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FROM JUST WAR TO PERMANENT SELF-DEFENCE: THE USE OF DRONES IN COUNTERTERRORISM AND ITS QUESTIONABLE CONSISTENCY WITH INTERNATIONAL LAW STANDARDS

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1. Introduction: drone strikes as means of counterterrorism and the need of regulation under International Law.

The use of drones (formally “unmanned aerial vehicles” [UAVs] or “remotely piloted aircrafts” [RPAs], according to the official definitions adopted by the United States Air Force in 2009¹) for targeted killings² represents one of the most effective means of

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¹ The most comprehensive treatise on UAVs is K. P. VALAVANIS, G. J. VACHTSEVANOS, (eds.), *Handbook of Unmanned Aerial Vehicles*, Dordrecht, 2015. For an in-depth examination on the status of remotely piloted aircrafts see I. HENDERSON, *International Law Concerning the Status and Marking of Remotely Piloted Aircraft*, in *Den. Jour. Int. Law. Pol.*, vol. 39, n. 4, pp. 615-628. A detailed list of acronyms describing drones «of varying sizes and capabilities» can be found in A. M. DRAKE, *Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law – An Overview*, in *ibid.*, pp. 629-660, at p. 630, note 2. See also R. J. VOGEL, *Drone Warfare and the Law of Armed Conflict*, in *ibid.*, vol. 39, n. 1, pp. 101-138.

² In his *Report on extrajudicial, summary or arbitrary executions* (see U.N. doc. A/HRC/14/24/Add.62, 28 May 2010, hereinafter *Alston Report*), the Special Rapporteur of the U.N. Human Rights Council, Philip Alston, describes targeted killings as «[...] the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator» (par. 1), specifying that it «is not a term

combating international terrorism – increasingly exploited by the United States, since the attacks of 11 September 2001³.

As it is widely known, the major feature of the military technology employed in such operations is the possibility of controlling the aircraft remotely, making it possible to conduct the various phases of a given mission (approach, attack and confirmation of the outcome) with no onboard personnel. This new technology, that achieves the common aim of employing military force in conditions of “risk-free warfare”⁴, entails a radical change in strategy and rules of engagement⁵.

Beyond the challenge that drones pose to the very concept of “battlefield”, the question arises whether their use is really consistent with current International Law rules and what collateral effects to long term they may have, considered their ethical and humanitarian impact⁶.

Several International Law scholars have examined the legal theories and the relevant State practice in order to identify the correct standards that should regulate this new

defined under international law» (par. 7). Following Reports *on extrajudicial, summary or arbitrary executions* (U.N. doc. A/68/382, 13 September 2013) and *on Promotion and protection of human rights and fundamental freedoms while countering terrorism* (U.N. doc. A/68/389, 18 September 2013) by Special Rapporteurs Christof Heyns e Ben Emmerson, respectively, confirmed that such a practice pose a question of «legal controversy», notably as regards the legitimate use of force «outside situations of armed conflict».

³ M. E. O’CONNELL, *Remarks: The Resort to Drones Under International Law*, in *Den. Jour. Int. Law. Pol.*, vol. 39, mn. 4, pp. 585-600, reports that «the first known use of a drone to kill a named individual occurred in Afghanistan in November 2001. This was about a month after the United States and the United Kingdom launched the intervention of October 7, 2001, in response to the 9/11 attacks» (p. 58). On that occasion, the United States Air Force led the operation, which fell within an armed conflict. Instead, the first drone strike carried out by the CIA occurred in Yemen on November, 3, 2002, when six persons – including a suspected top leader in the al-Qa’idah organization and a U.S. citizen – were killed while travelling in a passenger vehicle. The former Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions of the U.N. Human Rights Commission, Mrs. Asma Jahangir, disputed the legality of such operation, asserting that it «constitutes a clear case of extrajudicial killing», since it did not comply with international human rights and humanitarian law standards (see U.N. Doc. E/CN.4/2003/3, 13 January 2003, at par. 39).

⁴ The idea of a risk-free warfare is expressed by W. M. ARKIN, *Unmanned: Drones, Data, and the Illusion of Perfect Warfare*, New York, 2015 in terms of «illusion».

⁵ According to R. VOGEL, *op. cit.*, p. 102, «[d]rone targeting has proven to be spectacularly successful – both in terms of finding and killing targeted enemies and in avoiding most of the challenges and controversies that accompany using traditional forces». The same opinion is shared by S.-D. BACHMANN, *Targeted Killings: Contemporary Challenges, Risks and Opportunities*, in *Jour. Conf. Sec. Law*, 2013, vol. 18, n. 2, pp. 259-288, at 262, who claims that «[t]argeted killing seems to achieve tangible returns in terms of ‘decapitating’ terrorist networks».

⁶ Among International Law scholars there is a wide discussion on this topic, that involves many specific issues: e.g., the legal status of the CIA civilian drone operators (see A. BURT & A. WAGNER, *Blurred Lines: An Argument for a More Robust Legal Framework Governing the CIA Drone Program*, in *The Yale Journal of International Law Online*, vol. 38, pp. 1-15, available at <http://www.yjil.org/docs/pub/o-38-burt-wagner-blurred-lines.pdf>, who warn that «[w]ithout the legal status of combatant [...], CIA civilians who operate drones that hunt and shoot Hellfire missiles at al Qaeda militants arguably lose both the protection due to civilians and the immunity reserved for lawful combatants, rendering them both lawful targets of attack and criminally liable (for war crimes under international law or for murder under domestic law where the hostilities occur)» and propose, as a possible remedy, «to shift the program – or at the very least, the lethal nodes of it – to military control»; at pp. 11 and 15) or the relevance of a new «legal geography of war», as claimed by K. ANDERSON, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War’*, in P. BERKOWITZ (ed.), *Future Challenges in National Security and Law*, 2011, pp. 1-17, available at www.futurechallengesessays.com. See also N. LUBELL and N. DEREJKO, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, in *Jour. Crim. Inst.*, vol. 11, 2013, pp. 65-88.

method of warfare. Even this article will try to analyze the use of drones for targeted killings in order to establish the proper legal framework under which such operations should be regulated. Actually, the application of a particular set of international rules and, ultimately, the legality of drone strikes themselves depend on their qualification as law enforcement measures or as military operations conducted under International Humanitarian Law (hereinafter IHL). A further but disputable hypothesis considers drone strikes as lawful self-defence responses to an armed attack, even if they are launched long after it, in a different place and not against those directly responsible⁷.

Since each hypothesis could be matched with a different legal framework, it is worthy to briefly explain first the major differences among them. Thus, assuming that targeted killings are ordinary anti-terrorism operations, they should be considered as law enforcement measures which must comply with the norms and principles of International Law and International Human Rights Law (hereinafter IHRL) applicable in time of peace. Conversely, if they are considered as typical war operations – or even in the case in which, regardless their “intrinsic” legal nature, they are launched during a declared armed conflict – the appropriate legal framework to comply with is the IHL. Lastly, State practice shows that drones are mostly used in warfare scenarios which do not reach the threshold of armed conflicts. In such contexts, they are claimed to be self-defence responses to armed attacks launched by international terrorists, provided their consistency with current *ius ad bellum* rules⁸.

2. *The admissibility of self-defence against non-State actors after 11 September 2001: “a Grotian moment”?*

To establish if drone strikes against international terrorists can be considered as lawful measures of self-defence, the preliminary question is of a general nature and regards the current range of the *ius ad bellum* rules after 11 September 2001. Actually, according to some scholars, the extraordinary nature of the terrorist attacks of 9/11, because of the grave violation of the territorial sovereignty of the United States and the high number of casualties, caused an irrevocable shift of the legal conditions under which both the State injured and the international community as a whole are legitimated to respond⁹.

⁷ That is, ultimately, the United States position. In the *Department of Justice White Paper (Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force)*, it can be read: «[t]he President has authority to respond to the imminent threat posed by al-Qa’ida and its associated forces, arising from his constitutional responsibility to protect the country, the inherent of the United States to national self defense under international law, Congress’s authorization of the use of all necessary and appropriate military force against this enemy, and the existence of an armed conflict with al-Qa’ida under international law» (p. 1). See *infra*, par. 4-5.

⁸ See J. J. PAUST, *Self-Defense Targetings of non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, in *Col. Jour. Trans. Law*, vol. 19, n. 2, pp. 237-280, notably at 238. Of the same A. see also *Operationalizing Use of Drones Against non-State Terrorist Under the International Law of Self-Defense*, in *Alb. Gov. Law Rev.*, 2015, pp. 166-203.

⁹ On the right to use force in self-defence against non-State actors, emerging from the 9/11 attacks as a “constitutional moment”, see A.-M. SLAUGHTER & W. BURKE-WHITE, *An International Constitutional Moment*, in *Harv. Int. Law Jour.*, vol. 43, 2002, pp. 2-21. According to T. REINOLD, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, in *Am. Jour. Int. Law*, vol. 105, n. 2, 2011, pp. 244-286, such a right implies the possibility of a military intervention in the place of States that are “unwilling or unable” to control their

As with other decisive events in the history of international law (the creation of the Nuremberg Tribunal or the establishment of the United Nations), the concept of “*Grotian Moment*” has been evoked to describe «a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance»¹⁰.

