 2016a, citing Bingham, T. (2011), *The Rule of Law*: 'the rule of law requires compliance by the State with its obligations in

With regard to the understanding on self-defence uses of force (4), Article 2(4) of the UN Charter prohibits the use of force by States in their international relations. Article 51 recognises an exception for force used in self-defence in response to an armed attack, but also requires that the State exercising this right report immediately to the UN Security Council. It is well settled that States do not have to wait until an armed attack occurs to act in self-defence (but the armed attack in question does need to meet a particular threshold of gravity), but States are not permitted to stretch this term beyond parameters consistent with the object and purpose of the UN Charter (ICJ, 1986 and 2003). As Heyns observes:

‘necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack. Action taken lawfully in self-defence, such as the use of drones to target individuals in another State’s territory, must serve the purpose of halting and repelling an armed attack and must be both necessary and proportionate to that end’ (Heyns, 2013: paragraph 86).

It should be noted that where the target is a non-state actor, the context is necessity and proportionality under human rights law, not necessity and proportionality under the UN Charter. The *jus ad bellum* issue (the right for a State to use force) simply regards the existence of a threat that would trigger a right of forcible intervention under *jus ad bellum*, while the decision to use force must still meet either IHL or IHRL criteria, as applicable.

Where no attack has occurred, the use of force may be contemplated in anticipation of an attack that is ‘imminent’, as that term is understood in the *Caroline* case rather than adopting a more flexible interpretation²⁰. This answers the questions that arise regarding whether force can be used against terrorist suspects in anticipatory or pre-emptive self-defence before an armed attack has taken place; and, in the case of pre-emptive self-defence, even as a response to a persistent threat under which it is unclear when the attack will precisely take place but is unlikely to take place imminently (Alston, 2010: paragraph 45). Under the *Caroline* doctrine, anticipatory self-defence is recognised but limited to those cases in which an armed attack is imminent. This is the case when ‘the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation’ (*The Caroline Case* and Greenwood, 2009).

This is the standard of imminence long established and accepted in customary international law. The efforts of some States, including the UK’s recent speech by the Attorney General (Wright, 2017), to undermine or dismiss this standard by broadening this notion have not gained acceptance in the international community (and, in fact, a large number of States have expressly rejected these attempts)²¹.

Where consent forms the basis to use force (5), Member States have strong policy interests in publicly explaining that consent was provided, from which part of the host Government this consent was obtained, that the consent was valid (which means it represents the true, voluntary and clear intention of a State) (International Law Commission, 2001)²², and that it was given by the ‘legitimate Government’ of a State (one that holds *de jure* or *de facto* control)²³. It is important to note that without knowing whether requisite

international law as in national law.’ It also damages the credibility of a system, such as that of the ECHR, for the collective protection of human rights if one of its members is perceived to be openly breaching its international obligations. William Boothby, Former Deputy Director of Legal Services for the Royal Air Force in UK Parliament Joint Committee on Human Rights, 2015: ‘Of course interpretations that we make, and actions we take pursuant to them, will be noted by our adversaries and potential adversaries who may choose to take a similar position. We should therefore consider any policy on these matters most carefully and with that in mind.’

²⁰ The US Department of Justice released a memo which claims that to classify a person as posing an imminent threat ‘does not require the United States to have clear evidence that a specific attack on U.S. persons or interests will take place in the immediate future’ (US Department of Justice: p. 7).

²¹ See e.g. Heyns, 2013: paragraph 87, citing Gray, 2008: pp. 160-161. Heyns also outlines the reporting requirements under the UN Charter related to self-defence uses of force in paragraphs 92-94. See also Alston, 2010: paragraph 86; and Haque, 2017.

²² Article 20 of Articles on the Responsibility of States for Internationally Wrongful Acts on validity of consent. It: ‘must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion’. See also Heyns, 2013: paragraphs 82-84.

