Università degli Studi di Milano - Bicocca

Scuola di Dottorato
in Scienze Giuridiche

Curriculum in Diritto Internazionale

ASSASSINATION IN TIMES OF ARMED CONFLICT

A Clash of Theory and Practice

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XXVIII Ciclo - a.a. 2015-2016

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a Maddalena,

vento leggero di libertà

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INTRODUCTION

When in October 1995 one of the founders of the "Palestinian Islamic Jihad", Fathi Shaqaqui, was shot in Malta by two gunmen believed to be agents of the HaMossad leModiʿin uleTafkidim Meyuḥadim (hereinafter Mossad)[1], Israeli authorities did not formally recognize responsibility for his killing. The then Acting Prime Minister and Acting Defence Minister of Israel Shimon Peres, though, reportedly commented: "Islamic Jihad are killers, so it's one killer less"[2].

The suggestion that society may benefit from the death of "criminals", especially when deprived of their life without being previously subjected to a fair trial, rises serious moral questions (to say the least) and is legally untenable if examined against the backdrop of a legal regime based on the respect of fundamental rights where human dignity and the sanctity of life are uphold as foundational values. Under some extreme circumstances, however, a person's death might result from a legitimate use of force. Thus, for example, in peacetime law enforcement agents can resort to force in self-defence or in order to save other people's life, when absolute need be: the victim's death may be an unintended and yet legitimate consequence, inasmuch as the force used is proportionate and the ensuing death inevitable. Similarly, in the course of an armed conflict, the lawfulness of the killing of an enemy combatant on the battlefield is hardly questionable, if that combatant is not *hors de combat* or has not otherwise surrendered.

Yet, besides these and other analogous scenarios less clear-cut situations exist. Let us assume for instance that, in the example recalled above Fathi Shaqaqui may have been qualified not as a mere terrorist, but as a member of an organized armed group; let us assume again, arguendo, that such a group was involved in an ongoing armed conflict with a State; that when he was targeted, Fathi Shaqaqui was far removed from any cognizable battlefield and actually located within the territory of another State completely uninvolved in the ongoing conflict; that, even from a distance, he was somehow taking part to the ongoing hostilities, let us say by

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1 The HaMossad leModiʿin uleTafkidim Meyuḥadim, literally "Institute for Intelligence and Special Operations", is Israel's national intelligence agency, established on 13 December 1949 when the then Israeli Prime Minister David Ben-Gurion mandated Reuben Shiloah, foreign ministry special operations' adviser and former Jewish Agency state department official, to establish and head the "Institute for Collating and Co-ordinating Intelligence Operations". The Mossad is responsible, *inter alia*, for intelligence collection, counter-terrorism and covert operations. Access to the Mossad's official website is www.mossad.gov.il.

2 Noam Chomsky, *A Painful Peace*, in Obrad Savic, *The Politics of Human Rights*, London, 1999, p. 299.

planning future attacks against the State. Under this scenario, would have it been lawful for agents of the State involved in the ongoing armed conflict to identify this person, designate him as a target and design a kinetic operation whose final and unique aim is to deprive that person of his life?

This fictitious scenario is but one of many possible examples: is the killing of a soldier belonging to a State engaged in an armed conflict legitimate when the victim is not in active service or is far away from the theatre of combat? Is it possible, legally speaking, to target a civilian who has taken up arms in favour of a party to an armed conflict in a lapse of time when he is not directly involved in hostilities? As much as for the example made above, answers to these and other similar questions become all the more controversial when the persons subjected to the use of lethal force belong (or are believed to belong) to terrorist[3] organizations that threaten the public safety of one or more States. It is in fact in response to more or less credible "terrorist threats" that States most commonly tend to limit civil liberties: in the name of a supposed friction between human rights and public security they often seek to suspend a number of fundamental rights so as to acquire sweeping powers and be able to face the existing threats with a higher degree of efficiency[4]. It goes without saying that such approach may lead to a spiral of violence that further endangers public safety instead of enhancing it, innocent civilians often being victimized by both terrorists and State agents. This holds true in times of peace as well as during armed conflicts. It is no coincidence that the nowadays common expression "war on terror" was first adopted in the seventies by military regimes in south America that are (in)famously responsible for countless violations of human rights[5].

It is especially against this backdrop that the practice of targeting killings has gained momentum since the beginning of the current century and attracted ever-increasing consideration of States' policy makers, armed forces and legal scholars[6]. If it is true that these attentions are mainly due to reflections over the annihilation of

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3 In this introduction the terms "terrorist" and "terrorism" are purposefully used in a vague and undetermined meaning so as to embrace the broadest possible range of positions assumed by States on terrorism both in peace and war time. This does not in any way imply that the author of this research characterizes insurgents, "freedom fighters" or common criminals as terrorists.

4 In general, on the relationship between terrorist threats and regression in the protection of human rights see Cherif, M. Bassiouni *The regression of the rule of law under the guise of combating terrorism*, in *Revue internationale de droit pénal*, Toulouse, 2005, p. 17-26.

5 United States Assistant Secretary for Latin America Harry Shlaudeman, *The Third World War and South America*, 3 August 1976, pp. 1, 2, 13. This secret memorandum, sent by Shlaudeman to the U.S. Secretary of State Henry Kissinger, particularly referred to Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay.

6 On this topic see, *inter alia*, the pivotal work of Nils Melzer, *Targeted Killing in International Law*, Oxford, 2009.

terrorists, however, the numerous issues risen in this connection lead to question the very foundations of the relationships between individuals' fundamental rights and States' power to resort to lethal force also in contexts other than the fight against terrorism. In particular the use of premeditated, intentional lethal force against individually designated individuals has been consistently deployed in the last years in the framework of or (allegedly) in connection with ongoing armed confrontations often qualified by the States directly involved as armed conflict.

Thus, after the wake of the Al-Aqsa Intifada (also known as II Intifada) against Israel in September 2000 and the terrorist attacks conducted against the U.S. on 11 September 2001, a relatively small number of States began to resort more and more frequently to the use of lethal force against individuals pre-selected on the basis of intelligence suggesting their affiliation to or membership in terrorist organizations. This technique started to be particularly favoured due to the operational advantages it bears: issuing a standing order to kill specific persons involves the possibility to pursue the targets wherever they hide and eliminate them as soon as they are found, regardless of any other surrounding circumstance. What makes this method so appealing is that it reduces the risks attached to operations aimed at the capture of the targets, which require a higher degree of planning, the deployment of forces on the field, possible clashes on the ground and the unavoidable need to extract the persons captured, whenever the operation is conducted on the territory of third States. To the contrary, with specific reference to this latest point, the death of a specific target can be achieved in a comparatively easy way also when such person is in the territory of a third country. This holds particularly true in consideration of the fast technological developments registered in the last years in the field of weapon systems and combat equipment[7]. Therefore, following the beginning of the Al-Aqsa Intifada in September 2000, Israel started to acknowledge its responsibility over the targeted killings conducted by its armed forces as well as by its secret services. A few years later, the U.S. followed a similar path in the mark of their world-wide counterterrorism strategy, accepting responsibility for the killings conducted by their remotely-operated aerial vehicles (Drones) in Afghanistan, Pakistan, Yemen and Somalia.

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[7] Special reference is due, in this connection, to the deployment of so called "unmanned aerial vehicles", expression which include both "drones" and "remotely piloted aircrafts". Hereinafter, all these three categories of aerial vehicles will indistinctly be referred to as "drones", the latter being the name most commonly used in scholarly literature as well as politic speech when dealing with targeted killings. While the first known use of a battle drone dates back to 1919 when Elmer Sperry, inventor of the autopilot technology, sunk a German battleship, the deployment of armed drones for the purpose of targeted killings started at the beginning of the XXI century has exponentially grown ever since. To this end see, inter alia, Robert P. Barnidge Jr., *A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, in *Boston University International Law Journal*, Boston, 2012, pp. 413-415.

At the same time, the qualification of the ongoing confrontations with terrorist groups as armed conflicts seems particularly convenient for the adoption of these targeting techniques since it is widely accepted that in the law of hostilities paradigm limitations to the use of lethal force are generally more relaxed than those characterizing the law enforcement paradigm.

More relaxed limitations, however, does not equate a complete absence of legal parameters regulating the use of lethal force. In particular, among the many limitations to the use of force that also the laws of armed conflict impose on the parties to an armed conflict, one is significantly linked to practices of selective targeting: the prohibition of assassination.

While at least from the Ancient Era both state-sponsored and privately conducted killing of tyrants, enemy leaders, combatants or even common criminals were widely practiced and often considered to be legitimate[8], the development of the very first rules governing the conduct of hostilities since the Roman age has led to a granitic and absolute ban of "assassination" in times of armed conflicts. The same prohibition in peacetime was reinforced by the adoption of the Charter of the United Nations (hereinafter UN Charter)[9] and by the following progressive affirmation of human rights in the international arena as well as in domestic legislations. Regardless of the rise of formal guarantees to the right to life[10], however, in practice several States kept on recurring to the use of intentional lethal force against pre-selected enemy combatants, foreign leaders, alleged terrorists and political opponents also after the half of the past century[11]. In a move that confirmed the perceived illegality

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8 Amongst many others, a case in point to this end is for instance the killing of Greek Governors Nicanor and Philip commissioned by the then Indian Emperor Chandragupta Maurya in the fourth century before Christ. To this end see Roger Boesche, *Kautilya's Arthasastra on War and Diplomacy in Ancient India*, in *The Journal of Military History*, Lexington, 2003, pp. 9-11 and, Radha Kumud Mookerji, *Chandragupta Maurya and His Times*, 1966, Delhi, pp. 28-31. The tradition of "just tyrannicide" perpetrated by private individuals is believed to have begun with the killing of Hipparchus in 514 B.C. On this episode see Shannon K. Brincant, *"Death to Tyrants": the Political Philosophy of Tyrannicide*, in *Journal of International Political Theory*, St. Andrews, 2008, pp. 215-216. In higher detail on the historical evolution of targeting practices in times of armed conflict see *infra*, Ch. I, para. I.

9 *Charter of the United Nations*, signed in San Francisco on 26 June 1945.

10 See *International Covenant on Civil and Political Rights* (hereinafter ICCPR), Adopted by General Assembly Res. 2200A(XXI) of 16 December 1966, entered into force on 23 March 1976, Article 6.

11 Among them one can count most of the South-American States, Israel, South Africa, Vietnam, the Former Soviet Union, the United States of America (hereinafter U.S.) and a number of others. To this end see, in general, Lisa Langdon, Alexander J. Sarapu and Matthew Wells, *Targeting the Leadership of Terrorist and Insurgent Movements: Historical Lessons for Contemporary Policy Makers*, in *Journal of Public and International Affairs*, Princeton, 2004, pp. 59-78; Sascha Dominik Bachman, *Targeted Killings: Contemporary Challenges, Risks and Opportunities*, in *Journal of Conflict and Security Law*, Oxford, 2013, pp. 1-30; Friedman, Uri Friedman, *Targeted Killings: A Short History - How America came to embrace assassination*, in *Foreign Policy*, 13 August 2012, available at http://foreignpolicy.com/2012/08/13/targeted-killings-a-short-history/; Bill Blum, *Targeted Killing, a*

of such practices rather than legitimizing them, these States endorsed policies of targeted killings through covert operations and shielded themselves behind the doctrine of "plausible deniability"[12].

If at the beginning of the current century these killings were still widely condemned by the international community, especially when conducted outside well-recognized theatres of hostilities[13], in the following years third States' opposition gradually watered down. When a dozen of U.S. Navy Seals killed Osama Bin Laden on 2 May 2011, only a few foreign leaders expressed concern for the killing and no third State claimed the unlawfulness of the operation[14]. The UN Secretary-General Ban-Ki-Moon defined the death of Osama Bin Landen a "watershed in our common global fight against terrorism"[15], adding: "Personally I am very much relieved by the news that justice has been done to such a mastermind of international terrorism"[16].

Significantly States now publicly endorsing policies of targeted killing claim that this practice is to be distinguished from assassination and that, provided that certain conditions are met, they can be lawful under their domestic legislations as

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Legal History, 2013, available at https://www.truthdig.com/report/item/targeted_killings_a_legal_history_20130214?ln; Remi Brulin, *Operation Condor: Setting precedent from one 'war on terrorism' to the next*, in *Aljazeera*, 29 September 2013.

12 Remi Brulin, *Operation Condor: Setting precedent from one 'war on terrorism' to the next*, *supra*.

13 See, for instance, the comment of Kofi Annan, then Secretary-General of the United Nations, to the killing of Sheikh Ahmed Yassin, one of the founders of Hamas and its spiritual leader, by hand of Israeli security forces on 22 March 2004: "I do condemn the targeted assassination of Sheikh Yassin and the others who died with him. Such actions are not only contrary to international law, but they do not do anything to help the search for a peaceful solution". To this end see *Annan strongly condemns Israeli assassination of Hamas leader*, in United Nations Archive, 22 March 2004, available at http://www.un.org/apps/news/story.asp?NewsID=10155&Cr=middl#.V8Rs-Zh97IU.

14 The general reactions of political leaders in this case went from the "sober satisfaction" expressed by Canadian Prime Minister Stephen Harper to the joyful reactions of those who defined Bin Laden's death as a "great piece of news for the free world" (Israeli president Shimon Peres) or as the "victory of good over evil" (Franco Frattini, Italian Foreign Minister). The few voices riding against the wind came from Ecuadorean Foreign Minister Ricardo Patino, Vatican Spokesman Father Federico Lombardi and Venezuelan Vice President Elias Jaua but were mainly based on moral considerations over the celebration of a man's death rather than condemnation of the killing adopted from a legal point of view. To this end, see, *inter alia*, BBC News, *Osama Bin Laden's Death: Political Reactions in Quotes*, 3 May 2011; Aljazeera, *Reactions, Bin Laden's Death,* 2 May 2011; CNN, *World Leaders React to News of Bin Landen's Death,* 3 May 2011. On the killing of Osama Bin Laden in general see, *inter alia*, Michele L. Malvesti, *Bombing bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, in *the Fletcher Forum of World Affairs Jorunal*, Madford, 2002, p. 17-29.

15 United Nations Department of Public Information, *Secretary-General, Calling Osama Bin Laden's Death Watershed Moment, Pledges Continuing United Nations Leadership in Global Anti-Terrorism Campaign*, 2 May 2011, available at http://www.un.org/press/en/2011/sgsm13535.doc.htm.

16 *Ibidem.*

well as under the law of armed conflict. This evolution highlights the reasons why ongoing practices of targeted killings represent a crucial challenge for international law. As much as they could potentially represent an epochal evolution of the existing balance between individual rights and State authority and drastically change the current understanding of interstate relationships, they also may very well be nothing more than blatant violations of established norms of international law.

After all, the idea that any person may be identified in accordance with unknown parameters established by some State's secret services, that he may be searched for, ambushed and intentionally deprived of his life at any time, wherever he is and whatever he is doing on the un-proven assumption that he is a member of an organized armed group involved in an armed conflict taking place thousands of miles away is particularly disturbing. The same holds true for the unnecessary premeditated killing of a suspected member of an organized armed group deprived of his life in a supermarket located in an area under the full control of governmental forces. Targeted killings conducted in this way would most probably amount to a total abandonment of the principles established by the UN Charter and entail multiple violations of international law, even in times of armed conflict.

As it appears, in order to understand whether this is the case, the first relevant question to be answered is whether the laws of armed conflict pose any limitation to the use of premeditated lethal force against selected individuals. Provided that, as will be shown in higher detail in the course of this study, the centenary evolution of the rules and customs of war has led to the prohibition of assassination, any meaningful analysis of the use of intentionally lethal force against selected individuals in times of armed conflict necessarily needs to take steps from it and, arguably, to be geared around the scope and value of such a prohibition.

Two main problems rise in this regard. First, even though at the beginning of the XX century it was widely accepted that the prohibition of assassination had an absolute character and was inherent to the body of the laws and customs of war due to its customary nature, no definition of assassination whatsoever was ever endorsed in the relevant codifications of the laws of armed conflict at the time. The consequence is that neither the notion nor the scope of the prohibition of assassination have ever been thoroughly clarified in the realm of international law. The second problem is that over a hundred years have now elapsed since the beginning of the XX century. Throughout this time the laws of armed conflict have witnessed an incredibly complex, fruitful and thorough evolution but no instrument of international humanitarian law has ever dealt with assassination in and by itself. This factor alone is particularly significant in consideration of the alleged customary nature of the norm against assassination. So significant that it has led some to argue that the prohibition of assassination has lost its *raison d'être* in today's system of international law.

The purpose of the present work is therefore, first of all, to clarify whether the prohibition of assassination still holds a place at the heart of the laws of armed conflict as well as to evaluate its content and the impact it has on the XXI century system of international law when confronted with ever-on-the-rise practices of targeted killing.

CHAPTER I

Scope of the Matter and Definition

1. INTRODUCTION

Assassination is a "loaded term" with inherently negative connotations. Even in the most simplistic interpretation of the it as commonly used in everyday language, it relates not only to an action that causes the death of a person specifically designated to be killed but also speaks, to some extent, of the unlawfulness of such deed. Hence, on the face of it, dealing with assassination means to deal with the unlawful, intentional killing of a designated person.

The word "target" means "a person, object, or place selected as the aim of an attack" [17]. Targeting, as a consequence, implies in and by itself wilfully aiming an attack at a specific person, object or place. "To kill" implies the causing of death of a person (or animal or other living thing)[18]. Hence, dealing with "targeted killing" means to deal with the use of force wilfully aimed against a selected person that results in his or her death[19].

From a legal standpoint, nonetheless, it would be a mistake to reduce the meaning of the expressions "assassination" and "targeted killing" to such simplistic *formulae*. Most of the terms here-above resorted to, in fact, deserve an in-depth analysis capable of ensuring further refinement to their underlying concepts as well as to their ultimate implications. From what has been said till now, for instance, it would not be possible to either understand which degree of intentionality qualifies a targeting operation nor to assess whether or not the intention of the agents responsible for the killing shall refer only to the resort to force or, to the contrary, shall also embrace the lethal consequences ensuing from such use. Similarly, it would not be possible to understand which is the difference between the suggested scope of targeted killing and that of assassination, besides the latter unlawful character. This consideration further begs the question of what makes of assassination an unlawful practice and, with it, the doubt as to whether assassination is really to be considered always unlawful from a legal perspective.

Moreover, it is of the utmost importance to assess whether any conduct resulting in the death of the targeted person is capable of meeting the constitutive elements of the behaviours at hand, or a specific degree of intentionality is required in order to match the threshold of the tentative-definitions provided. Again, the

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17 Oxford Dictionary, 7th Edition, Oxford, 2005, p. 1570.

18 Oxford Dictionary, *supra*, p. 846.

19 Note that, depending on the exact legal meaning of the expression "targeted killing", to be expanded upon and re-defined in the present chapter, this *formula* might very well be framed in finalistic terms, *i.e.*, "to deal with a use of force wilfully aimed against a selected person with the intention to cause his or her death". To this end see below, Ch. I, para. 3, sub-para. 3.5.

abovementioned tentative-definitions of assassination on the one hand and targeted killing on the other does not permit to deduce which temporal framework shall govern their selecting phase: is an instant reaction to an external stirring sufficient to consider the object of the force as "selected"? Or shall such conduct only embrace situations where the target is pre-selected? And in this case, shall the lapse of time be the only factor to be taken into account in assessment of the selective process?

Not any intentional killing directed against a previously selected target falls within the scope of the current analysis which is only concerned with issues relevant for public international law. More precisely, international law has little to say in relation to privately motivated killings perpetrated by persons acting in their private capacity against other private capacity against other private individuals[20]. Such behaviours are dealt with in different ways depending on the national legislations of the States on whose territory the killing takes place or, in alternative, on those of the States whose nationality the victims or the perpetrators have. In addition to the vagueness of the terms adopted, hence, the range of the previously suggested *formulae* needs to be narrowed to a more specific scope since, as they stand, they could embrace not only State-sponsored conducts but also privately driven killings[21].

"Assassination" has been the object of various studies at both domestic and international levels[22]. At present, however, no agreed upon definition of the conduct exist. Provided that no black-letter provision of international law deals with assassination, moreover, not only its scope remains largely undefined but its very existence under nowadays international law is questioned. On the other hand, "targeted killing" does not either represent an autonomous legal concept nor does it bear a univocally recognized meaning[23]. Depending on a number of factual circumstances characterizing operations that lead to the use of lethal force against specific individuals, targeting practices may embrace a wide range of conducts which can rarely be classified *per se* as lawful or unlawful.

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20 It is worth to underline that also in this case international State responsibility might arise in particular circumstances. However, these circumstances are only limited to omissions of public authorities consisting in their failure to either ensure protection to the right to life of persons who are within their jurisdiction or to thoroughly investigate the deprivation of life of such persons and bring those responsible to account.

21 Note, however, that actions performed by private persons, also when driven by private means and intentions, might sometimes trigger State responsibility. It is enough, for now, to recall the sets of international norms concerning attribution and imputability of conducts to States, such as the ones concerning State responsibility for omission or secondary rules of international law related to the responsibility of insurrectional movements who succeed in taking over the power and getting in control of the State.

22 See *infra*, Ch. I, para. 3.

23 See *supra*, Introduction.

Hence, the present chapter will be entirely devoted to draw an outline of the conceptual framework of assassination and targeted killing, in an attempt to draw a distinction between these conducts and clarify their respective scopes. With the aim of narrowing the object of the present analysis on the one hand while establishing a coherent notion of assassination and targeted killing on the other, therefore, this chapter will take steps from an historical overview of targeting practices and, where possible[24], of the doctrines supporting their legitimacy and lawfulness[25], or lack thereof.

This historical analysis should have the purpose to explore solutions suggested in the past for practices that may be enjoying a current *renaissance*, to shed light on their virtues and flaws, in order to elucidate which of their facets can be applied, *in integrum* or *mutatis mutandis*, to the current context against the background of the more recent evolution of international law. Moreover, it will try to highlight the genesis and derivation of the very term "assassination", as well as that of related expressions such as political murder or tyrannicide, currently referred to by scholars as well as by practitioners of international law in vague and sometimes obscure ways. This reference will acquire all the more importance in consideration of the fact that the lack of definition of such notions at the international level leaves space to opposing interpretative results, largely depending on the national juridical culture of the commentators referring to them. Above all, such a departure point shall help in systematically and thoroughly reconstructing the basis in which the current international legal framework is rooted[26], in the awareness that "without a universal context particular facts are wholly precarious"[27].

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24 To this end, a series of practical and seemingly insurmountable problems face commentators who undertake the task of screening historical sources with the ambition of building a systematic theory. First and foremost, indeed, the analysis of conducts that took place centuries ago may be limited to an observation of the practice of the time, when data are at all available, due to the lack of any known legal discourse covering the issue of their legitimacy and lawfulness. In this connection, the present work will try to make reference as much as possible to relevant sources, wherever they do exist and they are known by the author.

25 On the issue of legitimacy and lawfulness in International law, the interaction of these two notions and their historical relations see Ennio Di Nolfo, *Giustizia e legittimità nel sistema internazionale*, in *Alberico Gentili, l'uso della forza nel diritto internazionale, Atti del convegno*, Milano, 2006, pp. 195 – 220.

26 On the necessity of reconstructing historically and thus also systematically the legal framework governing a juridical subject of analysis in order to grant a scientific character to the treatise see, *inter alia*, Aldo Mazzacane, *Savigny e la storiografia giuridica tra storia e sistema*, Napoli, 1983.

27 Harold J. Berman, *Law and Revolution, the Formation of the Western Legal Tradition*, Cambridge, 1983, p. VIII, also referring the famous statement by Oliver Wendell Holmes, Jr., who reportedly urged his law students as follows: "Your business as lawyers is to see the relation between your particular fact and the whole frame of the universe".

The historical analysis, will be followed by an in-depth focus on the definitions of assassination, murder as a war crime and targeted killing suggested by scholars, interpreters and legal practitioners. As it will be shown, several differing definitions of have been adopted in both doctrinal analysis and operational documents. Some broader than others, what really strikes out is that most commonly the notion of targeted killing adopted barely differs from figures such as assassination and political murder. It is in an attempt to draw analogies and differences and, at the same time, avoid terminological confusion, that the present treatise will apply the results of the historical analysis to nowadays legal discourse, attempting to draw where possible some cursory conclusions.

2. HISTORICAL BACKGROUND CONCERNING THE USE OF LETHAL FORCE AGAINST SELECTED INDIVIDUALS

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(1) State-Sponsored Targeted Killing Throughout Antiquity; (2) State-Sponsored Targeted Killing in Archaic and Classical Greece; (3) The Stance of the Indian Empire; (4) Rome: From the Absolute Prohibition of Assassination to the Crises of the Rule; (4.a) The Absolute Prohibition; (4.b) Giving in to Practical Needs; (5) Outside Rome: the Dawn and Rise of Assassination; (5.a) Sicarii; (5.b) Scandinavians; (5.c) Hashishiyyin; (6) The Genesis of the Laws of War and the Christian Ban on Means and Methods Leaving no Chances of Survival; (6.a) Initial View on the Permissibility of Lethal Actions in War; (6.b) The Council of Lyon and the Prohibition of "Murderous Weapons"; (6.c) The Genesis of Rules of Chivalry on Selective Killings; (6.d) The Development of Rules of Chivalry in the Feudal Age; (7) First Academic Appraisals of Assassination in Times of War; (7.a) Francisco de Vitoria and Gustavus II Adolphus of Sweden; (7.b) Balthazar Ayala; (7.c) Alberigco Gentili; (7.d) Hugo Grotius; (7.e) Emmerich De Vattel; (8) Conclusions.

The premeditated use of lethal force against selected persons has been a tool often resorted to in the past for the administration of public affairs, in war as well as in peace time, both in inter-State relations and as an instrument handled by insurgent groups or private individuals aiming at overthrowing the established authorities of a certain State.

Almost any historical era[28], indeed, proliferates of more or less acknowledged as well as secret premeditated executions of selected targets, sometimes only

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[28] It is not the purpose of this research to deepen the meanders of periodization of international law, i.e. the organization of times past into meaningful clusters. Suffice it to say here that reference will be made, where needed, to the periodization suggested by Macalister-Smith and Schwietzke, who identified the following time periods: Antiquity (from time immemorial to 475 AD); Middle Ages (from 476 to 1492 AD); 16th century (1493 to 1648); 17th and 18th centuries (from 1649 to 1815); from 1815 to present. See P. Macalister-Smith and J. Schwietzke, *Literature and Documentary Sources Relating to the History of Public International Law: An Annotated Bibliographical Survey,* in *Journal of the History of International Law,* Leiden, 1999, pp. 145-148. For a critical analysis of the suggested periodization see, *inter alia,* William E. Butler, *Periodization and International Law,* in Alexander Orakhelashvili, *Research Handbook on the Theory and History of International Law,* Cheltenham, 2011, pp. 379 – 393. It is important to bear in mind, however, that the specific features characterizing practices of targeted killing and the relevant theories related to their legitimacy and lawfulness would

attempted, some others successfully carried out. For reasons reported above[29] such killings, however appealed by contemporary and nowadays jurists, political scientists, ethical analysts or historians, only matter for the present research insofar as they bear significance for the understanding of the current framework of international public law. *Id est*, such practices as well as the proposed theories advanced in the past over their legitimacy and lawfulness will be hereby considered against the legal framework existing at the time they occurred; however, they will be selected through the lenses of nowadays criteria of attribution of responsibility under international law. If this were not the parameter of assortment to be adopted, indeed, the analysis would incur in a twofold risk: on the one hand, it could expand on issues totally unrelated to the remainder of the present research; on the other, on the opposite, it could leave conducts that could cover an important role in the generation of nowadays legal framework out of the analytical spectrum.

This first paragraph introduces an overview of a number of episodes of use of lethal force roughly referred to as assassinations, tyrannicides and political murders by past and contemporary commentators who have reported them. These instances cover a large number of conducts which sometimes, at a first glance, do not appear to have much in common: one might wonder what the assassination of Ehud by hand of Eglon in the XII century B.C. have to do with the deliberations of the Council of Ten in Venice in the XIV and XV centuries A.D? Yet, while not all the practices we will make reference to can properly fit within the notion of targeted killing that the present chapter will help to refine, what all of them have in common is their adherence to the above-mentioned tentative-definition. This analysis shall satisfy the need to outline differences and similarities among such actions in order to understand what led societies of the past to proscribe some of them as unlawful. To this end, reference will be made not only to mere facts but, rather, to legal and political doctrines flourishing around such behaviours.

This, of course, shall not induce one to overestimate the role of doctrine in history. While being nowadays elevated to the role of "subsidiary means for the determination of rules of law" by the Statute of the International Court of Justice[30], in the past legal doctrine has rarely been considered as a source of law *per se*. Similarly, one shall refrain from confusing doctrine with law and history: as William Butler puts it, "our confusion of doctrine with law may lead us to confuse doctrine with

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in and by themselves require a different periodization. This is all the more true if one glances outside of the Eurocentric arena, approach often characterizing historical reconstructions in the fields of law, political theory and ethics. As will be shown within this chapter, in fact, at certain historical eras correspond conflicting tendencies in the different geographical areas taken into account.

29 See *supra*, Introduction and Ch. I.

30 *Statute of the International Court of Justice*, annexed to the *Charter of the United Nations*, signed at San Francisco on 26 June 1945, Art. 48, para. d).

history [...] History might have doctrinal roots and use doctrinal writings as source material, but history does imply an objectivity of perception and presentation, a body of material fashioned according to the precepts of historical science, and not partisan advocacy"[31]. However, doctrinal works may help a great deal in understanding the legal framework existing at the time of their writings. It is believed that only through a correct appraisal of the rationale leading to the establishment of such legal frameworks may this leap into history benefit today's analysis of assassination. The assiduous reference to doctrine in the present chapter should therefore not be looked at as having a full normative value. It should rather serve the purpose of shedding light on the very *ratio* that has guided humanity to frame today's laws and may now guide our path to future choices in the field of assassination and targeted killing in times of war.

It shall indeed be kept well in mind that a coherent notion of international law only started to rise between the XVI and the XVII century A.D[32]. Absent a coherent international legal framework until that time, conducts that nowadays would entail international State responsibility were often left to the realm of philosophical or ethical considerations. Thus, for instance, no coherent legal theories on the lawfulness of tyrannicide has ever been elaborated, if not on the basis of ethical or theological considerations, due to the lack of any norm of international law on the subject[33].

Similarly, systematic legal theories on the lawfulness of assassination in war-time going beyond a case-by-case or comparative approach started to develop in the

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31 William E. Butler, *Periodization and International Law*, in Alexander Orakhelashvili, Research Handbook on the Theory and History of International Law, *supra*, pp. 393.

32 Tullio Scovazzi and Maurizio Arcari, *Corso di diritto internazionale, Parte I*, Milano, 2014, pp. 38 and 39. This stance does not imply that before the XVI and XVII centuries international law did not exist. As a matter of fact, to a certain extent, relationships among autonomous political entities took place since time immemorial, and some well-known treaties among such communities date back to centuries B.C. Nonetheless, it seems hardly possible to identify before those centuries the existence of a properly called international normative framework of a systematic nature. To this end, see also Henri Legohérel, *Histoire du droit international public*, Paris, 1996, pp. 3-15 and 41-47 and Antonio Cassese, *States: Rise and Decline of the Primary Subjects of the International Community*, in Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law*, Oxford, 2012, pp. 49-58. This is surely not the occasion to open an elaborated debate concerning the genesis and formation of international law. On the subject, for differing views see also, *inter alia*, Antonio Truyol y Serra, *Historia del derecho internacional publico*, 1998, Madrid, pp. 13-17 and 48-71; Martti Koskenniemi, *The Gentle Civilizer of Nations, the Rise and Fall of International Law 1870 – 1960*, Cambridge, 2002, pp. 1-11; Martti Koskenniemi, *International Law*, Cambridge, 1992, pp. XI-XXI.