Actually, such were the seriousness of the crimes committed and the significance of the violations of national territorial integrity and internal security, that the adoption of effective repressive measures (related with the need to contend with a terrorist threat of such intensity and danger and to prevent the recurrence of similar events) was indispensable. This aspect pertains to the *legitimacy* of the response of the affected State, *i.e.* to the State’s general interest to protect itself and its citizen. It remains to be established, however, whether the legal basis for such measures can be found in the norms of International Law already in force at the time of the 9/11 attacks or whether – following the aforementioned “Grotian Moment” theory – the attacks themselves, inasmuch as they demanded a “qualitatively” unprecedented response (due to their extent), did not contribute to a change of the applicable rules.

The aggressor’s status as a non-State *terrorist* actor is the main innovative element that, according to some authors, would justify the application of rules other than those traditionally concerning *ius ad bellum* between sovereign States. Hence, the overall response to the 9/11 attacks, as well as the single military operations carried on against the terrorists for the aforementioned purpose of protecting national security, would be qualified in terms of self-defence. Moreover, this would warrant the possibility of applying the special rules governing the *ius in bello* to such operations until the attack is finally ended and peace re-established¹¹.

However, if a serious terrorist act is considered a real armed attack or even an act of war (*i.e.* a serious breach of the prohibition of the use of force, to the extent that such act can actually give rise to an armed conflict), it then becomes necessary to establish *on a legal basis* what constitutes an appropriate response, considering both the nature of the enemy and the type of the conflict, as well as the role of the other States concerned – not only those in which the terrorists themselves hide or maintain bases, but also those that, at given

territory effectively. See also I. JOHNSTONE, *The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, in *Col. Jour. Trans. Law*, vol. 43, n. 2, 2005, pp. 337-388.

¹⁰ M. P. SCHARF, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, in *Cornell Int. Law Jour.*, vol. 43, 2010, pp. 439-469, at p. 444. Despite its reference to the classic doctrine of the “father of international law”, the expression “Grotian moment” has been coined in recent times by Professor Richard Falk (*The Grotian Moment*, in R. FALK, F. KRATOCHWIL and S. H. MENDLOVITZ (eds.) *International Law: A Contemporary Perspective*, Boulder, 1985, pp. 7-42). It denotes a sudden change of customary international rules hitherto generally recognized and applied and it is similar to the concept of “international constitutional moment”, although it «may signify a broader change and a wider-ranging development, which affects international law on the whole, and not merely subfields of international law» (M. STERIO, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 2010, pp. 1-27, at p. 5, available at: http://works.bepress.com/milena_sterio/5). SCHARF, *ibid.*, also distinguishes the theory of the “Grotian moment” from that of “instant customary law” (proposed by B. CHENG, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, in *Ind. Jour. Int. Law*, vol. 5, 1965, pp. 23-48), claiming that the first «contemplates accelerated formation of customary international law through states’ widespread acquiescence or endorsement in response to state acts, rather than instant custom based solely on General Assembly resolutions» (p. 446, note 34). To «instant custom» (with reference to the broadening of the notion of self-defence after the 9/11 attacks) addresses A. CASSESE, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, in *Eur. Jour. Int. Law*, vol. 12, n. 5, 2001, pp. 993-1001, at 997.

¹¹ *Infra*, parr. 4-5.

times and for specific operations, may provide military, logistical or even economic support¹². To this respect, for example, it is disputed if the use of force on the territory of another State in response to an armed attack launched by a non-State actor must be considered lawful when the territorial State is “unwilling” or “unable” to counter the terrorist threat itself¹³.

The raids recently carried out by some States against the Islamic State group in Syria and Iraq¹⁴ are a clear example of the current trend that considers lawful the use of armed force against terrorist groups even in the absence of an explicit authorization from the UN Security Council. Such operations are generally justified as measures of self-defence under Article 51 of the Charter of the United Nations, although they can be rather considered a legitimate reaction of the international community – legally represented by the States involved, acting *uti universi* – to the serious breach of *erga omnes* obligations, namely the prohibition of gross violations of human rights of the civilian population¹⁵.

¹² On the concept of “State-sponsored” terrorism and the legality under International Law of the U.S. legislation which abrogated the immunity of foreign States involved in sponsoring acts of terrorism against U.S. citizens, see W. P. HOYE, *Fighting Fire with... Mire? Civilian Remedies and the New War on State-Sponsored Terrorism*, in *Duke Jour. Comp. Int. Law*, vol. 12, 2002, pp. 105-152; S. MALZAHN, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, in *Hast. Int. Comp. Law Rev.*, vol. 26, 2002, pp. 83-114; D. JINKS, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups*, in *Chin. Jour. Int. Law*, 2003, pp. 83-107.

¹³ According to the *Alston Report*, *cit.*, «under the law of inter-state force [a] targeted killing conducted by one State in the territory of a second State does not violate the second State’s sovereignty if either (a) the second State consents, or (b) the first, targeting, State has a right under international law to use force in self-defence under Article 51 of the UN Charter, because (i) the second State is responsible for an armed attack against the first State, or (ii) the second State is unwilling or unable to stop armed attacks against the first State launched from its territory. International law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate» (par. 35). For a normative analysis of the “unwilling or unable” test, see A. S. DEEKS, “Unwilling or Unable”: *Toward a Normative Framework for Extraterritorial Self-Defense*, in *Va. Jour. Int. Law*, vol. 52, n. 3, 2012, pp. 483-550, who claims that «[m]ore than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat. Yet there has been virtually no discussion, either by states or scholars, of what that standard means» (p. 486). However, the Author admits that «I have found no cases in which states clearly assert that they follow the test out of a sense of legal obligation (i.e., the *opinion juris* aspect of custom), nor have I located cases in which states have rejected the test. Even if one concludes that the rule does not rise to the level of custom, however, the rule makes frequent appearances in state practice and therefore is the appropriate starting point from which to determine how the norm should develop» (p. 503, note 70).

¹⁴ Before launching the strikes against Islamic State’s placements in Syria, Foreign Minister Laurent Fabius declared that they would have been carried out «under Article 51 of the United Nations Charter, in other words, in self-defence», since «as soon as it is established that from Syrian territory, which is not entirely controlled by the Syrian government... Daesh forces are threatening French interests, both outside and inside France, it is perfectly legitimate that we defend ourselves». Also British Prime Minister David Cameron referred to the same rationale to justify the RAF drone strike that killed two British extremists in the Syrian city of Raqqa on August 21. Such argument, however, is not entirely convincing. According to Aisling Reidy, a senior legal advisor at Human Rights Watch, «[i]nvoking the right to self-defence does not give the French government a blank cheque to conduct targeted assassinations [on Syrian soil] under a general claim of threat to national security [...] Unless they can produce evidence of a direct and imminent threat of loss of life where using lethal force is essential to protect lives, then in accordance with human rights standards self-defence under the UN Charter does not give them the right to kill». See <http://tribune.com.pk/story/955050/france-invokes-self-defence-for-syria-air-strikes/>

¹⁵ That is the clear opinion of P. PICONE, *Unilateralismo e guerra contro l’ISIS*, in *Riv. Dir. Int.*, n. 1/2015, pp. 5-27, at 21, who argues that the military intervention of U.S. and their allies against the Islamic State group cannot be deemed as a form of «pre-emptive self-defence» (pursuant to the outdated and no more acceptable

By contrast, those who maintain that all terrorist acts, regardless of their gravity, amount only to international crimes – albeit horrific – and not to armed attacks, do not consider lawful any response qualitatively differing from those permissible on the basis of IHRL. Hence, in this perspective, the customary rules of *ius ad bellum* (i.e. the generally recognized legal conditions to start an armed conflict) could not find legitimate application in such situations¹⁶.

Whether or not the attacks of 9/11 caused a «transformative development» of customary rules applicable to counter terrorism operations, it must be noticed that International Law has experienced significant changes over the course of the first decade of the 21st century, due to the emergence of new forms of responsibility associated with the unlawful use of armed force by entities (such as terrorist groups) lying outside the traditional legal paradigms of interstate relations. Prior to this, in fact, the use of force by non-State actors, when falling short of a non-international armed conflict¹⁷, was taken into consideration basically in order to assess – through the well-known “control” test¹⁸ – the responsibility of the State that sponsored the attack, for the breach of the general prohibition established in art. 4, par. 2 of the UN Charter. Accordingly, the terrorist aim was not *ex se* a sufficient reason to convert a crime in an armed attack which warranted a self-defence response consistent with International Law by the State injured.

Yet, in the aftermath of the attacks of 9/11, such a huge and unexpected increase of the global terrorist threat has led international scholars to question whether the customary criteria for the attribution of international responsibility for the breach of the prohibition of the use of force could still have been considered valid. Due to the exceptional circumstances in which the attack has been carried out and the grave aggression brought to the territorial integrity of the United States, it has been recognized that the related responsibility should have been entirely attributed to the terrorist group, whose unlawful aims – namely, to cause the maximum possible damage to the U.S. interests, including the killing of its citizens as legitimate “military targets” of an absurd “defensive jihad”¹⁹ –

Bush doctrine), but as a «global war» against a structural phenomenon which follows criminal purposes and represents a serious threat for the whole international community.

¹⁶ M. E. O’CONNELL, *Remarks, cit.*, p. 597, argues that terrorism is generally a «crime», which cannot give rise to an armed conflict «regardless of how serious the consequences».

¹⁷ *Infra*, par. 3.