²³ For more robust discussion of the role of consent in drone strikes, see Byrne, 2016.

consent was validly obtained, this can undermine the entire self-defence legal framework as well as ascribing responsibility to host State. Additionally, as Heyns stated:

‘States cannot consent to the violation of their obligations under international humanitarian law or international human rights law. A State that consents to the activities of another State on its territory remains bound by its own human rights obligations, including to ensure respect for human rights and thus to prevent violations of the right to life, to the extent that it is able to do so.’ (Heyns, 2013: paragraph 38)

On the notion of a State consenting to rights violations (5), Heyns furthermore outlined the approach of the European Court of Human Rights (ECtHR):

‘It has been held that human rights treaties cannot be interpreted so as to allow a State party to perpetrate violations of the treaty on the territory of another State, which it could not perpetrate on its own territory. The same standard must apply to the right to life as a part of general international law and custom. The conclusion appears to be that any positive action by a State, on its own territory or that of another State, must be carried out in compliance with its human rights obligations under all applicable rules of international law.’ (Heyns, 2013: paragraph 51 [original footnotes omitted])

The discussion around the so-called ‘unwilling or unable’ test (Deeks, 2012) where a state would presume authority to carry out strikes in another State if that State were unwilling or unable to address the threat itself (6), is largely academic (Heller, 2015b) and this concept has not gained traction as a developing norm or custom under international law. Not many EU Member States have pronounced themselves explicitly on this, but in the ICCT 2015 research paper, the authors determined that based on responses from States, this standard may be relevant to assessing necessity (though no State was sure to what extent it was relevant, the Czech Republic was unsure whether it was relevant at all and the Netherlands said it was only one factor in determining necessity). Finally, one anonymous respondent Member State said it was a recognised legal standard but that, ultimately, the UN Security Council should be the arbiter of whether a State is unable or unwilling to address a threat. Other States have not publicly pronounced themselves on this issue.

On the extraterritorial application of human rights treaty obligations (7), in the case of *Hassan v. The United Kingdom*, the Grand Chamber of the European Court of Human Rights built on its jurisprudence in *Al Skeini and Others v. The United Kingdom* and referenced case law from the International Court of Justice (*The Legality of the Threat or Use of Nuclear Weapons*, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and *Armed Activities on the Territory of the Congo (Democratic Republic of Congo [DRC] v. Uganda)*), to clarify and reiterate that IHRL applies extraterritorially, notwithstanding the concurrent application of IHL, and that ‘the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part’ (European Court of Human Rights, 2014a: paragraph 77). Additionally, States that possess a superior technology, such as armed drones, have a residually higher standard of responsibility in using such technology. In terms of how this notion relates specifically to the use of armed drones, Heyns noted, with respect to the status of the right to life as a general principle of international law and a customary norm, that:

‘[...] irrespective of the applicability of treaty provisions recognizing the right to life, States are bound to ensure the realization of the right to life when they use force, whether inside or outside their borders. In addition, States are bound by those treaties to which they are a party and are subject to monitoring by their respective supervisory [human rights treaty] mechanisms.’ (Heyns 2013: paragraph 43).

With regard to the standards that trigger the application of IHL (8), the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is instrumental in advancing the standard, widely accepted as custom in international law. In its 1995 *Tadic* decision the ICTY stated:

‘An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a

State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.’ (ICTY, 1995: paragraph 70).

Furthermore on refining notions of organisation, ICTY’s *Boškoski* decision also is instrumental. *Boškoski* outlines a factor test (with indicators of each factor) that can help determine whether a group satisfies the organisational requirement laid out in *Tadic*. Those factors are the existence of a command structure; a military (operational) and logistical capacity, the existence of a disciplinary mechanisms as well as the capability to implement IHL and the ability to speak with one voice (ICTY, 2008: paragraphs 194-203). When IHL is the applicable legal framework, the EU guidelines on promoting compliance with IHL should be kept in mind, specifically as they confirm the EU’s commitment to IHL and also require that: ‘The responsible EU bodies, including appropriate Council Working Groups, should monitor situations within their areas of responsibility where IHL may be applicable, drawing on advice, as necessary, regarding IHL and its applicability. Where appropriate, they should identify and recommend action to promote compliance with IHL in accordance with these Guidelines.’ (EU Guidelines on promoting compliance with IHL, 2009).

On residual notions of carrying out armed drone strikes outside of an armed conflict, Alston offered guidance to this effect:

‘Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State’s own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.’ (Alston, 2010: paragraph 85)

3.3 Criteria for inclusion in national policies and legislation

Following the article(s) on common understandings, the Council Decision could include an article defining criteria to be applied by Member States in their national policies and legislation on armed drones. The elements proposed below refer to three different areas to be covered by such criteria.

3.3.1 Transparency

CRITERIA FOR INCLUSION IN NATIONAL POLICIES AND LEGISLATION

Transparency

All Member States shall provide maximum transparency through the sharing and publication of information that can contribute to the development of restrictive norms of behaviour, the prevention of harm and the strengthening of international law. The right to information shall be interpreted and applied broadly, and any restrictions shall be interpreted narrowly, and in those cases the public authority shall provide specific, substantive reasons to support said restrictions.