33 Indeed, as will be better shown *infra*, even the works of well-known scholars who started tackling the issue of assassination and targeting practices during the XVI and XVII century, such as Alberico Gentili and Hugo Grotius, took steps from ethical and moral considerations and focused on a case-by-case analysis rather than resorting to reference to a general frameworks, as the latter did not exist at the time in relation to this issues.

European framework only in the XVI and XVII centuries[34]. While international law of human rights started developing only centuries later, however, it should be kept in mind that it was indeed in the very same time-frame seeing the genesis of the laws and rules of warfare that legal as well as philosophical theories[35] started to be concerned with the rights of persons against the whims of their rulers, with considerations stretching beyond national considerations[36].

Against this background, it becomes apparent how reference to legal doctrine as well as to writings of philosophers, theologians, even secular humanists may contribute to provide a picture of the state of the law at the time of such writings. Even when they do not deepen legal theories over the legitimacy and lawfulness of the practices they report, at the very least, such works do relate about existing State practice, even though sometimes not in a systematic fashion[37]. Thanks to these comprehensive references to the history of international law and past doctrines concerning the use of premeditated lethal force, it should be possible to identify standing principles that came all the way through from history.

2.1. State-Sponsored Targeted Killing throughout Antiquity

Some of the earliest examples of killings by design of inter-national relevance are reported in Biblical narrative. Thus, the killing of Eglon King of Moab by hand

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34 See below, Ch. I, para. 2, sub-para 2.7.

35 On the relationship between philosophical and legal theory in connection with the genesis of international law see, *inter alia,* Martti Koskenniemi, *The Gentle Civilizer of Nations, the Rise and Fall of International Law 1870 – 1960, supra,* pp. 179-189.

36 To this end, one may refer by way of example to the work XVII century English philosopher of John Locke.

37 On the troublesome relationship existing between doctrine and State practice in the analysis of the history of international law, see *inter alia* Anthony Carty, *Doctrine Versus State Practice*, in Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law, supra*, pp. 972-996, stating that "the historical drive [...] which explains the continued paramount authority of general customary law as evidenced in the practice of States [...] produces a paradoxical situation in any attempt to understand the history of international law as a history of the practice of States. That practice is bound to be significant because it is bound up with the history of human beings in their life among the communities of nations. However, these communities are secretive towards one another. [Thus] history of international law shows that the very idea of state practice is a construction of doctrine, a confidence in a customary legal order of the normative attitudes and practices which peoples have as to how their relations be conducted. [...] Intellectual framing of the history of state conduct, from outside the discipline (cultural history/Lebow and discourse theory/Foucault) invites an alternative critique of state practice as a global administration of appetites and desires of mass populations of individuals".

of Ehud reported in the Book of Judges[38] shows that a pre-planned killing of the head of a foreign State and occupying power was perceived as legitimate and was prized by God. Similarly, the deprivation of life of the Canaanite general Sisera by Jael[39], while characterized by some differences from the previous episode, illustrates that such kind of pre-planned killings were considered lawful even when conducted with treacherous means against a defenceless enemy. Also in this case, as in the previous one, the perpetrator was vested with a public function, she planned the killing in advance and her target was pre-selected. The victim was now a general who could certainly be defined, in operational terms, as a "high value target"[40], but not as a foreign leader. However, what marks a major difference with the killing of Eglon is that Sisera had already been defeated, he was defenceless in the hands of his perpetrators, if not entirely under their control, and, above all, he was betrayed by his own allies. In spite of the treacherous means adopted by Jael to perform her plan, however, her action was deemed as righteous to the point that this very episode "was to have a powerful and continuing influence on the imaginations of writers and painters for many centuries to come"[41], the first example of which is the myth of Judith and Holofernes[42]. The Bible also recounts one of the first known examples of

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38 *La Bibbia di Gerusalemme*, Bologna, 1994, (in accordance to the *edition princeps*, 1971), Judges, 3: 12-30: in the context of what we would nowadays probably define as a belligerent occupation, Ehud, of the tribe of Benjamin, assassinated Eglon, King of Moab, liberating Israel from an 18-years long domination by Moabites, Ammonites and Amelekites. Following Ehud's behaviour, according to the Biblical account, God awarded the people of Israel with a 80-years-long period of freedom from foreign oppression.

39 *La Bibbia di Gerusalemme*, *supra*, Judges, 4: 6-24: in this case general Sisera, already defeated in battle, sought refuge by his ally Heber in the land of the Kenites. The latter's wife, after welcoming Sisera in her tent, poured him milk and offered him protection only to kill him herself as soon as he fell asleep.

40 So-called "high value targets" are political, military, insurrectional and even religious leaders whose death shall allegedly imply a major setback in the operational capacities and/or the disruption of the organizational structure of a real or perceived "enemy" (the term enemy is hereby used in its broadest possible meaning and does not imply any legal qualification of those eventually selected as "high value targets" as legitimate targets of an attack). The expression, often resorted to in the framework of counter terrorism and counter-insurgency strategies is hereby employed as it refers to a range of figures other than the sole heads of States or military commanders of a regular army but may very well at the same time cover also the latter categories of people. The resort to such expression does not imply any adherence of this author to theories concerning the legitimacy (or lack thereof) of such practices. In relation to the notion at hand see Matt Frankel, *The ABCs of HVT: Key Lessons from High Value Targeting Campaigns Against Insurgents and Terrorists*, in *Studies in Conflict and Terrorism*, Washington, 2011, pp. 17-30.

41 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism*, Cambridge and London, 1985, p. 9.

42 The killing of Holofernes, in fact, cannot be accounted for as an historical event due to the factual discrepancies affecting both its timeframe and the identity of the victim. To this end see, inter alia, Helen Efthimiadis-Keith, *Text and interpretation: Gender and violence in the Book of Judith, scholarly commentary and the visual arts from the Renaissance onward*, in *Old Testament Essays*,

premeditated, wilful killing of a rebel-leader whom we would nowadays define as *hors de combat*, telling about the killing of Absalom perpetrated by Joab, general of King David's army[43]. According to the biblical narrative, while king David showed signs of regret and desperation at the news of his son's death, he refrained to take any measure to sanction Joab, in a move that underlines the lawfulness of the latter's action[44]. A range of tyrannicides, then, garnishes the narrative of the I and II Book of Kings. Most of these examples show that such particular kind of deprivation of life by design were considered lawful as they were either labelled as the God's will or performed under the auspices and advises of prophets[45]. All to the contrary, it appears that since time immemorial the slaying of innocent people perpetrated for no reason other than the whims of the public authority has been deemed to be both unlawful and illegitimate[46].

These early examples of premeditated use of lethal force aimed at selected persons show that in the years flowing from around XII century to IX century B.C.

Pretoria, 2002, p. 64: "Judith is a highly complex book that unabashedly combines historical places, people, and events with the most glaring historical and geographical inconsistencies".

43 *La Bibbia di Gerusalemme*, *supra*, II Samuel, 18: 1 -33: around the X century before Christ, Joab, appointed by David, king of Israel, as commander of one third of the royal forces, defeated the rebels guided by prince Absalom, king David's third son, and Amasa, king David's nephew, in the Ephraim Wood, out of Jerusalem. While fleeing the battlefield on his mule, Absalom got his head stuck in the branches of an oak-tree and remained suspended in mid-air whit no defence. Joab, once told about his enemy's fate, went on the spot and killed him with three stabs to the hearth.

44 *La Bibbia di Gerusalemme*, *supra*, II Samuel, 18:1 – 33. Notice that Joab himself was shortly afterwards involved in yet a new killing of a similar kind. After pursuing until the city of Abel the leader of a new rebellion called Sheba the Benjamite, he closed a deal with the inhabitants of the city, who agreed to cut off Sheba's head and throw it over the wall in order to avoid the siege that the royal forces commanded by Joab would have otherwise moved against them.

45 Thus, in 900 B.C. Nadab, son of Jeroboam, second king of the northern Israelite Kingdom of Israel, was deprived of his life by one of his army officers named Baasha for having done "what was evil in the sight of the lord". Baasha overtook the power and immediately slaughtered "all the house of Jeroboam". The killing of Nadab was rewarded as the Lord's will (*La Bibbia di Gerusalemme*, *supra*, I Book of Kings, 15:16 – 16:7). In 842 B.C., military commander Jehu killed his own king Jehoram of Israel piercing him with an arrow and immediately afterwards ordered his men to pursue and kill Ahaziah of Judah, Jehoram's son and ally in the ongoing battle against the Aramenas. According to the biblical narrative, Jehu proceeded to perform these killings under the suggestion of prophet Elisha. The latter's blessing, if not direct impulse, shows that Jehu's conduct stood over a firm belief in its legitimacy (*Ibidem*, II Book of Kings, 9 – 10). Analogously, it was under the auspices of a religious guide, the chief priest Jehoiada, that Athaliah queen consort of Judah was slaughtered right outside the temple in 835 B.C., leading the seven years old Jehoash to the title of eight king of Judah (*Ibidem*, II Book of Kings, 8:26).

46 *La Bibbia di Gerusalemme*, *supra*, Judges, 9: 1-6 and 9 :22 – 24: according to the biblical account, when Abimelech, son of Gideon and "King of Shechem" killed 69 of his 70 brothers he was punished by God who induced the lords of Shechem to rebel against him so that "the violence perpetrated against Ierub-Baal 70 sons received the righteous punishment and their blood fell on Abimelech, their brother who had killed them, and on the lords of Schechem who had helped him to kill his brothers".

targeting was a conduct widely resorted to both at peace time as well as during conflicts, against foreign leaders as well as by and against rebel forces within the territory of one State[47]. Perhaps even more significantly, the biblical narrative itself makes it clear that most of such practices were not only tolerated but even considered to be lawful. Of all the abovementioned examples, the massacre perpetrated at the orders of Abimelech is the only instance clearly condemned as an abomination. This implies, in turns, that already at that time the wilful, premeditated killing of selected innocent civilians in peacetime would have probably been commonly deemed as an unlawful act. However, no other conclusions can be inferred from such episode: it shall be kept well in mind, in fact, that no information can be deducted from Abimelech's conduct that can be applied to other scenarios. It does not clarify whether public powers were ever actually entitled to dispose of civilians' lives and, if affirmative, under which conditions. For instance, how could they react against persons who posed a threat to the security of the State or to the safety of the King?

At any rate, it has been observed that the analysis of the reported episodes altogether could benefit to a "political theory only to the extent that theocracy is recognized as a self-validating form of government. Even for those who accept that form, it is necessary to acknowledge the capriciousness and unaccountability inherent in eulogies or condemnations of rulers when uttered by prophets"[48].

All to the contrary, in China at the beginning of the VIII century B.C. rules of chivalry were already particularly developed and "war was highly ritualized and guided by ethical considerations"[49], which excluded the possibility to lawfully make use of targeting techniques outside the theatre of battle.

2.2. State-Sponsored Targeted Killing in Archaic and Classical Greece

In the ages to come some properly called political theories and legal doctrines started to develop in relation to the premeditated killing of selected persons.

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47 Here as well as in the following paragraphs the term "State" is used with a certain degree of approximation due to the differences existing between the various forms of political communities existing at the time of the reported events on the one hand and the current notion of State under international law as characterized by the presence of a stable political authority governing over a population within a given territory. On the notion of State in current international law see, in general, *inter alia,* Mario Giuliano, Tullio Scovazzi and Tullio Treves, *Diritto Internazionale, Vol. II, Gli aspetti giuridici della coesistenza degli Stati,* Milano, 1983, pp. 3-28, and Tullio Scovazzi and Maurzio Arcari, *Corso di diritto internazionale, Parte I, supra,* pp. 5-24.

48 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism, supra*, p. 24.

49 Robert Kolb, *The Protection of the Individual in Times of War and Peace*, in Bardo Fassbender, Anne Peters, *The Oxford Handbook of the History of International Law*, *supra*, pp. 321 and 322.

Particular impulse to this articulated reflections was firstly derived from the rise of numerous tyrannies in archaic Greece between 800 B.C. and 480 B.C[50] which started to inspire the elaboration of theories of "just tyrannicide"[51]. While withholding personal ethical judgments in relation to the possibility of killing a tyrant, Plato gave it for granted that enemies of the tyrant would attempt to murder him as the only way they have to save themselves. Aristotle, on the other hand, explicitly stated that those who kill tyrants are rewarded with high honours[52]. Thus, when Harmodius and Aristogeiton stabbed to death the tyrant Hipparchus in 514 B.C. they were sanctioned with a capital execution for their action by order of Hipparchus's brother Hippias, but they did become the symbol of freedom and democracy all over Greece thereinafter[53].

It is not the purpose of this research to go through all attempted or successful assassination plans directed against actual or perceived Greek tyrants[54]. What is mostly relevant is that these episodes triggered a general reflection on the legitimacy and lawfulness of killing a tyrant. While no system of international law existed at the time and the destinies of those who resolved to commit a tyrannicide were mainly determined by domestic legal provisions and, even more, by the political events following the killing of the tyrant, considerations stemming from Greek theories of

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50 For a thorough assessment of the nature of tyrannies in Archaic Greece and their international relations see, *inter alia*, Matteo Fulvio Olivieri, *Tiranni della Grecia arcaica tra relazioni private e diplomazia internazionale: il caso della mediazione di Periandro nel conflitto tra Lidia e Mileto,* in *Quaderni di Acme,* Milano, 2010, pp. 99-136 and, in general, Matteo Fulvio Olivieri, *La politica internazionale dei tiranni nella Grecia antica: il caso di Atene,* Milano, 2012.

51 At its origins, the term "tyrannos" was not connoted by a negative meaning. It could either be referred to the rule of one man, without any further legal or moral implications, or identify a ruler who came to power through usurpation, without however implying any abuse of such power on his part. It was mainly in the writings of Plato and Aristotle that "the term tyranny came to refer not to the method by which a ruler came into power, but to the nature of his rule" and "all tyrants became by definition bad tyrants, tyranny being the perversion of monarchy". To this end see Oscar Jaszi and John D. Lewis, *Against the Tyrant: the Tradition and Theory of Tyrannicide,* Glencoe, 1957, p. 4. Accordingly, see also Stefano Caso, *Le 100 grandi congiure,* Milano, 2008, p. 17. Jaszi and Lewis clarify that the rationale underneath the consideration of every tyranny as a "bad tyranny" was rooted in Aristotle's observation that "the ruler who had seized power by force was likely to maintain it in a manner different from that of a lawful king". Plato went so far as to redesign the fundamental test of tyranny, shifting the focus to the character of the ruler, regardless of considerations related to the nature of his rule: thus, what really mattered according to Plato's theory was not how the ruler came to power but rather the way he exercised it. Similarly, Aristotle came to the conclusion that a king ruling contrary to the common good could indeed be considered a tyrant.

52 *Ibidem,* pp. 7 and 8.

53 In particular, the tradition of "just tyrannicide" perpetrated by private individuals is believed to have begun with the killing of Hipparchus in 514 B.C. On this episode see, *inter alia*, Shannon Brincant, "*Death to Tyrants": the Political Philosophy of Tyrannicide*, *supra*, pp. 215-216.

54 For a thorough account of such episodes, the general context surrounding them and the motives beneath perpetrators' deeds see Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism*, *supra*, pp. 25 – 46.

just tyrannicide paved the way for the creation of a theory of just resistance against despotic regimes that survived without any major change at least until Saint Paul and Peter's elaboration of a "duty of obedience"[55].

Tyrannicide was not, however, the only sub-species of targeted killing known in ancient and classical Greece. The killing of Jason, tyrant of Pherae and ruler of Thessaly, perpetrated in Delphi in 370 B.C.[56], is just one of many possible examples of premeditated killing of pre-selected individuals, a technique that appears to have been more than common in late classical Greece. Jason of Pherae was killed in what was probably the rise of an attempt to form a pan-Hellenic State. It is not known whether his assassination was carried out in the attempt to behead a foreign leader or if, to the contrary, his persecutors attempted at his life to free Pherae of his tyranny. Since the motives driving Jason of Pherae's conspirators remain unknown, it is not possible to drive conclusions on the lawfulness of such killing[57]. Nonetheless, this instance rises particular interest because it shows how, in the absence of any consideration concerning human rights and the holy value of life which inform nowadays-legal-systems, the value-judgment and even the legality of a deprivation of life of an individual may vary in relation to the mere motives of his perpetrators. In fact, the same incident may have been legitimate in case the perpetrators were acting to decapitate a perceived tyrant while, on the other hand, it would have been unlawful if the killing had been commissioned by a foreign power, as in such a case it would have squarely qualified as an assassination.

In 336 B.C., Philip the II of Macedon was stabbed to death by Pausanias, a member of his royal guards, in the very early stages of his invasion of Persia. While the motives of his assassination were never clarified[58] since the material culprit was killed in the immediate aftermath by the remainder of the guards, it is now widely believed among historians that Pausanias did not act out of personal motives[59]. To the contrary, it appears that Philip's death might have been commissioned by the

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55 Thus, for instance, Clearchus of Heraclea was assassinated in 353 B.C. after imposing an autocratic rule over his city for 12 years by Chion and Leonidas, two men of his own secret services. Such act was welcomed by Isocrates, Clearchus's own mentor and, most significantly, logographer and jurist, who expressed his satisfaction with the overthrown of Clearchus in a letter that he wrote a few years later to Clearchus's son Timotheus, underlying the perceived legitimacy of such action. To this end see Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism, supra*, p. 39. Accordingly, Latin authors such as Cicero, Seneca, Polybius and Plutarcos all agreed that tyrants might have been legitimately killed and that those responsible should have been rewarded with great honors.

56 Xenophon, *Ellenika*, 6.1.5.

57 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism, supra*, p. 24.

58 Nicholas Geoffrey Lemprière Hammond, *The End of Philip*, in *Makedonika*, Athens 1983, p. 174.

59 Amalia Skilton, *The Death of Philip of Macedon*, in *The Concord Review*, Sudbury, 2009, p. 57; J. Rufus Fears, *Pausanias, the Assassin of Philip II*, in *The Athenaeum*, London, 1975, p. 123; Ernst Badian, *The Death of Philip II*, in *Phoenix*, Montreal, 1963, p. 248.

Persian Crown[60]. Perhaps more significantly, this seems to be what the Macedonians mostly suspected of[61]. Taking into account precedent plots designed by the Persians to kill Philip II[62] as well as the Macedonians' belief concerning the blame for his murder, it is fairly possible to conclude that assassination of foreign leaders was at the time widely resorted to as a means of international relations, both at peace and war time. It has indeed been noticed that "in the Greek world such occasions [*i.e.*, banquets] were traditionally used to eliminate enemies"[63]. Nonetheless, the fact that the killing of prominent political and military figures was commonly practiced does not imply by itself a value-judgment upon their lawfulness. And in fact, in the following centuries a number of scholars such as Gentili, Grotius and De Vattel underlined how Alexander the Great perceived the Persian attitude toward assassination as an abomination and he underlined that Darius should have been considered as an enemy of mankind and should have been pursued and punished by all nations due to the odious means he employed since he was not a fair enemy but an assassin[64].

2.3. The Stance of the Indian Empire

Yet, what occurred a few years later in a different but somehow similar environment is of great help to analyze an opposing theory at the basis of premeditated killings of foreign leaders at the time. In the fourth century B.C. the then Indian Emperor Chandragupta Maurya commissioned the killings of Greek Governors Nicanor and Philip. These killings were supported by a theoretical study conducted by the Emperor's adviser Kautila in his *Artha´s- astra*. Such treatise, composed around 300 B.C, asserted not only the operative effectiveness of

60 Nicholas Geoffrey Lemprière Hammond, *The End of Philip*, *supra*, p. 171; Ernst Badian, *The Death of Philip II*, *supra*, p. 248; Stefano Caso, *Le 100 grandi congiure*, *supra*, p. 22; Benjamin David Turner, *Philip II of Macedon: Aspects of his Reign*, Birmingham, 2012, pp. 118 and 119.

61 John R. Ellis, *The Assassination of Philip II*, in *Ancient Macedonian Studies in Honor of Charles F. Edson*, Thessaloniki, 1981, pp. 128 and 129.

62 Nicholas Geoffrey Lemprière Hammond, *The End of Philip*, *supra*, p. 171.

63 A. Doug Lee, *Abduction and Assassination: the Clandestine Face of Roman Diplomacy in Late Antiquity*, in *The International History Review*, St. Andrews, 2009, p. 15. Thus, for example, Lee reports that "in the early fifth century BC, the Achaemenid Persian envoys were murdered in Macedon, and, in 379 BC, Theban democrats took advantage of a party to regain control of the city from the Spartans".

64 Emmerich De Vattel, *Le droit des gens. Ou principes de la loi naturelle, Appliqués a la conduite et aux affaires des Nations et des Souverains* (hereinafter *Le droit de gens*), London, 1758, 2 Vols., Vol. II, B. III, Ch. VIII, § 142 and 155.

premeditated killings against pre-selected individuals but also upheld their conformity to law and morality[65].

Kautila designed a "doctrine of silent war or a war of assassination and contrived revolt against an unsuspecting king", approving the resort to "secret agents who killed enemy leaders [and] of women as weapons of war"[66]. Assuming that in the world of international relations "dissension and force"[67] are the natural ways for nations to interact, the first goal of his so-called "*Mandala* theory"[68] of foreign policy was the "destruction of the enemies and the protection of his own people"[69]. Kautila therefore argued that "an arrow, discharged by an archer, may kill one person or may not kill [even one]; but intellect operated by a wise man would kill even children in the womb"[70]. He did not envisage limitations to the means to be used to gain this goal: in Kautila's view the king could resort to secret agents taking advantage of any kind of weapon, poison or fire; he could bribe enemy soldiers and mandate them to kill their king with treacherous means; he could hire assassins and poison-givers[71].

Despite his coarse approach towards "enemies", however, Kautila did not believe kings to be endowed with an unlimited right to kill everybody they wished. When he buttressed enemies' "extermination", in fact, he only had in mind the killing of enemy leaders, or "high-value-targets"[72]. In his writing, indeed, he strongly advocated for a "human treatment" of conquered soldiers and subjects and supported principles of social justice towards all commoners, including the ones recently conquered[73]. In particular, he held that "when attacking the enemy's fort or camp, they [soldiers] should grant safety to those fallen down, those turning back, those surrendering, those with loose hair, those without weapons, those disfigured by terror and to those not fighting"[74]. His assessment helps to clarify that in the Asian continent of the IV century B.C. premeditated killings of pre-selected individuals were both resorted to and believed to be righteous, but only when addressed to high-value-targets. Accordingly, the Sanskrit poem *Mahabharata*, describing Hindu laws of war standing between the III century B.C. and the III century A.D., around one

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65 Roger Boesche, *Kautilya's Arthasastra on War and Diplomacy in Ancient India*, in *supra*, pp. 9-11; Radha Kumud Mookerji, *Chandragupta Maurya and His Times*, *supra*, pp. 28-31.

66 Roger Boesche, *Kautilya's Arthasastra on War and Diplomacy in Ancient India, supra*, p. 10.

67 Kautila, *Artha´s-astra*, 9.7.68–69: 431.

68 *Mandala* is a word coming from Sanskrit nowadays identifying a Hindu and Buddhist spiritual symbol composed of a series of concentric squares and circles representing the univers.

69 *Ibidem*, 10.6.51: 453.

70 *Ibidem*, 14.3.88: 509.

71 Roger Boesche, *Kautilya's Arthasastra on War and Diplomacy in Ancient India, supra*, p. 24.

72 See *supra*, Ch. I, para. 2, sub-para. 2.1.

73 *Ibidem*, pp. 19, 30 and 31.

74 Kautilya, *Artha´s-astra*, 13.4.52: 490.

century after Kautila's treatise was published, maintained a similar approach towards the lawfulness of targeting operations during wartime. In particular, the *Manumsrti* (or *Hindu Code of Manu*) banned the employment of treacherous means of combat forbidding, *inter alia*, the use of poisoned and fiery arrows and proscribing the killing of certain categories of people such as those who surrender, are wounded or are not directly involved in hostilities when the action takes place because they are, for instance, asleep[75].

2.4. Rome: From the Absolute Prohibition of Assassination to the Crises of the Rule

a) The Absolute Prohibition

Similarly, the new power rising in the Italian peninsula, the city-State of Rome, avoided for centuries to resort to assassinations either in peace or in war time. Indeed, "the Roman republic lived for almost exactly four centuries without the politically motivated slaying of a leading public figure, from [534 B.C.] until the assassination of Tiberius Sempronius Gracchus in 133 [B.C.]"[76]. This seems to be attributable, *inter alia*, to the structure, tactics and composition of Roman armies, "for here was something that expressed the *old virtues* of loyalty, unselfishness and rational organization, in short, the very embodiment of *res pubblica*"[77]. This holds true for assassination plots organized at the detriment of Roman public officials - be they designed by private individuals or rival political factions - as well as for the employment of assassination techniques against enemies at both war and peacetime[78].

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75 Manoj Kumar Sinha, *Hinduism and International Humanitarian Law*, in *International Review of the Red Cross*, Geneva, 2005, p. 291: "The code of Manu advises the king: when he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire. Whether he himself fights or engages others to fight for him, the king must ensure that the battle will be an honest duel. Elsewhere the code of Manu proclaims: let him not strike one who (in flight) has climbed on an eminence, nor a eunuch, nor one who joins the palms of his hands (in supplication) nor one who (flees) with flying hair nor one who sits down nor one who says, 'I am thine'. Nor one who is sleeping, nor one who has lost his coat of mail, nor one who is naked nor one who is disarmed nor one who looks on without taking part in the battle nor one who is fighting with another foe". See also, *inter alia*, Gaurav Arora, Gunveer Kaur and others, *International Humanitarian Law and the Concept of Hinduism*, in *International Journal of Multidisciplinary Research*, Huston, 2012, p. 456; Surya P. Subedi, *The Concept in Hinduism of Just War*, in *Journal of Conflict and Security Law*, Oxford, 2003, p. 355; Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War*, Cambridge, 2010, p. 4.

76 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism, supra*, p. 47.

77 *Ibidem*, p. 48.

78 Accordingly, see Ward Thomas, *Norms and Security: The Case of International Assassination*, in *International Security*, Harvard, 2000, pp. 105-133.

As a matter of fact, it appears that the practice of eliminating foreign leaders, albeit commonly employed by the Romans themselves in late antiquity[79], was rarely resorted to in earlier periods of Roman history[80]. What bears even higher importance than the frequency at which these episodes occurred is the radical change of attitude towards their lawfulness in late antiquity. Indeed, a proposal to assassinate Pyrrhus advanced to the senate in the third century B.C. met with rejection[81]. One more proposal to kill Pyrrhus poisoning his wine was advanced by Nicias, one of his servants. This time such plan was personally refused by the Roman general Gaius Fabricius Luscinus who even warned Pyrrhus of the plot[82]. Likewise, in the instance of Viriathus' death[83] the Senate refused to pay the promised bribe to the culprits and, to the contrary, from Rome sanctioned them with exile. Even more relevant are two episodes reported respectively by Ammianus Marcellinus and Tacitus. The former underlined the unlawfulness of the assassination of the Armenian King Pap, whose loyalty to the Romans was uncertain. According to Ammianus Marcellinus, a Roman commander named Trajan invited Pap at a banquet and he had him stabbed in his back on orders issued by Valens, Valentinian's brother and co-ruler of the Roman Empire[84]. As some had tried to upheld the rightfulness of such assassination through an analogy to the assassination of Sertorius by Marcus Perpenna Vento in 72 B.C., Ammianus Marcellinus underlined: "It is true that some flatterers attempted to justify this recent unheard-of and shameful crime by the example of the assassination of Sertorius. Presumably they did not know that a wrongful act is not justified by the fact that another similar act has gone unpunished"[85]. The latter episode, instead, described Emperor Tiberius's reply to a Germanic leader called Adgandestrius, who suggested to assassinate Arminius, the man responsible in 9 A.D. for the massacre of the Roman legions in the Teutoburgerwald: "the reply was that it was not by secret

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79 A. Doug Lee, *Abduction and Assassination: the Clandestine Face of Roman Diplomacy in Late Antiquity*, *supra*, pp. 5-17.

80 *Ibidem*, pp. 18 and 19. According to A. Doug Lee, only "five incidents that bear a closer resemblance to the episodes of abduction and assassination from Late Antiquity" can be identified in the previous centuries of Roman history. Out of these five, only three involved a successful or attempted use of lethal force against the enemy, namely: the deprivation of life of the Lusitanian leader Viriathus, killed by his own men bribed by Roman commander Caepio (Appianus Alexandrinus, *Romanarum historiarum quae supersunt*, Lib. VI); the attempt designed by Caesar's lieutenant Labenius at the detriment of the Gallic leader Commius (Tacitus, *Annales* Lib. XI, para.19); and the killing of the Germanic leader Gannascus by Roman general Corbulo (Julius Caesar, *De bello gallico*, Lib. VIII, para. 23).

81 *Ibidem*, p. 18.

82 Ammianus Marcellinus, *Rerum gestarum libri qui supersunt*, Lib. XXX, paras. 1.18-23. On the life of Pyrrhus see also Plutarch, *The parallel lives*, in *Loeb Classical Library Edition*, 1920, Vol. IX, pp. 347 - 461.

83 See *supra*, in this same paragraph.

84 Ammianus Marcellinus, *Rerum gestarum libri qui supersunt*, *supra*, Lib. XXX, paras. 1.18-23.

85 *Ibidem*, Lib. XXX, paras. 1.22-23.

treachery but openly and by arms that the Roman people avenged themselves on their enemies"[86].

It appears, however, that also in Roman classical antiquity there could have been room, even though limited, for conducting killings against pre-selected persons. In fact, it was believed that such killings would be unlawful only if denoted by treachery or carried out via treacherous means. Accordingly, Cesar's lieutenant Labienus is said to have "decided that it would be no treachery to destroy [...] a traitor"[87]. Similarly, in the 40s A.D. Roman general Corbulo planned and had a plot to execute Gannascus. Since the latter was a deserter from the army, Corbulo considered that his pre-planned killing could not be "dishonourable"[88].

b) Giving in to Practical Needs

At any rate, in Late Antiquity the Romans started to exploit targeting techniques more and more often. "During the second half of the fourth and the early fifth century, the imperial government had made a number of clandestine attempts to neutralize troublesome foreign rulers, many of them successful"[89]. It was mainly the change in the late empire's political situation and the corresponding decline of Rome's military hegemony that led the Romans to rely more and more heavily on diplomacy and, with it, on secret assassinations of foreign leaders[90]. It has been noticed, moreover, that an inextricable link existed between the rise in the employment of assassination techniques against foreign leaders and the willingness of emperors during the Principate to eliminate domestic political rivals[91].