¹⁸ In the famous *Nicaragua* case (ICJ, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 27 June 1986), the ICJ used the «effective control» test – as subsidiary alternative to the «strict control» one – to ascertain the possibility of attributing an act of a non-State armed group to a State. The «effective control» test is based on a “case by case” assessment about the «financing, organizing, training, supplying and equipping» of the non-State actor, as well as «the selection of its military or paramilitary targets and the planning of the whole of its operation» by the State organs (*ibid.*, par. 115). In the *Tadić* case (ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, 15 July 1999), the ICTY proposed a different test, based on a less rigid «overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations» (*ibid.*, par. 120-121). However, in the *Genocide* case (ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 27 february 2007), the ICJ confirmed the approach followed in the *Nicaragua* case.

¹⁹ A. C. ORR, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, in *Cornell Int. Law Jour.*, vol. 44, pp. 729-752, quoting the “al-Qa’ida goals” and the “Messages to the world” of Osama bin Laden, affirms that «[t]he ongoing threat from al Qaeda is underscored by al Qaeda’s emphasis on the fact that all Americans are targets. Assuming that al Qaeda’s goals survive the death of Osama bin Laden, al Qaeda holds American people complicit in the actions of their government, and regards those actions as justifications for the armed attacks that bin Laden called “defensive jihad”» (pp. 737-738).

assumed, in this perspective, specific relevance. Actually, it is just on the basis of the support to the terrorist aims that the State sponsor's responsibility has been established, thus reversing the traditional paradigm under which the self-defence measures carried out by the State victim can be considered consistent with *ius ad bellum* rules. In the words of Cassese: «[s]o far self-defence has been justified only *against states* [...]. As a consequence, the target was specified: the aggressor state. The purpose was clear: to repel the aggression. Hence also the duration of the armed action in self-defence was fairly clear: until the end of aggression. Now, instead, all these conditions become fuzzy. Problems arise to the *target* of self-defence, its *timing*, its *duration*, and the *admissible means*»²⁰.

Such an innovation of the self-defence paradigm, codified in the well-known UN Security Council resolutions 1368 and 1373 of 12 and 28 September 2001, has therefore to be considered when assessing the legality of the related measures taken by the States victims against non-State actors. Accordingly, the lawfulness of the use of drones for the purpose of targeted killings must be reviewed also in the light of this new framework under which the counterterrorism operations are currently carried out.

3. *The prohibition of extrajudicial killings pursuant to International Human Rights Law standards applicable in times of peace.*

In the previous paragraph it has been reported how the terrorist attacks of 9/11 introduced some significant elements of innovation within the legal framework related to self-defence, notably because of the unprecedented legal relevance assigned to the entity responsible of the attacks. It must be then established whether such innovations might also entail a corresponding change of the rules applicable to the armed response originated by the attacks, properly as regards its «target», «timing» and «duration», provided that the use of force should be considered, in this perspective, an «admissible means»²¹.

The simplest scenario provides that, with the attacks of 9/11, the terrorist organization of al-Qa'ida gave rise to an armed conflict against the United States. Hence, it must be assessed whether such a conflict, because of its specific features, is still in course and, if so, with what legal means of combat it may be fought. The deployment of remotely-controlled military technology consistent with IHL for the killing of individuals belonging to the aggressor terrorist organization, in fact, should be considered fully acceptable if an armed conflict does exist between the parties.

²⁰ A. CASSESE, *Terrorism*, *cit.*, p. 997. See also N. RONZITTI, *The Expanding Law of Self-defence*, in *Jour. Conf. Sec. Law*, vol. 11, 2006, pp. 343-359.

²¹ See K. ANDERSON, *Targeted Killing in U.S. Counterterrorism Strategy and Law (A Working Paper of the Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution)*, 11 May 2009, available at: <http://ssrn.com/abstract=1415070>, who argues that «American counterterrorism is a hybrid employing distinct palettes of legal tools. One is criminal law enforcement; another is armed conflict. Americans have been arguing about these two palettes [...] nonstop since September 11. Each occupies important ground in the legal and policy regulation of uses of force and violence in counterterrorism. As a matter of long-term counterterrorism strategy, each will continue to play an important role. Moreover, despite many now-familiar arguments, sometimes ferocious, over such issues as Guantánamo, habeas corpus, civilian versus military criminal trials, detention, rendition, and interrogation, each of these fields – law enforcement and armed conflict – have well established legal and policy protocols» (p. 5).

Conversely, if in the given situation the threshold of armed conflict has not been reached, since the single terrorist acts after those of 9/11 – albeit interrelated and intended to serve the same subversive goal – cannot be considered *inter se* functionally-connected so as to constitute single acts of a whole offensive war), it would appear to be more difficult to find a legal rationale for drone strikes as a lawful means of reaction.

According to some leading scholars, despite its extreme violence, highly destructive consequences and large number of victims, a terrorist attack could never trigger an armed conflict, due to the absence of a sufficient level of «intensity of fighting» between the belligerent parties²². However, it is arguable that the absence of “fighting”, in its traditional meaning, would partially depend on the very nature of such attacks, which generally entail the suicide of the terrorist attackers and deny the victims the possibility of responding, if not prevented in advance.

On the other hand, the Israeli High Court of Justice, addressing acts of terrorism against Israeli citizens, maintained, in accordance with its constant case law, that «between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter “the area”) a continuous situation of armed conflict has existed since the first intifada». This state of continuous conflict can be inferred from the fact that «[...] the State of Israel is under a constant, continual, and murderous wave of terrorist attacks, directed at Israelis – because they are Israelis – without any discrimination between combatants and civilians or between men, women, and children»²³. Viewed in this light, individual terrorist acts are not isolated incidents, but parts of an unique armed attack, indiscriminately targeting both military forces and the civilian population.

The lack of a generally-accepted definition of the crime of terrorism easily encourages the inclination of States to unilateralism and self-regulation, so that it is shareable the opinion that «international law currently is not in a position to guide State behaviour with respect to targeted killings»²⁴. The main problem, however, does not seem to be the absence of a legal definition of terrorist or its overlap with that of “freedom fighter” (a terrorist group, in fact, can hardly be confused *stricto sensu* with an armed movement for liberty or self-determination)²⁵. What is more problematic are the changing circumstances in which the crime of terrorism is perpetrated. As noted before, international legal practice in the wake of the 9/11 attacks certainly reflects the need of a common response to the increased danger posed by terrorist groups, as well as to the global nature of the offensive

²² M. E. O'CONNELL, *Remarks, cit.*, p. 597. See also ID., *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in S. BRONITT (ed.), *Shooting To Kill: The Law Governing Lethal Force in Context*, Notre Dame Legal Studies Paper No. 09-43, 2010, available at <http://ssrn.com/abstract=1501144>; *Drones under International Law*, Washington University Law, Whitney R. Harris World Law Institute, 8 October 2010, available at <http://law.wustl.edu/harris/documents/OConnellFullRemarksNov23.pdf>.

²³ Israeli High Court of Justice, *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel* (and others), Judgement of 11 December 2005, par. 16. On the Israeli policy on targeted killings, see R. OTTO, *Targeted Killings and International Law*, Heidelberg (Springer), 2012.

²⁴ W. J. FISHER, *Targeted Killing, Norms, and International Law*, in *ColumJTransnatL*, vol. 45, 2006-2007, pp. 711-758.

²⁵ It can be shared the opinion of C. J. TAMS, *The Use of Force against Terrorists*, in *Eur. Jour. Int. Law*, vol. 20, 2009, pp. 359-397, at p. 361, who argues that «the definitional problem has not paralysed the international community. It has not stopped states from asserting a right to use force against persons or groups they claimed were ‘terrorists’, and it has not stopped others from reacting to those assertions». See also P.-M. DUPUY, *State Sponsors of Terrorism: Issues of International Responsibility*, in A. BIANCHI (ed.), *Enforcing International Law Norms against Terrorists*, Portland (Hart Publishing), 2004, pp. 3-16, at p. 6.

strategies they have adopted, but this has not led yet to the creation of a special regime (whether by treaty or customary law), in order to properly contend with this phenomenon²⁶.

Anyway, as it has been correctly observed, «even the reaction to the worst and most treacherous attacks or any action aiming to prevent such incidents must adhere to the rule of law»²⁷. After the killings of a U.S. citizen in Yemen in 2011 and of two U.K. citizens in Syria in 2015, the duty of acting States to ensure that drone missions comply with the rule of law principle, preventing extrajudicial killings of their own citizens, has been strongly emphasized by the public opinion²⁸.