To this end, Member States that use armed drones in any situation or assist in their use shall provide timely public information subject only to limitations for the protection of legitimate national security interests (and only for such time as withholding of such information is required to protect such interests), to ensure the privacy of survivors or families of those killed, or to ensure the physical safety of an individual or individuals. The types of information include:

- 1. An explanation of which legal and policy guidelines apply to a Member State’s own operations or those involving intelligence sharing or provisions of assistance involving the use of armed drones.*
- 2. Detailed statistics released at least annually on lethal force practices in both armed conflict and non-armed conflict situations, including data such as number of strikes, broken down by geographic location, weapons platforms utilised in strikes, numbers of those killed and injured by country, location, sex, age, and the identity and affiliation of any intended target.*
- 3. Prompt and public acknowledgement of each and every strike carried out, including a detailed assessment of the impact of each drone strike*

4. *An explanation of the legal basis for each use of force, including a determination as to whether a strike conformed to applicable international law, national laws and policies and rules of engagement. Member States conducting and assisting in targeted strikes as well as States where strikes occur may provide this information.*
5. *Description and explanation of the chain of command and the targeting decision-making process and target selection criteria, without prejudice to matters concerning national security or those necessary in the interest of defence.*
6. *Disclosure of all oversight mechanisms and policies adopted to improve the protection of civilians in operations involving armed drone strikes.*
7. *Publication of details of investigatory and accountability processes and mechanisms outlined in the accountability elements below.*

It is integral to the legitimacy of operations involving the use of armed drones, especially in those outside of recognised armed conflict that Member States and other relevant actors provide full levels of transparency. Common interests that stretch broadly across the international community also justify this objective; transparency and accountability can contribute to the quest for legitimacy and credibility for all actors involved and strengthen democracy. It can also contribute to evaluation of effectiveness of certain tactics in countering terrorism or during particular military operations.

This approach and rationale echo one of the policy recommendations from Melzer's 2013 study, which urges steps to be taken to make 'the promotion of transparency, accountability and the rule of law in relation to the development, proliferation and use of new weapons technologies a declared priority of European foreign policy.' (Melzer, 2013: p. 44).

The UNODA study lists a number of other reasons why full transparency and establishing oversight and accountability regarding the use of armed drones is in the best interest of States. For example, through greater transparency and a more robust accountability and oversight mechanism, Member States can increase the confidence in and adherence to relevant international law; prevent the unlawful use of armed drones and related technology by others; increase civilian protection; in line with EU values and fundamental freedoms, it can promote international peace and security as well as the legitimacy of any counter-terrorism operations Member States may undertake; it can assist in any necessary investigation of violations of human rights; and finally, it can facilitate the implementation of relevant export controls at the national and international levels (UNODA, 2015: pp. 50-52). Transparency is valuable to all actors involved in using armed drones as well as to other stakeholders, such as Member States, military actors, civil society, and victims of uses of force.

It must be noted that transparency and accountability, though intimately linked (Oliveira Martins & Backhaus, 2015), are separate notions that require detailed information in the criteria. Transparency requires providing relevant, accessible, timely and accurate information. Accountability is the act of ensuring that relevant officials or institutions are answerable for actions and that there is recourse in situations where obligations are not met. It is imperative to note that transparency is often pre-requisite to, but does not always culminate in accountability. These two notions are therefore linked but must be kept segregated in listing their requirements.

With respect to particular elements that make up requirements of transparency and accountability, it is crucial that Member States using armed drones, or cooperating with those who do, make clear the legal basis on which they are approaching the decision-making process. The elements listed in the Model Council Decision outline the contours of information necessary in assessing the legality of operations; by publishing (and consequently acting accordingly through the established effective accountability mechanisms) on this kind of information, the objectives outlined above can be met.