As for the resort to pre-meditated lethal force directed against pre-selected enemies, the frequency of episodes of this kind suggests that emperors and officials in command had no qualms in adopting such tactics, especially in consideration of their perceived effectiveness. In practice, killings by design were resorted to at the detriment of foreign leaders, either allies or enemies, whose death was caused at both peace time and during conflict. In addition, it seems that Romans resorted to such targeting techniques with no distinction based on geographical limitations, as they conducted pre-planned killings within the borders of the Roman empire as well as

86 Tacitus, *Annales, supra,* Lib. II.

87 Caesar, *De bello gallico, supra,* Lib. VIII, para. 23.

88 Tacitus, *Annales, supra,* Lib. XI, para. 19.

89 *Ibidem,* p. 5.

90 A. Doug Lee, *Abduction and Assassination: the Clandestine Face of Roman Diplomacy in Late Antiquity, supra,* pp. 2, 3, 4 and 10. From the half of the IV century A.D. until the end of the VI century A.D. around 15 secret plots to assassinate or disappear foreign leaders have been reported by historians.

91 A. Doug Lee, *Abduction and Assassination: the Clandestine Face of Roman Diplomacy in Late Antiquity, supra,* p. 18.

outside the territories under their control. Thus, for instance, in 359 A.D. an advance party of the Roman army composed of around 300 soldiers attempted at the life of several Alemannic chiefs ambushing them after a feast appositely arranged by Rome's ally Hortarius under the orders of emperor Julian[92]. The following year the death of yet another Alemannic king called Vithicabius, Vadomarius' son and successor, was commissioned by emperor Valentinian to one of his personal staff[93]. Valentinian himself was also the architect of Gabinius' assassination. The latter being the chief of the Germanic Quadi, in 374 A.D. he complained about the Roman invasion of their lands. Marcellianus, Roman commander over the disputed lands, invited him to dine together under the pretext of sorting out the quarrel and had him killed[94].

However, an episode occurred under the reign of Justinian casts doubt on the lawfulness of pre-meditated killing of foreign leaders even after the establishment of the Roman Empire. In 555 Gubazes, king of the Lazi and ally to Rome, complained with the emperor about the behaviour of Martin and Rusticus, Roman commander and *sacellarius* in Armenia respectively, who decided to have him killed trying to obtain imperial approval for the assassination. Far from approving such killing, Justinian had Rusticus tried and sanctioned to death due to the unlawfulness of his deed[95].

Nonetheless Ammianus Marcellinus himself, while upholding the unlawfulness and immorality of pre-planned killings of enemy leaders in general, did not disapprove taking advantage of favourable circumstances and, somehow contradictorily, in some instances he took a pragmatic attitude to the issue in stark contrast with the principles he upheld in different and yet similar circumstances. For example, describing the killing of Saxon riders perpetrated by Roman forces in north Gaul in 370 after the two factions had concluded a truce, Ammianus Marcellinus states: "although some just judge will condemn this act as treacherous and hateful, yet on careful consideration of the matter, he will not think it improper that a destructive band of brigands was destroyed when the opportunity presented itself"[96]. In a similar fashion, Ammianus Marcellinus also considered rightful the pre-emptive massacre of Goths serving under Julius, the Roman commander in the east, perpetrated in 378 A.D[97].

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92 Ammianus Marcellinus, *Rerum gestarum libri qui supersunt, supra,* Lib. XVIII, para. 2.13.

93 *Ibidem,* Lib. XVII, paras. 10.3-4 and Lib. XXIX.

94 *Ibidem,* Lib. XXIX.

95 Agathias, *Histories,* Lib. III paras. 2.9-4 and 1.1-11.4.

96 Ammianus Marcellinus, *Rerum gestarum libri qui supersunt, supra,* Lib. XXVIII, paras. 5.1-7.

97 *Ibid.*, Lib. XXXI, para. 16.8: Following a defeat of Roman forces by the Goths at Adrianopole, in fact, Julius believed that the Goths serving in his army may betray him to join their compatriots, thus posing a threat to the security of the Roman army. He thus decided to gather them and kill them all in order to pre-empt such risk.

As these episodes show, the passage from Classic to Late antiquity was characterized by a shift in the consideration of the rightfulness - both moral and legal – of targeting practices. Such shift was mirrored by an increased resort to pre-planned killings of enemy leaders in late antiquity and was evidently influenced by the changed political as well as military scenario in the times of the Principate. It has been noticed that "the paucity of cases before the fourth century in which the Romans employed the tactics of abduction and assassination, and the prevailing view prior to Late Antiquity that such tactics were contrary to Roman values, [made their use legitimate] only against traitors. [Thus] the clandestine use of abduction and assassination [...] marks a departure from the attitudes and practices that characterized Roman dealings with foreign peoples during earlier periods of the empire's history"[98].

[98] A. Doug Lee, *Abduction and Assassination: the Clandestine Face of Roman Diplomacy in Late Antiquity*, *supra*, pp. 21 and 22.

2.5. Outside Rome: the Dawn and Rise of Assassination

a) Sicarii

Romans, however, did not have the monopoly on targeted executions; to the opposite, such practices were resorted to by other people under the empire's occupation as well as outside the empire's borders. The first centuries before Christ were marked, in the eastern regions, by assassinations conducted by and to the detriment of, *inter alia*, Greeks, Indians and Persians. In the middle east, the reign of King Herod in Palestine saw the rose of three main parties among the Jews – Sadduces, Pharisees and Essenes - each of them characterized by a different attitude towards Roman domination but all persuaded to pursue their purposes by peaceful means. A fourth separate faction nominated "the Zealots", later on to be known by the Romans by the name of *Sicarii, i.e.* "dagger-men", to the contrary, decided to capitalise on violent means in order to prompt a general insurrection against the Romans. In 6 A.D. they launched a large scale campaign of assassination. While the individuals stroke down by the attacks performed in such framework were pre-selected rather than random, such actions aimed not only at public officials of the occupying power, but also at those civilians – be they of Roman or Jews origins – who were prone to accept foreign domination[99]. The Zealots carried on such actions, with more or less intensity until they did succeed in prompting the Jews War of 66 – 70 A.D. Before the outburst of the so called Jews War the killings perpetrated by the Zealots could not be deemed as more than terrorist attacks, and therefore acts of murder, sanctioned in accordance with Roman criminal laws. When the war started, to the contrary, such pre-planned killings were employed as a combat technique in what we would nowadays probably define as a war of resistance against an occupying power. Therefore their legitimacy was to be assessed against the framework of an existing armed conflict. While no coherent laws of war existed at the time, the principles governing the conducts of the Romans at war in this time-frame, as mentioned above[100], forbad the resort to assassination and similar targeting techniques even during wartime.

b) Scandinavians

Similarly, some four centuries later, when the empire started to collapse, Teutonic barbarians and Scandinavian chieftains gave proof of being particularly affectionate to killings by design and to perform them in the absence of any moral or legal qualms[101]. Remarkably, neither Teutonic barbarians nor Scandinavian peoples

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99 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism, supra*, p. 91

100 See *supra,* Ch. I, para. 2, sub-para. 2.4.

101 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism, supra*, pp. 94 – 96.

were organized in State-like entities back then. In particular, most of their communities were lacking a governmental structure proper[102]. Against this background, one may wonder if the killings perpetrated and suffered by one community or the other should not be better classified as simple murders. However, it has been noticed that "political murder, to qualify as such, requires only some discernible connection with political institutions, no matter how underdeveloped"[103].

c) Hashishiyyin

Meanwhile, a series of internal divisions started to characterize the Islamic world. In 644 A.D. the first ever assassination of a Muslim leader was recorded. Omar, as such was his name, was killed by a Christian-Persian slave out of a mosque in Damascus. In the following years religious conflicts internal to such confession led to the first schism between Sunnites and Shi'ites, completed in 680 A.D. The faction of Ismailis came to light in 873 A.D. after a further shims taking place among the Shi'itthes themselves[104]. Finally, in the XI century A.D. a radical group of Ismailis started to gather around Hasan ibn-al-Sabbah[105], who formed an underground force of missionaries and murderers. Such sect took the name of *Hashishiyyin*[106], or "order of the assassins", giving birth to the name still used today to commonly express the politically motivated murder of important or famous persons[107]. After taking the city of Alamut in Persia – precisely in what today is the territory of Iran – in 1090, the Order of the Assassins operated in the Near East for around two centuries, before being stormed and dissolved by the Mongols in Persia[108] and by the Mamluks in Syria in the 1270s[109]. With the conquest of Alamut Hasan ibn al-Sabbah also became the chief of the surrounding territories extending on much nowadays Iran[110].

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102 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism, supra*, p. 94.

103 *Ibidem*, p. 94.

104 In detail on the history of Islam see, Alessandro Bausani, *L'islam*, Milano, 1999. See also Bernard Lewis, *The Arabs in History*, Oxford, 2002; Massimo Campanini e Karim Mezram, *Arcipelago Islam, Tradizione, riforma e militanza in età contemporanea*, Roma, 2007.

105 Chevalier Joseph von Hammer, translation by Oswald Charles Wood, *The History of the Assassins*, London, 1835, pp. 1-38.

106 *Ibidem*, pp. 40 and 41; Anthony Campbell, *The Assassins of Alamut*, Teheran, 2008, pp. 10-0. In higher detail, on the order of the Assassins see, *inter alia*, Enno Franzius, *History of the Order of Assassins*, New York, 1969.

107 Oxford Dictionary, *supra*, p. 77.

108 Chevalier Joseph von Hammer, *The History of the Assassins*, *supra*, pp. 181–219.

109 James Waterson, *The Mamluks*, in *History Today*, 2006, available at http://www.historytoday.com/james-waterson/mamluks.

110 Thomas Keightley, *Secret Societies of the Middle Ages*, London, 1837, pp. 56–58; Campbell, *The Assassins of Alamut, supra*, p. 15. As reported by historians, in particular, "Along with the spread of his doctrine and the intervention in political events, Hassani-i Sabbah was successful in building an autonomous infrastructure in the Elburz Mountains among the more than 70 fortresses scattered over a

From there, the sect started spreading terror through organized assassinations: they carried out targeted executions against selected enemies such as princes, generals and caliphs that they perceived as unjust rulers, regardless of their religion. Thus, on 16 October 1092 members of the order daggered the Vizier Nizam al Mulk of Persia, the absolute ruler of the Seljuk empire, while he was travelling from Isfaham to Baghdad[111]. Exactly a century later, members of the sect disguised as monks killed in a similar fashion Conrad of Monferrat, ruler of Jerusalem[112]. Over such lapse of time the order of the assassins mowed down innumerable victims, many of them crusaders, such as Count Raymond II of Tripoli, killed in Syria in 1129[113].

Throughout the entire time period they held power, the Order of the Assassins enforced the *sharia*, the Muslim ritual law, to its full extent[114]. In their interpretation of such law, therefore, the wilful and premeditated deprivation of life of a selected person was not illegal and, all to the contrary, was both lawful and moral. In fact, it has been suggested that the utilitarian efficiency of assassination methods may have also been accompanied by a relatively sound humanitarian intent: "Murder as a political weapon was not, of course, an Ismaili invention, and indeed it appears that a number of groups in Iran were making use of it at the time. The Ismailis, however, undoubtedly took the trend further than most. They may have believed that it was more humane to kill one man selectively than a multitude in a battle [...] In any case, given the fact that they were so enormously outnumbered by their enemies, terrorism was a logical enough expedient"[115].

2.6. The Genesis of the Laws of War and the Christian Ban on Means and Methods Leaving No Chances of Survival

a) Initial View on the Permissibility of Lethal Actions in War

large area, and in which the Assassins lived. They had their own currency and communicated with each other through a system of light signals and a kind of Morse Code". To this end see Bärbel Debus, *The Assassins – Suicidal Assailants of Earlier*, in *Islam und christlicher Glaube / Islam and Christianity*, Frankfurt, 2004, pp. 32 and 33.

111 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism*, *supra*, p. 102.

112 Bärbel Debus, *The Assassins – Suicidal Assailants of Earlier*, *supra*, p. 32.

113 Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism*, *supra*, p. 102.

114 Campbell, *The Assassins of Alamut*, *supra*, p. 15.

115 *Ibidem*, p. 16. Notice that the same reasoning was at the roots of Thomas More's utilitarian theory of assassination purported in his Utopias almost four centuries later. See below, Ch. I, para. II, sub-paras. 2.7 and 2.8.

The adoption of targeting techniques during the crusades, while probably most effectively employed by the Order of the Assassins[116], worked both ways. Gratianus in his *Decretum*[117] made clear that the Church had a right to employ physical force against its offenders, be it even lethal. In Causa XXIII of his *Decretum* Gratianus wondered, *inter alia*, whether or not it would be unlawful for a Christian to become a soldier, if there could be any just cause for war, whether this implies that combatants can legitimately inflict injuries to each other, whether it is lawful to do so in vengeance and whether judges or other public authorities could legitimately cause the death of other persons[118].

While maintaining that war is morally wrong in general, Gratianus introduced a straight demarcation between law and morality by reference to the notion of public authority[119]. He held, in particular, that under the auspices of public authority what would have been otherwise illegal as well as immoral could have been rightfully done. Thus, according to Gratianus, it would be lawful to carry arms, to take part to a war and, ultimately, to kill, when the killing takes place under the orders of a public authority[120]. This stance, widely shared by canonists contemporary as well as

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116 According to historians, in fact, that several Muslim as well as Christian rulers payed a tribute to the sect in exchange for being left out of their targeting campaings. To this end see Bernard Lewis, *Saladin and the Assassins,* in *The Bulletin of the School of Oriental and African Studies,* London, 1953, pp. 239 -245.

117 Aemilius Ludovicus Friedberg, *Corpus Juris Canonici, Aeditio Lipsiensis Secunda, Decretum Magistri Gratiani seu Concordia Discordantium Canonum* (hereinafter Decretum Gratiani), Leipzig, 1879. The Decretum Gratiani is all the more significant in this regard in consideration of its values as a transmissive instrument of Aquinas theories on war. To this end see Ryan Martin Greenwood, *Law and War in Late Medieval Italy: the Jus Commune on War and its Application in Florence, c. 1150-1450*, Toronto, 2012, p. 23.

118 *Ibidem,* C. XXIII: "Quidam episcopi cum plebe sibi conmissa in heresim lapsi sunt; circumadiacentes catholicos minis et cruciatibus ad heresim conpellere ceperunt, quo conperto Apostolicus catholicis episcopis circumadiacentium regionum, qui ab inperatore ciuilem iurisdictionem acceperant, inperauit, ut catholicos ab hereticis defenderent, et quibus modis possent eos ad fidei ueritatem redire conpellerent. Episcopi, hec mandata Apostolica accipientes, conuocatis militibus aperte et per insidias contra hereticos pugnare ceperunt. Tandem nonnullis eorum neci traditis, aliis rebus suis uel ecclesiasticis expoliatis, aliis carcere et ergastulo reclusis, ad unitatem catholicæ fidei coacti redierunt. (Qu. I). Hic primum queritur, an militare peccatum sit? (Qu. II). Secundo, quod bellum sit iustum, et quomodo a filiis Israel iusta bella gerebantur? (Qu. III). Tertio, an iniuria sociorum armis sit propulsanda? (Qu. IV). Quarto, an uindicta sit inferenda? (Qu. V). Quinto, an sit peccatum iudici uel ministro reos occidere? (Qu. VI). Sexto, an mali sint cogendi ad bonum? (Qu. VII). Septimo, an heretici suis et ecclesiæ rebus sint expoliandi, et qui possidet ab eretici ablata an dicatur possidere aliena? (Qu. VIII). Octauo, an episcopis uel quibuslibet clericis sua liceat auctoritate, uel Apostolici, uel inperatoris precepto arma mouere?".

119 James Brundage, *Holy War and the Medieval Lawyers*, in *The Holy War*, Ohio, 1976, pp. 105-107.

120 *Decretum Gratiani*, *supra*, C. XXIII, Q. IV, C. XXXVI: "Qui dicatur gladium accipere. Ille gladium accipit, qui, nulla superiori ac legitima potestate uel iubente, uel concedente, in sanguinem alicuius armatur"; C. XXIII, Q. VIII, C. XXXIII: "Homicida est, qui, publicam functionem non habens, aliquem occidit aut debilitat. Item Augustinus in libro de ciuitate Dei. *Qui percutit malos in eo, quod mali sunt, et habet causam interfectionis, minister Dei est. Qui uero sine aliqua publica*

subsequent to Gratianus, rose however further questions concerning who legitimately held such authority[121].

Gratianus as much as the great majority of the canonists also made reference to a set of laws of governing the conduct of hostilities. In particular, he referred to Isidore of Seville's *Etymologiae*[122] and to Saint Augustine's *Contra Faustum*[123] and listed by way of example a series of conducts proscribed and sanctioned during wartime, ruling out *inter alia* excessive cruelty and vengeance[124]. In this regard, in the fifth *Quaestio* of *Causa XXIII* of the *Decretum,* Gratianus established a distinction between enemies (*hostes*) on the one hand and common criminals (*praedones*) on the other, borrowing it directly from Roman law[125]. One of the main consequences he derived by such distinction was the adoption of two different legal regimes for peace and war time, which led to the legitimization of killing only in the latter scenario[126]. Thus, it was the general opinion among decretists and canonists of the high middle-ages that killing a public enemy in time of war represented a licit deed, while during peace-time only judges were vested with the authority of putting a person to death[127]. However, the possible violence to be employed in war time was not unrestrained. Thus, certain classes of people such as churchmen, pilgrims, merchants, peasants and travellers could not legitimately be attacked[128].

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amministratione maleficum, furem, sacrilegum, adulterum et periurum, uel quemlibet criminosum interfecerit, aut trucidauerit, uel membris debilitauerit, uelut homicida iudicabitur, et tanto acrius, quanto non sibi a Deo concessam potestatem abusiue usurpare non timuit" (emphasis added).

121 James Brundage, *Holy War and the Medieval Lawyers, supra*, p. 110.

122 Isidore of Seville, *Etymologiarum sive originum libri XX* (hereinafter the *Etymologiae*),VII century A.D., Liber V.VII.

123 Augustinus, *Contra Faustum Manichaeum* (hereinafter *Contra Faustum*), V century A.D.

124 *Decretum Gratiani*, C. XXIII, Q. I, C. IV: "[…] Nocendi cupiditas, ulciscendi crudelitas, inplacatus atque inplacabilis animus, feritas rebellandi, libido dominandi, et si qua similia, hec sunt, que in bellis iure culpantur. Que plerumque ut etiam iure puniantur, aduersus uiolentias resistentium (siue Deo, siue aliquo legitimo inperio iubente) gerenda ipsa bella suscipiuntur a bonis, cum in eo rerum humanarum ordine inueniuntur, ubi eos uel iubere aliquid tale, uel in talibus obedire iuste ipse constringit".

125 James Brundage, *Holy War and the Medieval Lawyers, supra*, p. 113.

126 *Decretum Gratiani*, C. XXIII, Q. V, C. XLVIII: "Si ergo uiri sancti et publicæ potestates bella gerentes non fuerunt transgressores illius mandati: *Non occides*, quamuis quosque flagitiosos digna morte perimerent; si miles suæ potestati obediens non est reus homicidii, si eius inperio quemlibet flagitiosum interfecerit; si homicidas, et uenenarios punire non est effusio sanguinis, sed legum ministerium; si pax ecclesiæ mesticiam consolatur perditorum; si illi, qui zelo catholicæ matris accensi excommunicatos interficiunt, homicidæ non iudicantur: patet, quod malos non solum flagellari, sed etiam interfici licet" [emphasis added].

127 James Brundage, *Holy War and the Medieval Lawyers, supra*, p. 114, quoting the gloss to C. XXIII, Q. V, C. IX of an anonymus Anglo-Norman decretist who held that: "Tribus modis sit licite homicidium, scilicet cum inspiratur aliquis deo occulte ut aliquem interficiat, uel cum iudex habens potestatem gladii aliquem interficit, uel cum precepto principis miles interficit hostem".

128 James Brundage, *Medieval Canon Law and the Crusader*, in *Speculum, a Journal of Medieval Studies*, Cambridge, 1971, pp. 12 – 14.

b) The Council of Lyon and the Prohibition of "Murderous Weapons"

However, legal restrictions to violence were not limited to classes of people; rather, they also concerned certain means and methods of warfare. Thus, the First Council of Lyon, *i.e.* the thirteen ecumenical council, taking place in Lyon in 1245, issued among others a *Constitutio* named *On employing assassins*, thereby explicitly proscribing assassination, even if only attempted, and its procurement[129]. Such proscription referred to both peace and war time. As a matter of fact, the killings of Count Raymond of Tripoli and Conrad of Montferrat[130] "were denounced throughout western Christendom as outrages attributable to Muslim evil"[131].

Similarly, the employment of certain weapons considered as particularly murderous was generally forbidden[132]. Thus, crossbows and *ballistae* could not be legitimately employed. While the limitation to means of warfare does not come as a surprise for today's standards[133], what is mostly relevant here is the rationale behind their ban: crossbows and *ballistae*[134] were not forbidden due to the excessive suffering they caused[135]; they were forbidden inasmuch as they were "too murderous

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129 First Council of Lyon, *Constitutio XVIII*, 1245,: "[…] Since therefore there are people who with a terrible inhumanity and loathsome cruelty thirst for the death of others and cause them to be killed by assassins, and thus bring about not only the death of the body but also of the soul, unless the abundant divine grace prevents it, we wish to meet such danger to souls, so that the victims may be defended beforehand by spiritual arms and all power may be bestowed by God for justice and the exercise of right judgment, and to strike those wicked and reckless people with the sword of ecclesiastical punishment, so that the fear of punishment may set a limit to their audacity. We do so especially since some persons of high standing, fearing to be killed in such a way, are forced to beg for their own safety from the master of these assassins, and thus so to speak to redeem their life in a way that is an insult to Christian dignity. Therefore, with the approval of the sacred council, we decree that if any prince, prelate or any ecclesiastical or secular person shall cause the death of any Christian by such assassins, or even command it -- even though death does not follow from this-or receives, defends or hides such persons, he automatically incurs the sentence of excommunication and of deposition from dignity, honour, order, office and benefice, and these are to be conferred on others by those who have the right to do so. Let such a one with all his worldly goods be cast out for ever by all Christian people as an enemy of religion, and after it has been established by reasonable evidence that so loathsome a crime has been committed, no other sentence of excommunication, deposition or rejection shall in any way be needed".

130 See *supra,* Ch. I, para. 2, sub-para. 2.5.

131 Franklin L. Ford, Political Murder, *From Tyrannicide to Terrorism, supra*, p. 108.

132 Such prohibitions, while representing general rules in wars among Christian kingdoms were sometimes waived in relation to conflicts against people holding different beliefs.

133 See below, Ch. II, para. 3.

134 A *ballista* was a medieval siege weapon used to eject heavy projectiles at a target.

135 Second Lateran Council, *Canon XXIX*, 1139: "We prohibit under anathema that murderous art of crossbowmen and archers, which is hateful to God, to be employed against Christians and Catholics from now on". See also Fourth Lateran Council, *Constitutio XVIII,* 1215, "Clerics to dissociate from shedding-blood: […] no cleric may be put in command of mercenaries or crossbowmen or suchlike men of blood; […]".

and too effective in their results"[136]. Such a prohibition added on the already existing ban to deploy poisonous weapons[137]. Nonetheless, the canonists themselves noticed that the prohibition to *ballistae* and crossbows went widely unobserved in practice[138]. Johannes Teutonicus explicitly excluded that such prohibition could amount to a customary rule of a binding nature[139]. Accordingly, the events occurred in the years and centuries following the second and the fourth Lateran Councils displayed that the great majority of Christian kingdoms did not in fact abide by the prohibition of crossbows and *ballistae* thereby provided for[140].

c) The Genesis of Rules of Chivalry on Selective Killings

Nonetheless, the "rules of chivalry" developed in the feudal period ranging from the XII up to the XIII century A.D. have been defined as a "major historical basis for the LOAC [law of armed conflict]"[141], inasmuch as they contributed to humanize warfare[142]. In particular, such rules imposed on knights the duty to act

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136 James Brundage, *Holy War and the Medieval Lawyers, supra*, p. 115. The fact that the rationale of the prohibition of ballistas and crossbows lays in their deadly effects rather than in possible excessive suffering or indiscriminate targeting founds indirect confirmation in the different approach towards the use of *saggittae ignae* and *saggittae toxicae*: while, before the Lateran Councils' bans, crusaders were apt to resort to the formers, indeed, the latters had always been considered unlawful by western jurists as well as political theorists and they were employed almost exclusively by peoples of other faith. To this end, see *inter alia,* John of Salisbury, *Polycraticus,* 1159, Liber VIII, 20. For an historical precedent of the ban on long-range weaponry one might recall the treaty concluded between archaic Chalcis and Eretria during the Lelantine War (710 – 650 B.C.) and prohibiting the use of *missiles.* Such treaty, like its successors constitutions and canons stemming from the Second and Fourth Lateran Councils, forbade *missiles* due to their deadly potential and excessive effectiveness. To this end see Everett L. Wheeler, *Ephorus and the Prohibition of Missiles,* in *Transactions of the American Philological Association,* Baltimore, 1987, p. 159.

137 Paul Fournier, *La prohibition par le II Concile de Latran d'armes jugées trop meurtrières (1139)*, in *Revue Archéologique*, Paris, 1916, p. 297.

138 James Brundage, *Holy War and the Medieval Lawyers, supra*, p. 115.

139 *Glossa Ordinaria to the Decretum,* Causa X, para. 1.34.1: "Sed quod dicit his hodie non tenet; et episcopi qui non seruant hanc constitutionem, non dicuntur transgressores, quia non fuit moribus utentium approbata huiusmodi treuga, 4 dist. cap. in isti § leges [D. 4 d.p.c. 3]".

140 Paul Fournier, *La prohibition par le II Concile de Latran d'armes jugées trop meurtrières (1139)*, *supra*, p. 300: "Que la décision de Latran n'ait pas été très efficace, cela résulte de faits nombreux. Par exemple, le rôle des archers et arbalétriers dans la première guerre lombarde et dans les luttes qui suivirent en Italie […] ". Fournier specifies that the only Kingdom to abide by the rule was that of Louis VII, where such weaponry became unknown for around 45 years. However, he underlines, "comme la prohibition édictée par le Concile [Latran de 1139] n'était nullement respectée par les voisins et les rivaux du Royaume capétien, les Français durent, après quarante ans, revenir à l'emploi des engins condamnés"(see *Ibid.*, p. 301).

141 Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War, supra*, p. 6.

142 Notice that according to other authors rules of chivalry are not the basis of what would later develop as the law of armed conflict but already represented a specific set of rules that, together with a number of others, already formed in the middle ages the general legal framework governing the conduct of

honourably and not to kill vanquished enemies. While such prohibition does not directly refer to targeting techniques, it does help to understand that already at the time the primary aim of war was not the complete eradication of the enemy. It is no coincidence that it was in the very same XII century that the first humanitarian approaches toward prisoners of war started to develop, at least in a broad understanding of such expression[143]. Rather, the conquest of victory was to be obtained without inflicting excessive suffering to the enemies and, above all, sparing their lives whenever possible. In fact, even where the limitations to means and methods of warfare advocated by the Lateran council went partly disregarded, the prohibition of employment of assassins stood still. Thus, in his main juridical work, the *Siete Partidas*[144], Alfonso X "El Sabio", King of Castilla y Leon since 1252, explicitly allowed the use of crossbows and *ballistae* and even advised his border-patrols to resort to such weapons[145]. However, in line with the predicament of *Constitutio XVIII* of the First Council of Lyon they forbad the employment of assassins, defining them as persons who kill with treachery, *i.e.* with such modalities that do not leave to their victims any possibility to defend themselves[146]. Most notably, as can be easily inferred from a textual reading of the *Partida Septima*, treachery was directly linked with killing without leaving to the designated victim the possibility to guard himself and was not merely restrained to betrayal of the enemy's confidence or feigning of protected status.

Taking steps from the principles of chivalry indeed lawyers, scholars and legislators started detecting in treachery the demarcation line between lawful and unlawful killings by design during wartime, paving the way for a distinction that

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hostilities. To this end see Robert Kolb, *The Protection of the Individual in Times of War and Peace*, *supra*, p. 321: "Rules as to the conduct of warfare have existed since most ancient times [...]. These rules are of four types: (i) rules of chivalry for combat tactics [...]; (ii) rules as to the prohibition of certain weapons, for example poisoned ones; (iii) rules as to the protection of certain persons [...]".

143 Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, Charlottesville, 1977, p. 4.

144 The *Siete Partidas* were a statutory code compiled during the rein of Alfonso X (1252 - 1284) of Castille derived by Roman law as codified under the Justinian code and originally named *Livro de las legies*. It is not known when precisely the were enacted entering into force and acquiring a binding nature. It is however well known that they did become binding in the rein of Catille y Leon and, in the following centuries, had a huge impact in south-America where they remained into force until the XIX century.

145 Alfonso X "El Sabio", *Siete Partidas*, Partida Secunda, Titulo 22, Ley 7.

146 *Ibid.*, Partida Septima, Titulo 27, Ley 3: "Aquí se comienza la setena partida de este libro, que habla de todas acusaciones y malfetrias que los hombres hacen, por las que merecen recibir pena. [...] Hay cinco maneras de hombres desesperados [...] La quinta es la de los asesinos y de los otros traidores, que matan a hurto a los hombres por algo que les dan. Asesinos son llamados una manera que hay de hombres desesperado y malos, que matan a los hombres a traicion de manera que no se puede de ellos guardar; y tales hay de ellos que andan vestidos como religiosos y otros como peregrinos, y otros que andan come en manera de labradores, y lleganse a hablar con los hombres porque se aseguran en ellos y andan my encubiertamente en estas maneras sobredichas y en otras semejantes de ellas, porque puedan cumplir su traicion y su maldad que tienen en corazon de hacer".

would stand for centuries to come. In general, treacherous and dishonourable methods of killing were identified with perfidious deception, not allowed under any circumstance due to its nature *contra fidem*, capable of leading to a twisted use of the laws of war themselves[147].

Thus, rules of chivalry did not prohibit the pre-planned killing of enemies during war time in and by itself. To the contrary, surprises and ruses were widely resorted to and generally believed to be in conformity with law and morality[148]. However, they were intended to forbid (and therefore prevent) treacherous attacks upon the enemy's life. Since treachery was not restricted to a betrayal of confidence but embraced attacks against defenceless persons, in accordance with the meaning elucidated in the *Siete Partidas*, surprise attacks were to be considered permissible also *viz* combatant units or else armed enemies, but not at the detriment of an unarmed individual outside the battlefield. Moreover, poisoning continued to be considered unlawful *per se*; consequently, the ban on poison and poisonous weapons as a means of conducting assassinations remained sturdy throughout the XIII, XIV and XV centuries. Notably, "this prohibition of poison also strengthens the point [...] that victory was not to be achieved at *any* cost"[149], a principle that would maintain its value in the law of armed conflicts forever after.

d) The Development of Rules of Chivalry in the Feudal Age

Starting with the feudal age, then, a number of customs began to develop in relation to protections to be afforded at specific clusters of non-targetable persons. Thus, in the XIV and XV centuries the cleric Honoré Bouvet, the French soldier and author Philippe de Mézières and the writer Christine de Pizan all agreed that non-combatants were entitled to immunity from attack as much as prisoners of war, whose lives were to be spared since harming the defenceless could not be compatible with the duty of knights, even though in practice this rule went commonly breached[150]. In England, Richard II's 1386 *Ordinance for the Government of the Army* provided for the death penalty for those who directed force against women or churchmen. Accordingly, Henry V's 1419 *Ordinances of War* reinforced the rules aimed at the protection of women and clerics[151]. As noticed in connection with early

147 David G. Whetham, *Unorthodox Warfare in the Age of Chivalry: Surprise and Deception in the Hundred Years War*, London, 2004, pp. 9 and 10.