Since 9/11, the fight against international terrorism has involved the whole international community in the search for new legal instruments to target and punish the responsible, including individuals. To this respect, for example, the well-known U.N. Security Council “targeted sanctions” regime, with the establishment of listing and de-listing procedures of individuals suspected of terrorist activities before the Sanction Committee²⁹, has been firmly criticized – despite its proven efficacy – as targeted

²⁶ For a general survey on the international legal system’s response to terrorism, see G. ABI-SAAB, *The Proper Role of International Law in Combating Terrorism*, in *Chin. Jour. Int. Law*, 2002, pp. 305-313; A. AUST, *Counterterrorism: A New Approach. The International Convention for the Suppression of the Financing of Terrorism*, in *Max P. YB. Un. Nat. Law*, 2001, pp. 285-306; A. Ü. BÄLI, *Stretching the Limits of International Law: the Challenge of Terrorism*, in *ILSA Jour.*, 2002, pp. 403-416; I. BANTEKAS, *The International Law of Terrorist Financing*, in *Am. Jour. Int. Law*, 2003, pp. 315-333; R. P. BARNIDGE, *Non-state Actors and Terrorism: Applying the Law of State Responsibility and The Due Diligence Principle*, The Hague, 2008; M. C. BASSIOUNI, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, in *Harv. Int. Law. Jour.*, 2002, pp. 83-103; F. BATTAGLIA, *Il terrorismo nel diritto internazionale*, Napoli, 2012; T. BECKER, *Terrorism and the State. Rethinking the Rules of State Responsibility*, Oxford, 2006; A. BIANCHI, *Enforcing International Law Norms Against Terrorism*, Oxford, 2004; M. BYERS, *Terrorism, the Use of Force and International Law after 11 September*, in *Int. Comp. Law Quart.*, 2002, pp. 401-414; A. CASSESE, *The Multifaceted Criminal Notion of Terrorism in International Law*, in *Jour. Int. Crim. Just.*, 2006, pp. 933-958; J. I. CHARNEY, *The Use of Force Against Terrorism and International Law*, in *Am. Jour. Int. Law*, vol. 95, n. 1, 2001, pp. 835-839; J. DELBRÜCK, *The Fight against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the “War against Terrorism”*, in *Germ. YB. Int. Law*, 2001, pp. 9-24; M. DU PLESSIS, *Terrorism and National Security. The Role of the Judiciary in a Democratic Society*, in *Eur. Hum. Rights Law Rev.*, 2007, pp. 327-334; M. J. GLENNON - S. SUR (eds.), *Terrorism and International Law / Terrorisme et droit international*, Leiden, 2008; G. GUILLAUME, *Terrorism and International Law*, in *Int. Comp. Law Quart.*, 2004, pp. 537-548; G. HOON, *The Legal Response to Global Terror*, in *Calif. West Int. Law Jour*, 2007, pp. 107-116; N. MCGARRITY - A. LYNCH - G. WILLIAMS (eds.), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11*, Abingdon, 2010; D. MOECKLI, *The Emergence of Terrorism as a Distinct Category of International Law*, in *Texas Int. Law Jour.*, 2009, pp. 157-183; V. P. NANDA, *Law in the War on International Terrorism*, Ardsley, NY (Transnational Publishers), 2005; G. NESI (ed.), *International Cooperation in Counter-Terrorism*, Burlington, 2004; E. ROSAND, *Security Council Resolution 1373, The Counter-Terrorism Committee and The Fight Against Terrorism*, in *Am. Jour. Int. Law*, 2003, pp. 333-341; A. SAMBEI - A. DU PLESSIS - M. POLAINE, *Counter-Terrorism Law and Practice: An International Handbook*, Oxford, 2009; B. SAUL, *Defining Terrorism in International Law*, 2006.

²⁷ R. OTTO, *Targeted Killings*, cit., p. 535.

²⁸ See the post on *Opinio Juris* blog of K. J. HELLER, *Let’s Call Killing al-Awlaki What It Still Is – Murder*, available at <http://opiniojuris.org/2014/06/23/lets-call-killing-al-awlaki-still-murder/>.

²⁹ Security Council resolution 1267 (1999) first imposed sanctions against the Taliban for their support to the al-Qa’ida organization and, particularly, for allowing the territory under their control to be used «for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens». It also established a Sanctions Committee for the dual purpose of designating Taliban individuals and entities associated with al-Qa’ida and monitoring the implementation of sanctions (S/RES/1267 (1999), at parr. 1 and 4). The introduction of the “listing” procedure is specifically due to the subsequent resolution 1333 (2000). Following the adoption of this resolution, the main task of the Committee was to establish and periodically update various lists of individuals and entities against which sanctions had to be applied, on the basis of the relevant information provided by the national intelligence services of the member States or by

individuals have no power to challenge the application of such measures (mostly consisting in freezing their funds or other financial resources)³⁰. This feature affects the very nature of the sanctions, by making them similar to criminal penalties. Even with the further establishment of the “focal point”³¹ and the “Ombudsperson”³², the Security Council failed to provide a clear review mechanism of the Committee’s decisions, as neither of the two can be considered consistent with the principles of rule of law and due process³³.

Accordingly, International Law scholars seem to concur on the illegality of targeted killings, when falling short of the legal framework of armed conflict³⁴. Under ordinary peacetime conditions, in fact, territorial control, crime-prevention and the repression of illegal behaviour must be implemented by means that do not involve the use of force and comply with IHRL standards. Temporary and cautionary arrest and detention are thus generally permitted, as they are measures that limit personal freedom pursuant to a fair trial,

regional organizations. It is from this moment on that the practice of “listing” came into force. After 11 September 2001, the sanctions’ regime was extended to the «al-Qa’ida network» and strengthened through new measures by resolution 1390 (2002).

³⁰ Several authors have considered the implications, for the rule of law, of the Security Council’s role and actions. See, *inter alia*, M. C. BASSIOUNI, *The Regression of the Rule of Law Under the Guise of Combating Terrorism*, in *Revue internationale de droit pénal*, 2005, pp. 17-26; A. BIANCHI, *Ad-bocism and the Rule of Law*, in *Eur. Jour. Int. Law*, 2002, pp. 263-272; E. CANNIZZARO, *Machiavelli, the UN Security Council and the Rule of Law*, Global Law Working Paper Series, n. 11/05, pp. 1-32; J. M. FARRALL, *United Nations Sanctions and the Rule of Law*, Cambridge (Cambridge University Press), 2009; O. M. FISS, *The War Against Terrorism and the Rule of Law*, in S. BREITENMOSER (ed.), *Human Rights, Democracy and the Rule of Law. Liber Amicorum Luzius Wildhaber*, Zürich (Gallen), 2007, pp. 1239-1263; J. A. FROWEIN, *The UN Anti-Terrorism Administration and the Rule of Law*, in P.-M. DUPUY - B. FASSBENDER - M. N. SHAW - K.-P. SOMMERMANN (eds.), *Völkerrecht als Wertordnung : Festschrift für Christian Tomuschat / Common Values in International Law : Essays in Honour of Christian Tomuschat*, Kehl (N. P. Engel Verlag), 2006, pp. 785-795; N. PHILLIPS, *Impact of Terrorism on the Rule of Law*, in *The Int. Lawyer*, 2009, pp. 13-26; S. SUCHARITKUL, *Jurisdiction, Terrorism and the Rule of International Law*, in *Golden Gate Univ. Law Rev.*, 2002, pp. 311-323.

³¹ S/RES/1730 (2006).

³² S/RES/1904 (2009). See also S/RES/1989 (2011) and S/RES/2083 (2012).

³³ In its judgement of 30 September 2010 on the case T-85/09 (*Yassin Abdullah Kadi v. Commission*, the third episode of the famous “Kadi saga”, the EU General Court stated that «the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee’s list requires consensus within the committee [...]. For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee» (par. 128). In the previous judgment on the joined cases C-402/05 P and C-415/05 P (*Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*) of 3 September 2008, the European Court of Justice, confirming its preceding case-law, stated that «it is to be borne in mind that the [European] Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions» (par. 81).

³⁴ See M. STERIO, *The United States’ Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law*, in *Case West. Res. Jour. Int. Law*, vol. 45, 2012, pp. 197-214, at 201, who argues that «most targeted killings are illegal under international law; only a very small number of such killings, performed under carefully crafted circumstances, could potentially comply with the relevant rules of *jus ad bellum* and *jus in bello*, and only if one accepts the premise that the United States is engaged in an armed conflict against al-Qaeda».

while the arbitrary deprivation of human life is firmly prohibited, with the exception of killings strictly necessary in order to save other human lives, in emergency situations³⁵.

Public officials charged with law enforcement are thus authorized to kill only when their own lives or those of other innocent people are in immediate danger. This clearly excludes missions – whether by means of drones or even by more “traditional” methods – that constitute «intentional, premeditated and deliberate use of lethal force [...] against a specific individual who is not in the physical custody of the perpetrator»³⁶. It is precisely the element of premeditation that makes targeted killings incompatible with international IHRL, with specific reference to the aforementioned prohibition of the arbitrary deprivation of life. This is because, in the context of law enforcement operations, the killing of the “enemy” cannot be the legitimate purpose of a mission, but only the unintentional outcome of unforeseeable circumstances. Thus, although targeted killings would appear to be permissible in the context of armed conflict – assuming the prior identification of the military targets –, this is not the case for law enforcement operations, which must be consistent with the law applicable in times of peace. Such operations must, therefore, should be limited to the arrest of the terrorists and their delivery to the judicial authority³⁷.

Provided that the practice of targeted killings, when falling short of an armed conflict, is subject to the legal paradigm of law enforcement operations, the position of the States on whose territory such operations are carried out appears to be problematic³⁸. In principle, the absence of an explicit request for intervention, or at least tacit consent by the territorial State, would make recourse to the use of force illegal, as it would constitute a violation of the sovereignty of such States. The only acceptable exceptions could be referred to a specific authorization from the UN Security Council or to the need to safeguard primary national interests of the State concerned (as life or security of its citizens who are resident in the host State’s territory) in the face of a grave and imminent threat.

However, the territorial State’s consent could not be deemed sufficient to provide legitimacy for the targeted killing of terrorists outside the legal context of armed conflict.

³⁵ According to article 6, par. 1, of the *International Covenant on Civil and Political Rights*, «[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life». The same prohibition is established by article 2 of the European Convention on Human Rights.

³⁶ See *Alston Report*, *supra*, note 2. See also *ibid.*, par. 33: «[...] under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation [...]. Lethal force under human rights law is legal if it is strictly and directly necessary to save life».