The Global Principles on National Security and the Right to Information (Tshwane Principles)²⁴ offer guidance on this issue:

‘No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.’ (Tshwane Principles, 2013: Principle 4)

3.3.2 Accountability and investigative requirements

CRITERIA FOR INCLUSION IN NATIONAL POLICIES AND LEGISLATION

Accountability processes and mechanisms

Member States that use armed drones or assist those who do shall conduct prompt, thorough, effective, independent, impartial and transparent investigations into all incidents resulting in death or serious injury as a result of the use of force, including by armed drone strikes and publish the results of each investigation in a timely manner, subject only to redactions necessary to ensure the privacy of survivors or families of those killed, or to ensure the physical safety of an individual or individuals. All Member States shall ensure that the rights of victims of drone strikes are upheld by ensuring effective access to judicial remedies and reparation, including by establishing a comprehensive, accessible and effective compensation and condolence payments mechanism for those killed and injured in armed drone strikes and their families. In establishing such accountability processes and mechanisms, Member States shall take into account inter alia:

- 1. Procedures and institutions in place that can carry out effective disciplinary and criminal investigations.*
- 2. Provision of information to the public and those directly impacted by strikes regarding processes for accountability in place.*
- 3. A systematic and effective mechanism for condolence payments.*
- 4. Details of specific actions taken to ensure accountability for strikes, including by investigation, disciplinary action and/or prosecution, as well as details of each time compensation or condolence payments are paid, and the amounts paid, subject only to the right to privacy of survivors or families of those killed, or to ensure the physical safety of an individual or individuals.*
- 5. Robust ex post facto judicial review of the use of armed drones, both at the national and international level, ensuring that the invocation of State secrets, national security concerns or other doctrines are not obstacles to effective judicial review of drone strikes, particularly in cases where there are allegations of violations of international law, including international human rights law and international humanitarian law.*

Building on the notion of transparency, the briefing now turns to the related notion of accountability in the applicable legal regimes. To start, it is imperative to note that IHL has a few provisions on obligation to investigate in particular circumstances: for example, the obligation to search for those suspected of war crimes. In terms of the IHRL framework, as Heyns noted,

²⁴ From the Open Society Foundations’ webpage on the Global Principles on National Security and the Right to Information (The Tshwane Principles), available at <https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>, last accessed on 18 April 2017. These principles provide guidance to those drafting, revising or implementing laws that implicate a State’s ability to withhold information on national security grounds (or in punishing any disclosure of this kind of information). They are culled from international and national law, State practice, standards as well as secondary sources such as expert writings and are informative with respect to the kind of information relevant to what should be made public in the discussion around the use of armed drones.

'The modern concept of human rights is based on the fundamental principle that those responsible for violations must be held to account. A failure to investigate and, where applicable, punish those responsible for violations of the right to life in itself constitutes a violation of that right.' (Heyns, 2013: paragraph 95)

He goes on to highlight that only in situations where the public has access to relevant information can there be a meaningful and effective path to enforcing international obligations and overseeing adherence to the same, going further to note that any time violations of IHL or IHRL occur, there is a duty by States to provide accountability (Heyns, 2013: paragraphs 92-98).

Furthermore and to serve as a guide to informing a Council Decision, a robust access to justice schematic already exists within the EU. Directive 2004/80/EC relating to compensation to crime victims outlines that Member States must provide a system that appropriates fair compensation to victims of intentional violent crime and creates a system of cooperation amongst national authorities in cross-border compensation cases.

Additionally, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in Article 16 provides the right to obtain a decision on compensation by the offender, within a reasonable time, in the course of criminal proceedings (or other legal procedures). It also encourages mechanisms to recover compensation awards from the offender (Directive 2012/29/EU).

The 2012 Directive's Recital 13 clarifies the scope of the Directive, which extends over extraterritorial offenses should criminal proceedings take place within the EU. The purpose of these two directives is to recognise and treat victims – irrespective of nationality or country of residence – with respect and dignity, protect them from further victimisation when participating in the criminal justice process, ensure that they receive appropriate support throughout any proceedings and ultimately have access to compensation (Directive 2012/29/EU), in line with international obligations.

In order to envisage possible alternative bases under the EU Treaties to define accountability standards for drone strikes, it is important to first assess the intent of the EU institutions. If it is concerned with the position of victims of drone strikes, Article 82(2) TFEU could potentially form an appropriate legal basis. If the intent is to establish security and safety requirements with regard to drones as a weapon, a legal basis in Article 29 TEU, for example, may be more appropriate. Under Article 21 TEU, the Union shall 'define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations', in order to (i.e.) consolidate and support human rights and the principles of international law and preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles (i.e.) of the United Nations Charter (UNC), including those relating to external borders.

Under Article 47 of the Charter of Fundamental Rights of the European Union (CFREU), everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in Article 47 CFREU.

Under Article 13 of the European Convention on Human Rights (ECHR), everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Under Article 2 of the UNC, all members to the UNC shall settle their international disputes by peaceful means in such a manner that international peace and security and justice, are not endangered. This means that, also in relation to CFSP Decisions, the Union must take into account access to justice.