148 *Ibidem*, pp. 83, 180, 224 and 241. Accordingly, see also *Zeynep Kocabiyikogluy Cecen, Interpreting Warfare and Kinghthood in Late Medieval France: Writers and Their sources in the Reign of King Charles VI (1380-1422)*, Ankara, 2012, p. 185.

149 *Ibidem*, p. 181.

150 Zeynep Kocabiyikogluy Cecen, *Interpreting Warfare and Kinghthood in Late Medieval France, supra*, p. 150.

151 Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War, supra*, p. 6. Accordingly, see also Anne Curry, *The Military Ordinances of Henry V: Texts and Contexts*, in Chris

European battlefield codes a few centuries later, also these normative instruments and doctrinal works "dissimilar and geographically scattered as they were, are significant [inasmuch as] they established precedents for other States and raised enforcement models for battlefield offences"[152].

Given-Wilson, Ann Kettle and Len Scales, *War, Government and Aristocracy in the British Isles, c. 1150 – 1500*, 2008, Woodbridge, pp. 240 and 243.

152 *Ibidem*, p. 7.

2.7. First Academic Appraisals of Assassination in Times of War

a) Francisco De Vitoria and Gustavus II Adolphus of Sweden

When Francisco de Vitoria finalized his *De jure belli*[153] in 1532 he did not make any reference to assassination[154]. Similarly, no provision concerning targeting rules and techniques appears in Gustavus II Adolphus of Sweden's *Articles of Military Lawwes to Be Observed in Warres*[155], issued almost a century later, in 1621[156]. The *Articles*, however, did endorse a set of rules of a humanitarian nature. In particular, Arts. 99 and 100 proscribed the targeting of specially protected places, such as churches, schools and hospitals, and forbad the ill-treatment of clergymen, elderly, women and children. Such list discloses that no general distinction existed at the time between civilians and combatants. To the contrary every man was legitimately targetable during wartime[157].

b) Balthazar Ayala

This lack of normative reference to the theme of assassination during war time, however, does not imply any abandonment of the subject by the legal discourse throughout those centuries. To the contrary, the debate on the legitimacy of killing by design and assassination started gathering more and more attention by jurists. In 1582 the Spanish jurist Balthazar Ayala touched upon this subject within his *De jure et officiis bellicis et disciplina military, libri III*[158], condemning the use of assassination in foreign policy due to the contrariety of such technique with honour and good faith[159].

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153 Francisco de Vitoria, *De indis et de jure belli,* 1532.

154 Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations*, Ithaca (U.S.A), 2001, p. 64.

155 Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War, supra*, p. 7.

156 Gustavus II Adolphus of Sweden, *Articles of Military Lawwes to Be Observed in Warres*, 1632. These articles bear particular significance since, as underlined by Kenneth Ögren, they represent the first battlefield rules taking the form of orders rather than agreements between contracting parties such as did, to the contrary, the code of Ferdinand of Hungary (1526), the code of Maximilian II (1570) and the code of Maurice of Nassau (1590). To this end see Kenneth Ögren, *Humanitarian law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden*, in *International Review of the Red Cross*, Geneva, 31 June 1996.

157 The fact that every male person able to bear arms was usually considered as a legitimate target is confirmed by the writings of the main authors of the time, such as Grotius and De Vattel.

158 Balthazar Ayala, *De jure et officiis bellicis et disciplina military, libri III*, 1582.

159 Balthazar Ayala, *De jure et officiis bellicis et disciplina military, libri III*, 1582, Book I, Chapter VIII, §§ 4 and 5: "At veteres illi Romani omnes has fraudes & fallacias aspernati sunt, & nisi virtute, & aperta vi, romanisque artibus, ut illi dicebant, vincere voluerunt. […]. Eadem fide indicatum Pyrrho medicum vitae eius insidiantem; eadem Faliscis vinctum traditum proditorem filiorum regis. […] Eius

Moreover, two of the leading scholars of late XVI – early XVII centuries, Alberico Gentili and Hugo Grotius, abundantly treated the matter in their pivotal works, *De jure belli libri III*[160] and *De jure belli ac pacis*[161] respectively. Neither of them actually proposed a complete ban on the wilful killing of pre-selected targets; both authors nonetheless suggested a set of limitations to such practice partly based on a similar rationale.

c) Alberico Gentili

Gentili's work tended to strike a balance between military and humanitarian necessities[162]. Hence, according to Gentili, a series of weapons and means of combat were strictly forbidden as no party to a conflict could be above justice[163]. For instance, Gentili considered unlawful the employment of poison or poisonous weapons (in battle as well as in peacetime)[164]. Moreover, in Gentili's view it was not

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[hostis] demum animum in perpetuum vinci, cui confenssio expressa esset, se neque arte, neque casu, sed collatis cominus viribus, iusto ac pio bello esse superatos. […] Sic quoque Fabritius, pari virtutis specie Pyrrhum, qui armis superari non poterat, vicit, prodens illi medicum vitae eius insidiantem. […] Idque eius factum a senatu laudatu fuit, qui magnum dedecus & flagitium iudicabant, quicum laudis certamen fuisset, eum non virtute, sed scelere superatu". With reference to this stance, in his *The Ethics of Destruction: Norms and Force in International Relations*, *supra*, p. 64, Thomas assumes that Ayala is univocally against the employment of assassination techniques. Nonetheless, Ayala's approach to the subject remained, to say the least, quite contradictory. As a matter of fact, in a different passage of the same treatise (Chapter VIII, §§ 1 and 2 and Chapter VII, § III) Ayala himself reports passages from Roman authors as well as practical examples pointing to the conclusion that in the quest of victory every possible means can be employed to overcome the enemies. From a systematic reading of Ayala's work, it appears that, while he considers assassination to be against valour and honour, he also realizes that the only people among those known to him who had such view and ruled assassination out of their warring techniques were in fact "those old Romans". His practical approach to the subject could not but make him notice that his peers did resort to assassination as well as to any other deceit. Thomas himself, indeed, recognizes that Ayala's "treaties was published at the beginning of a decade, the 1580s, that would witness a spate of international plots".

160 Alberico Gentili, *De jure belli libri tres*, 1598.

161 Hugo Grotius, *De jure belli ac pacis*, 1625.

162 Tullio Scovazzi and Maurizio Arcari, *Corso di diritto internazionale, Parte I, supra*, p. 43.

163 Alberico Gentili, *De jure belli libri tres, supra*, Lib. II, Cap. I, p. 123: "dolum et asperitatem et iniustitiam propria esse bellorum negotia, id de bellis administratis inique est capiendum, sicut et alia eiusmodi aliorum quorundam patrum : ut in superiore libro expositum est. Ut enim dolus atque asperitas in bello locum habeat iure, nulla tamen est belli pars quae uacare iustitia posit".

164 In his treatise Gentili consecrates one entire chapter to the topic and reaffirms the ban on the use of poison in a number of circumstances. See Alberico Gentili, *De jure belli libri tres, supra*, Lib. II, Cap. VI, pp. 146 – 154; Lib. II, Cap. VII, p. 154 and 160: "Nam si dicis de armis et supradictis uenenis, quod Seneca, ueneficium simile esse mendacio : at ista iam induci palam. […] Alexander uere magnus, qui hostis, Darii illius, quem nec iustum hostem, sed ueneficum percussorem dicebat, necem parricidialem ultus est immani supplicio". Lib II, Cap. VIII, p. 162: "Et itaque degeneres insidiae,

lawful to kill an enemy anywhere: even though he did approve of the killing perpetrated by Pepin by sneaking inside his enemy's tent and killing him while the latter was asleep[165], Gentili made clear that he disagreed with Baldus' assessment that "*hostis bene interficitur ubique*"[166]. He upheld, indeed, that defenceless enemies could not be legitimately killed either on the battlefield nor far away from the theatre of hostilities[167]. In line with such reasoning, in Gentili's opinion, it was not legitimate to kill an enemy that could be captured[168]. The scholar defined this practice as cruel, as well as obviously unlawful. Thus, he stressed that the employment of *sicarii, i.e.*, assassins, was to be considered strictly unlawful[169]. According to Gentili, however, this did not prevent belligerents from targeting a specific individual enemy during battles[170].

The rationale beyond Gentili's condemnation of assassination, differing from Ayala's[171], did not lie solely on moral or humanitarian considerations. While the scholar from San Ginesio did consider assassination in and by itself to be a shameful and wicked practice and asserted that the objectives of war were to be achieved by valorous means, indeed, his position on the subject also mirrored practical

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bellum iniustum contra iustum hostem. Uenenum nec adprobant contra tyrannum. cui forte non plus debetur iuris quam praedoni: imo etiam debetur multo minus. Non adprobant nec aduersus perfidum rebellem".

165 Michael N. Schmitt, *Essays on Law and War at the Fault Lines*, The Hague, 2012, p. 287.

166 Alberico Gentili, *De jure belli libri tres, supra,* Lib. II, Cap. VIII, p. 164.

167 *Ibidem*: "Non sane, ubique: quemadmodum, nec omni modo; ut dixi: nec semper, nec omnem; ut sum dicturus. Marcellum bene interfecerit Annibal lauantem se, (si haec est uerior in triplici scntentia de eius morte) qui castra castris collata illic habebat. Ceterum si ab armis procul agentcm, et natantem forte in Tyberi quaesisset eum Annibal, et occidisset, cgo Annibalem non probarem: qui inermes, longe a bello, nec in bello occidendos, caecidisset". Accordingly, see Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations, supra,* p. 65. For an opposing view, see Michael N. Schmitt, *Essays on Law and War at the Fault Lines, supra,* pp. 286 – 289. Note however that Schmitt does not take into account any of the sections of the *De jure belli libri tres* hereby mentioned and their inconsistency with his view on the issue. To the contrary, Thomas Wingfield suggests that in Gentili's view treachery is the distinguishing factor between a lawful and an unlawful assassination (to this end see Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, in *Maryland Journal of Internaional Law*, Baltimore, 1998, p. 299). However, it would be difficult to argue that, in the latter scenario reported by Gentili, Annibal could be burden with any duty of trust towards Marcellus.

168 Alberico Gentili, *De jure belli libri tres, supra,* Lib. II, Cap. XVI, p. 200: "Ut occidi ille etiam posse videatur, qui durare captus nolit capientium, et restitet. Saepe tamen nulla sua occiditur culpa, at per ambitionem, et avaritiam capientium: qui suum quisque velit. Quod omnino crudele et iniustum. Eius et iniustum, qui cum posset apprehendere, maluit occidere".

169 Alberico Gentili, *De jure belli libri tres, supra,* Lib. II, Cap. VIII, p. 164: "Condemnati late in historiis sunt sicarii illi, qui propriumque fecere hoc infame nomen sibi, qui hostem publicum occidere quomodocunque".

170 Alberico Gentili, *De jure belli libri tres, supra,* Lib. II, Cap. VIII, p. 164: "In bello nihil imputabitur hosti qui illic quaerit ducem hostium praecipue".

171 See *supra*.

considerations[172]. In particular, Gentili considered that a widespread resort to assassination by all States would only perpetuate a state of disorder in the international community and public conflicts would thus shift to private matters[173]. Some authors have referred to this *ratio* to point out that Gentili was primarily concerned with the assassination of "high value targets" [174] rather than with those of common people, be them civilians or combatants. Nonetheless, such focus might very well have been prompted by the fact that assassination attempts did usually aim at political or military leaders at Gentili's times, rather than at common people or lower ranking military. This does not mean that the same considerations couldn't be referred to any other person.

Such conclusion may draw further confirmation from a few references that Gentili makes to Thomas More's *Utopia*[175] throughout his work[176]. The English lawyer and humanist had advocated in the early XVI century for the employment of assassination of enemy leaders as a means to spare multitudes of men otherwise involved in large-scale conflicts[177]. Gentili's *De Jure Belli*, *Libri III* disapproves of such techniques but does found laudable More's intentions[178], humanitarian in nature even though utilitarian in their method. As it has been noticed, in fact, "[Gentili] too advocates the sparing of as many people as possible, but not by means of killing enemy leaders: bad means do not justify good ends"[179].

While the legal discourse around the permissibility or unlawfulness of assassination mainly concerned times of hostilities, in Gentili's work one may also find reference to assassination attempts during peace time. In his *De Legationibus Libri III*[180] Gentili devoted one entire chapter to the treatment deserved by diplomatic agents who conjure against the sovereigns by whom they are performing their mandate[181]. The opinions expressed by Gentili in such treatise stemmed from an episode really occurred in 1548, when Spanish ambassador Bernardino de Mendoza

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172 Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations*, *supra*, p. 64.

173 *Ibidem*, p. 65.

174 See *supra*.

175 Thomas More, *Utopia*, Leuven, 1516.

176 Alberico Gentili, *De jure belli libri tres*, *supra*, Lib. II, Cap. VIII, p. 160, Lib II, Cap. XII, p. 180, Lib. III, Cap. IV, p. 312.

177 *Ibid.*, Lib. III, Cap. IV, p. 312 : "Thomas Morus probat procuratam principis hostium necem: ut ita parcatur multitudini innoxiae: quae non sua sponte, sed furiis agitata principum rapiatur in bellum".

178 *Ibid., "*Neque ego tamen aut ducum captorum (si meam uis audire sententiam) probo necem : at hoc tantum cupio, multo maxime parci multitudini".

179 Philip Dust, *Alberico Gentili's Commentaries on Utopian War*, in *Moreana*, Bouzigues, 1973, p. 36. Accordingly, see also John Tinetti, *Lawful Targeted Killing or Assassination? A Roadmap for Operators in the Global War on Terror*, Newport (U.S.A), 2004, p. 2.

180 Alberico Gentili, *De Legationibus, Libri III*, London, 1585,

181 Alberico Gentili, *De Legationibus, Libri III*, supra, Lib. II, Cap. XVIII, pp. 77 – 80, appositely entitled Si legatus in principem conjuraverit, apud quem legatus est.

conspired against Queen Elizabeth of England[182]. Against this background, Gentili wondered what shall happen to the diplomatic agent who attempts at the life of the prince[183]. Genitli's focus in such analysis was not that much related to the issue of targeted killing; he was rather concerned with the issue of immunity of diplomatic agents from prosecution. Yet, even though incidentally, Genitli did touch upon the subject when, recommending the expulsion from the State of the diplomatic agent responsible for the assassination plot[184], he in fact assumed the unlawfulness of such act. In order to come to this conclusion, in fact, Gentili explained that pursuant to international law (what he called *ius gentium*) diplomatic agents could not be sanctioned with death, penalty otherwise provided for the crime of *lèse-majesté* or high treason, thus making clear that anybody else not protected by the international rules concerning diplomatic immunities would have incurred in such punishment[185].

d) Hugo Grotius

As many commentators noticed, Grotius' attitude towards the pre-planned killing of selected individuals was less stringent than Gentili's[186]. As a matter of fact, according to Grotius "the lawfulness of injuring or destroying the person of a public

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182 On such episode see, inter alia, Frank Frost Abbot, *Gentili and his Advocatio Hispanica*, in The American Journal of International Law, Washington, 1916, p. 738 - 740; Jensen De Lamar, *Diplomacy and Dogmatism: Bernardino de Mendoza and the French Catholic League*, in Ralph E. Giesey, *Renaissance News*, Chicago, 1965, p. 30; Giuliano, Scovazzi, Treves, *Diritto internazionale, Vol. II, Gli aspetti giuridici della coesistenza degli stati*, *supra*, p. 450. It shall be noted that, besides being involved in seditious activities and deemed responsible for an assassination attempt at the detriment of Queen Elizabeth of England, Bernardino de Mendoza is also thought responsible for the commission of a number of other murderous attempts at the lives of anti-Catholics in England. To this end see, inter alia, Richard Malim, *Great Oxford: Essays on the Life and Work of Edward De Vere, 17th Earl of Oxford, 1550 – 1604*, Royal Tunbridge Wells, 2004, p. 199.

183 Alberico Gentili, *De Legationibus, Libri III, supra*, Lib. II, Cap. XVIII, p. 77: "Si legatus in principem coniuraverit,apud quem legatus est, quid ipsi fieri oporteat".

184 *Ibid.*, p. 78: "Dimictendum legatum exiftimamus optimis docti rationibus,exemplisque". Notably, Gentili had come to the same conclusion in the expert opinion he drafted for the English Crown the year before publishing his *De Legationibus, Libri III*, specifically tackling the issue related to the involvement of Bernardino de Mendoza in the attempt to assassinate the queen. To this end see, *inter alia*, Frank Frost Abbot, *Gentili and his Advocatio Hispanica*, *supra*, p. 739.

185 *Ibid.*, pp. 77 and 78: "Peccatur in ius gentium graui ter, si in vi repellenda supra quam oportet enitimur. Sed legatum hunc interficiendo, loge magis, quam est necesse, saeuitur. Abire enim lllum princeps iubere potest. Igitur non est interficiendus. Nec mihi quisquam dicat, eam iurisconsultorum definitione privatis stare hominibus, non regibus. Nam stat aequaliter omnibus iuris gentium ratio ratio et quae ratio est privati hominis ad privatum ea est proculdubio publicae persona ad personam publicam, et legati ad regem: quia legatus quoque principis personam gerit. Atque ita nos credimus".

186 See, *inter alia*, Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, *supra*, p. 300; Emilio J. Cardenas and Gaston Sokolowicz, *Muertes anticipadas o asesinatos selectivos? Pese a la condena de la ONU el gobierno Israelí continua con esta estrategia en su lucha contra el terrorismo*, in *Agenda internacional*, Buenos Aires, 2004, p. 65; John Yoo, *Assassination or Targeted Killings After 9/11*, in *New York Law School Review*, 2011, p. 74.

enemy is supported by the testimony of many of the best writers [...]" and "to kill a public enemy, or an enemy in war is no murder"[187]. Recalling a passage from Livius, Grotius asserted that the concept of enemies encompassed "not only those who actually bear arms, or who are immediately subjects of the belligerent power, but even all who are within the hostile territories, as [...] *war is declared against the sovereign, and all within his jurisdiction*"[188]. Indeed, in his *De jure belli ac pacis* Grotius specified that in practice "even women and children are frequently subject to the calamities and disasters of war"[189]. Similarly, Grotius relates about a widespread practice to put to death prisoners of war[190].

Differing greatly from Gentili, Grotius also added that attacks on an enemy were not restricted to either the battlefield or the theatre of hostilities: "persons of natural-born subjects, who owe permanent allegiance to a hostile power may [...] be attacked, or seized, wherever they are found. For whenever [...] war is declared against any power, it is at the same time declared against all the subjects of that power. And the law of nations authorises us to attack an enemy in every place [...]. They may be lawfully killed there, or in their own country, in the enemy's country, in a country belonging to no one, or on the sea"[191].

This is not to say, nonetheless, that Grotius himself did not envisage any limits to the use of targeting techniques aimed at depriving an enemy of his life. First of all, as for the geographic range of the right to attack enemies he envisaged, Grotius clarified that sovereigns would be prevented from pursuing enemies and depriving them of their lives in the territory of neutral powers: "But as to the unlawfulness of killing, or violently molesting [enemies] in a neutral territory, this protection does not result from any personal privileges of their own, but from the rights of the sovereign of that country" [192]. Most notably, Grotius tied such limitations to the sovereigns' exclusive right to decide whether to try and sanction individuals within their territory in accordance with the principles of the rule of law, focusing his analysis on State obligations rather than on persons' rights[193]: "For all civil societies had an undoubted right to establish it [their jurisdiction] as a standing maxim that no violence should be offered to any person within their territories, nor any punishment inflicted but by due process of law. For where tribunals retain their

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187 Hugo Grotius, *De jure belli ac pacis, supra*, L. III, Cap. IV, para. V.

188 *Ibidem*, L. III, Cap. IV, para. VI (emphasis added).

189 *Ibidem*, L. III, Cap. IV, para. IX. For a similar assessment see also, inter alia, Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations*, *supra*, p. 65

190 *Ibidem*, L. III, Cap. IV, para. X.

191 *Ibidem*, L. III, Cap. IV, para. VIII.

192 *Ibidem*, L. III, Cap. IV, para. VIII.

193 For a further confirmation of Grotius' focus on inter-State obligations rather than on individual rights in this context see also Louis Rend Beres, *On Assassination as Anticipatory Self-defense: the Case of Israel*, in *Hofstra Law Review*, New York, 1991, p. 324.

authority in full vigour, to try the merits of every offence, and, after impartial inquiry, to acquit the innocent, or condemn the guilty, the power of the sword must be restrained from inflicting promiscuous death"[194]. Thus, far from attributing any individual rights to the targeted persons, Grotius geared such geographical limitation to the right to kill enemies in third countries around the concept of sovereignty. His theory did not consider private persons as centres of individual rights against sovereigns but, to the contrary, envisaged a limitation stemming from inter-state obligations. In so doing, he did construe a system where persons were not right-holders but simple objects of protection, the one granted by the function of courts in respect of the principles of due process and rule of law.

Besides geographical restrictions, Grotius also envisaged certain restrictions to the right to kill in relation to both personal limitations and the modalities employed to kill enemies. As far as personal considerations are concerned, while Grotius did not relate about legal limitations concerning civilians[195], he did advise to spare enemies "who have committed no acts of atrocity and cruelty in war"[196], qualifying such forbearance as a tribute to justice as well as to humanity[197]. Similarly, Grotius reported that "humanity will require that the greatest precaution should be used against involving the innocent in danger"[198]. Stressing the focus on humanity, Grotius introduced an additional parameter to be kept into consideration before depriving of his life an enemy: in the absence of "extreme urgency and utility", a persons fitting within a number of categories could not be lawfully targeted: "Thus age and sex are equally spared, except where the latter have departed from this privilege by taking arms. […] The same rule may be laid down too with respect to males, whose modes of life are entirely remote from the use of arms [such as] ministers of religion, [...] those who devote their lives to the pursuit of letters, and other studies beneficial to mankind [and] those employed in husbandry. [...] To the above catalogue […] may be added merchants. […] More civilized manners having abolished the barbarous practice of putting prisoners to death, the surrender of those, who stipulate for the preservation of their lives either in battle, or in a siege, is not to be rejected"[199].

Moreover, Grotius recounted of a further set of limitations linked to the methodology and the means allowable to kill enemies. Besides condemning resort to unnecessary cruelty[200], significantly, he affirmed that "nobody can be justly killed by

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194 Hugo Grotius, *De jure belli ac pacis, supra*, L. III, Cap. IV, para. VIII.
195 See *supra*.
196 *Ibidem*, L. III, Cap. XI, paras. VI and VII.
197 *Ibidem*.
198 *Ibidem*, L. III, Cap. XI, para. VIII.
199 *Ibidem*, L. III, Cap. XI, paras. IX - XVI .
200 *Ibidem*, L. III, Cap. XI, paras. I and II.

design"[201]. Two exceptions were envisaged by Grotius to this general rule: everybody could be deprived of his life through a pre-planned killing either by way of legal punishment or in self- defence when no other means could lead to the same result. In so doing, Grotius *de facto* assessed that recourse to assassination techniques was only allowable as a measure of last-resort, limited by principles of necessity and proportionality. Even in these cases, nonetheless, Grotius outlined that not any kind of pre-planned deprivation of life directed at a selected enemy could be legitimately performed. While conceding that "it is more noble to kill in such a way that he who is killed may have a chance to defend himself, but this is not an obligation due to one who has deserved to die"[202], Grotius stressed that "from old times the law of nations [...] has been that it is not permissible to kill an enemy by poison"[203]. This rule, according to the scholar, was rooted in the necessity that the dangers of war might not be too widely extended.

Grotius, contrary to Gentili[204], treated poisoning both as a sub-spices of assassination, *i.e.* as a particular modality to carry out a pre-planned killing, and additionally as an autonomous and separate conduct. Against the background of such analysis, the value-judgment attributed by Grotius to poisoning on the one hand and to assassination on the other touched upon different considerations. Indeed, while he related of a generally established norm banning poisoning, with reference to assassination he considered the general rule to be quite the opposite, assassination by poison representing one of the exceptions to such rule: "Not merely by the law of nature but also by the law of nations, as we have said above, it is in fact permissible to kill an enemy in any place whatsoever; and it does not matter how many there are who do the deed, or who suffer. [...] According to the law of nations not only those who do such deeds, but also those who instigate others to do them, are to be considered free from blame"[205].

According to Grotius, therefore, targeted killing, albeit widely resorted to in practice, was not generally permitted by either the law of nations or the law of nature, if intended as a "killing by design". He moreover condemned assassinations performed with "treachery"[206]: "a different point of view must be adopted in regard to those assassins who act treacherously. Not only do they themselves act in a

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201 *Ibidem.*

202 *Ibidem*, L. III, Cap. IV, para. XV.

203 *Ibidem*.

204 *Supra*, Ch. I, para. 2, sub-para. 2.7(c).

205 Hugo Grotius, *De jure belli ac pacis, supra*, L. III, Cap. IV, para. XVIII.

206 Accordingly see also, inter alia, Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, *supra*, p. 300; Tom Ruys, *License to Kill? State-sponsored Assassination under International Law*, Leuven, 2005, p. 14.

manner inconsistent with the law of nations, but this holds true also of those who employ their services"[207].

From the examples Grotius recounts in this connection, it appears that his conception of treachery was as wide as to embrace outlawry of enemies, putting a price on enemies' heads, resort to so called "secret crimes", *i.e.* crimes performed by robbers and by prisoners, killings perpetrated by the victim's friends, soldiers, allies or subjects bribed by enemy powers to become traitors[208]. In these cases, Grotius specified, both the traitors who materially performed the assassination and those who engaged them to carry out such deeds could be held equally responsible. Interestingly enough, Grotius established a parallelism between the prohibition of poisoning and the ban on treacherous assassinations rooted in the very rationale at their basis: the prohibition of treacherous assassination as much as the ban on poison "has in view the purpose to prevent the dangers to persons of particular eminence from becoming excessive"[209].

According to Grotius, however, the scope of limitation on treacherous methods of assassination as defined above was not unlimited. In particular, while it held true in relation to enemies during wartime, it did not apply to the killing of pirates, robbers or renegades since treacherous obliterations of persons fitting within those categories "goes unpunished among nations by reason of hatred of those against whom it is practiced"[210]. Such difference of attitude towards pirates and robbers was mainly due to their qualification as "*hostis humani generis*"[211]. Notably, though, Grotius did make clear that one thing is to assess the lawfulness of a certain behaviour, one very different thing is to say that such behaviour, even though unlawful, goes unpunished. Thus, while asserting that every means were commonly employed to assassinate renegades and pirates, he also added that "treachery towards [them] is not indeed blameless"[212].

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207 *Ibidem.*

208 *Ibidem*.

209 *Ibidem*.

210 *Ibidem.* Accordingly, see also Hugo Grotius, *De jure belli ac pacis, supra,* L. I, Cap. II, para. III : "so that if our lives are threatened with assassination or open violence from the hands of robbers or enemies, any means of defence would be allowed and laudable. [...] reason has taught this to the learned, necessity to the barbarians, custom to nations, and nature herself to wild beasts, to use every possible means of repelling force offered to their bodies, their limbs and their lives. […] But if any violence is done to the tamest of them, they are roused, and upon receiving any hurt, will defend themselves with the greatest alacrity and vigour"; L. II, Cap. II, para. XVIII: "Pirates and robbers, as they form no civil community, cannot rest any claim to protection and support upon the law of nations";

211 *Ibidem*.

212 *Ibidem*. Accordingly, see also Tom Ruys, *License to Kill? State-sponsored assassination under international law, supra,* p. 15. An opposite interpretation has been proposed Kiersten Cronin in *The Killing Businness: a History of the CIA Assassination Program and Implications for United States*

e) Emmerich De Vattel

A further testimony that assassination was an issue widely present in XVII and XVIII centuries' legal discourse is provided by the work of the Swiss scholar Emmerich De Vattel[213]. Also De Vattel, as Grotius before him[214], stated that in wartime assassinations, meant as the intentional killing of pre-selected individuals, were not banned in and by themselves but inasmuch as they were perpetrated by treachery[215]. His definition of assassination sheds light on what De Vattel considered to be treacherous, a term embracing a quite wide range of conducts. According to the Swiss scholar, indeed, assassination was "un meurtre commis par trahison, soit qu'on y employé des Traîtres, sujets de celui qu'on fait assassiner, ou de son souverain, soit qu'il s'exécute par la main de tout autre émissaire, qui se sera introduit comme Suppliant ou Réfugié, ou comme Transfuge, ou enfin comme Etranger"[216]. The rationale at the basis of the ban on treachery, perfidy and ruses was attached, according to De Vattel, to a general duty of good faith in the conduct of hostilities instrumental to a principle of self-preservation that implied the unlawfulness of such deeds even when those acts would imply a military advantage[217]. De Vattel had indeed foreseen that such killing by design could entail a twofold danger: on the one hand it would risk degenerating into a total war characterized by the aim of killing each and every enemy through pre-planned schemes; on the other it would risk

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Foreign Policy/International Relations, Bloomington, 2014, p. 4, rightly reporting that the logic behind the lack of punishment of treacherous assassinations directed against hostis humani generis "has been used to justify the ways in which the United States has dealt with terrorists". Nonetheless, this interpretation does not seem to take into consideration the difference marked by Grotius between impunity and legality of the conduct hereby analyzed.

213 Emmerich De Vattel, *Le droit des gens. Ou principes de la loi naturelle, Appliqués a la conduite et aux affaires des Nations et des Souverains* (hereinafter *Le droit de gens*), London, 1758, 2 Vols., Vol. II, B. III, Ch. VIII, § 155, p. 123 : "c'est ici le lieu d'examiner une question célèbre, sur laquelle les Auteurs se sont partage. Il s'agit de savoir, si l'on peut légitimement employer toute sorte de moyens, pour ôter la vie à un ennemi; s'il est permis de le faire assassiner, ou empoisonner".

214 See s*upra*, Ch. I, para. 2, sub-para. 2.7(d);

215 Emmerich De Vattel, *Le droit de gens*, *supra*, Vol. II, B. III, Ch. VIII, § 155, p. 124: "Mais, pour traiter solidement cette question, il faut d'abord ne point confondre l'Assassinat, avec les surprises, très-permises, sans-doute, dans la Guerre. Qu'un soldat déterminé se glisse pendant la nuit dans le Camp ennemi; qu'il pénètre jusqu'à la tente du Général, & le poignarde; il n'y a rien là de contraire aux Loix Naturelles de la Guerre; rien même que de louable, dans une Guerre juste nécessaire". Acordingly, see also Stephen C. Neff, *Vattel and the Laws of War: a Tale of Three Circles*, in Vincent Chetail and Peter Haggenmacher, *Le droit international de Vattel vu du XXIe siècle*, Leiden, 2011, p. 323 ; Stephen Wrage, *Norms for Assassination by Remotely Piloted Vehicle*, in Center on Contemporary Conflict, *Strategic Insights*, Annapolis, 2011, p. 32; and Michael N. Schmitt, *Essays on Law and War at the Fault Lines*, *supra*, p. 289.

216 *Ibid.*, Vol. II, B. III, Ch. VIII, § 155, pp. 125 and 126.