³⁷ In the case *McCann and others v. United Kingdom* (n. 1894/1991, judgement of 27 September 1995), the European Court of Human Rights, assessing whether the «anti-terrorist operation» conducted by the U.K. military forces against a group of terrorists belonging to the IRA organization had been «controlled and organised in a manner which respected the requirements of Article 2 (art. 2) and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects» (par. 201), stated that, in those specific circumstances, the killing of terrorists «[...] lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects». For these reasons, the Court was «not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention» and declared «that there has been a breach of Article 2 (art. 2) of the Convention» (parr. 212-214).

³⁸ In the latter case, it is a matter of dispute whether a State may use armed force in the framework of an international policing operation solely on the basis of the unwillingness or proven inability of the territorial State to respond to a terrorist threat. *Supra*, note 11.

Such a consent, in fact, would be unlawful, as it would authorize a violation of IHRL with respect to the prohibition of the arbitrary deprivation of human life in peacetime. To be more precise, it should be considered *inutiliter datum*, since territorial State would authorize an unlawful operation that would never become lawful because of its mere consent³⁹. It depends upon the legal nature attributed to the prohibition in question to establish which consequences can be inferred from its violation.

Provided that the prohibition of the arbitrary deprivation of human life is a IHRL standard of customary nature, its violation authorized by the territorial State has as a consequence to shift the responsibility from the acting State to the territorial one within the limits of the consent given, but this does not change the unlawfulness of the action. It can be questioned whether the responsibility must be shared between the two of them when the consent has not been expressed explicitly, but only tacitly, namely through the acquiescence inferred from the absence of any formal protest towards the acting State. The international responsibility has to be shared likewise between the States involved whether the prohibition in question is supposed to fall into the category of *ius cogens* obligations (whose observance is entirely independent of the existence of a corresponding reciprocal obligation between the States involved in its breach), provided that it is based on the inviolability of the individual's right to life, albeit with the aforementioned exceptions (which do not affect *ex se* the peremptory nature of the prohibition). Hence, even if two States agreed to maintain the permissibility of extrajudicial killings in peacetime, such an agreement should be considered void, since it would conflict with a peremptory norm of International Law, as stipulated in articles 53 and 54 of the Vienna Convention on the Law of Treaties⁴⁰. Moreover, due to the high risk of collateral victims, drone strikes could be deemed, in time of peace, as disproportioned measures respect to the specific anti-terrorism objectives pursued by the States concerned, to the extent that, in the case in which they are repeated in series, causing indiscriminate terror among the civilian population, they could amount to an act of war themselves.

4. Targeted killings missions in asymmetric warfare and the respect of International Humanitarian Law.

If the legality of drone strikes must be excluded *a priori* in a scenario dominated by the compliance with IHRL, the further question should be whether and under what condition the use of drones can be admitted in situations of armed conflict regulated under IHL. As widely known, IHL rules are generally considered *lex specialis* with respect to those governing human rights protection, although IHRL standards keeps on being applied to «any legal gap»⁴¹. Of course, this does not mean that the prohibition of arbitrary

³⁹ According to the U.N. *Special Rapporteur* Alston, such a consent would fail to comply with the territorial State's «responsibility to protect those on its territory from arbitrary deprivation of the right to life». Hence, «a consenting State may only lawfully authorize a killing by the targeting State to the extent that the killing is carried out in accordance with applicable IHL or human rights law» (par. 37).

⁴⁰ For a general survey, see C. TOMUSCHAT - J.-M. TOUVENIN (eds.), *The Fundamental Rules of the International Legal Order: Ius Cogens and Obligations Erga Omnes*, Leiden, 2006. See also A. J. J. DE HOOGH, *Obligations Erga Omnes and International Crimes*, The Hague (Kluwer), 1996.

⁴¹ See M. MCNAB and M. MATTHEWS, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationship Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law*, in *Den. Jour. Int. Law. Pol.*, vol. 39, n. 4, pp. 661-694, at 683.

deprivation of life has no relevance within an armed conflict, but only that the legal conditions for its admissibility under IHL are different from those applicable in peacetime⁴².

Indeed, according to IHL norms, codified in the Geneva Conventions of 1949 and Additional Protocols of 1977 but deriving from customary law (IHL constitutes one of the oldest bodies of the *corpus iuris gentium*), missions devised for the purpose of killing combatants in the enemy army are permissible and the accidental killing of civilians is tolerated, on condition that they occur within predetermined parameters.

It is well known that the Geneva Conventions and Protocols identify two types of armed conflict: *international* (as defined in art. 2, common to the four Conventions, and further detailed in art. 1, par. 4 of the First Additional Protocol) and *non-international*, the definition of which can be inferred, by exclusion, from that of international armed conflict (art. 3, common to the four Conventions, and art. 1, par. 1 of the Second Additional Protocol)⁴³. *Tertium non datur*: that is to say that, in accordance with the distinction provided in the aforementioned agreements (which – as noted above – fully reflect customary law in this matter), provided that the conflict originated from a terrorist attack and the consequent State response amount to an armed conflict consistent with IHL, it should fall under the second category, considering the non-State nature of the aggressor.

Some commentators argued, however, that the customary rules of IHL are not those appropriate to regulate this new kind of asymmetric warfare⁴⁴, as they were conceived in a different historical context (the so-called “Westphalian” one)⁴⁵. Actually, the “war on terror” is a classical example of asymmetric warfare, because of the aforementioned characteristics of the terrorist organizations involved and the way in which the conflict itself is conducted. To this respect, it can be questioned if IHL is ready to face a shift from traditional localized conflicts to a new kind of worldwide and virtually endless conflicts, in

⁴² In its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996, the ICJ stated: «[i]n principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [of Civil and Political Rights, see note 28], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself» (par. 25).

⁴³ Both Geneva Conventions and Additional Protocols fail to define armed conflict. According to the ICTY, it must be considered existing 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» (ICTY, Appeal Chamber, *Prosecutor v. Tadić*, *cit.*, par. 55). The requirement of the “protraction” of the hostilities, however, does not meet general consent in order to qualify an armed conflict. See F. PATEL KING, O. SWAAK-GOLDMAN, *The applicability of International Humanitarian Law to the “War against Terrorism”*, in *Hague YB Int. L.*, pp. 39-49, at 47.

⁴⁴ On the concept of “asymmetric war” (addressed to weak States fighting against stronger ones), see T. V. PAUL, *Asymmetric Conflicts: War Initiation by Weaker Powers*, New York, Cambridge University Press, 1994.

⁴⁵ R. S. SCHONDORF, *Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?*, in *NY. Univ. jour. Int. Law*, vol. 37, n. 1, 2004, pp. 1-78, calls for «the creation of a new category of armed conflict in international law for such situations – “extra-state armed conflict” – since such hostilities have unique features rendering their classification into traditional categories of intra or inter-state armed conflict inappropriate». He points out that «[t]he term “extra-state armed conflict” intends to capture the two defining characteristics of such hostilities: the idea that the conflict takes place, at least in part, outside the territory of the state; and the idea that an entity that is outside the framework of the state is a party to the conflict» (*ibid.*, pp. 5-6, note 19), although this new legal paradigm would be applicable to the armed conflicts between States and all kinds of non-State actors (not only terrorist groups).

which a State fights against a non-State terrorist group on the territory of other States and in which the State's citizens themselves are targeted and attacked as military objectives. Nor is it possible to select single customary rules to create a special legal framework, on the assumption that what is currently known as "war on terror" should be regulated under IHL because it is definitely a "just war"⁴⁶. On the other hand, once accepted the idea that the *ius ad bellum* rules have been innovated after 9/11 in order to broaden their scope and to admit accordingly the use of armed force in self-defence against non-State terrorist actors, it seems to be correct to assess whether this would entail also a corresponding innovation of the relevant IHL standards, provided that the acceptance of a *ius in bello specialis* for armed conflicts between States and non-State terrorist groups would presume the proven inadequacy of the current rules⁴⁷.

To this respect, it is known that both the Geneva Conventions and the Additional Protocols lack specific criteria for determining the legal conditions under which a state of non-international conflict can be said to exist. To this respect, importance should be given to the restrictive clause of art. 1, par. 2 of the Second Additional Protocol («[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts»), as well as to the analysis of international practice and the relevant case-law of international Courts⁴⁸. On the basis of these elements, it may be concluded that, in order for hostilities to amount to a non-international armed conflict, they must be sufficiently *intense* and *prolonged* and involve a State and an *organized* non-State entity⁴⁹.

As regards the latter criterion, the terrorist group responsible for the attacks of 11 September can be said to possess an organizational structure suitable to be considered a veritable belligerent party (although its cells enjoy ample operative autonomy).

As for the intensity and duration of the conflict, it goes without saying that neither of these characteristics lends itself to rigid definition. Furthermore, although conflicts between a State and a terrorist group may not attain the intensity necessary to constitute an armed conflict at the time of the initial attack, they may do so at a later date. Accordingly, there is little reason to believe that a conflict of this kind will maintain the same level of intensity throughout its duration. It may, indeed, at one or more specific stages, entail only sporadic attacks and limited counter-attacks. In such an event, it is not easy to determine whether the conflict is still in progress or whether it should be "downgraded" to a simple succession of isolated armed attacks. *E.g.*, as for the U.S. drone campaign in Pakistan, it has been argued that «the nature and quantity of the armed engagements between Pakistan and militant groups, including the TTP [i.e. the Tehrik-e-Taliban Pakistan], have developed and changed over the past few years. An examination of the current state of the fighting in the context of existing jurisprudence regarding the definition of armed conflict confirms the

⁴⁶ See M. WALZER, *Just and Unjust War*, 4th ed., New York, Basic Books, 2006.