Together the aforementioned Articles could support the argument that there is a legal basis for the EU to regulate access to justice for (relatives of) victims of the use of armed drones through Article 29 TEU.

Article 82 and 83 TFEU, however, do not necessarily provide a legal basis for access to justice but more to facilitate judicial cooperation in situations where access to justice has already been established. Other starting points for access to justice could perhaps be found in the Handbook on access to justice²⁵.

3.3.3 Preventing assistance in unlawful drone strikes

CRITERIA FOR INCLUSION IN NATIONAL POLICIES AND LEGISLATION

Preventing Assistance

Member States shall not assist any actor in carrying out unlawful drone strikes by providing data, intelligence, infrastructure or any other kind of logistic support, including through satellite communication facilitation. Member States shall accept their 'third-party responsibility' related to this objective. To this end,

- 1. Member States shall introduce procedures covering all forms of cooperation that enable them to make an informed decision about assistance to be offered to States and non-state actors, including a comprehensive risk assessment.*
- 2. The procedures may include inter alia identifying the relevant factual circumstances, risks, ways to mitigate said risks; and the process for making the final decision.*
- 3. Strategies that assisting States may draw upon to ensure compliance include attaching conditions to assistance; vetting and training recipients of assistance; and monitoring and following-up on any risks identified.*
- 4. Assessing the risks of assistance shall take place at all appropriate points in time, bearing in mind the dynamic circumstances in which cooperation often occurs. Member States may elaborate the procedures and strategies above in public policy guidelines. Where possible, without prejudice to national security, the conditions upon which assistance is granted shall also be made public.*
- 5. Member States assisting other States or non-state armed groups shall, without prejudice to legitimate national security considerations, be transparent about both the factual information surrounding their assistance and their understanding of the applicable legal framework.*
- 6. Member States shall use their best endeavours to share and coordinate best practices and lessons learned with other States, following the processes in the field of exports of military technology and equipment.*

Article 16 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts provides a useful place to start when discussing what the concept of assistance entails. The Article provides that

'[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.' (International Law Commission, 2001).

Article 16 is informative, but as Moynihan pointed out, there are other more specific rules found in IHL and IHRL that also flesh out the requirements of assistance (Moynihan, 2016) and the ICCT also analysed the requirements with respect to jurisprudence from the ECtHR (Paulussen, Dorsey & Boutin, 2016: pp. 15-17). In the interest of brevity, it is impossible to cover all such requirements here, though for information regarding where the model Council Position criteria can be found, these two documents provide a rich context.

The Dutch report mentioned above is also instrumental in formulating the criteria necessary with respect to offering assistance in carrying out drone strikes (Dutch Review Committee on the Intelligence and Security Services, 2016). It is important to note that this briefing does not take a position on whether the

²⁵ Available at http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf, last accessed on 5 June 2017.

articulations of requirements under preventing assistance in carrying out unlawful drone strikes found in the model Council Decision are required as a matter of law or rather of policy. The criteria outlined are based in Moynihan's recommendations and are meant to aid Member States in making informed decisions about the kinds of information or infrastructure they choose to share with other States that use armed drones.

3.4 Regulation of the export of armed drones

At the outset it should be stated that the EU Common Position on Arms Exports, with its control over Military List goods and dual-use goods 'where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country', as well as the dual-use recast process, taking into account the link with terrorism and non-state actors, are instruments that provide a rich framework to cover export control concerns. Also, this article merely aims to affirm these notions and is included to address drones as a specific weapon type and to link their export with particular guidelines for use in line with international obligations as outlined in the other criteria and articles suggested elsewhere in this briefing.

Though the EU Common Position and its reference to both the EU Military List and the Dual-Use List provide this robust scheme for control of military technology, current developments in the field of armed drones and related technology will see new challenges in terms of export controls over drone platforms and payloads (e.g. smaller types of drones, swarm capability and more autonomy), which could potentially fall outside of existing arms export control mechanisms due to the dual-use nature of such technologies and novel assemblage options that facilitate an easy transformation of a civilian drone into an armed drone.

These developments contribute significantly to the blurring of existing definitions in arms export control regimes and to the novel application in the use of military and civilian drones. The relative ease with which civilian drones can be modified for military purposes with specific technology and weapons might create new *lacunae* in export control regimes. Therefore, regulation of the export of armed drones or drones that could be armed should be in line with the criteria as set under the EU Common Position, 2008/944/CFSP (Council of the EU, 2008), including references to international legal frameworks to prevent misuse by recipients and/or diversion to unwanted end-users.