217 Stephen C. Neff, *Vattel and the Laws of War : a Tale of Three Circles*, *supra*, p. 325.

involving civilians as traitors carrying out the deed or as informers of foreign powers resorting to assassination[218].

As some commentators have noticed[219], at the very core of the Vattelian analysis of the laws of war lies the principle of necessity, the sole and irreplaceable prism through which the Swiss scholar's whole theory is construed. Thus, the limitations reported by De Vattel to treachery, perfidy and ruses "represent the one and only important respect in which his system departs from reliance on the single principle of necessity"[220]. Such an exception couldn't find its foundations solely in a general principle of good faith. De Vattel, in fact, advanced a principle possibly more compelling than the former in this regard, namely, the principle of humanity: "Ne quittons point cette matière de ce qu'on est en droit de faire contre la personne de l'Ennemi […] N'oublions jamais que nos ennemis sont hommes. […] ne dépouillons point la Charité, qui nous lie à tout le Genre-humain. De cette manière, nous défendrons courageusement le droits de la Patrie, sans bleffer ceux de l'humanité"[221]. Based on these premises, in a further passage of his treatise De Vattel adds: "Ce serait une erreur également funeste & grossière de s'imaginer, que tout devoir cesse, que tout lien d'humanité soit rompu, entre deux Nations qui se font la guerre. Réduits à la nécessité de prendre les armes, pour leur défense & pour le maintien le leurs droits, les hommes ne cessent pas pour cela d'être hommes […]. Celui-là même qui nous fait une guerre injuste, est homme encore; nous lui devons tout ce qu'exige de nous cette qualité. […] Le droit de sureté nous autorise à faire contre cet injuste ennemi, tout ce qui est nécessaire pour le repousser, ou pour le mettre à la raison. Mais tous le devoirs, dont ce conflit ne suspend pas nécessairement l'exercice, subsistent dans leur entier ; il nous obligent & envers l'ennemi, & envers tous les autres hommes. Or tant s'en faut que l'obligation de garder la foi puisse cesser pendant la guerre, en vertu de elle devient plus nécessaire que jamais, en vertu de la préférence que méritent le devoirs envers soi-même; elle devient plus nécessaire que jamais"[222]. It is on these basis that the Swiss scholar could wonder "sera-t-il indifférent à la Société humaine, qu'elles [les Nations] y employant des moyens

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218 In line with such interpretation see, inter alia, Michael L. Gross, *Assassination: Killing in the Shadow of Self-Defense*, in J. Irwin, *War and Virtual War: The Challenges to Communities*, Amsterdam, 2004, pp. 99 and 100.

219 See, inter alia, Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, in *The American Journal of International Law*, Washington, 2012, p. 455; Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge, 2004; Stephen C. Neff, *Vattel and the Laws of War : a Tale of Three Circles*, *supra*, pp. 317 and 318; Michael N. Schmitt, *Essays on Law and War at the Fault Lines*, *supra*, p. 290.

220 Stephen C. Neff, *Vattel and the Laws of War: a Tale of Three Circles*, *supra*, p. 325. Accordingly see also, *inter alia*, Gabriella Silvestrini, *Vattel, Rousseau et la question de la "justice" de la guerre*, in Vincent Chetail and Peter Haggenmacher, *Le droit international de Vattel vu du XXIe siècle*, Leiden, 2011, pp. 115 and 116.

221 Emmerich De Vattel, *Le droit de gens*, *supra*, Vol. II, B. III, Ch. VIII, § 158, p. 130.

222 *Ibid.*, Vol. II, B. III, Ch. X, § 174.

odieux, capable de porter la désolation dans toute la Terre, & desquels le plus juste, le plus équitable des Souverains, soutenu même de la plupart des autres, ne saurait se garder? […] Pourquoi jugeons-nous qu'un acte est criminel, contraire à la Loi de la Nature, si ce n'est parce que cet acte est pernicieux à la société humaine, & que l'usage en serait funeste aux hommes ? Et quel fléau plus terrible à l'humanité, que la coutume de faire assassiner son Ennemi par un Traitre?" and conclude "Encore un coup, introduisez cette licence; la vertu la plus pure, l'amitié de la plus grande parties des Souverains, ne seront plus suffisantes pour mettre un Prince en sureté"[223].

In light of these considerations it may be possible to further understand the parallelism introduced by De Vattel between assassination and poisoning. De Vattel identified two reasons behind the ban on poison and poisonous weapons: first of all, poisoning was forbidden because of its inevitable effects[224]. Notably, his focus was not on the excessive suffering that poison or poisonous weapons would cause to victims but, rather, on the fact that poison would not leave them any chance of survival. In this regard, it is significant that De Vattel's analysis did not rely solely on the principle of humanity but also on the principle of military necessity "in its constraining mode"[225]. Secondly, De Vattel underlined the risks of such practice in consideration of the principle of reciprocity because if one party to a conflict were to legitimately make recourse to poisoning than the other would follow suit[226]. On the other hand, since responding to poisoning with further poisoning would only escalate into a widespread resort to such despicable technique, De Vattel further argued that the use of poison remained unlawful under every circumstance, even when the enemy himself were to use it[227]. The same reasoning held true also with regard to the prohibition of assassination: "l'assassinat et l'empoisonnement sont donc contraires aux Loix de la guerre, également proscrits par la Loi Naturelle et par le consentement des peuples civilisés. Le Souverain qui met en usage ces moyens exécrables, doit être regardé comme l'Ennemi du Genre-humain, et toutes les Nations sont appelées, pour le salut commun des hommes, à se réunir contre lui, à joindre leurs forces pour le châtier"[228]. The responsibility for an assassination, according to De Vattel, would

223 *Ibid.*, Vol. II, B. III, Ch. VIII, § 155, p. 126.

224 *Ibidem*, Vol. II, B. III, Ch. VIII, § 155, p. 127 : "Le poison donné en trahison a quelque chose de plus odieux encore que l'assassinat; l'effet en serait plus inévitable, & l'usage plus terrible : Aussi a-t-il été plus généralement détesté".

225 Stephen C. Neff, *Vattel and the Laws of War: a Tale of Three Circles*, *supra*, p. 323.

226 Emmerich De Vattel, *Le droit de gens*, *supra*, Vol. II, B. III, Ch. VIII, §§ 156 and 157, pp. 129 and 130.

227 *Ibidem*, Vol. II, B. III, Ch. VIII, § 155, pp. 127 and 128. To this end, De Vattel recalled that "Tibere se glorifiant d'imiter ainsi la vertu des anciens Capitaines Romains. Cet exemple est d'autant plus remarquable, qu'Arminius avait fait périr par trahison Varus avec trois Légions Romaines. Le Sénat, & Tibere lui-même ne pensèrent pas qu'il fut permis d'employer le poison, même contre un perfide, & par une forte de rétorsion, ou de représailles".

228 *Ibidem*, Vol. II, B. III, Ch. VIII, § 155, p. 126. Accordingly see also Gabriella Silvestrini, *Vattel, Rousseau et la question de la "justice" de la guerre, supra,* pp. 113 and 114.

equally fall upon him who materially perpetrates the deed and him who has ordered it, with the consequence that they would both become *hostes humani generis*[229]. This implied, first and foremost, that professional assassins, poisoners and incendiaries, as well as those who commissioned their services, could have been captured and punished wherever they were found[230].

As above-mentioned, this does not imply that every kind of pre-planned execution was forbidden in and by itself. As a matter of fact, De Vattel himself recalled the episode of Pepin to demarcate the difference existing between an assassination by treachery and a lawful pre-planned killing. Nonetheless, the parallelism envisaged by some commentators[231] between De Vattel and Grotius due to their similar reference to such episode seems to be too far-fetched. Indeed De Vattel, differing greatly from Grotius, also added that at his age combatants disliked such techniques except on those rare occasions where they became necessary to the very safety and being of their country[232], thus disclosing the rising of a trend towards a further limitation to the legitimacy of such practices under international law.

De Vattel placed a further limitation on the legitimacy of killings by design pinpointing certain classes of persons as non targetable. First and foremost, De Vattel excluded that any civilian could be subject to attack, unlike what happened in previous ages[233]. Not even those who took up arms, De Vattel stressed, would become lawful belligerents. In this case, indeed, they would be captured and hung as common bandits and robbers[234]. Such assessment is perfectly in line with De Vattel's focus on military necessity. As it has been observed, according to the Swiss scholar civilians were to be spared because their death would not bring any military advantage[235]. On the same basis De Vattel argued that captured enemy soldiers were to be spared[236], the only exception to this general rule being that of enemies who have been responsible for atrocities and greave breaches of the laws and customs of war[237]. De Vattel, however, remarks that in the latter scenario there is a shift from the laws of war to a law-enforcement paradigm, whereby the victims are no longer

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229 *Ibidem*, Vol. II, B. III, Ch. VIII, § 155, p. 126 : "[…] & je dis, qu'un pareil attentat est une action infâme & exécrable, dans celui qui l'exécute, & dans celui qui la commande".

230 Louis Rend Beres, *On Assassination as Anticipatory Selfdefense: the Case of Israel*, *supra*, p. 333.

231 Michael N. Schmitt, *Essays on Law and War at the Fault Lines*, *supra*, p. 289.

232 Emmerich De Vattel, *Le droit de gens*, *supra*, Vol. II, B. III, Ch. VIII, § 155, p. 126.

233 *Ibidem*, Vol. II, B. III, Ch. XV, §§ 225 and 226, pp. 198 and 199: "C'est donc avec raison que l'usage contraire a passé en coutume chez les Nations de l'Europe […] Les Troupes feules font la guerre, le reste du peuple demeure en repos".

234 *Ibidem:* "si des paysans commettent d'eux-mêmes quelque hostilités, l'ennemi les traite sans ménagement, & les fait pendre, comme il serait des voleurs ou des brigands".

235 Stephen C. Neff, Vattel and the Laws of War : a Tale of Three Circles, supra, p. 321.

236 Emmerich De Vattel, *Le droit de gens*, *supra*, Vol. II, B. III, Ch. VIII, § 140, p. 107.

237 *Ibidem*, Vol. II, B. III, Ch. VIII, § 141, p. 107.

executed as targetable enemies during conflict operations but sanctioned with death as war criminals[238].

2.8. Conclusions

At the beginning of the XIX century, *i.e.* the century that laid down the foundations for the formation of the law of armed conflict as we know it today, a century characterized by the first systematic codifications of the laws and customs of war at both the national and international levels, the relation between public powers and individual rights under international law was still heavily unbalanced in favour of the former, but a number of limitations to their arbitrariness had already started to come into being. While not yet taking the form of individual rights, such limitations directly stemmed from a number of obligations imposed on belligerents, grounded on both humanitarian considerations and a *proto*-principle of military necessity and enshrined, *inter alia*, a set of restrictions to the belligerents' authority to kill.

Until then, practices of killing by design, or pre-meditated killing of pre-selected individuals, had gone through many historical phases crossing just as many different attitudes towards their lawfulness. In this regard it may be noticed that history did not follow an evolutive path conclusively inclined towards an ever coherent narrowing or, to the contrary, broadening approach to their legitimacy.

Thus while the rather permissive stance towards killings by design that appears to shine through Biblical narrations faced a marked reshaping in ancient and classical Greece, at the same time it had an opposite evolution in the Asian continent, where a theory of an all-out extermination of high value targets both at peace and wartime became the official policy of the Indian empire. Again, pre-planned killing of enemies was forbidden in late-antiquity Rome regardless of the means employed to perform the deed but the Romans themselves then assumed a more liberal custom towards such practice from the formation of the Empire onwards, admitting assassination as a generally lawful practice, except when perpetrated by treachery or poison. Such fluctuating considerations on the lawfulness of killings by design persisted for centuries and so did the resort to such technique in practice.

Nevertheless a few principles started to consolidate and at the beginning of the XIX century when some targeting rules seemed to have become firmly established. First of all, differing from the past, attacks exemptions started coming

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238 *Ibidem*: "Le refus qu'on lui fait de la vie, n'est point une suite naturelle de la Guerre, c'est une punition de son crime ; punition que l'offensé est en droit d'infliger".

into being for certain classes of persons: not everybody bearing citizenship of one of the belligerent countries or residing in their territories could have been legitimately attacked, either with pre-planned, targeted violence or with any other technique. Clerics and women, above all, were to be exempted from attacks and civilians in general could not be subjected to any violence[239]. Similarly, the prohibition to deprive prisoners of war of their lives had acquired the status of a general rule of the law of armed conflict[240]. Finally combatants could not have been made object of attack once *hors de combat*, *i.e.* even persons directly involved in hostilities, once become defenceless due to wounds or sickness started to enjoy protection from direct attacks. The same protection from violence applied to those who had disengaged from belligerent activities after having expressed their willingness to surrender.

Secondly, but in a way somehow related to the latest category of non-targetable individuals just recalled, it should be noticed that at the beginning of XIX century poisoning was universally banned. Such prohibition is particularly relevant not only because poisoning was often used as a method to conduct killing by design, but also because of the *ratio* that led to the establishment of such rule, which acquired its customary value first and foremost because poison did not leave any way out to its victims leading to an inevitable death. Precisely these concerns led De Vattel to consider "Mais cet usage [des armes empoisonnées] n'en est pas moins interdit par la Loi Naturelle, qui ne permet point d'étendre à l'infini les maux de la Guerre. Il faut bien que vous frappiez votre ennemi, pour surmonter les efforts: Mais s'il est une fois mis hors de combat, est-il besoin qu'il meure inévitablement de ses blessures ?"[241].

The same reasoning may be applicable to any pre-planned killing of a pre-selected person in and by itself. As a matter of fact, while a few jurists hinted more or less obviously at such solution, a general rule in this terms cannot be said to have been established at the time. Nonetheless, a general rule of a customary nature strongly limiting the possibility to assassinate an enemy had indeed come into force and circled around the concept of treachery. While it was deemed in general allowable to kill a pre-selected enemy by design, such plot could not entail a breach of the victim's confidence or else it would have been conducted with treacherous means and would have been unlawful. The concept of treachery was stretched so far as to cover quite a wide range of conducts: thus, an assassination could not have been

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239 Note in this connection that it was however object of debate whether civilians who took up arms could have been targetable inasmuch as they acquired *de facto* combatant status or else, if they were to be captured and treated as common criminals.

240 Note that those killed after being captured because of the atrocities they had previously committed were deprived of their lives only as a measure of law enforcement due to their grave breaches of the laws and customs of war.

241 Emmerich De Vattel, *Le droit de gens*, *supra*, Vol. II, B. III, Ch. VIII, § 156, p. 129.

lawfully perpetrated through the employment of traitors or professional assassins and through the services of people bound to the victim by a duty of good faith. Putting a price on the head of the victim and outlawry of enemies were equally deemed to be treacherous means.

These rules, humanitarian in nature, were paralleled by an ever increasing consideration of the value of human life. It is no surprise that in the XVIII century the German philosopher Immanuel Kant placed assassination among those dishonourable stratagems that States shall absolutely refrain from adopting during war: "It follows that a war of extermination [*i.e.*, large-scale employment of assassination], which can wipe out both parties and all justice, can lead to 'perpetual peace' only in the vast burial ground of the human race. Such a war, therefore, must be absolutely forbidden, as must any activities that lead to such a war. The examples that I cited in my statement of article 6 come under this ban, because they do inevitably lead to a war of extermination. [...] Articles 1, 5, and 6 are of the strict kind that hold regardless of circumstances, demanding to be acted on right away"[242]. Such humanitarian standing indeed echoed Kant's well known *formula* that human beings are to be treated as ends in themselves and not as mere means, as opposed to utilitarian conceptions purporting the contrasting view according to which the good of private individuals may be expendable for the "greater" good of society. As a matter of fact a juxtaposition of utilitarianism and humanitarianism might turn out to be excessively rigid: as we have seen through references to the works of Kautila first and Thomas More then, a utilitarian approach may indeed be driven by humanitarian intentions or at least it may reach acceptable humanitarian effects. It is however the struggle between humanitarian and utilitarian conceptions of the value of life that gives rise to interpretive problems still vivid in the legal discourse concerning nowadays international human rights law standards[243].

In this connection it shall be borne in mind that international law had nothing to say about individual rights during peacetime at least until the creation of human rights law around one and a half century later. In the absence of a specific international legal framework on human rights, every consideration inherent to the issue of killings by design stemmed from the duty imposed on those who performed such killings rather than on the rights of actual or potential victims. Things were

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242 Immanuel Kant, *Toward Perpetual Peace: A Philosophical Sketch*, 1795, Art. 6: "No state during a war is to permit acts of hostility that would make mutual confidence impossible after the war is over—e.g. the use of assassins and poisoners, breach of capitulation, incitement to treason in the opposing state".

243 See for an example the analysis conducted by the German Bundesverfassungsgeright in its decision of 15 February 2006 on the German Aerial Security Law (*Constitutional Complaints of Dr. H. and Others against the Aviation Security Act - German Aerial Security Law case*) and the significance to this end of the so called "trolley problem"(to this end see Juditg Jarvis Thomson, *The Trolley Problem*, in *Yale Law Journal*, New Haven, 1985).

however different within domestic systems whereby private persons already enjoyed a certain if limited degree of civil liberties or rights depending on national legislations, constitutional *apparati*, and enforcement practices. The one very specific instance where international law already dealt with the way public powers could employ targeting techniques against private persons during peacetime was related to the issue of *hostes humani generis.* In this case, as we have seen, the recently-born international community started developing the principle of universal jurisdiction: pirates and other similarly considered categories of renegades could be punished by any nation (*rectius,* State) wherever they were found, regardless of considerations related to their nationality, to their victims' nationality or to the *locus commissi delicti*. It was widespread practice among States to slain such persons wherever they were found. As underlined by Grotius[244], such State practice, however unpunished, was not exempted from blame and could not be considered entirely lawful. As a matter of fact, the principle of universal jurisdiction implied an extraterritorial application of otherwise strictly domestic law enforcement models. In the XVII, XVIII and XIX centuries the capital punishment was often resorted to as the established sanction for a wide range of conducts. As a matter of fact, it was common for many national courts to issue sentences legitimizing everybody to kill a certain renegade as well as for executive authorities to issue standing orders legitimizing everybody to fetch a criminal "dead or alive". Although these orders were executed within and outside national boundaries, what most matters in this connection is that these practices fell within a framework of law enforcement and even though renegades and pirates were defined as *hostes, i.e.* as enemies, they were never considered as targetable combatants or fighters, but as simple criminals who should have been prosecuted, captured or, eventually, killed in conformity with a sentence or a standing executive order, a practice that nowadays would most certainly breach States' human rights obligations. Interpreting these practices as an historical precedence that, transposed to nowadays international law, *mutatis mutandis*, would allow for the targeted killing of suspected terrorists without further ado amounts therefore to a significant misrepresentation.

[244] See *supra*, p. Ch. I, para. 2, sub-para. 2.7(d).

3. DEFINING ASSASSINATION AND TARGETED KILLING

(1) The Role of Assassination in the First Codifications of the Laws of War; (2) The Attainment of Customary Status; (2.a) Prohibition of Assassination as a General Rule of International Law; (2.b) Searching for Content; (2.c) Peacetime v. Wartime Assassination; (3) Murder or Assassination?; (4) What Makes an Assassination: Treachery, Perfidy or Pre-Meditation? (5) Defining Targeted Killing.

According to some authors, the premeditated killing of a pre-selected person in times of conflict has been considered a lawful practice since time immemorial[245]. As we have seen in the section above, this conclusion seems, to say the least, seriously inaccurate[246]. The pivotal works of Ayala, at first, and then Gentili, Grotius and De Vattel, among others, have reported and shaped the gradual development of an emerging consensus in the international community regarding the unlawfulness of at least some kind of pre-planned killing of selected persons. In particular, all these authors reported that, *ad minima*, "assassination" was strictly forbidden by the laws of war of their times.

3.1. The Role of Assassination in the First Codifications of the Laws of War

The secular genesis of a customary rule of international law against assassination found its coronation in Section IX of the so called *Lieber Code*[247]. Regarded by many as one of the most significant national codifications of the laws of war in the whole history of international law[248], the *Lieber Code* was not in and by

[245] To this end see, *inter alia*, Louis Rene Beres, *Assassinating Saddam Hussein: The View From International Law*, in *Indiana International and Comparative Law Review*, Indianapolis, 2003, pp. 847- 851comparing assassination to tyrannicide; Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: the Case of Israel*, *supra*, p. 323, suggesting that assassination constitutes a legittimate mean of self-defence.

[246] See *supra*, Ch. I, para. 2, sub-paras. 2.6-2.8.

[247] *General Orders No. 100, Instructions for the Government of Armies of the United States in the Field* (hereinafter, *Lieber Code*), promulgated in Washington on 24 April 1863. Note that the name *Lieber Code* pays due recognition to the American-German legal scholar who actually drafted the code, Francis Lieber.

[248] To this end see, inter alia, Theodor Meron, *War Crimes Law Comes of Age: Essays*, Oxford, 1998, p. 132; Marco Basile, *International Law as American History*, in *Harvard International Law Journal*, Harvard, 2013, p. 138; and, in general, Mark Weston Janis, *Lieber, Field, and Wharton: The Science*

itself a legally binding document at the international level, as it was a General Order promulgated by Abraham Lincoln with the aim of governing the conduct of U.S. soldiers during and after the American Civil War. Nonetheless, it held particular value for international law since the very date of its promulgation, being commonly understood as the first thorough and trustworthy codification of the laws and customs of war[249]. Perhaps even more significantly, such codification is also commonly considered as a milestone due to its influence on the following evolution of the international law of armed conflicts[250].

The *Lieber Code* explicitly proscribed assassination in the harshest terms: "The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism"[251]. In addition to the quoted provision, in a separate and yet related article, the *Lieber Code* stated: "While deception in war is admitted as a just and necessary means of hostility, and is consistent with honourable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them"[252].

In line with the lengthy evolution of the ban on assassination under international law, the *Lieber Code* overtly linked assassination to the proscription of outlawry. In addition, it strictly forbade treacherous and clandestine attempts to injure and, *a fortiori*, kill enemies. It is important to underline that such prohibition was motivated by the very danger of such attacks, in accordance, once more, with the very rationale that had led in previous centuries to the first restrictions to the use of certain weapons, among which crossbows, ballistae and, ultimately, poison[253].

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of International Law, in Mark Weston Janis, *America and the Law of Nations 1776-1939*, Oxford, 2010.

249 See accordingly, inter alia, Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, in P*roceedings of the Annual Meeting (American Society of International Law)*, 2001, pp. 112-115; ICRC, Treaties and Documents, available at www.icrc.org;

250 See accordingly, *inter* alia, Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, in Michael N. Schmitt, *Essays on Law and War at the Fault Lines*, *supra*, p. 302. In general, on the influence of the *Lieber Code* on the following evolution of the laws and customs of war see, *inter alia*, Richard Shelly Artigan, *Lieber's Code and the Laws of War*, Chicago, 1983 and Paul Finkelman, *Francis Lieber and the Modern Law of War*, in *The University of Chicago Law Review*, Chicago, 2012, pp. 2071 – 2132.

251 *Lieber Code*, *supra*, art. 148.

252 *Lieber Code*, *supra*, art. 101.

253 See *supra*, Ch. I, para. 2, sub-paras. 2.3-2.8.

The reason why the use of treachery was not placed under the section dedicated to assassination should probably be traced to the fact that such provision has a broader meaning: it does not solely refer to treachery used in causing an enemy's death but, in general, to all treacherous attempts on the enemies' physical integrity. In spite of this systematic attire, the norm against assassination emerging from the *Lieber Code* seemed to embrace both killings perpetrated by treachery and killing perpetrated following the declaration of an enemy's outlawry.

Just a few years after the promulgation of the *Lieber Code*, a conference of 15 European States was held in Brussels with the view of reaching an international agreement on the laws and customs of war and adopt an international convention on the issue. The so called "*Brussels Declaration*"[254] was never ratified. Nevertheless, it represented a fundamental step for the adoption of the *Manuel des lois de la guerre sur terre* (hereinafter, *Oxford Manual*) in 1880[255] and, together with the latter, it placed the basis for the adoption of the Hague Conventions of 1899 and 1907[256].

The *Brussels Declaration* did not make any express reference to assassination. At least, it did not label as assassination any specific conduct. Nonetheless, in line with the *Lieber Code*, it forbade the use of poison and poisoned weapons as a means of injuring enemies and, most importantly, it prohibited "murder by treachery of individuals belonging to the hostile nation or army", besides condemning any denial of quarter or "making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges […]"[257]. In fact, the *Brussels Declaration* represented a first attempt of codification at the international level of the norms enshrined in the *Lieber Code*[258].

The *Oxford Manual* made the linkage between treachery and assassination more explicit. While not dedicating a specific section to assassination itself, it indeed provided as follows: "It is forbidden (a) To make use of poison, in any form whatever; (b) To make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender; (c) To attack an

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254 *Project of an International Declaration concerning the Laws and Customs of War* (hereinafter *Brussels Declaration*), Brussels, 27 August 1874.

255 Institut de Droit International, *Manuel des lois de la guerre sur terre* (hereinafter *1880 Oxford Manual*), Oxford, 1880.

256 To this end see, inter alia, ICRC, *Treaties and Documents*, available at www.icrc.org and Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, in Michael N. Schmitt, *Essays on Law and War at the Fault Lines*, The Hague, 2012, p. 302.

257 *1874 Brussels Declaration, supra*, Arts. 12 and 13(b),(d) and (f).

258 Institut de Droit International, *Examen de la Déclaration de Bruxelles de 1874*, The Hague, 1875, section III.

enemy while concealing the distinctive signs of an armed force; (d) To make improper use of the national flag, military insignia or uniform of the enemy, of the flag of truce and of the protective signs prescribed by the ' Geneva Convention"[259].

As easily noticeable, no thorough definition of assassination can be inferred by either of the aforementioned instruments[260]. What can be surely deducted, however, is that treacherous conducts leading to the killing of a designated individual were deemed to generate an assassination. Contrary to the *Lieber Code*, none of these instruments made reference to outlawry of enemies. Avoiding any express mention of outlawry, however, did not entail an exclusion of such conduct from those that would qualify a killing as assassination. To the opposite, as already happened in the past[261], such omission may very well have meant the inclusion of outlawry within the broader notion of "treachery" itself.

3.2. The Attainment of Customary Status

a) Prohibition of Assassination as a General Rule

Following the path traced by these instruments, the *1907 Convention (IV) respecting the Laws and Customs of War*[262] and, especially, the annex to such treaty (hereinafter *Hague Regulations*)[263], prohibited "to kill or wound treacherously individuals belonging to the hostile nation or army"[264]. The provisions enshrined in the *Hague Regulations* bear particular importance as they are still legally binding for every State, having attained the status of customary rules of international law[265].

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259 *1880 Oxford Manual*, *supra*, art. 8.

260 Similarly, the *Manuel des lois de la guerre maritime dans les rapports entre belligérants*, adopted by the Institut de Droit International in its session of 1913, held in Oxford, avoided to define assassination, rather making references to treachery, perfidy and barbarous acts. To these end see arts. 14 - 17 of the mentioned Manual.

261 See *supra*, Ch. I, para. 2, sub-paras. 2.6-2.8.

262 *Hague Convention (IV) respecting the Laws and Customs of War* (hereinafter *Hague Convention IV*), The Hague, 18 October 1907.

263 *Regulations concerning the Laws and Customs of War on Land, annexed to Hague Convention IV* (hereinafter *Hague Regulations*), The Hague, 18 October 1907.

264 *Hague Regulations*, *supra*, Art. 23(b).

265 International Military Tribunal, Nuremberg, *Judgment and Sentences*, 1 October 1946, reprinted in 41 *American Journal if International Law*, Washington, pp. 248 – 249. The International Military Tribunal for the Far East, established in Tokyo on 19 January 1946, took the same stance in 1948. To this end see also ICRC, *Treaties and Documents*, at www.icrc.org.

Once more, the lack of direct reference to assassination did not entail the abandonment of such legal category. All to the contrary, art. 23(b) of the *Hague Regulations* has traditionally been understood as outlawing exactly assassination. While making clear that "[art. 23(b) of the Hague Regulations] obviously does not preclude lawful attacks by lawful combatants on individual soldiers or officers of the enemy", the *U.S. Air Force Pamphlet* as well as the *U.S. Army Manual* state that such norm does forbid "assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive'"[266]. In line with such reading, it has been correctly pointed out that art. 23(b) of the Hague Regulations "prohibits any treacherous way of killing and wounding combatants. Accordingly: no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted"[267].

As a matter of fact, even in the absence of any specific reference to assassination in international conventions, at the beginning of the XX century the unlawfulness of such practice was so certain that it was considered as peremptory as the ban on poison and the prohibition of torture. In this view, the English scholar and Late Principal Assistant Secretary at the English Air Ministry James Molony Spaight affirmed: "the most imperative military necessity could not justify the use of poison or the torture (inhuman treatment) of a prisoner of war, or assassination"[268].

The lack of specific normative definitions of assassination persisted in the following instruments of international law related to the laws of armed conflict. The label "assassination", as such, was not used to define any specific conduct under the *1949 Geneva Conventions*[269] as it was not employed under the *1907 Hague Conventions*[270]. Similarly, the *1977 Protocols Additional to the Geneva*

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266 Department of the Army Field Manual, *The Law of Land Warfare* (herein after *1956 US Army Manual*), 10 May 1956, Art. 31.

267 Lassa Oppenheim, *International Law, Vol. II, Disputes, War and Neutrality*, London, 1952, p. 341.

268 James Molony Spaight, *War Rights on Land, supra*, p. 8.

269 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (hereinafter *Geneva Convention I*); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (hereinafter *Geneva Convention II*); *Convention (III) relative to the Treatment of Prisoners of War* (hereinafter *Geneva Convention III*); *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (hereinafter *Geneva Convention IV*), Geneva, 12 August 1949.

270 Accordingly, see, inter alia, Jason D. Söderblum, *Time to Kill? State Sponsored Assassination and International Law*, Canberra, 2004, p. 6; Iran Human Rights Documentation Center, *Condemned by Law: Assassination of Political Dissidents Abroad*, New Haven, 2008, p. 5.

Conventions[271] avoided mentioning assassination as an autonomous legal category. Establishing a certain link to Art. 23(b) of the *Hague Regulations*, *Protocol II Additional to the Geneva Conventions* does forbid to kill, injure or capture enemies resorting to perfidy[272]. The norm at hand then goes on to provide examples of perfidious conducts falling within its proscription. It should be noted, however, that the concept of perfidy under Art. 37 of *Protocol II Additional to the Geneva Conventions* is probably construed in a narrower fashion than the notion of treachery under Art. 23(b) of the *Hague Regulations*[273].

The consequence is that, at present, there is no "black-letter" prohibition of assassination under international law. The lack of conventional provisions, however, does not equate to a normative vacuum. That is to say, the fact that a specific prohibition of assassination is not enshrined in any international treaty currently into force does not in itself imply that the customary international norm against assassination has been superseded. Indeed, the codification of the prohibition of perfidy in *Protocol II Additional to the Geneva Conventions* has not even outdated the broader prohibition of treachery[274]. To this end, it should be noted that the *Rome Statute of the International Criminal Court* (hereinafter *ICC Statute*)[275] while once more avoiding reference to assassination *per se* yet proscribes "killing or wounding treacherously individuals belonging to the hostile nation or army"[276] as well as

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271 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (hereinafter *Protocol I Additional to the Geneva Conventions*); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (hereinafter *Protocol II Additional to the Geneva Conventions*), 8 June 1977.