⁴⁷ To this respect, however, K. ANDERSON, *Targeted Killing*, *cit.*, p. 10, observes: «[a] resort to force might well raise an international law question of whether it constitutes, on the one hand, an act of aggression or, on the other, a lawful resort to self-defense. But that is a separate question from whether the particular resort to force *also* invokes IHL as the law governing the conduct of that resort to force».

⁴⁸ See above, note 43. For an overview of customary international law of armed conflict, see J.-M. HENCKAERTS and L. DOSWALD-BECK, *Customary International Humanitarian Law, Volume I: Rules*, ICRC, Cambridge University Press, 2005, available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁴⁹ See R. PROVOST, *International Human Rights and Humanitarian Law*, Cambridge, 2002, p. 266.

already prevalent conclusion in the general media that Pakistan and the TTP – and possibly the United States – are involved in an armed conflict»⁵⁰.

The question is not purely theoretical, but presents specific relevance when determining the permissibility of the use of drones for the purpose of targeted killings. Of course, if it is accepted the basic premise of the existence of a whole armed conflict between the United States and al-Qa'ida, in keeping with the view of the Israeli High Court cited above, there is no need to qualify the missions discussed here as individual acts of legitimate self-defence “in response to” or in the presence of an “imminent threat of” a terrorist attack⁵¹. The necessity and proportionality of acts committed within the framework of an armed conflict are evaluated in terms of overall military goals pursued by the State – neutralizing the enemy’s offensive capability, for example – regardless of the intensity of a given attack or of the response to it. By contrast, if the legal concept of an “overall armed conflict” against terrorists must be rejected in principle, there follows the need to ascertain the legal conditions for the application of IHL in every single Country where drone strikes have been launched⁵².

Ultimately, the way in which drone killings are considered, under a legal perspective, hinges upon whether the hypothesis of a “permanent” armed conflict between United States (and their allied) and the terrorist organization, sparked by the attacks of 9/11 and fought in the territory of any other State involved, is accepted or not⁵³.

In the former hypothesis, IHL requires the belligerent State to apply the well-known criteria of *necessity*, *proportionality*, *distinction* and *humanity*. Adherence to these principles ensures that the use of force in the framework of an armed conflict is commensurate with the military goals pursued and does not exceed predetermined limits, such as causing civilian deaths in an indiscriminate way. In this context, the use of drones for missions of targeted killings cannot be considered, in principle, a violation of the limits imposed by the respect of *ius in bello*. Actually, both the official position of the U.S. government and the majority of the commentators agree that the choice of targets (generally terrorists in positions of command within the organization and responsible for previous attacks) and the weaponry deployed in such strikes comply with the principles of necessity and proportionality.

With regard to the criterion of distinction, according to IHL standards the killing of civilians is tolerated – although always morally deplorable – if the military targets can be distinguished from civilian non-targets present in the area of conflict and if the weapons deployed allow such distinction. The drones used in targeted killings are supposed to comply with this criterion, although, in several occasions, people other than the military targets have been killed. It is also worth noting, in this context, that civilian victims may

⁵⁰ See L. R. BLANK and B. R. FARLEY, *Characterizing US Operations in Pakistan: Is the United States Engaged In An Armed Conflict?*, in *Fordh. Int. Law Jour.*, vol. 34, n. 2, 2011, pp. 151-189, at pp. 17-18.

⁵¹ *Infra*, par. 4.

⁵² N. LUBELL, *Extraterritorial Use of Force Against Non-State Actors*, Oxford, Oxford University Press, 2010, pp. 255-256, arguing over «the possibility of the Afghan conflict crossing borders» (that would legitimize U.S. drone strikes in Pakistan territory on the basis of an existing armed conflict), claims that «[...] this does not, however, lead to a *carte blanche* to strike at any individual in any country [...]. Individuals do not carry the battlefield away with them whenever they relocate to a different territory, otherwise there would be no possibility to disengage for an armed conflict. Rather, it is a question of whether the conflict activities themselves have also relocated». See also ID., *The War (?) Against Al-Qaeda*, in E. WILMHURST (ed.), *International Law and the Classification of Conflicts*, Oxford, Oxford University Press, 2012, pp. 421-454.

⁵³ *Infra*, par. 5.

present different levels of non-involvement in the military action: from those completely extraneous to the conflict who happened to be close to the target at the time of the mission, unacceptably killed by mistake, to those who implicitly accepted the risks entailed by remaining close to the terrorists, while being generally aware of the grave threat to their life.

Lastly, as for the principle of humanity, it may be agreed that «there is no evidence that drone strikes themselves cause any more injury or suffering than traditional forms of bombardment», although such a kind of technology appears inadequate to guarantee the enemy's right to surrender after being targeted, as well as to allow the shift of the goal of the mission (from killing to capture) at the latest stage⁵⁴.

It can thus be argued that the qualification of the “war on terror” as an armed conflict would, in principle, afford legitimacy to drone killings, provided that such operations comply with the aforementioned principles of IHL. However, this specific point appears to be still controversial. Actually, albeit the U.S. drone strikes programme seems to be conceived as a whole military strategy to fight international terrorism within the context of an ongoing armed conflict, its legal effects – and, ultimately, the admissibility of such practice under International Law – depend on various factors, namely the foreign State on whose territory the attacks are launched, their concrete modalities and targets. Hence, maintaining that, after the attacks of 9/11, the whole terrorist offensive failed to amount to an armed conflict consistent with IHL standards (except for isolated warfare situations, like that in Afghanistan from October to December 2001), the appropriate legal framework under which the legality of drone strikes should be assessed keeps on being that of IHRL. It remains to analyse, however, if the «disruption» of the legal category of self-defence by the 9/11 attacks allowed the injured State to target suspected terrorists, although the hostilities with the non-State entity involved does not rise to the level of an armed conflict. In this perspective, drone strikes have claimed to be an exceptional measure of use of force, tolerated for its legitimate purpose (the «inherent right» to self-defence, recognized by Article 51 of the U.N. Charter) even under the legal framework of IHRL⁵⁵. This questionable argument will be illustrated in the next paragraph.

5. Drone strikes as “pre-emptive” or “ongoing” self-defence measures against non-State actors.

As reminded above⁵⁶, the legal basis on which the «inherent right» of States to self-defence, recognized by Article 51 of the U.N. Charter could be exercised not only against another State and non-State entities acting on behalf of a foreign government⁵⁷, but also

⁵⁴ R. J. VOGEL, *Drone Warfare*, cit., p. 128.

⁵⁵ G. BLUM, P. HEYMANN, *Law and Policy of Targeted Killing*, in *Harv. Nat. Sec. Jour.*, Vol. 1, n. 145, 2010, pp. 145-170.

⁵⁶ *Supra*, par. 2.

⁵⁷ Such limitation directly from the “horizontal” structure of international relations, on whose basis every right that is recognized by virtue of membership in the international legal order (such as the right to self-defence) can only be legally exercised against opposite subjects that are formally members of the same legal order. The position of the International Court of Justice on this point – reflected in the well-known decisions in the *Military and Paramilitary Activities in and against Nicaragua* and *Oil Platforms* cases, as well as in the advisory opinion concerning the *Construction of a Wall in the Occupied Palestinian Territory* – has consistently been that the

against terrorist organizations has been found in the Security Council resolutions 1368 and 1373 of 2001, adopted in the aftermath of the 9/11 attacks⁵⁸.

While both of them expressly considered the attacks, «like any act of international terrorism [...], a threat to international peace and security», recognizing *inter alia* the legitimate resort to «individual or collective self-defence», in order to «combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts»⁵⁹, it has been noticed also that no limits on the right of self-defence can be inferred from the letter of the article 51 of the United Nations Charter⁶⁰. To this respect, there is no point recalling that the origin of the customary international rule on the right of self-defence is related to the *Caroline* incident, that involved British Forces and Canadian insurgents⁶¹. In this perspective, prominent scholars argued that International Law has evolved to recognize the admissibility of the right of self-defence against a non-State entity, regardless to the assessment of the State's "effective" or "overall" control, on the assumption that, since – under the classic "Nicaragua" legal paradigm – «[t]he use of force, by a state, against individuals or groups was *as such* not sufficient to violate the prohibition [of article 2, par. 4, of U.N. Charter]» which «only obliged states not to use force 'in their international relations'», even «anti-terrorist force» could be deemed lawful «as long as it did not concern the scope of states' international relations»⁶². This specific argument, however, seems to be strongly framed in a "Westphalian" perspective, in which international legality basically protects States' interests *uti singuli*, while does not takes into account those of the international community as a whole. In any event, it leads to another point at issue that will be further examined: the «legal geography» of self-defence⁶³.

Provided that the resort to self-defence against terrorist groups could be legally justified, some other questions remain unanswered. First, it should be considered whether

right of self-defence can rightly be invoked against a non-State group only when there is a link between the armed attack perpetrated by such a group and a State involved.

⁵⁸ For a comprehensive study on the Security Council role and activity pursuant to Chapter VII of the U.N. Charter and for a criticism of its self-attributed legislative powers, see R. CADIN, *I presupposti dell'azione del Consiglio di Sicurezza nell'articolo 39 della Carta delle Nazioni Unite*, Milano, 2009, notably at p. 278 ff.