Export Controls

All Member States shall enact strict controls on the transfer of military and dual-use drone technology and equipment in line with their obligations under the Council Common Position 2008/944/CFSP and the Arms Trade Treaty. This includes standardising categories of drones and related technology in export control regimes and treaties on national, regional and international levels, and applying clear criteria to prevent irresponsible transfers. These obligations include the following insofar as they are relevant to technology related to the use of armed drones:

1. *International obligations of Member States and their commitments to enforce United Nations, European Union and Organization for Security and Cooperation in Europe arms embargoes;*
2. *International obligations of Member States under Article 36 of the First Additional Protocol to the Geneva Convention, Articles 11 and 13(3) of the Arms Trade Treaty, CCW, UN Register of Conventional Arms, EU Council Common Position 2008/944/CFSP and Council Regulation 428/2009;*
3. *Commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement, The Hague Code of Conduct against Ballistic Missile Proliferation*

Member States shall adopt a presumption-of-denial policy for licences to entities designated by the UN or EU for involvement in proliferation of drones or drone related technologies to undesirable end-users, without prejudice to Regulation (EC) No 428/2009.

Member States undertake to regularly participate in global debates in relevant international fora and exchange best practices with other States so as to work towards a broader understanding of, and support by States for, stricter control of export of drones and drone-related technology.

One feature of the current EU export regime is that the common military list of the Common Position is annually updated, with the last update having taken place in March 2017. Additionally, the Annexes to the Dual Use regulation are also regularly updated. There is a review planned for the Common Position in 2018 at which the shortcomings or lack of comprehensive coverage for all relevant technology could be addressed. During the current recast process of dual-use technology, it is expected that much more importance to IHL and IHRL considerations will be given. However, as that process is yet to conclude, it is not possible to say at the time of writing whether or not that attempt will be successful or if other considerations will prevail.

Briefly on the topic of end-user licences, a clear risk assessment in particular for armed or unarmed military drones that could facilitate violations of IHL or IHRL should be made before providing an end-user licence, which should include such considerations in the assessment as how users plan to employ the particular drones, the possibility for their use in cross-border operations, whether the State has previous involvement in carrying out targeted killings and whether unarmed military drone operations may further facilitate the lethal use of force. Given that the development of armed drones and related technology is outpacing the legislation or policies regulating it, timely exchange of new information between member states, for example as a standard agenda or a regular discussion point during monthly meetings of the Working Party on Conventional Arms Exports (COARM), should be encouraged.

As a final point, the EU should actively undertake efforts to reach out at the international level to encourage other States beyond the Union to include similar principles in their national legislation to ensure the existence of and adherence to a strict and transparent global export control regime on military and dual-use drone technology.

3.5 Summary of remaining elements

Element 3

This Decision shall not affect the right of Member States to enact or operate more restrictive national policies.

Element 4

Member States shall annually publish national reports on drone acquisition or use with relevant information related to Articles 1-3 of this Decision, contributing to an Annual EU Report on policy, acquisition and use of armed drones and drone-related technology, especially for the advancement of preventing, mitigating and investigating deaths and injuries stemming from the use of armed drones and for reporting on holdings in conventional arms. The Annual EU Report shall be published in the 'C' series of the Official Journal of the European Union.

Element 5

Member States shall ensure that their national legislation directly reflects the interpretation of their obligations set forth in this Decision.

Element 6

Member States shall use their best endeavours to encourage other States in the use or acquisition of armed drones and related technology to incorporate elements of this Decision and encourage regular exchange with third States and other relevant actors on related issues.

Element 7

This Decision shall take effect on the date of its adoption.

Element 8

This Decision shall be reviewed every three years subsequent to its adoption.

Element 9

This Decision shall be published in the Official Journal of the European Union.

Element 3 envisions a right for Member States to enact more restrictive national policies or laws than what is listed in the Council Decision. Element 4 establishes a requirement to increase transparency at the EU level as well as at the national level. Element 5 contains the explicit requirement to integrate the Council Decision into national policy and Element 6 speaks to the efforts to reach out to external parties also found within the EU Global Strategy Document. As for Element 7, this is standard language regarding the effective date of a Council Decision and Element 8 stems from the 2008/944 Export Common Position but alters the language to ensure a regular review of the Decision at three-year intervals (as opposed to a one-time review prescribed by the Council Common Position on exports of military technology and equipment).

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