272 *Protocol I Additional to the Geneva Conventions, supra*, Art. 37: "Prohibition of Perfidy: It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: a) the feigning of an intent to negotiate under a flag of truce or of a surrender; b) the feigning of an incapacitation by wounds or sickness; c) the feigning of civilian, non-combatant status; and d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict".

273 Accordingly see Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, in *International Review of the Red Cross*, Geneva, December 2006, pp. 900 and 901. To this end, it shall be underlined that most of the acts nowadays deemed to fall within the notion of perfidy were indeed enumerated as alternative and actually additional to treachery under both the *1874 Brussels Declaration*, *supra*, Arts. 12 and 13 and the *Oxford Manual*, *supra*, art. 8.

274 On the relationship between perfidy and treachery see in higher detail *infra*, Ch. III, para. 2.

275 *Statute of the International Criminal Court* (hereinafter *ICC Statute*), Rome, 1 July 1998, entered into force on 1 July 2002.

276 *ICC Statute*, Arts. 8(2)(b)(XI) and 8(2)(e)(IX).

"declaring that no quarter will be given"[277] in both international and non-international armed conflicts[278].

Perhaps even more significantly, a good deal of State practice supports the conclusion that numerous conducts traditionally associated with assassination are still strictly forbidden under the current laws of war or, at least, that they have been so prohibited until very recently[279].

As a matter of fact, assassination as an autonomous legal category is expressly proscribed in a number of military manuals[280]. Similarly, the reference to the prohibition of assassination in international legal documents and official statements issued by States' representatives[281], as well as the lack of any official contrary practice[282] seem to conclusively confirm that the long-standing international law prohibition of assassination has been in place until very recently, if it is not valid today[283].

b) Searching for Content

The main problem with assassination is that the lack of an instrument unequivocally dealing with this matter at the international level, be it of a *per se* binding character or even of a mere declarative nature, makes it exceptionally hard to reach a univocal definition of the exact scope and purpose of the prohibition.

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277 *ICC Statute*, Arts. 8(2)(b)(XII) and 8(2)(e)(X).

278 On the distinction between international and non-international armed conflicts and the repercussion of such distinction upon the applicable legal regimes see *infra*, Ch. II, para. 2.

279 To this end see, *infra*, Ch. IV., paras. 1 and 2.

280 To this end see, *inter alia*, besides the already mentioned *US Army Manual*, the military manuals of New Zeland, Australia, Canada, Israel and Switzerland. Accordingly, see Nils Melzer, *Targeted Killing in International Law*, *supra*, pp. 48 and 49 and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, *Volume I: Rules*, Geneva, 2006 and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, *Volume II: Practice* (both referred to hereinafter as *ICRC Study on Customary International Humanitarian Law*), Rule 65. Notably, the ICRC has set up a database linked with the study which publicly accessible on the internet and is constantly updated. In the rest of this work, reference will be made to both the *Study* itself and, where updated practice or rules may be found, to the mentioned database. The database is accessible at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home, Rule 65. A thorough analysis of the content of several military manuals and their interpretation in relevant State practice will be conducted *infra* under Ch. II – Ch. IV.

281 See *infra*, Ch. IV.

282 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 65.

283 Note that it is one of the scopes of the present research to assess whether or not the evolutions witnessed by the laws of war in these last years, especially in relation to targeting practices, may have had an impact on the validity of the rule against assassination. The question thus opened here will only find a (tentative) answer in the conclusions of this work.

Since current black-letter international law provides no precise definition of assassination[284], it has been suggested that "Assassination can be defined very broadly or very narrowly. Depending on the breadth of definition, assassination could define any intentional killing, or it could define only murders of state leaders in the narrowest of circumstances"[285]. Between these two ends of the *spectrum* lay the most diverse conducts and identifying which of them really fall within the scope of today's prohibition of assassination is crucial: depending on the width of the notion of assassination a conduct may be strictly forbidden or, all to the contrary, always allowed. This is distinction that bears extreme practical consequence as it determines, in turns, who gets to live and who gets to die. Moreover, the absence of a precise definition obviously facilitates the elusion of legal restrictions simply by an *ad hoc*, *a posteriori* redefinition of the borders of what is lawful and what is unlawful, since States may (and do) appositely resort to practices falling in grey areas and in between other more explicit limitations to the use of force until they may take advantage of definitional *lacunae.*

It has been noted that, in general, the word assassination conveys the idea of politically motivated killings of high ranking State officials or other renowned persons[286]. Such definition, even when restricted as to embrace solely killings perpetrated outside proper legal guarantees, is of an historical character, it can be assimilated to the every-day meaning of "political murder" and does not bear any particular legal significance. This is not to say that this conclusion has never been reached in legal literature: some authors, in fact, have defined assassination as "the targeted killing of a prominent person", specifying that "the focus of the definition is who is intentionally killed, not why, where, how or by whom"[287]. Framed in this guise, assassination would actually embrace a broad range of conducts, being different from a general targeted killing only inasmuch as it applies only to so called "high value targets". As those who stand by this construction concede themselves, however, such definition is not of a legal nature but it rather refers to "instances [that assassination] is understood to encompass in the common everyday use of the word"[288].

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284 Accordingly see, *inter alia,* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Washington, 2 November 1989, p. 1.

285 Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order12,333: A Small Step in Clarifying Current Law*, in *Military Law Review*, Charlottesville, 2002, p. 3.

286 Iran Human Rights Documentation Center, *Condemned by Law: Assassination of Political Dissidents Abroad*, *supra*, p. 5. Accordingly, see also, in general, Oscar Jaszi and John D. Lewis, *Against the Tyrant*, *supra* and Franklin L. Ford, *Political Murder, From Tyrannicide to Terrorism*, *supra.*

287 Stephen Knoepfler, *Dead or Alive: The Future of U.S. Assassination Policy Under a Just War Tradition*, in New York University Journal of Law and Liberty, New York, 2010, p. 464.

288 Stephen Knoepfler, *Dead or Alive: The Future of U.S. Assassination Policy Under a Just War Tradition*, *supra,* p. 460. As a matter of fact, in a common understanding "assassinate" is meant as "to murder by sudden or secret premeditated attack, usually for political or religious reasons or to injure

In fact, scholarly researches and analysis conducted on the subject have come to the most disparate conclusions as to the real definition of assassination. It is in a way quite oxymoronic, from a strictly legal standpoint, to assess that something is forbidden before assessing what that something even is. It has been sharply noticed, in line with this critique to the whole discourse on assassination, that in a proper analysis of this notion one should privilege an ontological rather than a deontological standpoint: "Our definition ought to reflect what we understand assassination to be, not what we think it ought to be"[289]. Accordingly, it is suggested, one should first construe a comprehensive definition of assassination and only later on assess which of the conducts falling within such notion, if any, are proscribed under international law. This, in turn, implies that, at least theoretically, there could be lawful as well as unlawful instances of assassination.

Although this may seem, at first glance, a reasonable enough starting point for a proper analysis, at the current state of the art what we certainly know is the exact opposite. That is to say: we do know that international law forbids assassination[290]. Or, at least, that it has forbidden assassination and every conduct it embraces for centuries, until very recently[291]. What we do not know, instead, is what exactly assassination has been meant to be and what it is right now.

c) Peacetime vs. Wartime Assassination

In general, the first due remark on the subject cannot depart from the consideration that the same terminology has been often used to identify two very different phenomena. That is, "assassination" has often been considered to identify killings during both peace and war-time[292]. It has been carefully noted that, depending on the surrounding circumstances, however, the same term takes up very different meanings[293]. A number of scholars have then tried to reach a

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or destroy unexpectedly and treacherously". To this end see *Longman Dictionary of the English Language*, Essex, 1984, p. 85.

289 Stephen Knoepfler, *Dead or Alive: The Future of U.S. Assassination Policy Under a Just War Tradition*, *supra*, p. 467. Note that the author mentioned shortly after states "for now, let us put normative and legal constraints out of our mind and define what assassination is", failing to see that "what assassination is" depends exactly on normative and legal constraints.

290 On the existence of a customary law rule against assassination, besides the arguments already adduced above, in Ch. I, para. 2, see *infra*, Ch. IV, paras. 1 and 2.

291 To this end see *infra*, Ch. IV, para. 3.

292 Nils Melzer, *Targeted Killing in International Law*, *supra*, pp. 46 and 47 and Stephen Knoepfler, *Dead or Alive: the Future of U.S. Assassination Policy Under a Just War Tradition*, *supra*, p. 460.

293 Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, in *Law and Public policy Journal*, Ithaca (U.S.A), 1992, p. 291, arguing that "Americans have an aversion to the word "assassination." Visions of President Kennedy in Dallas come to mind. Unfortunately, the applicable

comprehensive definition of peace-time assassination as well as a comprehensive definition of war-time assassination, identifying as a constitutive element of the former the quality-status of the victim as a "high value target" or, in a somehow narrower manner, as a political figure[294].

Such an effort, it is submitted, is not however strictly needed. In fact, it is argued here, what is called by some "peace-time assassination" is no assassination at all, under a strictly legal point of view. From an international law perspective, indeed, there is no need to postulate the existence of a self-sufficient category of "peace-time assassination" as differing from murder, simply because international law does not attach any particular consequence to the killing of a political figure, protected person for the purposes of the *New York*

Convention on Protected Persons[295] or, generally speaking, "high value targets". In times of peace, in fact, States have an obligation to grant the right to life to anybody without distinction and, at the same time, they bear an obligation to refrain from any arbitrary use of lethal force. That is, they must first of all refrain from extra-judicial executions and, at the same time, when someone is arbitrarily deprived of his or her life, States have an obligation to conduct prompt, *ex officio,*

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legal standards get lost in rhetoric and emotional reactions. The intentional killing of any public official become the shorthand definition. This definition is inaccurate. The use of simplistic generalizations muddles the debate because the opposing sides are not talking about the same thing". Accordingly, see, *inter alia,* Michael N. Schmitt *State-Sponsored Assassination in International and Domestic Law, supra,* p. 285 and Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine, supra*, p. 306.

294 Michael N. Schmitt *State-Sponsored Assassination in International and Domestic Law, supra,* pp. 291-301, arguing that the alleged category of "peacetime-assassination" is an illegal offense under international law, involving the targeting of a particular individual and characterized as a deprivation of life of a transnational nature with political overtones. Accordingly, see also, *inter alia,* David Newman and Tyll Van Geel, *Executive Order 12333: The Risks Of A Clear Declaration of Intent*, in *Harvard Journal of Law & Technology*, Harvard, 1989, p. 434, arguing that "assassination refers to the intentional killing of a high-level political figure, whether in power or not. The assassination must, for our purposes, be authorized or condoned by a responsible official of a sovereign State as an intentional State action expected to influence the policy of another nation"; Steven R. David, *Israel's Policy of Targetd Killing*, in *Ethic and International Affairs Journal*, Cambridge, 2003, p. 112, defining assassination as the "Killing of a specific individual who is politically prominent and who is targeted because of that prominence […] It involves treacherous means […] when the countries involved are at peace". Bert Brandenberg, *Legality of Assassination*, in *Virginia Journal of International Law,* Charlottesville, 1987, p. 55; Mark V. Vlasic, *Assassination & Targeted Killing - a Historical and Post-Bin Laden Legal Analysis*, in *Georgetown Journal of International Law*, Washington D.C., 2012; David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?*, in *The European Journal of International Law*, Firenze, 2005, pp. 173 and 200: "It seems to me that the term 'assassinations' should be reserved for deliberate killing of political figures, rather than killing of suspected terrorists".

295 *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*, New York, 14 December 1973.

thorough, independent and impartial investigations, to prosecute those responsible, to try and sanction them in accordance with their domestic legal systems[296]. The difference in the treatment of the perpetrators as assassins (properly so called) or murderers will therefore only be dependent upon national qualifications of the underlying crime[297].

This marks a stark difference with assassination in wartime since this latter category may in many cases actually draw the line between a lawful killing and an unlawful one. As it appears, this entails a crucial consequence: it is indeed forbidden to kill by assassination a person who would otherwise be a legitimate target. Let us imagine for a moment that a sniper belonging to the armed forces of a State engaged in an armed conflict aims at an enemy combatant and kills him on the battlefield. In this case, it could be concluded with a certain degree of confidence that the killing does not amount to a violation of the laws of war and the deprivation of the enemy's life will be under such circumstances a legitimate one. However, if the former soldier were to kill the latter while feigning civilian status and being aided by him, the killing could most probably be defined as assassination and would therefore be unlawful[298].

As a consequence, the real distinction should not be drawn between peace-time assassination and war-time assassination. It seems more appropriate, instead, to state that the term assassination only has one proper legal meaning in the realm of international law: as an autonomous legal category, assassination exists only during war-time. Besides this technical understanding of the term, there is, admittedly, a widespread a-technical use of the label "assassination", most commonly understood as the murder of political or other well-known figures. This latter understanding serves solely descriptive purposes and has no consequences whatsoever in the realm of international law.

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296 On the obligation of States under a human rights law paradigm see in higher detail *infra,* Ch. II, paras. 4-6.

297 Those who argue for the existence of a category of peace-time assassination, such as Professor Schmitt in his *State Sponsored Assassination in International and Domestic Law, supra,* pp. 291-301, usually does so making reference to the *Charter of the Organization of African Unity* (hereinafter OAU Charter), Addis Abbeba, 25 May 1963, to the *New York Convention on Protected Persons, supra,* to extradition treaties and State practice in general. However, it shall be noticed that the *New York Convention on Protected Persons* never mentions assassination explicitly but it rather refers to "murder, kidnapping or other attack". The *OAU Charter* exclusively refers to "political assassination", condemning it in a firm but generic fashion. As conceded by Professor Smith (*State Sponsored Assassination in International and Domestic Law, supra,* p. 295) himself, then, extradition treaties vary widely, most of them considering assassination as a subset of murder or an aggravated form of such crime. This is also confirmed by State practice: domestic courts have always treated assassination as a form of murder even though, sometimes, with aggravated sanctions.

298 On the relationship between assassination and other kinds of unlawful killings see *infra,* Ch. I, para. 3, sub-paras. 3.3-3.5. On feigning civilian status as a form of perfidy see *infra,* Ch. II, para. 2.

In spite of the many differences in definition reached by scholars researching on the subject, there is a widespread consensus on the characterization of assassination as involving, at the very least, three constitutive elements: a causation of death, intentional and premeditated, at the detriment of a pre-selected individual.

Thus, first of all and quite obviously, an assassination implies in and by itself a loss of life. If the target of the violence does not die, the conduct does not amount to an assassination. Where the force employed was intended to be lethal but the design does not succeed for reasons different from the agent's willingness, we can at most speak of an attempted assassination. When the force adopted was not intended to be lethal at all, the conduct may amount to some other category of crime, even of an international nature, but it will not amount to an assassination.

Moreover, for an assassination to occur the use of lethal force must be intentional. If the target's death is the unintended consequence of the agent's conduct, such episode cannot be characterized as an assassination. Think, by way of example, of a soldier who is attempting to immobilize an enemy and, while doing so, inadvertently hits his head thereby causing his death. This episode would surely not qualify for assassination. Inextricably linked with the element of intentionality is, moreover, that of pre-meditation. As intentionality, indeed, pre-meditation belongs to the subjective element of assassination. Whereas the notion of pre-meditation is in and by itself a rather obscure once, given that its contours and its scope are largely un-defined[299], for the purposes of the present research it is sufficient to consider that it entails a certain degree of pre-planning which must necessarily take place over a certain period of time. While pre-meditation may not require more than a few hours, it should be understood here that it is not to be understood as embracing either reactions, split-second decisions or immediate data elaboration.

Closely linked with the requirement of intent (and even more, perhaps, with that of premeditation) is that of selectivity: the perpetrator's consciousness and intention must embrace at once the use of lethal force and the direction of such force against a specific individual. That is, the victim must be a person chosen to be killed. This implies that the victim of an assassination can actually lose his life alone as well as with other people. What is relevant is that

[299] No notion of pre-meditation may indeed be found in instruments of international law. At the same time, domestic legislations on this issue lead to the most disparate conclusions as to the real mining and scope of premeditation. Notably, even within the same legal system oft times premeditation dramatically changes meanings with the passage of time. For the purposes of this work there is no need to go too far into detail into this subject.

the attack is aimed at killing that person specifically. In this case, other people killed in the attack may be unintended casualties of the action targeting the assassinated person. The opposite, however, is not true.

If a person is killed as a result of an attack that was undertaken for reasons different from the deprivation of life, such attack does not qualify as assassination proper. This is to say, a person that has not been singled out for an attack and that, nonetheless, dies as a result of lethal force used by the offender in pursuit of a different purpose, such as in the framework of a broader military operation, cannot be considered as a victim of assassination. Once more, this does not imply in and by itself that the killing of such person is lawful under either international human rights law or international humanitarian law. However, such killing cannot be qualified as assassination.

This holds true also when the person's death results as an unintended, although foreseeable, consequence of an attack: such instance does not qualify as an assassination due to the lack of univocal directionality of the force employed. In instances of assassination, therefore, the aim of the attack must be the deprivation of the target's life. This, in turns, implies that for a killing to be qualified as assassination any other surrounding circumstance is irrelevant: it does not matter whether unintended casualties resulting from the attempt on the targeted person's life are justified under other principles of international humanitarian law, or if they even are legitimate targets themselves[300]. These may indeed be relevant considerations in the assessment of the overall lawfulness of the operation or lack thereof. But the respect or the violation of further rules of international humanitarian law does not make an assassination a lawful killing, nor *vice-versa*.

In this connection, some doubts may rise, nonetheless, in less clear-cut situations, when intentional lethal attacks are directed against an individual who is believed to be somebody else. In any such case, which may be qualified as an instance of *error in personam*, the agents' intentionality covers both the resort to lethal force and the direction of such force at a selected individual. However, due to a mistake in the selection process, the targeted person is not the one really wanted by the perpetrator[301].

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300 For a distinction between legitimate and non-legitimate targets under international humanitarian law see *infra*, Ch. II, para. III and Ch. V, para. 2.

301 One such episode could perhaps be identified in the killing of the Moroccan waiter in Norway perpetrated by the Cesarea Unit of the Israeli Mossad following the 1972 Munich Olympics. For both further references to this particular episode and the possibility to qualify as assassination killings perpetrated by occupying powers outside the occupied territories see *infra*, Ch. IV.

Before proceeding to the analysis of more controversial features of assassination, a few further specifications are needed.

First of all, it should be noted that personal motives driving the assassin's conduct are irrelevant. The agent's motives shall be kept well divided from the end pursued with the action. While the former, by definition, are what moves the agent, the latter is the objective effect that the agent is willing to pursue through his conduct. The pursuit of a specific end is at the basis of those crimes characterized by an especially qualified subjective element, defined as *dolus specialis*. One such crime is, by way of example, genocide[302]. Under this category, what matters is that the agent's (intentional) conducts are performed as part of a broader plan aimed at the a specific final purpose, that is the extermination of an entire population. In this case, relevance will be place on the agent's intention to perform his deed (*dolus generalis*) and, additionally, on his awareness and willingness to perform such action in the pursuit of a specific purpose (*dolus specialis*). Notably, even under these circumstances, the agent's motives, *i.e.* the intimate reasons that motivate him to his action, remain fully irrelevant.

While it has been pointed out that assassination cannot occur if the agent is driven by personal motives, it seems possible to avoid any reference to such an highly intimate paradigm underlying that, in order to amount to assassination, the killing must be objectively linked with a conflict. It is obvious, then, that a person acting on personal motives, even during war time, is not perpetrating a crime that has ties with the conflict itself and, therefore, he cannot be held responsible for an assassination. As a matter of fact, this conduct is intimately private and escapes the logic of public warfare, that is the only model of warfare acceptable under nowadays international law[303]. International law draws a distinction between conducts of State organs (even when unauthorized or *ultra vires*) and purely private conducts: only the

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302 The *United Nations Convention on the Prevention and Punishment of the Crime of Genocide*, New York, 9 December 1948, Art. 1, defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".

303 Whereas in the past it was generally accepted to conceive of "private wars" next to "public ones" amongst sovereigns (to this end see for instance Hugo Grotius, *De Iure Belli ac Pacis, Libri Tres, supra*, L. I, C. III; on private wars in feudal systems see J. Firnhaber-Baker, *Seigneurial War and Royal Power in Later Medieval Southern France*, in *Past and Present*, Oxford, 2010, pp. 37-76), it is widely uncontroversial that under the current system of international law armed conflicts may only take place between States or states and other organized armed groups short of statehood and nonetheless characterized by a similar degree of organization and structure. To this end see *inter alia* Rotem Giladi, *Francis Lieber on Public War*, in *Goettingen Journal of International* Law, Goettingen, 2012, pp. 447-477.

former may be attributed to a State[304]. *Mutatis mutandis*, if only for these purposes, the same reasoning can be applied in relation to non-state actors taking part to an armed conflict. In the absence of such attribution and, consequently, in the absence of an objective link with an armed conflict, the conduct is to be attributed to the individual agent alone, with the consequence that it would lack at least one of the constitutive elements of assassination. As it appears, therefore, there is no need to inquire into the personal motives which stimulate the agent to conduct an assassination insofar as due attention is payed to the existing links between the killing potentially amounting to assassination and an ongoing armed conflict.

One more issue deserves special attention: according to some, even in times of war a targeted killing qualifies as assassination only if performed against so called "prominent persons". From this standpoint, if the target is not prominent, then the killing is not an assassination, no matter that all other requirements are fully fulfilled[305]. This seems to introduce an excessive restriction on the notion of assassination. First of all, such assessment poses an unjustifiable distinction between "prominent" and "non-prominent" targets, introducing as an element of the conduct a consideration on the alleged "importance" of a person and thus positing that some people's lives are more important than others. On the other hand, it may be argued that if a person is individually targeted, then the agent must have a certain interest in his or her killing and therefore such person is inherently prominent. Finally, nothing in the evolution of the laws of war since the *Lieber Code* seems to hint at such conclusion. Nor does this conclusion appear in line with the considerations of the first authors who have introduced assassination in the legal discourse at the international level: even those who justified the prohibition of assassination on the basis of a supposed "holy value" of kings' and general's lives, indeed, were not saying anything different than what we say today when suggesting that the right to life is a "foundational"[306] or "supreme"[307] right and every single individual is therefore entitled to a dignified life, no matter how "prominent" the person is, thanks to the evolution of constitutionalism first and international human rights law later on[308].

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304 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, 2001, Art. 4, § 13.

305 Stephen Knoepfler, *Dead or Alive: the Future of U.S. Assassination Policy Under a Just War Tradition*, *supra*, p. 477.

306 ACmHPRs, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, Banjul, 2015, Preface;

307 Christof Heyns and Thomas Probert, *Securing the Right to Life: A Cornerstone of the Human Rights System*, in *EJILTalk!*, 11 May 2016.

308 *ACmHPRs, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, Banjul, 2015, paras. 3, 6, 11 and 43; HRC, *Draft General Comment No. 36 (Article 6: Right to Life)*, UN Doc. CCPR/G/GC/R.36/Rev.2, 2 September 2015, paras. 3, 28 and 52.

As a matter of fact, as much as any reference to the agent's motives, any allusion to the target's prominence or to the political nature of the crime would only be useful for a definition of peace-time assassination, a category that we have seen has no real legal meaning under international law. Actually, those who do consider the victim's prominence to be an element of the crime of assassination are usually the same authors who do not envisage any distinction between war-time and peace-time assassination and therefore need to bring this requirement back into the picture in order to found a general category of assassination applicable to both situations[309].

Thus far it has been observed that assassination surely involves the intentional killing of an individual specifically selected for death. This means that for an act to amount to assassination, the agent's will and consciousness should cover both the action (the use of lethal force) and the subject of the action (the targeted individual). However, such a simple assessment would describe assassination as coinciding with any other kind of intentional killing. What is then that should particularly characterize an assassination besides the agents' *dolus generalis*?

It has already been pointed out that assassination, under an international law perspective, bears significance only insofar as it is perpetrated during wartime. Since assassination must have an objective and material link with an armed conflict, a killing may be qualified as assassination if and only if it is attributable to a State[310] or to an organized armed group[311] within the meaning of international humanitarian law.

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309 See, *inter alia*, Matthew S. Pape, *Can We Put the Leaders of the "Axis of Evil" in the Crosshairs?*, in *US Army War College Quarterly*, Carlisle, 2002, p. 64: "Assassination can be defined as the premeditated and intentional killing of a public figure accomplished violently and treacherously for a political purpose. […] all definitions of the act involve the idea of an illegal killing, a murder of a specific public figure or leader for a political rather than private purpose".

310 In relation to criteria of attribution of unlawful conducts see International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission*, 2001, arts. 4 – 11.

311 The issue of attribution of conducts to non-state actors is particularly problematic under international law and deserves further deepening: as far as non-state actors are concerned, in fact, the problem of attribution has generally been explored in relation to the ties that such State actors may or may not have with State entities, particular reference being made to Arts. 4 and 10 of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (to this end see, *inter alia*, Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, 2006; Miles Jackson, *State Complicity, Non-State Actors, and Attribution*, in *Complicity in International Law*, Oxford, 2015; Marko Milanovic, *State Responsibility for Acts of Non-State Actors: A comment on Griebel and Plucken*, in *Leiden Journal of International Law*, Leiden, 2009, pp. 307-324; Graham Cronogue, *Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors*, in *Duke Journal of Comparative and International Law*, Duke, 2013, pp. 365-388). However, such deepening is outside the scope of the present research. In particular, many difficulties exist in relation to attribution to organized armed groups as the notion itself of organized armed group is not thoroughly defined and, even less so, is their status under international law. To this end see *infra*, Ch. V, para. 2. For the present purpose, therefore, attribution

However, if we were to consider any intentional killing of a selected individual perpetrated by a State or armed group in the framework of an armed conflict as an instance of assassination, our definition would be so broad as to embrace lawful conducts and, as far as the unlawful ones are concerned, conflate assassination with other international crimes, such as, first and foremost, the war crime of murder. As it appears, therefore, the elements outlined thus far do not seem sufficient to reach an accurate definition of assassination as an autonomous international unlawful act. Therefore two crucial questions remain unanswered: a) what makes assassination different from other unlawful killings; b) what makes assassination unlawful.

3.3. Murder or Assassination?

In general, in times of conflict constraints to the use of lethal force are more relaxed than during peacetime. However, combatants remain first and foremost under an obligation to spare the lives of those who are *hors de combat*, they cannot kill medical or religious personnel and they cannot resort to violence against civilians who are not participating in hostilities directly[312]. Any soldier or, generally speaking, combatant, who intentionally kills a person falling within any of the aforementioned categories bears personal responsibility for such action which amounts to the war crime of murder[313] if not, depending on the specific circumstances of the case, to murder as a crime against humanity[314]. The function of the proscription of murder in

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to a non-state actor should be equated to acts put in place by persons *de facto* belonging to such groups.

312 To this end, see *infra*, Ch. V, para. 2.

313 The war crime of murder is sanctioned under art. 8(2)(c) of the *ICC Statute*. Such war crime is characterized by five constitutive elements, namely: "1. The perpetrator killed one or more persons. 2. Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities. 3. The perpetrator was aware of the factual circumstances that established this status. 4. The conduct took place in the context of and was associated with an armed conflict not of an international character. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict". To this end see *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session*, New York, 2002, art. 8(2)(c).

314 The crime against humanity of murder is sanctioned under art. 7(1)(a) of the *ICC Statute.* Such war crime is characterized by three constitutive elements, namely: "1. The perpetrator killed one or more persons. 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population". To this end see *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session*, New York, 2002, art. 7(1)(a).

times of conflict is to protect persons who are not involved in hostilities against unnecessary violence: as these persons do not pose any threat to their enemies, their enemies cannot resort to lethal force against them. As it appears, murder is characterized by the target's death, by the perpetrator's intent to kill him or her specifically, by the fact that the perpetrator is a combatant (or another person taking part to hostilities[315]) and his conduct is therefore objectively linked to an ongoing armed conflict. It does therefore embrace all the requirements set forth above when trying to delineate the scope of application of assassination. The war crime of murder as well as murder as a crime against humanity, however, require an additional constitutive element: a certain use of lethal force qualifies for murder only when it is addressed at protected persons.

This means that the peculiar characterization of assassination is not to be detected in one or more qualifying elements that distinguish it from both the war crime of murder and murder as a crime against humanity. The difference between assassination and murder as a war crime (or as a crime against humanity) is apparent: for one thing, as it has always been framed, the prohibition of assassination is not limited to "illegitimate targets". That is, while the criminalization of murder as a war crime and as a crime against humanity does not impede, in and by itself, to kill an enemy combatant (if not those who are *hors the combat*), the prohibition of assassination proscribes the undertaking of some peculiar kind of killing even against "legitimate targets". As it is, or at least as it has been for centuries, the prohibition of assassination represents a protection extended to every person, regardless of his or her status: nobody can be assassinated, under any circumstance. At the same time, as we have seen, assassination does require some degree of pre-planning, the pre-selection of the target and a qualified intentional element, *i.e.* not mere willingness but pre-meditation. Murder, on the contrary, does not necessitate any of the aforementioned.

What should be clear, therefore, is that assassination is not a *sub-specie* of murder because the constitutive elements of these two sets of crimes do not entirely match: assassination is not a qualified type of murder, it is an autonomous and different limitation to the belligerents' justification to kill during wartime. It should also be clear, however, that the relationship between these two figures is not that simple. Indeed, a conduct may indeed qualify for both murder and assassination or, in other words, a murder can be an assassination. This happens when (and only when) besides meeting all the requirements of murder as a war crime (or as a crime against humanity), the relevant conduct also embraces pre-meditation, pre-planning and pre-selection. Thus, for instance, the pre-meditated killing of a designated person when he is *hors de combat* would surely qualify for murder. At the same time,

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315 See *infra*, Ch. V, para. 2.

however, it would also meet the required constitutive elements of assassination and may consequently be characterized as such.

3.4. What makes an assassination: treachery, perfidy or premeditation?

Since the very origins of the prohibition of assassination, it has been suggested that its distinguishing feature could be identified in treachery[316]. The latter should be understood, to this end, with a breach of a general duty of good faith towards the enemy target[317]. According to this view the prohibition of assassination would not limit the possibility to resort to otherwise lawful means of combat, no distinction being made between the weapons or strategies deployed to carry out the attack. At the same time, such prohibition would not be dependent upon the target's duties or proximity to combat[318].

A related but more restrictive approach holds that what marks the difference between assassination and other types of lawful conduct should be the perfidious nature of such deed[319] and therefore it would be possible to identify assassination with all those killings perpetrated after inviting the confidence and trust of the adversary that no harm will be done to him, just to exploit the situation and proceed to kill him[320] later on. Under this guise, perfidy would be an exacerbated form of treachery and therefore not every single treacherous attempt at an enemy's life would be proscribed in and by itself.

However, it has been rightly pointed out that "the mere fact that treacherous killings may be committed by way of assassination does not necessarily entail that the concept of assassination must be restricted to treacherous killing"[321]. In fact, this

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316 See *supra*, Ch. I, para. 2.