⁵⁹ *Supra*, par. 2. In the advisory opinion concerning the *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, the ICJ did not agree with the Israeli invocation of the right of self-defence essentially because the terrorist threat could not be considered *external* to the occupied territory controlled by Israel, regardless of the legal status of the parties involved: «[t]he Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence» (ICJ, *Advisory Opinion* of 9 July 2004, par. 139).

⁶⁰ According to J. J. PAUST, *Self-Defense Targetings*, *cit.*, at p. 241, note 5, «[t]he word "state" does not appear as a limit in Article 51, although it appears elsewhere in the United Nations Charter, especially in Article 2(4) with respect to restrictions on the right of member states to use armed force against the territorial integrity or political independence of another state. U.N. Charter art. 2, para. 4. It is evident, therefore, that the drafters knew how to use the word "state" as a limitation and chose not to do so with respect to armed attacks and the "inherent right" of self-defence addressed in Article 51 of the Charter».

⁶¹ See M. A. ROGOFF, E. COLLINS, JR., *The Caroline Incident and the Development of International Law*, in *Brooklyn Jour. Int. Law*, vol. 16, 1990, pp. 493 *et seq.*; J. KITTRICH, *The Right of Individual Self-Defence in Public International Law*, Berlin (Logos), 2008, pp. 153 *et seq.*

⁶² C. J. TAMS, *The Use of Force*, *cit.*, p. 365.

⁶³ K. ANDERSON, *Targeted Killing and Drone Warfare*, *cit.* (*supra*, note 5).

the single terrorist attacks that would warrant the State resort to self-defence must reach a minimum threshold of intensity to amount to an “armed attack” pursuant to International Law standards. On this aspect too, the relevant State practice is not unequivocal. Although it is generally accepted that occasional and limited armed cross-border incursions do not satisfy the requirements of an armed attack⁶⁴, the sufficient threshold of intensity must be evaluated with regard to the concrete circumstances in which the armed action is perpetrated and to the goals it seeks to achieve. In its judgment in the *Oil Platforms* case, the International Court of Justice affirmed that it could not exclude, in principle, «the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence’»⁶⁵, indicating that the minimum threshold of intensity required to qualify the use of force as an armed attack is not rooted in abstract and predetermined parameters, but is of a variable nature⁶⁶. Nevertheless – even outside the legal context of an armed conflict – the State’s response in self-defence must be strictly related to the specific characteristics of the attack (or its imminent threat), regardless of the aggressor’s overall unlawful behaviour. It follows that, to be considered lawful as self-defence measures, drone strikes should respect – each and every time they are launched – the well-known principles of *necessity*, *immediacy* and *proportionality* and cannot be used to pursue a broader military goal (i.e. the repression of international or transnational terrorism).

To comply with the principle of necessity means to assess that there are no means other than the use of force to prevent an enemy attack. The inefficacy of diplomatic initiatives or other measures short of war renders the military option permissible as “last resort”. In the case of a terrorist attack, this parameter is expected to assume a marginal importance, as the possibility of resorting to peaceful means with the organization responsible for the attack, including diplomatic contacts, remains contingent upon the conditions posed by the organization, which are generally unacceptable in principle. It is worth noting also that, since drone strikes are always carried out on the territory on a foreign State, a relevant part of the whole “necessity” test could be covered by the “unwilling or unable” one⁶⁷. In other words, individual self-defence against terrorists could be properly considered *necessary* only when the territorial State has proven to be unwilling or unable to fight terrorists by itself. This does not mean, however, that such a test alone is sufficient to warrant a cross-border military operation of targeted killings.

⁶⁴ See M. E. O’CONNELL, *Remarks, cit.*, p. 594: «[e]ven when militant groups remain active along a border, and are regularly carrying out small attacks, such incursions are not considered armed attacks that can give rise to the right of self-defence under Article 51, unless the state where the group is present is responsible for their actions».

⁶⁵ ICJ, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, par. 72.

⁶⁶ According to C. J. TAMS, *op. loc. cit.*, p. 369, the ICJ *Nicaragua* «clear message that it would ‘be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’ [...] came to shape the dominant understanding of self-defence as a defence against qualified uses of force. This narrow interpretation could draw on the differences in wording between Article 2(4) UNC on the one hand (‘any ... use of force’) and Article 51 UNC on the other (‘armed attack’)». Such a distinction – and the very interpretation of the notion of «armed attack» as the unique form of the use of force which legitimizes a self-defence response – does not seem to lose importance after 11 September.

⁶⁷ *Supra*, par. 1, note 11.

The principle of immediacy, according to Webster's classic formulation⁶⁸, refers to the imminence both of the threat and of the response to it. In this sense, it is closely linked to the requirement of necessity, because it allows a response just intended to prevent an enemy attack in the brief span of time afforded to the State to evaluate the aggressor entity and prepare the appropriate means of defence. Hence, if it is reasonable to dismiss the possibility of any course of action other than the use of force against a terrorist attack, the planning of missions of targeted killings would not appear to be compatible, in principle, with a scenario that presumes a substantial simultaneity between the armed attack and the State's response to it. The anticipatory exercise of the right of self-defence is thus permitted only when it seeks to prevent an imminent attack, while it can be deemed lawful against future attacks that are only merely possible, although highly probable.

Furthermore, even though it can be supported the opinion of those who are rather sceptical about the efficacy of a strategy of mere "constant alert" before the possibility of further terrorist attacks, it must be admitted that invoking the right of self-defence in order to justify a drone strike would clearly not be permissible in the absence of a grave and imminent threat. Actually, such a pre-emptive self-defence⁶⁹ could not be considered relevant for the purposes of article 51 of the U.N. Charter, nor could it be accepted on the basis of customary law, since the (specific) need to prevent the perpetration of individual attacks must not be confused with the (general) need to prevent the terrorist offensive as a whole. The latter purpose can be legitimately pursued in peacetime, through law enforcement operations complying with IHRL standards and, only where it has been established that a situation of (non-international) armed conflict exists between the State and the terrorist group (regardless of the imminence of an attack), in accordance with the norms of IHL.

The principle of proportionality entails the need to ensure a clear symmetry between action and response. The use of means beyond those required to contend with the attack or its consequences is thus precluded. This does not mean, however, that the affected State must resort to the same type of armed force employed to launch the attack, nor that the damage it inflicts upon the aggressor entity must be equivalent to the damage it has sustained. In order to assess the proportionality of an act of self-defence, thus, it is not necessary to compare the harm threatened and the harm inflicted in response, but the defensive means at the affected State's disposition and the means effectively employed. It follows that, if the affected State has only one means to defend itself appropriately, it would be legitimate to use that means, albeit the damage it inflicts is much greater than that inflicted by the aggressor. Accordingly, the use of lethal force can be considered legitimate

⁶⁸ «Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show upon what state of facts, and what rule of national law, the destruction of the *Caroline* is to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it» (extract of the note of D. Webster, 24 April 1841, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp).

⁶⁹ It obviously must not be confused with the concept of "anticipatory" self-defence, «a narrower doctrine that would authorize armed responses to attacks that are on the brink of launch, or where an enemy attack has *already* occurred and the victim learns more attacks are planned». See M. E. O'CONNELL, *The Myth of Preemptive Self-Defense*, ASIL Task Force Papers, 2002, pp. 1-21, at p. 2 (available at www.asil.org/taskforce/oconnell.pdf).

if it is supposed to be the only effective and definitive means of preventing a terrorist attack. It can be argued that drone strikes satisfy the requirement of proportionality where only the killing of a combatant-terrorist is deemed sufficient to fully remove the threat of an imminent attack⁷⁰.

Finally, it must also be considered the *place* in which the right of self-defence may be exercised according to International Law. This is a rather controversial issue, notably with regard to the use of drones for counter-terrorism missions.

As noticed above, according to the law enforcement model, the premeditated use of lethal force is unlawful because it violates the prohibition of arbitrary killing imposed by the IHRL standards. Therefore, targeted killing missions cannot be considered permissible, even when formally authorized by (or agreed upon with) the territorial State. The situation appears to be different if it is accepted the existence of an armed conflict between a State and a non-State terrorist actor. In such an eventuality, the territory in which the mission is carried out is unimportant, as long as it remains within a predefined battlefield⁷¹. Thus, the fact that a mission is conducted in the territory of a State other than the acting one does not pose any particular problem, on condition that the territorial State is involved in the armed conflict (so that it can be considered formally “at war” with a common enemy too)⁷².

In a scenario of drone strikes carried out in the territory of another State short of an armed conflict, however, the situation appears to be somewhat more complex. Such operations, albeit justified on the basis of the exercise of the right of self-defence, necessarily presuppose the consent of the territorial State, otherwise they would constitute a violation of its territorial integrity. Even the type of consent required is unclear: to exclude the acting State’s international responsibility, indeed, it must be assessed in advance whether it would be sufficient an implicit authorization inferred from the behaviour of the territorial State or whether this State should be informed prior to the mission. As it is widely known, consent given after the wrongful act has been committed is not considered valid for the purposes of excluding the acting State’s responsibility, although it could affect the extent of reparations. Practice, albeit limited, seems to confirm, however, that the territorial State’s consent can be inferred from behaviour indicating substantive non-opposition to such missions (*facta concludentia*)⁷³.

From a partially different perspective, it has to be considered that the consent of the territorial State could be appraised not as a free expression of its sovereignty, but as a legal

⁷⁰ It goes without saying that such an approach would make it possible to exclude, *a priori*, any need to first ascertain the feasibility of law enforcement operations for the apprehension of a terrorist, as the State might employ lethal force to protect itself (i.e. its institutions) and its citizens.

