

***Quo vadis* ECtHR? An assessment of Carter v. Russia before the European Court of Human Rights**

The European Court of Human Rights (hereinafter: ECtHR or court) has recently delivered its first decision on extraterritorial assassinations in the Carter v. Russia case¹ The judgment concerned Mr. Alexander Litvinenko, former member of the Soviet Union's secret service, KGB, who had been living in the United Kingdom since 2000 until his poisoning in 2006 by Russian state agents.²

Before turning to the questions of law raised by the case, it is necessary to elucidate what actually is meant under the term 'assassination'. In light of the authoritative American legal scholarship, the definition of assassination is dependent upon whether it was conducted in times of war or peace.³ During peacetime, politically motivated killings are considered to be assassinations, while within the framework of an armed conflict, perfidious or treacherous killings of individually selected adversaries are characterized as assassinations.⁴ According to the views of this author, assassinations can be seen as a subcategory of 'targeted killings', a notion which describes the extraterritorial use of intentional, premeditated, deliberate lethal force against individually selected persons, who are not in the physical custody of the attacker. The use of force is attributable to a state or international organization and there is no judicial decision authorizing the killing of the target.⁵

Based on the above, the poisoning of Mr. Litvinenko can be considered a classic peacetime assassination, since the killing had an undeniable political motivation.⁶

The judgment of the ECtHR is notable – among other things – for having established the jurisdiction of the respondent state in connection with the substantive limb (or negative obligation) of the right to life – for an extraterritorial use of force, contrary to the longstanding 'precedent' of the Bankovic decision.⁷ In that judgment, the court famously held that bombing a person does not create jurisdiction for the state in question in the absence of effective control on the ground.⁸ In its subsequent case law, the ECtHR remained true to Bankovic, arguing that states' jurisdiction is primarily territorial, however, a number of exceptions have been identified which relied on the authority and control of a state agent on the person in question.⁹ In the recent Georgia v. Russia (II) case¹⁰ however, the ECtHR took a step back from expanding extraterritorial jurisdiction as illustrated by Al-Skeini v. The United Kingdom¹¹ towards the Bankovic decision,¹² finding no jurisdiction for the

¹ *Carter v Russia* (App. no. 20914/07) ECtHR (2021) The ECtHR has found six to one, that the Russian Federation has violated Mr. Litvinenko's right to life (both the substantive and the procedural limb) and afforded EUR 100,000 as non-pecuniary damage to the widow of the late Mr. Litvinenko. See, *Ibid.* ratio decidendi paras. 4-5.

² *Ibid.* paras. 6. 33-34. and 169.

³ <https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/ParksMemorandum.pdf> (18 October 2021). pp. 2-3.

⁴ N. Melzer, *Targeted Killing in International Law*, OUP, Oxford 2008, pp. 46-47.

⁵ B. Kis Kelemen, *Célzott likvidálás a nemzetközi jogban különös tekintettel a fegyveres, pilóta nélküli repülőgépek alkalmazására*, Doctoral Dissertation (Submitted for public defence) University of Pécs, Pécs 2021. pp. 38-40. The definition relies heavily on Melzer's 2008 characterization. See Melzer 2008, p. 5.

⁶ *Carter v Russia* para 10. Mr. Litvinenko was engaged in activities aiming to expose corruption in Russia.

⁷ *Bankovic and Others v Belgium and 16 other Contracting States* (App. no. 52207/99) ECtHR (2001)

⁸ *Ibid.* para. 75.

⁹ *Carter v Russia* paras. 124-127.

¹⁰ *Georgia v Russia (II)* (App. no. 38263/08) ECtHR (2021)

¹¹ *Al-Skeini and Others v The United Kingdom* (App. no. 55721/07) ECtHR (2011)

¹² <https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of->

Russian Federation during the hostilities of an international armed conflict, except for persons in physical custody.¹³ The court further argued that state agent authority and control beyond arrest or detention has only been established in connection¹⁴ in relation to “isolated and specific acts involving an element of proximity.”¹⁵ This reasoning was later taken up and expanded upon by the Chamber in *Carter v. Russia*,¹⁶ claiming that this “should apply with equal force in cases of extrajudicial targeted killings by State agents acting in the territory of another Contracting State outside of the context of a military operation.”¹⁷ The ECtHR also claimed that “[t]argeted violations of the human rights of an individual by one Contracting State in the territory of another Contracting State undermine the effectiveness of the Convention both as a guardian of human rights and as a guarantor of peace, stability and the rule of law in Europe.”¹⁸ It needs to be highlighted nevertheless that the court still reiterated that the case in question has occurred “in a situation of proximate targeting”.¹⁹

Where does this leave us in terms of judicial oversight of targeted killing programs? Well, we have reason to have confidence in the future despite the fact that the decision can still be overturned by the Grand Chamber in case of a referral to it, but the present author strongly agrees with Marko Milanovic that it is highly unlikely that the Grand Chamber would reverse the judgment as matter of legal interpretation.²⁰

However, the present author also feels that jurisdiction over extraterritorial targeted killing operations is still not carved in stone, since the most prominent targeted killing operations, i.e., the use of armed drones to kill terrorist suspects can still fall outside the scope of the abovementioned test for jurisdiction for at least three reasons.

First, it can be argued that a targeted killing by an unmanned aerial vehicle is not an isolated and specific act since most contemporary targeted killing operations occur within the framework of a state policy or program.²¹

Second, targeted killing by a drone by the nature of things does not involve any level of proximity in contrast with, for example, poisoning.

Third, many targeted killings occur in times of armed conflict. The ECtHR has already held that “the active phase of hostilities which the Court is required to examine in the present case in the context of an international armed conflict is very different, as it concerns bombing and artillery shelling”²² Although, the case in question – *Georgia v. Russia (II)* – occurred without doubt in a situation of an international armed conflict, but in theory it is still arguable, that the “context of chaos”²³ can exist in a non-international armed conflict as well, within which the vast majority of targeted killing operations take place.

chaos/ (18 October 2021).

¹³ *Georgia v Russia (II)* paras. 113-144. 239. and 269.

¹⁴ *Ibid.* para. 131.

¹⁵ *Ibid.* para. 132.

¹⁶ <https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/> (18 October 2021).

¹⁷ *Carter v Russia* para. 130.

¹⁸ *Ibid.* para. 128.

¹⁹ *Ibid.* para. 161.

²⁰ <https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/> (18 October 2021).

²¹ Kis Kelemen 2021, pp. 46-53. and 57.

²² *Georgia v Russia (II)* para. 133.

²³ See, for example *ibid.* 126.

It remains to be seen whether the ECtHR chooses to further elaborate on extraterritorial jurisdiction over targeted killing operations abroad, or whether *Carter v. Russia* simply becomes an interesting episode of the case-law of the court.

Nota bene: the abovementioned loopholes were not identified to argue against a strong judicial oversight of targeted killings, but rather to shed some light on the problematic conditions the ECtHR choose to rely on in its recent case-law.

Bence Kis Kelemen