317 Patricia Zengel, *Assassination and the Law of Armed Conflict*, in *Military Law Review*, Charlottesville, 1991, p. 18: "It thus appears that assassination under customary international law is understood to mean the selected killing of an individual enemy by treacherous means. Treacherous means include the procurement of another to act treacherously, and treachery itself is understood as a breach of a duty of good faith toward the victim". Accordingly see, *inter alia*, W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, *supra*, pp. 4 - 7.

318 W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, *supra*, p. 3.

319 *Protocol I Additional to the Geneva Conventions*, *supra*, Art. 37.

320 Joseph B. Kelly, *Assassination in War Time*, in *Military Law Review*, Charlottesville, 1965 p. 102: "assassination must be distinguished from surprise attack by combatants against individuals. Should a resolute soldier steal into the enemy's camp at night, penetrate the general's tent, and stab him, he has done nothing that is not perfectly commendable and violative of no law of war. This distinction explains the essence of the war crime of assassination. It is, in most cases, the selected killing of an enemy by a person not in uniform".

321 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 48.

reading is in line with some codifications of assassination under national military manuals. The *Old British Manual for Military Law,* for example, proscribed as assassination the "killing or wounding of a selected individual behind the line of battle by enemy agents or partisans"[322]. Thus, it seems safe enough to conclude that while not every single assassination necessarily needs to be a treacherous killing, the opposite assertion is valid: every treacherous killing amounts in and by itself to assassination. One commentator has argued that "Time-tested, it is [assassination] the paradigmatic *smart* weapon: identify your prey, hunt him down and kill him"[323]. It is perhaps this dimension of manhunt establishing a parallelism between human beings and preys that is so disturbing in accepting any envisaged lawfulness of practices of assassination. If it is so, if therefore what qualifies a killing as an assassination, making it an unlawful practice, is its characterization as a chase, then elements others than pure treachery or perfidy may come into consideration. After all, national military manuals oft make clear that the prohibition of assassination also embraces outlawry, putting a price on the head of an individual enemy, declaring a person wanted dead or alive[324]. Therefore, it may very well be that a killing be qualified as an assassination by reference to the selectivity process or the agent's premeditation alone.

All of these notions have been alternatively or cumulatively considered as the peculiar elements characterizing assassination during time. Some of them are still explicitly proscribed by conventional instruments into force[325], even though none of them is expressly linked to the prohibition of assassination. Some others, such as premeditation, outlawry and limitations to military operations outside theaters of hostilities, have not been punctually codified as prohibitions or crimes under currently existing international treaties while yet being considered under state practice as elements that may affect the lawfulness of pre-planned attacks against selected individuals.

As it appears, the definition itself of the concept of assassination is the first major obstacle that face those practitioner and scholars who deal with the subject. It largely depends on the interplays of the notions of treachery, perfidy, outlawry and denial of quarter, and even more significantly, of the interpretation given to such notions under current State practice. Only through a careful analysis of the evolution of such state practice, of the interplays between the overlapping regimes of

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322 War Office, *Old British Manual of Military Law, Part III, The Law of War on Land*, (hereinafter *Old British Military Manual*), London, 1958, Section 115.

323 Michael L. Gross, *Assassination: Killing in the Shadow of Self-Defense*, *supra*, p. 99.

324 Accordingly see, *inter alia*, Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 49.

325 Thus, for example, reference has been made above to the prohibition of treachery under Art. 37 of *Protocol I Additional to the Geneva Conventions*, to the prohibition of treachery and denial of quarter under Arts. 8(2)(b)(XI), 8(2)(e)(IX), 8(2)(b)(XII) and 8(2)(e)(X) of the *ICC Statute*.

international humanitarian law and human rights law and, ultimately, of the current trends of legitimization of similar if not identical conducts, shall we see whether the concept of assassination is really so extremely narrow as some suggest[326] and whether its prohibition is not still into full vigour, after all.

3.5. Defining Targeted Killing

It is perhaps this lack of definitional clarity that has induced the international community to seek for alternative *formulae* in order to identify conducts that would look *prima facie* as assassination.

Some authors have alleged that the very same action may alternatively be defined as "named killing", "targeted killing", "preventive killing" and "extrajudicial executions", among others[327]. However, most of these labels have been used in a rather vague fashion. Indeed, one should carefully refrain from a terminological conflation of differing concepts. Among such expressions, in particular, "targeted killing" has progressively gained momentum, coming nowadays to be the most frequently used in the legal discourse concerning the intentional killing of selected individuals. As we will see shortly, notions such as that of targeted killing introduce

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326 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 47.

327 Sasha-Dominik Bachmann, *Targeted Killing, Contemporary Challenges, Risks and Opportunities*, in *Journal of Conflict and Security Law*, *supra*, pp. 9 and 10, stating: "Targeted killings executed outside the context of hostilities and directed against political leaders are usually referred to as assassinations […]One key distinction between assassination and targeted killing lies in the difference in terms of motivation and purpose, namely, the former's nexus to political warfare as part of a politicized irregular warfare"; Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, in *Journal of Applied Philosophy*, Oxford, 2006, p. 324: "targeted killings consist of, first, compiling lists of certain individuals who comprise specific threats and second, killing them when the opportunity presents itself during armed conflict. I will therefore refer to assassination and targeted killings as named killing". Accordingly see also Michael L. Gross, *Fighting by Other Means in the Mideast: a Critical Analysis of Israel's Assassination Policy,* in *Political Studies*, Oxford, 2003, p. 362; Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, in *Georgia Journal of International and Comparative Law*, Athens (U.S.A) 2001, p. 9: "Furthermore, much of the recent debate concerning assassination has focused on a contextual definition turning on the question of whether the country is in a state of war. If this is the case, and assuming that it is impossible to be in a state of war with private terrorists (as opposed to another nation), then any analysis will be abbreviated. Again, if the traditional notion of assassination under international law is used, then the term will be understood to apply primarily to a head of state […]For the present purposes, the term "assassination" will be used to signify the targeted killing of an individual, by an official agent of a nation, regardless of whether a state of war exists"; and Stephen Knoepfler, *Dead or Alive: The Future of U.S. Assassination Policy Under a Just War Tradition*, *supra*, p. 468.

in international law rather new categories[328] which are neutral in relation to the conducts they embrace: that is to say, differing greatly from assassination, which, if not yet repelled by contrary international practice, is in and by itself unlawful, concepts such as that of targeted killing do not predicate the rightfulness or lack thereof of their underlying conducts.

As a matter of fact, even those who have most laudably analysed the issue of targeted killing have never referred to this notion as one characterized by an autonomous and monolithic legal regime, making clear that their rightfulness entirely depends on the particular circumstances surrounding each and every case[329]. This is to say, the label "targeted killing" covers both legitimate and illegitimate killings[330]. It most likely embraces also instances of assassination: as a matter of fact, while it would be a mistake to consider every targeted killing as an assassination, every assassination can be defined as a targeted killing.

Since the beginning of the current century, and especially since the aftermath of the well-known terrorist attacks of 11 September 2001, the notion of "targeted killing" has been employed more and more often in relation to every killing of terrorists or alleged terrorists individually targeted by western powers, thus fostering a number of discussions concerning its exact definition and its legal contours[331]. In fact, the sudden rise in references to the notion of targeted killing has been matched by a progressive abandonment of references to assassination.

As the former does not *per se* entail the unlawfulness of a given killing, while the latter is always a proscribed practice, the continuous tendency to resort to the broader category of targeted killings leads to a shadowy qualification of episodes traditionally deemed as assassination and, consequently, to a relaxation of the rigid limitations traditionally posed by international law to such conducts.

The use of the proper semantics in this field is crucial. Some scholars, for example, have suggested that the best way to avoid breaching the ban on

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328 One of the very first references in international practice to the concept of targeted killing may be traced back to 1983, when the UN Special Rapporteur on Summary or Arbitrary Executions dedicated part of his annual report to the killing of specifically targeted individuals not detained by the targeting State. To this end see UN Commission on Human Rights, *Report by the Special Rapporteur on Summary or Arbitrary Executions*, 31 January 1983, UN Doc. E/CN.4/1983/16, paras. 91 – 93 and, in more detail, *infra*, Ch. IV, para. 2, sub-para. 2.2, Ch. IV, para. 6, sub-para. 6.2

329 On the subject see the comprehensive analysis conducted by Nils Melzer in his *Targeted Killing in International Law*, *supra* and Philip Alston, *Alsto Report, supra*, standing by this assessment.

330 To this end see Nils Melzer, *Targeted Killing in International Law, supra*, pp. 3- 7.

331 Accordingly, see also Iran Human Rights Documentation Center, *Condemned by Law: Assassination of Political Dissidents Abroad, supra*, p. 5: "The changing landscape of international relations since the tragic events of September 11, 2001 has elicited considerable debate regarding the legality of targeted killings under international law".

assassination is simply not to call the underlying action with its real name, resorting to alternative tags not loaded with any negative implications under traditional international law[332]. An analytical clarification of the notion of targeted killings as it is understood today under international law is therefore critical to a proper examination of its interrelationship with assassination.

The expression targeted killing has been used until recently in a quite vague fashion by legal practitioners and scholars. In fact, as for assassination, some authors have argued that there is no generally accepted definition of targeted killing[333].

One of the first references to targeted killing in official legal documents can be traced back to 1983 when the then Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (hereinafter SREJK) Mr. S. Amos Vakos, while not yet resorting to such expression and without any attempt to define such concept as an autonomous legal category, dedicated an entire section of his report to the "deliberate killings of targeted individuals, who are not under detention by governments"[334]. The SREJK in such circumstance referred to the phenomenon as inherently unlawful, conducts falling within his analysis being defined as extrajudicial executions. More recently, other SREJKs have reiterated concerns over targeted killings of terrorists while still not defining the core content of the conduct[335]. In 2003, the UN Human Rights Committee (hereinafter HRC)[336] resorted to the term targeted killing as "pre-emptive measure, also described as liquidation, assassination"[337]. Accordingly, in 2004 the SREJK somehow merged targeted killings and assassination, resorting to

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332 To this end see, *inter* alia, Matthew S. Pape, *Can We Put the Leaders of the "Axis of Evil" in the Crosshairs?*, *supra*, p. 68, arguing that, when it comes to elude the ban on assassination imposed within the U.S. legal framework by Executive Order 12333, "In general, the key way in which a President narrowly construes the executive order to avoid breaking it is that he does not call the approved plan an assassination".

333 Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War*, Cambridge, 2010, p. 538. Accordingly, see, inter alia, Janiel David Melamed Visbal, *Dilemas Legales y Democraticos en la luca contra el terrorismo: La politica de asesinato selectivo*, in *Universidad del Norte, Revista de Derecho*, Colombia, 2011, p. 293.

334 UN Commission on Human Rights, *Report by the Special Rapporteur on Summary or Arbitrary Executions*, 31 January 1983, UN Doc. E/CN.4/1983/16, paras. 91 – 93.

335 To this end see, *inter alia*, UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 24 December 1996, UN Doc. E/CN.4/1997/60, paras. 69, 70 and 268; UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 23 December 1997, UN Doc. E/CN.4/1998/68, para. 74; UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 6 January 1999, UN Doc. E/CN.4/1999/39, para. 48.

336 The Human Rights Committee is a body composed of 18 independent experts mandated to monitor the implementation of the *International Convenant on Civil and Political Rights* (hereinafter ICCPR). For further information on the HRC see www.ohchr.org.

337 HRC, *Summary Record of the 2118th Meeting*, Geneva, 6 August 2003, UN Doc. CCPR/C/SR.2118, para. 2.

the expression "targeted assassination", which he qualified as arbitrary executions[338]. In 2007 the then SREJK Philip Alston qualified as a "targeted killing" the operation that led to the death of Haitham Al-Yemeni[339], defining it as a governmental practice to "identify and kill known terrorists"[340].

Among scholars, various definitions have been suggested, some more restrictive than others. For example, some have argued that targeted killing shall be understood as the "Intentional slaying undertaken with explicit governmental approval of a specific individual or group of individuals belonging to political, armed or terrorist organizations"[341], thus limiting the conduct to counter-insurgency or counter-terrorist operations. Similarly, other authors have made reference to targeted killings as to conducts that only come into play during armed conflicts and are solely addressed at so called unlawful combatants and civilians taking direct part to hostilities[342], while excluding any relevance of such expression during peacetime[343]. Others have referred to such practice as "targeted preventive killing"[344], avoiding to define the precise contours of the conduct but limiting its envisaged employment to instances of preventive self-defence. In line with such assessment, other authors have placed under the spotlight the threat posed by the targeted individual to the targeting State, while attempting a further refinement of the underlying concept[345]. One of the

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338 UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 22 December 2004, UN Doc. E/CN.4/2005/7, para. 84.

339 See *infra*, Ch IV, para. 6.

340 Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Summary of Cases Transmitted to Government and Replies Received*, *supra*, paras. 183 and 264.

341 Mathew J. McMahon, *Targeted Killing as an Element of US Foreign Policy in the War on Terror*, Fort Leavenworth, 2006, p.15. Accordingly see also Stefanie Schmahl, *Targeted Killing*, in Christian Tomuschat, *The Right to Life*, Leiden, 2010, p. 233.

342 On the condition of unlawful combatancy and the notion of direct participation in hostilities see *infra*, Ch. V, para. 2.

343 Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War*, Cambridge, 2010, p. 538: "Intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the contest of an international or non-international armed conflict".

344 Hélène Tigroudia, *Assassinats ciblés et droit à la vie dans la jurisprudence de la Cour suprême israélienne*, in Christian Tomuschat, *The Right to Life*, Leiden, 2010, p. 267.

345 Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*: "Lethal attack on a person that is not undertaken on the basis that the person concerned is a combatant, but rather where a State considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that person, even at a time when the individual is not engaged in hostile activities". See accordingly University Center for International Humanitarian Law, *Report of the Expert Meeting on the Human Right to Life in Armed Conflict and Situations of Occupation*, Geneva, 2005, p. 894. Similarly, see *Sperotto e De Stefani*, Introduzione al diritto internazionale umanitario e penale, Padova, 2011, p. 46: "the premeditated decision to kill by the employment of military weapons and techniques an individual involved in activities that threat

leading researches on the subject has instead shifted the focus on the overall targeting operations, defining it as a "broad process including planning and execution, encompassing the consideration of prospective targets of attacks, accumulation of information […], determination of which weapon and method should be used to prosecute the target, the carrying out of attacks, including those decided upon at short notice and with minimal opportunity for a planning and other associated activities"[346]. Others have stressed that one necessary element of a targeted killing is the lack of material custody on the victim[347].

In spite of the many differences that the aforementioned definitions outline, almost every scholar dealing with the subject agrees that targeted killing involves, at the very least, "the premeditated killing of an individual by a government or its agents"[348]. Besides this common elements, though, each of these understandings seem to be rather contextual, that is, they do not attempt to establish a basis for a comprehensive definition of the phenomenon, rather making reference to the specific kind of targeted killing relevant for the kind of analysis conducted. It has been correctly observed, to this end, that such definitions "which may suit the context in which they are discussed, [...] do not provide a comprehensive and sufficiently precise description of the method" of targeted killing[349].

It is the author's contention, to this end, that a shared and conclusive definition of targeted killing does indeed exist. According to the pivotal work on the subject, "targeted killing" shall be defined as a "use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting

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State security or the safety of its organs, including soldiers, or that of the civilian population" (author's translation).

346 William H. Boothby, *The Law of Targeting*, Oxford, 2012, p. 4.

347 Sasha-Dominik Bachmann, *Targeted Killing, Contemporary Challenges, Risks and Opportunities*, *supra*, p. 5: "The term targeted killing refers to military operations involving the use of lethal force with the aim of killing individually selected persons who are not in the physical custody of those targeting them".

348 W.C. Banks and P. Raven-Hansen, *Targeted Killing and Assassination: The U.S Legal framework*, in *University of Richmond Law Review*, Richmond, 2002, p. 667. See, accordingly, inter alia, Richard Murphy and John Radsan, *Due Process and the Targeted Killing of Terrorists*, in *Cardozo Law Review*, New York, 2009, p. 406: "Extrajudicial, premeditated killing by a State of a specifically identified person not in its custody"; Steven R. David, *Israel's Policy of Targeted Killing, supra*, p. 112: "Intentional slaying of an individual or group of individuals undertaken with the explicit governmental approval"; Human Rights Watch, *Questions and Answers: U.S. Targeted Killing and International Law*, New York, 19 December 2011, available at www.hrw.org: "Targeted killing has commonly been used to refer to a deliberate lethal attack by government forces against a specific individual not in custody under the color of law".

349 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 5.

them"[350]. Defined in this fashion, targeted killings are characterized by five constitutive elements:

i. the use of lethal force,
ii. by state agents,
iii. supported by a *dolus directus* (that is, intentional, deliberate and premeditated),
iv. carried out against an individually selected person;
v. who is not held in physical custody[351].

This definition has been adopted by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execitions, Mr. Philip Alston, in the first "*Study on targeted killing*" ever specifically undertaken by a UN agency[352] and then followed by other Special Rapporteurs dealing with the subject[353]. Arguably, the notion of targeted killing construed as above is objective and neutral, inasmuch as it does not imply either the lawfulness or the unlawfulness of the conduct. As a matter of fact, as we have had occasion to underline above, since time immemorial some conducts falling within the parameters of this definition have been considered morally tenable and in perfect compliance with the law while others have been reputed morally outrageous as much as proscribed by law[354]. There is yet another point to be underlined: the definition at hand applies at both peace-time and war-related killings. That is to say, its scope of application is not strictly limited to one body of law, but embraces conducts performed when the legal regime governing the situation is international human rights law alone as well as conducts held in times of conflict (when human rights law and international humanitarian law simultaneously apply). A targeted killing may therefore be classified as an extrajudicial, arbitrary or summary execution or, to the opposite, as a lawful resort to lethal force, depending on the precise circumstances characterizing every specific case.

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350 *Ibidem*, p. 5.

351 Accordingly see, inter alia, Giuseppe Pellegrino, *Targeted Killings: l'uso della forza internazionalmente letale tra esercizio della sovranità e tutela dei diritti fondamentali della persona*, Padova, 2012, p. 18, stating that the constitutive elements of targeted killing are: "sul piano oggettivo: la letalità dell'uso della forza; l'intenzionalità e premeditazione dell'esito letale dell'operazione; sul piano soggettivo: il compimento da parte di stati o gruppi armati organizzati; la copertura giuridica degli agenti che operano su incarico degli stati; la destinazione nei confronti di individui specificamente designati; la carenza di alcun controllo di natura detentiva da parte dell'esecutore nei confronti dell'obiettivo designato".

352 Philip Alston, *Alsto Report, supra*, p. 4, explicitly mentioning the research of Nils Melzer and stating that "the common element in all these contexts is that lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator.

353 See *infra*, Ch. IV, para. 6.

354 See *supra*, Ch. I, para. 2.

The definition at hand, it has been underlined, highlights some crucial facets of a targeted killing: "In a targeted killing, the specific goal of the operation is to use lethal force. This distinguishes targeted killings from unintentional, accidental, or reckless killings, or killings made without conscious choice. It also distinguishes them from law enforcement operations, e.g., against a suspected suicide bomber. Under such circumstances, it may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill"[355]. Since targeted killing always amount to either a lawful practice or to an arbitrary execution, the necessity to consider such practice and assess its legality amidst different scenarios is therefore not rooted in an equivalent necessity to establish an autonomous legal category of conducts. It rather rises from a pattern of behaviours adopted by a rapidly increasing number of States that have recently resolved to kill individually selected persons and tried to legitimize their conducts on the basis of several legal (or, sometimes, *para*-legal) considerations. These considerations, which will find further confirmation in the analysis that follows[356], gain particular relevance when the need arises to "criminalize" one or more conducts which can be linked to targeted killings, if not bluntly defined as such in their entirety.

Actually, if the very first references to targeted killing, mostly sporadic in the landscape of international law until the dawn of the current century, linked such practice to conducts commonly considered as essentially unlawful, the generally accepted definition of the expression nowadays has extended its scope, embracing the most diverse conducts. In turns, this implies that there is no general rule against targeted killing: even analyzed under the strictest parameters of international human rights law, it would not be possible to exclude the legitimacy of any possible conduct matching such definition.

This marks a stark contrast with assassination, since a rule of customary international law proscribing such practice already exists or, at the very least, it has been into force until recently. It is not something that needs to be established from scratches now. What needs to be done is to try and explore its core content so as to understand which conducts exactly fall within its definition (being consequently proscribed under each and any circumstance) and which do not (being consequently allowed, under certain circumstances).

Such a conclusion does not imply that assassination has no links with targeted killings at all. All to the contrary, a cursory survey of the constitutive elements of the latter category of conducts shows that assassination does embraces every single constitutive element of targeted killings.

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355 Philip Alston, *Alsto Report*, *supra*, p. 4.

356 See *infra*, Ch. IV, paras. 3 and 4.

Therefore, assassination does not diverge from such practice; to the contrary, it amounts to a specific kind of targeted killing. In other words, assassination embraces all the constitutive elements of targeted killing and, in addition, is characterized by a qualifying feature that makes it a sub-category of the former. A sub-category that, as pointed out, is always unlawful. A similar conclusion may be reached with reference to murder as a war crime or as a crime against humanity which, while constituting an autonomous crime different from assassination, spares with the latter a few features and may, under certain circumstances, fall under the common, broader umbrella of targeted killing.

4. CONCLUSIONS

The lengthy evolution of the history of mankind has witnessed the most disparate approaches to targeting practices in general and assassination in particular.

As we have seen in the first paragraph of this chapter, it is not possible to identify a univocal trend towards either the permissibility or the prohibition of assassination in times of war. Even more significantly, no univocal definition of assassination may be gathered from these eras at all. Whereas more than one Biblical account shows that it was sometimes considered lawful to resort to any kind of targeting practice during wartime, including feigning civilian status and poisoning the enemy, in other epochs, such as in Rome, killing an enemy outside a battlefield confrontation was generally considered unlawful in and by itself. Any such practice could be defined, in this regard, as an assassination.

It is true that, as some observe, assassination is a "loaded term". It derives such load from its historical and etymologic derivation from the sect of Hashyiishyn, employing poisoned daggers and civilian disguise to attack their enemies and injure them with a method specifically designed to leave them no chances of survival.

It is indeed this deprivation of chances of survival the most permanent feature to characterize traditional reflections as well as rules over assassination and targeting practices throughout history. Thus, the first official restrictions on means and methods of warfare established an absolute prohibition of assassination, poison, crossbows and ballistae due to their "excessively murderous effects". When attempting to define assassination in his *Siete Partidas* Alfonso X "El Sabio" expressed the view that treachery is a constitutive element of assassination but also clarified that treachery was to be regarded as any attack directed at defenceless persons and, most significantly, as any attack leaving no chances of survival to the enemy. By a similar reasoning, Gentili came to admit of targeted killing only on the battlefield, Grotius rejected the lawfulness of any killing by design whatsoever, De Vattel again traced the notion of assassination back to treachery but, as most of his predecessors, understood treachery in very broad terms.

Pursuant to this historical evolution, when the laws of war were first codified there was widespread consensus that even in times of armed conflict "assassination" was strictly forbidden. What remained less clear, however, was the exact content and scope of the relevant conduct. The codification of the laws of war has not solved this problem.

It could be tempting to argue that, since the first codifications of the laws of war did not provide a definition of assassination, then it should be considered that no norm of international law whatsoever actually ever came to existence in this regard.

Nonetheless, such an assessment would be incorrect. First, because of the steady opposition to "assassination" endorsed by the legal literature preceding and accompanying the genesis of the laws of war. Second, because the first codifications of the laws and customs of war themselves, while making no express reference to a general category of forbidden conducts defined in their entirety as assassination, nonetheless proceeded to introduce specific rules banning specific conducts that had traditionally been associated with assassination. This is the case, for instance, of outlawry, keeping assassins in pay, placing bounties on enemies' heads, poison and, ultimately, treacherous killing. Third, because again at the beginning of the XX century some of the most prized and distinguished experts of international law described the prohibition of assassination in times of armed conflict as a general rule of customary international law.

Whereas, therefore, a rule to this end did come to be part of the general norms of international law, the codifications of the laws and customs of war did not help in refining its exact meaning and scope, besides banning the already recalled very specific conducts corresponding to particular facets of the general prohibition of assassination.

Nowadays, a black-letter prohibition of assassination under international law is nowhere to be found. This cannot however lead to the simplistic conclusion that such prohibition has been definitely abandoned: assassination as an autonomous legal category is indeed expressly proscribed in a number of military manuals, it is referred to in international legal documents and official statements issued by States' representatives, and there is a notable lack of any official contrary practice.

A broader notion, not necessarily related to the implied the lawfulness or unlawfulness of selective deprivations of life has recently emerged: that of "targeted killing" is a descriptive definition which does neither confirms nor replace the traditional notion of assassination. The latter therefore qualifies as a specific kind of targeted killing, which is however characterized by one or more specifying elements.

It should be noted that the point here is not "arguing about each other's definition"[357]. Reaching a correct interpretation of a historical prohibitions, such as the one on assassination and murder as a war crime on the one hand, and evolving categories of conducts relevant to international law, such as targeted killings, on the other, draws the line between who gets to live and who gets to die. It thus become of the utmost importance to correctly understand the interplays among these conducts

[357] In his writing named *Persons and Masks of the Law,* John T. Noonan Jr. suggests that "the definition of law depends on the purpose of the definer […] Many of those who write about jurisprudential matters analyze rules abstractly, without reference to their aim, and argue about each other's definition".

and, in general, the existing relationships amongst all the international norms relevant to their qualification. It has indeed been underlined that the definition itself of the concept of assassination is the first major obstacle that face those practitioner and scholars who deal with the subject. It largely depends on the interplays of the notions of treachery, perfidy, outlawry and denial of quarter, and even more significantly, of the interpretation given to such notions under current State practice.

Only through the analysis of such norms shall we be able to ultimately determine whether the longstanding prohibition of assassination remains still in spite of the *nomen juris* employed to define conducts bluntly falling within its scope until recently or whether, all to the contrary, the rise of a new terminology responds to exigencies of the changing landscape of international law and such prohibition has been superseded by more permissive regimes, such as that of targeted killings.

What the historical and definitional analysis just conducted highlights, however, is that historically, assassination has either been considered as any killing by design, as any premeditated lawful killing conducted outside areas of active hostilities, as the killing of defenceless persons or persons not taking part to hostilities, as treacherous killings, whereby treachery would not be restricted at today's limited notion of perfidy but would also embrace any premeditated killing of persons off guard. The perhaps most commonly reported notion of assassination, finally, seems to be tied to its nature of method intended to leave no chances of survival to the opposing party, a rationale that indeed motivated its prohibition together and in parallel with the ban on poison at the very origins of the laws of armed conflict.

CHAPTER II

Applicable Legal Regimes

1. INTRODUCTION

As we have seen in the previous paragraph, the ban on assassination has been for a long time a categorical one under the laws of war even though its core content has hardly ever been thoroughly defined. The aim of this and the following paragraphs is therefore of a twofold nature: first of all, identify which content such ban indeed has and which consequences stem from it in terms of state obligations as well as in terms of individual rights. After such a refinement of the notion of international assassination has been conducted, we shall compare it with targeting practices adopted by states in the context of hostilities over the last years and see whether their conducts have somehow affected the scope of the ban on assassination, remodelling its contours or even replacing the whole prohibition at once.

In order to do so, we need first of all to assess: a) when the laws of war are applicable; b) which are their main principles in the conduct of targeting operations; c) whether, under such circumstances, there are other legal regimes that can influence the scope of international humanitarian law; d) if affirmative, which is their core content; e) what are the conditions of applicability of such regimes; and f) ultimately, which is the interaction existing between them and the laws of war.

It is now widely accepted that, whereas international humanitarian law only finds application in times of conflicts, international human rights law finds application during both peace and war time. Also when the threshold for the existence of an armed conflict is met, and regardless of the nature of the armed conflict in question, therefore, an additional branch of international law, that of human rights, will find application.

Whereas it is not the purpose of the present study to go into detail into human rights law implications on states' use of force during peacetime, therefore, a cursory review of the core content of the human rights obligations binding states in relation to the right to life remains an essential prerequisite for the remainder of the current analysis.

After having clarified which is the core content of the right to life, we should see whether the duty to respect and ensure respect to such a right also remains valid when states operate outside their territories. In doing so, we should take into account the most common features characterizing targeting practices in general and assassination in particular.

Finally, since this legal regime is not necessarily coordinated with that of international humanitarian law and the interplays of the two actually pose more than a few problems, *inter alia*, with reference to targeting practices, we shall explore

which is the exact relationship existing between them and, in particular, what their interaction entails for the international humanitarian law ban on assassination.

2. SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN

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(1) Existence and Scope of Armed Conflicts; (1.a) Conditions for the Existence of an Armed Conflict; (1.b) Geographical Scope of Armed Conflicts;

International humanitarian law is a legal body that finds application solely in times of armed conflicts. It thus becomes crucial to establish which conditions give rise to a situation of armed conflict, differentiating it from situations of civil unrest under which the law enforcement parameters pertaining to human rights law are the only principles governing state conducts. Moreover, given that rules of international humanitarian law vary depending on the nature of a conflict – *i.e.* some rules apply to conflicts of an international character whereas others apply when the conflict is non-international, and yet other rules find application in case of military occupation – it is of the utmost relevance for the current analysis to identify which kind of conflicts exist and in what terms they diverge.

Once identified the different kinds of conflict existing and their respective characterizing elements, we shall then pass on to briefly mention which are the main principles of international humanitarian law governing the conduct of hostilities with specific reference to the use of force and targeting practices.

2.1. Existence and Scope of Armed Conflicts.

The International Criminal Tribunal for Former Yugoslavia (hereinafter, the ICTY)[358] has underlined that the dichotomy between conflicts of an international character on the one hand and internal conflicts, otherwise identified as civil-strife, on the other, has started to lose its rigid borders ever since the 1930s[359]. Such blur has led to the creation of a normative framework which is nowadays characterized by multiple notions of armed conflicts whose characterization varies depending on their

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[358] International Criminal Tribunal for Former Yugoslavia, established by *UN Security Council Resolution 808 (1993)*.

[359] ICTY, *Prosecutor v. Tadic, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 97.

peculiarities[360]. While it is strongly debated whether different norms of international humanitarian law apply to different kinds of confrontations, it is well accepted that international norms concerning the conduct of hostilities presuppose the existence of a conflict: that is, in the absence of a situation of belligerency, international humanitarian law does not apply[361]. It thus becomes essential to establish when an armed conflict occurs in order to recognize when this body of international law comes into play and which effects it brings about.

a) Conditions for the Existence of an Armed Conflict

Traditionally, the laws of armed conflict used to apply solely to wars taking place between two or more states[362]. Accordingly, art. 2 common to the four *Geneva Conventions* of 1949[363] confined the field of application of those instruments to armed conflicts of an international character, understood as confrontations between two or more states[364], regardless of any consideration concerning formal declarations of war, the intensity of the conflict[365], or its underlying reasons[366]. That is, the

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360 Marko Milanovic and Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in Nigel White, Christian Henderson, *Research Handbook on International Conflict and Security Law, Jus ad Bellum, Jus in Bello and Jus post Bellum*, Cheltenham, 2012, p. 1: "while the two main archetypes – international armed conflict and non-international armed conflict – are reasonably clear in their basic forms, their boundaries are complex and obscure. Many recent conflicts do not fit the classical archetypes well, provoking debates on spill-over, internationalized, mixed or hybrid and even transnational armed conflicts".