⁷¹ That is the case of the Afghan conflict, whose activities are supposed to have been partially relocated in Pakistan. *Supra*, note 44.

⁷² D. KRETZMER, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, in *Eur. Jour. Int. Law*, vol. 16, 2005, pp. 171-212, at p. 188, distinguishes between two hypothesis, assessing the validity of both of them: as to the first, «[t]he original armed attack, or the armed response of the victim state, has created an international armed conflict between the victim state and the host state, and within the context of this conflict the terrorists are legitimate targets»; as to the second, «[w]hether or not an international armed conflict exists between the victim and host states, an armed conflict has been created between the victim state and the terrorist group, and within the context of this conflict the terrorists are legitimate targets».

⁷³ J. J. PAUST, *Self-Defense Targetings*, *cit.*, p. 249, infers directly from the letter of Article 51 (as well as from «customary international law reflected therein or in pre-Charter practice») that U.S. did not need any consent for drone strikes in Pakistan territory, as, «[...] with respect to permissible measures of self-defense under Article 51, a form of consent of each member of the United Nations already exists in advance by treaty».

obligation inferred from the «duty to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts», imposed by resolution 1373 and deriving from the general prohibition to allow a State's territory to be used for acts contrary to the rights of other States, recognized for the first time by the International Court of Justice in its famous judgment in the *Corfu Channel* case. In this perspective, the problem of the consent of the territorial State seems to lose much of its importance, provided that the acting State's interest to fight international terrorism worldwide has been recognized as a general interest of the whole international community, prevailing, under certain conditions, even on the safeguard of the States' territorial integrity. Basically, the core question seems to be the same that has been posed in other different contexts (from the "humanitarian intervention" in Kosovo, to the recognition of a common "responsibility to protect" the local populations in Libya, to the current military intervention in Syria and Iraq against the IS group), namely the permissibility of the use of force as a lawful instrument of defence of the common values and interests of the international community. It can be argued, however, that such a fundamental question cannot be faced appropriately without establishing, on a customary basis, common principles regulating the resort to armed force on the behalf of the international community, for all the cases in which the Security Council does not manage to perform its institutional function pursuant to U. N. Charter⁷⁴.

In any event, it is on the basis of an extensive interpretation of the "Corfu channel" prohibition that it can be questioned if current International Law actually allows State to exercise the right of self-defence regardless to the principle of territorial sovereignty, *a fortiori* when the territorial State has demonstrated to be unable to deal with the terrorist threat autonomously and effectively. On the other hand, it cannot be ignored that its concrete implementation would encounter serious difficulties. Indeed, hardly can States be expected to consent to missions of targeted killings within their jurisdiction in the absence of a clear recognition of their legal qualification as acts of self-defence. This raises a further difficulty, regarding the admissibility, under International Law, of the concept of "ongoing" self-defence, as well as of that of "permanent" war.

6. Tertium (*non*) datur?: *legitimacy v. legality in the fight against terrorism*

In his speech at the annual meeting of the American Society of International Law in 2010, the Legal Adviser Harold Koh declared that the United States finds itself in an «armed conflict with al-Qaeda as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defence under international law»⁷⁵. Even U.S. President Obama, in his speech on counterterrorism of 23 May 2013, fully confirmed that view⁷⁶.

⁷⁴ This perspective is supported with highly strong arguments by P. PICONE in all his principal works, gathered in *Comunità internazionale e obblighi «erga omnes»*, 3^o ed., Napoli, 2013.

⁷⁵ See H. H. KOH, *The Obama Administration and International Law*, Speech at the Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010, available at <http://www.state.gov/s/1/releases/remarks/139119.htm>. He continues stating: «[t]hus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks [...]. Of course, whether a particular individual will be targeted in a

This position – which can be shared on a moral basis (as well as in a common, *pre-legal* sense) – while excluding the need of a *ius ad bellum* assessment respect to the single strikes on the assumption that the relevant threshold allowing the resort to armed force is automatically reached due to the existence of a permanent non-international armed conflict, reflects, however, a basic ambiguity that stems from a real difficulty in placing drone strikes within a predetermined legal framework.

Such is the *dilemma*, namely if there is the need to devise a new appropriate legal paradigm to regulate targeting missions, provided that the current ones does not work properly. However, this question hides another one – much more dangerous – namely if there is the need to create a special legal paradigm *only* to justify the use of drones.

Professor O' Connell clearly argues that «[...] drones have not created a revolution in legal affairs. The current law governing battlefield launch vehicles is adequate for regulating drones»⁷⁷. Nevertheless, it cannot be denied that, after 9/11 attacks, the international legal order itself has changed, at least as for the unprecedented relevance recognized to non-State terrorist actors and to their own actions. This has led to change the way States can *legitimately* respond to terrorist attacks, without clarifying, however (such is the very, uncertain nature of International Law), whether the traditional legal standards are currently applicable or have to be re-adapted.

To summarize, it has been examined three possible legal frameworks, in order to ascertain whether drone strikes would comply with their specific rules and could be thus deemed lawful. Targeted killings have proven to be inconsistent with the law enforcement model, applicable in peacetime and based on the respect of IHRL. Within this legal context, indeed, targeted killings are strictly forbidden, since the arbitrary deprivation of human life cannot be the final purpose of a law enforcement operation (nor can it be disposed without a due process), but only an unpredictable outcome.

As for both the “armed conflict” and “self-defence” models, instead, the resort to lethal force against enemies cannot be excluded in principle, although it must comply with the mentioned criteria established by IHL and by the *ius in bello* rules consistent with self-defence. Therefore, the use of drones for targeted killings can be considered permissible in the abstract, but, due to the own features of such a weapon system (remote control, extreme difficulty in aborting missions at the latest stage, risk of casualties), its compliance with IHL principle must be ascertained case-by-case.

This does not seem to be the real problem though, since it must assessed before whether the armed conflict and self-defence paradigms reflect the actual conditions in which drone strikes are carried out (in Afghanistan, Pakistan, Yemen or Somalia). Only if it is clearly admitted that U.S. is within an overall armed conflict «with al-Qaeda as well as the Taliban and associated forces», a regular use of drones (respectful of IHL) can be lawfully accepted.

However, such a conflict is fought in the air space and in the territory of one or more third States, so it cannot be avoided to appraise their position within. Even in the case in which the conflict is supposed to be downgraded to a series of individual armed attacks

particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses».

⁷⁶ The text of the speech is available at <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

⁷⁷ M. E. O' CONNELL, *Remarks, cit.*, p. 599.

(that warrant, anyway, the affected State's right to respond in self-defence), it must be taken into consideration the position of the territorial States involved, whose responsibility can be recognized at different levels, namely as the terrorist attacks are launched from their territory or because they are unwilling or unable to pursue them appropriately or, finally, for helping terrorists by harbouring their bases and camps⁷⁸.

According to an inherent interpretation of the U.N. Security Councils resolutions 1368 and 1373, only the last type of responsibility would fully justify an armed intervention in self-defence against the territorial State (*rectius*: against the terrorists fighting within its borders). In the other two scenarios, indeed, the relevant international practice fails to demonstrate that the will of the affected State to legitimate its military intervention in terms of self-defence must necessarily prevail on that of the territorial State, which could prefer, instead, to keep on pursuing the terrorists under the legal paradigm of law enforcement.

Ultimately, none of the legal bodies above examined (albeit cursorily) seems to ensure, in and of itself, a solid support for drone strikes. This mostly regards the recognition of a general framework under which the use of drones can be deemed consistent with the *ius ad bellum* international rules, although a new legal concept of "ongoing and self-defensive armed conflict" seems to develop from the interplay among the different paradigms at stake. The legitimate and understandable aspiration of the U.S. government to eradicate the terrorist threat posed by al-Qa'ida, however, does not make the need to establish appropriate legal categories (under whose conditions the struggle against terrorism may actually be carried out) less urgent⁷⁹.

⁷⁸ See A. S. DEEKS, "Unwilling or Unable", *cit.*, p. 489, note 16, who summarizes the alternative regimes of intervention against the territorial State. As for the first, the Author observes that: «[t]o defend this test, one would have to argue that nothing in Article 51 of the Charter requires a state that has suffered an armed attack to limit its actions in self-defense to particular geographic areas or that a use of force within a state against a nonstate actor, when the victim state evidences no intent to occupy or otherwise affect the territorial state's borders or political independence, should not be deemed to constitute a use of force against the territorial integrity of that state in violation of Article 2(4)».

⁷⁹ It can be firmly supported the opinion of J. BRUNNÉE and S. J. THOOPE, *Legitimacy and Legality in International Law. An Interactional Account*, Cambridge, 2010, who claim that «[t]he criteria of legality underscore that, to discharge their important justificatory function, legal categories must retain relative normative clarity and coherence. This point is especially important in case of exceptions to fundamental, and broadly stated, rules. Legal norms are typically applied by analogy to a broader framework of norms and to past practices that circumscribe plausible interpretation. Legal norms are not self-applying, but neither are they infinitely malleable. It is not enough that 'an argument' can be made; the argument must have the power to persuade and thereby to generate adherence. In other words, the criteria of legality not only determine the strength of legal norms, but also serve to discipline legal arguments. Relative clarity and coherence also help to avoid the problem of mixed motives on the part of international actors. If discipline is required in justifying resort to the use of force, it becomes harder for states simply to pick and choose amongst an available menu of justificatory options».