361 See accordingly, inter alia, Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*, p. 893.

362 Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge, 2011, pp. 5 and 6. Accordingly, see also Marko Milanovic and Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, *supra*, p. 6, arguing that the reasons behind such understanding was to be detected in states' unwillingness to the existence of international constraints to the armed force states could use against their own subjects.

363 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, *Convention (III) relative to the Treatment of Prisoners of War*, *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (hereinafter the *1949 Geneva Conventions*), Geneva, 12 August 1949, Common Art. 2.

364 David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?*, *supra*, p. 189.

365 Some authors have suggested that the existence of a state of war may be identified only in the presence of a subjective element, that is, when resort to armed violence is coupled with an *animus belligerandi*. According to this view, it might be possible to qualify an extraterritorial deployment of military force as a simple measure of law enforcement on the territory of a third state. To this end see Yoram Dinstein, *War, Aggression and Self-Defence*, *supra*, pp. 14 and 15. It has been noticed that, according to this view, a military strike conducted by a US predator drone in Yemen would be a measure of law enforcement. The same rationale could be applied to the actions of Colombian military forces in Ecuador. This approach rises however serious doubts. In particular it would be quite difficult to assess the feasibility of legitimately resorting to targeted killings within the framework of human rights law. To this end see *infra*, Ch. II, para. V. In higher detail, on this issue, see Francoise J.

international nature of an armed conflict is defined by the identity of its actors, which must be states[367].

Art. 3 common to the four *Geneva Conventions* of 1949[368] was instead the first international provision to specifically address conflicts not of an international character[369], extending a minimum standard of protection to victims of confrontations that were not fought by states against one another but rather by states against non-governmental entities[370]. While at first common article 3 was meant to apply solely in situations akin to conventional inter-state warfare[371] and civil wars[372], with time passing by this provision ultimately led to the applicability of a specific set of norms of international humanitarian law to any internal conflict, regardless of the level of intensity it may reach[373]. Of course, not any situation of internal unrest may

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Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, in *International Review of the Red Cross*, Geneva, 2008, p. 553. As a matter of fact, in contrast with the interpretation previously reported, the ICRC has pointed out that "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place". To this end see Jean Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 1952, p. 32.

366 Accordingly see, inter alia, Dietrich Schindler, *The different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, Leiden, 1979, p. 131.

367 Marko Milanovic and Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, *supra*, p. 17.

368 *1949 Geneva Conventions*, Common Art. 3.

369 Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge, 2010, p. 25. Note, however, that already in the 1930s a serious debate was prompted concerning the applicability of international norms to the conduct of civil strife. To this end see, *inter alia*, Antonio Cassese, *International Law*, Oxford, 2005, p. 430.

370 The International Court of Jsutice (hereinafter ICJ) has defined common art. 3 as a "minimum yardstick" reflecting elementary considerations of humanity, applied as such also in cases of international armed conflicts. To this end see ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (hereinafter, *Nicaragua Case*), Judgment of 27 June 1986, para. 218.

371 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volume IV*, Geneva, 1958, p. 36. Accordingly, see also ICRC, *Final Record of the Diplomatic Conference of 1949, Volume II, Section B*, pp. 45 – 50. See also, *ibidem*, pp. 11 – 15 and 35; and ICRC, *Final Record of the Diplomatic Conference of 1949, Volume I*, p. 352.

372 Note that "Before the adoption of the 1949 Conventions civil war only came within the scope of international law if the insurgents were recognized as belligerents. Recognition of belligerency lay at the free discretion of the government which was opposing the insurgents as well as that of thirds states". To this end see Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, in Michael N. Schmitt and Wolff Hentschel von Heinegg, *The Scope of Applicability of International Humanitarian Law*, Farnham, 2012, p. 48. On the concept of "belligerency" see, *inter alia*, Yair M. Lootsteen, *The Concept of Belligerency in International Law*, in *Military Law Review*, Charlottesville, 2000, pp. 109-141.

373 Antonio Cassese, *International Law*, *supra*, p. 431.

fall within its scope of application[374]: the threshold of armed force necessary to trigger a non-international armed conflict remains indeed way higher than that necessary to trigger an inter-state conflict[375].

The adoption of the 1977 Additional Protocols to the Geneva Conventions led to further developments concerning the identification and characterization of armed conflicts: following the path already traced by other international instruments of a non-binding character[376], AP I narrowed down the scope of non-international armed conflicts expressly qualifying wars of national liberation as conflicts of an international nature[377]. At the same time, AP II was adopted in order to afford a "first real legal instrument for the protection of victims of non-international armed conflicts"[378].

Defining the protocol's material field of application, art. 1 of AP II[379] introduces an enhanced protection in non-international armed conflicts, while at the same time reducing the field of application of such notion if compared with common

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374 Frits Kalshoven, *Reflections on the Law of War, Collected Essays*, Leiden, 2007, p. 498. Accordingly see also Jean Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987 (hereinafter the *Commentary on the APs*), para. 4341: "The expression armed conflict gives an important indication in this respect since it introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree".

375 Marko Milanovic and Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, *supra*, p. 16.

376 To this end see, inter alia, United Nations General Assembly, *Resolution 3103 (XXVII), Basic Principles of the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*, 12 December 1973, principles 3 and 4. Accordingly see, inter alia, Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, an Introduction to International Humanitarian Law*, Cambridge, 2011, p. 84.

377 *AP I*, art. 1. Accordingly see, *inter alia*, Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, *supra*, pp. 63 - 65. For a thorough analysis of the expressions "colonial domination", "alien occupation" and "racist regimes" see *Commentary on the APs*, § 112. On the conditions of applicability of art. 1 (4) AP I see, *inter alia*, Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, an Introduction to International Humanitarian Law*, *supra*, p. 85.

378 Jean Pictet, C*ommentary on the Additional Protocols*, *supra*, para. 4337. On the need for the creation of one instrument furthering the law of non-international armed conflicts beyond the obligations stemming from art. 3 GC see, *inter alia*, Hans-Peter Grasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, in *American University Law Review*, Washington, 1983, p. 104; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, *supra*, pp. 63 – 65; Sylvie Junod, *Additional Protocol II: History and Scope*, in *The American University Law Review*, Washington, 1989, pp. 30 and 31; See, *inter alia*, International Criminal Tribunal for Rwanda (hereinafter ICTR), *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber, 21 May 1999, para. 170. The International Criminal Tribunal for Rwanda was established by the UN Security Council with its *Resolution 955(1994)* on 8 November 1994.

379 *AP II*, art. 1.

art. 3[380]. First of all, AP II is only applicable to conflicts occurring between a state and internal belligerent forces, not also to conflicts among armed groups[381]. Besides, art. 1(1) AP II subordinates the application of such instrument to the simultaneous presence of a number of requirements[382]. Art. 1(2) AP II provides a negative definition of non-international armed conflicts, dividing situations of civil unrest from situations characterized by the existence of open hostilities, thus requiring for the applicability of AP II armed confrontations of high intensity. The demarcation line lays therefore on the continuous character of the armed activities as well as on the intentions of the belligerents[383]. Art. 1(2) therefore identifies the lowest edge of the threshold required for the existence of a non-international armed conflict in the meaning of AP II and, in so doing, it correlatively determines the scope of application of art. 3 common to the Geneva Conventions[384].

On this issue the ICTY took a decisive stance clarifying that norms of international humanitarian law find application also in hostilities that do not reach the threshold requirement envisaged by art. 1(1) AP II[385]. In so doing, the ICTY

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380 Marko Milanovic and Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, s*upra*, pp. 26 and 27.

381 Accordingly see, inter alia, Noëlle Quénivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict*, in D. Jinks, J. Maogoto and S. Solomon, *Application of International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, The Hague, 2014, pp. 35 and 36.

382 Accordingly, see, *inter alia*, Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols, supra*, p. 50: first of all, the armed groups involved must be under a responsible command; secondly, such armed groups must have control over a certain territory; in addition, they must be able to carry out continuous military operations; finally, they shall be capable of enforcing the provisions of the protocol. According to the Jean Pictet's *Commentary on the APs*, the "responsible command requirement", is to be considered fulfilled when the armed group is characterized by a level of organization potentially capable "on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority". To this end see Jean Pictet, C*ommentary on the Aps*, *supra*, para. 4463. The requirement of territorial control is a symptom of the existence of a responsible command but different interpretations exist as to the extent of control required but, in any event, territorial control does not have to be either substantial or stable. Accordingly see Jean Pictet, C*ommentary on the Aps*, *supra*, para. 4467 and ICTR, *Prosecutor v. Akayesu*, Trial Chamber Judgment of 2 September 1998, para. 626. In order to be "sustained" operations must be kept up continuously over a certain lapse of time while the expression "concerted" means "agreed upon, planned and contrived, done in agreement, according to a plan". To this end, Jean Pictet, C*ommentary on the Aps*, *supra*, para. 4469.

383 Jean Pictet, C*ommentary on the Aps*, *supra*, para. 4341. Note however that the ICRC commentary itself admits that "no real definitions are given" for the terms "internal disturbances and tensions". *Ibidem*, p. 1354, para. 4474.

384 Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, *supra*, p. 108.

385 ICTY, *Prosecutor v. Tadic*, *Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, *supra*, para. 70 : "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized

opened the door, at the same time, to the theorization of three possible categories of conflicts[386]: a) international armed conflicts as defined by art. 2 common to the *1949 Geneva Conventions*, including campaigns for national liberation (pursuant to Art. 1 *AP I*); b) armed conflicts not of an international character satisfying the requirements of arts. 1(1) and (2) *AP II*; c) armed conflicts of a non-international character falling within the scope of art. 3 common to the *1949 Geneva Conventions* and responding to the requirements of organization and intensity set forth by the ICTY in the *Tadic Case*.

Notably, this last kind of conflict may very well be integrated by hostilities among non-state actors that fall short of the parameters that would satisfy *AP II*[387]. With this judgment the ICTY clarified that, when one or more non-state armed groups are involved, an armed conflict exists if: a) there is a situation of protracted armed violence; b) the armed groups involved in the hostilities respond to an

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armed groups or between such groups within a State". Accordingly, see Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law, supra,* pp. 118 – 119.

386 Accordingly see, *inter alia*, Paolo De Stefani e Federico Sperotto, *Introduzione al diritto internazionale umanitario e penale*, *supra,* p. 22.

387 On the suggested partition see also Philip Alston, *Report of the Sepcial Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings*, UN Doc. A/HRC/14/24/Add.6, 28 May 2010 (hereinafter *Alston Report*), para. 50 and Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols, supra*, p. 48. That AP II represented a specie of the broader notion of non-international conflict entailed by common art. 3 had actually been noticed well before the *Tadic Case*. It was however only with the ICTY's interlocutory decision on Dusko Tadic's plea for alleged lack of jurisdiction that the lower edge of the scope of armed conflicts (considered altogether) was defined. To this end see, *inter alia,* Sylvie Junod, *Additional Protocol II: History and Scope, supra*, p. 35. The consistent jurisprudence of international criminal tribunals and courts as well as the works of scholars and practice of various UN experts and commissions have provided wide support to the so called *"Tadic test"*. To this end see, *inter alia,* ICTY, *Prosecutor v. Tadic,* Trial Chamber Judgment, 7 May 1997, para. 561; *Prosecutor v. Delalic,* Trial Chamber Judgment, 7 May 1997, para. 183; *Prosecutor v. Furundzija,* Trial Chamber Judgment, 16 November 1998, para. 59; *Prosecutor v. Kunarac and others,* Trial Chamber Judgment, 22 February 2001. ICTR, *Prosecutor* v. *Akayesu*, *supra,* para. 619; *Prosecutor* v. *Rutaganda* , Trial Chamber Judgment, 6 December 1999, para. 92. Special Court for Sierra Leone, *Prosecutor* v. *Fofana and others*, *Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'*, Appeals Chamber Judgment, *Separate Opinion of Justice Robertson*, 16 May 2005, para. 32. ICC *Prosecutor* v. *Lubanga, Decision on the Confirmation of Charges*, 29 January 2007, para. 233; *Prosecutor v. Bemba Gombo, Decision on the Confirmation of Charges*, 15 June 2006, para. 229. Sima Samar, *Report of the Special Rapporteur on the Human Rights Situation in the Sudan*, UN Doc. E/CN.4/2006/111, 11 January 2006, para. 8; Marzuki Darusman, Yasmin Sooka and Steven R. Ratner, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, para. 181; UN Secretary General, *Children and Armed Conflict: Report of the Secretary-General*, UN Doc. A/62/609-S/2007/757, 21 December 2007, para. 5. Its codification into the Rome Statute of the International Criminal Court (*Rome Statute of the International Criminal Court*, entered into force in Rome on 1 July 2002, art. 8(2)(f)) arguably confirmed its customary nature. Accordingly see, *inter alia*, Marko Milanovic and Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, *supra,* p. 24 and also Sylvie Junod, *Additional Protocol II: History and Scope, supra,* pp. 120 and 121.

organized structure[388]. Thus, international criminal tribunals have found that possible factors to keep into account to assess the existence of the lower threshold of an armed conflict may be the number of active participants, the number of victims, the duration and protracted character of violence, the capability of the parties to respect international humanitarian law, the collective, open and coordinated character of the hostilities, the direct involvement of governmental armed forces and not only law enforcement agencies, the degree of *de facto* authority of non-state entities over potential victims[389].

Most notably, in order meet the threshold of an armed conflict and thus trigger the applicability of international humanitarian law both the involved armed groups and state authorities (or other organized armed groups taking part to the hostilities) should have recourse to armed violence characterized by a certain degree of intensity[390]. Indicators of the precondition of "intensity" necessary to trigger a situation of armed conflict may be the seriousness of attacks, the frequency of armed clashes, their geographical width over territory and their temporal length over time, the number of forces involved and the mobilization and distribution of weapons among the parties to the conflict, the attention paid to the situation by the UN Security Council and, in general, other UN bodies[391].

Any different interpretation would lead to a logical paradox, entailing that the more the unilateral violence used by a party alone, the more likely the possibility to trigger the applicability of international humanitarian law. In the words of a distinguished scholar, "if an individual is punched, but walks away from his attacker, we do not say there is a fight. Without a counter-punch the person is a victim, not a

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388 ICTY, *Prosecutor v. Tadic*, Trial Chamber Judgment, *supra*, para. 562. See, accordingly, *inter alia*, ICTY, *Prosecutor v. Kordic and Cerkez,* Appeals Chamber Judgment, 17 December 2004, para. 341; ICTR, *Prosecutor v. Akayesu*, Trial Chamber, 2 September 1998, paras. 619-621 and 625. See accordingly Marco Sassoli, *Use and Abuse of the Laws of War in the War on Terrorism,* in *Law and Inequality: A Journal of Theory and Practice*, Minneapolis, 2004, p. 201. Note that, at any rate, the existence of a situation of "protracted armed violence" and "well organized armed group" is to be assessed on a case-by-case analysis. To this end see ICTR, *Prosecutor v. Musema,* Trial Chamber Judgment, 27 January 2000, para. 248.

389 *Ibidem.*

390 To this end see *Prosecutor v. Limaj and others*, Trial Chamber Judgment of 30 November 2005, para. 90. Accordingly, see also ICTY, *Prosecutor v. Tadic*, Trial Chamber Judgment, *supra*, paras. 562, 566 and 567, *Prosecutor v. Delalic,* Trial Chamber Judgment, *supra*, paras. 188, 189 and 190, *Prosecutor v. Milosevic,* Trial Chamber, Rule 98bis Decision of 16 June 2004, paras. 28-31. Additional factors have been identified in the mobilization of troops, the kind of weaponry used, the destruction of property and the number of casualties on both sides: *Prosecutor v. Limaj and others*, Trial Chamber Judgment, *supra*, paras. 135-167.

391 *Ibidem.*

fighter"[392]. As seen before, international humanitarian law is aimed at the protection of persons adversely affected by a conflict. However, it should be kept well in mind that the existence of an armed conflict does loosen up the standard of protection afforded to individuals by human rights law[393]. For one thing, because under human rights law nobody can legitimately be killed by state agents if not in exceptional circumstances, while under international humanitarian law the rule is the opposite.

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392 Mary Ellen O'Connell, *Combatants and the Combat Zone*, in *University of Richmond Law Review*, Richmond, 2009, p. 111.

393 Accordingly see, *inter alia*, Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, in *Texas International Law Journal*, Austin, 2012, p. 300: "[…] the salient difference between these two bodies of law lies in their disparate provisions regarding the use of lethal force. International humanitarian law allows for lethal force to be employed based upon the status of the target. […] In contrast, international human rights law permits lethal force only after a showing of dangerousness".

b) Geographical Scope of Armed Conflicts

Once established which are the conditions set forth by international humanitarian law in order to identify the existence of an armed conflict, its geographical scope of application remains to be determined. In other words, the question remains as to which are the borders wherein belligerents can lawfully conduct hostilities.

Such determination heavily depends upon the nature of the armed confrontations. Problems concerning the geographical scope of a conflict arise because in both international and non-international armed conflicts international humanitarian law does not pertain exclusively to areas where actual fighting takes place, as underlined by the ICTY[394]. Depending on the understanding of geographical limitations to the conduct of hostilities, military attacks may or may not be performed outside precise zones of active combat and, as a consequence, a certain targeted killing may or may not be banned on the basis of geographical considerations. Therefore, the crucial question is: where can the parties to an armed conflict legally strike? There is no international consensus on this issue[395].

According to the consolidated jurisprudence of the ICTY, "whether or not the conflict is deemed to be international or internal, there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable"[396].

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394 ICTY, *Prosecutor v. Tadic*, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, *supra*, para. 67: "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities". This does not however amount to say that there hostilities (and the application of international humanitarian law with them) can stretch wherever without any limitation. The idea of an existing "global battlefield" whereby no territorial limitation on the applicability of targeting rules and rules governing the conduct of hostilities may be envisaged has been authoritatively advanced, *inter alia*, in 2006 by the U.S. Supreme Court in its decision on the case *Hamdan v. Rumsfeld*, 29 June 2006. Such understanding, nonetheless, is not tenable due to lack of compatibility with basic principles of international law. See, accordingly, Marco Sassoli, *Use and Abuse of the Laws of War in the War on Terrorism*, *supra*, p. 198; Human Rights Watch (hereinafter HRW), *Open Letter to President Obama (I)*, 7 December 2010, p. 2 and *Open Letter to President Obama (II)*, 13 May 2015, pp. 1 and 2. On the notion of global battlefield see, *inter alia*, Marko Milanovic and Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, *supra*, pp. 49 and 50.

395 ICRC, *The Use of Armed Drones Must Comply with Laws*, 10 May 2013, available on www.icrc.org. Accordingly, see also Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counter-Terrorism Operations*, UN Doc. A/68/389, 18 September 2013 (hereinafter *Emmerson Report 2013*), para. 64.

396 ICTY, *Prosecutor v. Delalic*, Trial Chamber Judgment, 7 May 1997, para. 185. Accordingly, see also ICTY, *Prosecutor v. Blaskic*, Trial Chamber Judgment, 3 March 2000, para. 64.

However, the criterion thus envisaged does not purport the existence of an unlimited theatre of hostilities: first, the ICTY has made clear that international humanitarian law applies within the whole territory of warring states and the territory under the control of a party to the conflict when this is non-international in nature.

Secondly, and consequently, the principle in case of international armed conflict and non-international ones is not the same. What is alike is the underlying rationale of the general rule, that is, international humanitarian law continues to apply beyond the strict boundaries of the battlefield. The actual implications of such assessment, however, differs for inter-state conflicts and internal ones since in the former scenario international humanitarian law will find application throughout the whole territory of the belligerents; in the latter, to the opposite, the laws of armed conflict will govern a limited part of the territory only[397]. Moreover, the ICTY's reasoning only refers to "some provisions" of international humanitarian law which are protective in nature. This is of course in line with the object and scope of the laws of armed conflict, *i.e.* the creation of restraints to the brutalities of war. This same *ratio* cannot be turned onto its head and applied *a contrario* to extend the permissibility of armed attacks where they would otherwise be prohibited. Applying this very same rationale, international humanitarian law provisions concerning the conduct of hostilities and, among them, the rules governing the law of targeting, shall be narrowly interpreted. Accordingly, when the ICTY has made reference to a broad geographical scope of international humanitarian law has done so in order to avoid

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397 ICTY, *Prosecutor v. Tadic,* Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, supra*, paras. 67 – 70: "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. […] some of the provisions of the [Geneva] Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. […]The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions […] also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities. […] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there". Accordingly, see also ICTY, *Prosecutor v. Kordic and Cerkez,* Trial Chamber Judgment, 26 February 2001, para. 27 and ICTY, *Prosecutor v. Kunarac and Others,* Appeals Chamber Judgment, 12 June 2002, para. 56.

leaving unpunished crimes which clearly had a nexus with the armed conflict that had occurred over the territory of former-Yugoslavia[398].

This interpretation is actually in accordance with the requirement of "intensity" of hostilities, which must be evaluated against the background of the armed violence used within a certain area and not, instead, on a global scale[399]. Accordingly, the ICRC has expressed the view that international humanitarian law does not permit to target persons outside the territory of belligerent states since otherwise the "battlefield" would cover the whole planet[400]. Such view does in fact impose a further restriction: although international humanitarian law applies throughout the whole territories of belligerent states, armed attacks shall be confined to zones of active hostilities or else located in proximity of such zones[401]. It seems reasonable therefore to conclude that, in general, there is no combatant privilege to kill outside armed conflicts[402] as defined by the conditions set forth by the "*Tadic Test*". If these conditions are not met at the location where armed violence is used, then international humanitarian law does not apply and the attack is therefore likely to be deemed unlawful[403]. If this is the case, and the attack causes the death of the

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398 See, accordingly, *Prosecutor v. Delalic*, Trial Chamber Judgment, *supra*, para. 185 and *Prosecutor v. Naletilic and Martinovic*, Trial Chamber Judgment, 31 March 2003, 177.

399 *Emmerson Report, supra,* para. 63, noting however that most of the scholars upholding a restraining view on the geographical scope of international humanitarian law do make allowances for cases of non-international conflicts spilling over the territory of another country.

400 ICRC, *The Use of Armed Drones Must Comply with Laws, supra.* Accordingly, see also Mary Ellen O'Connell, *Combatants and the Combat Zone, supra*, p. 114: "In addition to exchange, intensity, and duration, armed conflicts have a spatial dimension. It is not the case that if there is an armed conflict in one state—for example, Afghanistan—that all the world is at war, or even that Afghanis and Americans are at war with each other all over the planet. Armed conflicts inevitably have a limited and identifiable territorial or spatial dimension because human beings who participate in armed conflict re-quire territory in which to carry out intense, protracted, armed exchanges".

401 To this end see also, *inter alia,* Christopher Greenwood, *Scope of Application of Humanitarian Law*, in Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflict*, Oxford, 1995, p. 53: "Military operations will not normally be conducted throughout the area of war. The area in which operations are actually taking place at any given time is known as the "area of operations" or "theatre of war." The extent to which a belligerent today is justified in expand-ing the area of operations will depend upon whether it is necessary for him to do so in order to exercise his right of self-defence. While a state cannot be expected always to defend itself solely on ground of the aggressor's choosing, any expansion of the area of operations may not go beyond what constitutes a necessary and proportionate measure of self-defence. In particular, it cannot be assumed—as in the past—that a state engaged in armed conflict is free to attack its adversary anywhere in the area of war". Accordingly, Mary Ellen O'Connell, *Combatants and the Combat Zone, supra,* pp. 116-118.

402 Mary Ellen O'Connell, *Combatants and the Combat Zone, supra,* p. 112.

403 Accordingly see, inter alia, Michael W. Lewis, *Drones and the Boundaries of the Battlefield, supra,* p. 301.

persons targeted, the operation is to be deemed as an extra-judicial execution, save in extremely limited exceptions[404].

3. GENERAL PRINCIPLES GOVERNING THE USE OF FORCE UNDER INTERNATIONAL HUMANITARIAN LAW.

(1) Military Necessity; (2) Distinction and Proportionality; (3) Interlocutory conclusions

The existence of an armed conflict triggers the applicability of the body of international humanitarian law for belligerent parties[405]. The aim of this set of rules as a whole is to govern the conduct of hostilities in order to limit their effects and bring about a certain degree of "humanity" in armed conflicts[406]. International humanitarian law is geared around four main principles: military necessity, proportionality, distinction and, finally, humanity. These are all principles of a customary nature and they are widely believed to apply to any kind of conflict[407]. A brief analysis of such principles, in particular those of necessity and distinction, is needed in order to attempt answering a first crucial question: who, in general, may be lawfully attacked during an armed conflict?

3.1. Military Necessity

404 For a completely opposite view on the subject see Yoram Dinstein, *War, Aggression and Self-Defence, supra*, pp. 19 and 20 and Michael W. Lewis, *Drones and the Boundaries of the Battlefield, supra*, p. 303, arguing that "the claim that there are legal restrictions on the employment of combat force during armed conflict based solely on the distance from the frontlines finds no support in practice". Supporting this view see also Jens David Ohlin, *The Duty to Capture*, in *Minnesota Law Review*, Minneapolis, 2013, pp. 17-22.

405 International humanitarian law finds application in addition to international human rights law and does not trumps its applicability. To this end see, *inter alia*, Christof Heyns, *Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions*, UN Doc. A/68/382, 13 September 2013, para. 67. In detail, on the interplay between these two branches of international law see *infra*, Ch. II, para. 6.

406 Accordingly see, *inter alia*, Matteo Fornari, *Le Regole fondamentali nella conduzione delle ostilità*, in Tullio Scovazzi e Massimo Annati, *Diritto internazionale e bombardamenti aerei*, Milano, 2012, p. 6; Paolo De Stefani e Federico Sperotto, *Introduzione al diritto internazionale umanitario e penale, supra*, p. 12. In general, on the issue, see N. Schmitt and Wolff Heintschel von Heinegg, *The Scope and Applicability of International Humanitarian Law*, Ashgate, 2012; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, 2006; Jean D'Aspremont and Jérôme de Hemptinne, *Droit International Humanitaire*, Paris, 2012.

407 Human Rights Council, *Report of the Commission of Enquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*,UN Doc. A/HRC/3/2, 23 November 2006, para. 82. Jean D'Aspremont and Jérôme de Hemptinne, *Droit International Humanitaire, supra*, p. 298.

The notion of military necessity is as much essential to the whole body of international humanitarian law[408] as it is elusive and somehow controversial[409].

Since its first formulations, several doctrines of military necessity have gained momentum without ever coming to a convincing refinement of its real concept. Suffice it to recall here those doctrines of the past that considered military necessity as a form of justification for any possible conduct otherwise contrary to the laws of war[410].

The trajectory of the concept of military necessary as we understand it today clearly emerges from the sentence issued by the U.S. Military Tribunal at Nuremberg[411] in the so called *Hostage Case*[412] where the Tribunal heavily borrowed from art. 14 of the *Lieber Code*[413] thus reinforcing the value of a notion largely unchanged since then[414]. Accordingly, military necessity is not to be deemed as a justification but rather as an exemption clause that operates only in connection to those rules of *jus in bello* which explicitly allow it[415]. That is, military necessity does

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408 Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge, 2004, pp. 2 and 7.

409 Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law - Preserving the Delicate Balance*, in *Virginia Journal of International Law*, Charlottesville, 2012, p. 796: "No principle is more […] misunderstood than that of military necessity. It has been proffered both to justify horrendous abuses during armed conflicts and to impose impractical and dangerous restrictions on those who fight". Accordingly see, inter alia, Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, in *Boston University International Law Journal*, Boston, 2010, p. 41.

410 Among such doctrines the most well-known was elaborated in Germany at the end of the XIX century: Kriegsrason geht vor Kriegsmanier (necessity in conflict overrules the manner of warfare). On the "Kriegsrason Doctrine" see, *inter alia*, Natalino Ronzitti, *Diritto internazionale dei conflitti armati*, Torino, 2006, p. 184. See also M.N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law - Preserving the Delicate Balance*, *supra*, p. 796.

411 Control Council, *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Berlin, 20 December 1945.

412 *United States v. Wilhelm List and others* (hereinafter the *Hostage Case*), reported in *United Nations War Crimes Commissions, Law Reports of Trials of War Criminals, Vol. VIII*, London, 1949, *Case 47*, p. 66.

413 *Lieber Code, supra*, art. 14: "military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."

414 Jens David Ohlin, *The Duty to Capture,* in *Minnesota Law Review*, *supra*, p. 1298. The influence of the *Lieber Code* on today's notion of military necessity has been recently underlined also by the ICRC. To this end see ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (hereinafter the *ICRC's Interpretative Guidance*), Geneva, 26 February 2009, in *The International Review of the Red Cross*, Geneva, 2008, pp. 1041 and 1042.

415 Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, *supra*, p. 132.

not trump other rules of international humanitarian law but allows conducts otherwise unlawful only when the laws of armed conflict overtly provide for such derogation[416]. As a consequence, the notion of military necessity is negative in nature and is to be narrowly construed[417]. This, in turns, implies that a number of rules of international humanitarian law cannot in any event be derogated due to considerations of necessity.

Furthermore, the *formula* adopted in *The Hostage Case* displays the twofold nature of military necessity which, besides its permissive character, is also inherently restraining inasmuch as it does not allow for the employment any means and method of warfare going beyond what is needed to ensure the submission of the enemy[418]. In this latter regard, it has been pointed out that "military necessity appears as both a specific element and a general foundational principle of the laws of armed conflict"[419]. This feature is at the basis of its dual bond with the principles of distinction, proportionality and humanity: on the one hand, necessity is prodromal to these principles since in its absence no resort to force can be justified. A military action not supported by necessity would be illegitimate without need to balance considerations on the principles of distinction, proportionality and humanity[420]. On the other hand, when an action is allowable under the premises of military necessity, such action will not breach the laws and customs of war only in so far as it matches the criteria posited by the abovementioned principles, *i.e.* if the military force deployed is not directed against civilians, if it is proportionate and, finally, if it abides by the rules of "humanity".

In order to better identify the inherent limits of military necessity as it stands today it has been observed that its notion can very well be deconstructed into a four-pronged model. According to this theory, only conducts that match four cumulative

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416 Accordingly, see *The Hostage Case*, *supra*, p. 69. In the words of the ICRC, "Considerations of military necessity and humanity neither derogate from nor override the specific provisions of IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions". To this end see *ICRC's Interpretative Guidance,* p. 1041. In the same token see also *Report of the Commission of Enquiry on Lebanon, supra*, para. 316; Christopher Greenwood, *Historical Development and Legal Basis,* in Dieter Fleck, *The Handbook of International Humanitarian Law,* Oxford, 2008.

417 Matteo Fornari, *Le Regole fondamentali nella conduzione delle ostilità, supra*, pp. 16 and 17.

418 The interpretation of military necessity as a two-facets notion integrated by a permissive limb as well as a constraining limb is not of recent creation but has been noticed and supported for centuries by scholars reflecting on the laws of war. To this end see *supra*, Ch. I. See accordingly Stephen C. Neff, *Vattel and the Laws of War: a Tale of Three Circles, supra*, p. 323.

419 M.N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law - Preserving the Delicate Balance, supra*, p. 797.

420 To this end see, *inter alia*, Human Rights Council, *Report of the United Nations Fact-finding Mission on the Gaza Conflict* (hereinafter *Goldstone Report*), UN Doc. A/HRC/12/48, 25 September 2009, paras. 1323 – 1325.

requirements may fall within the purpose of military necessity: "the measure was primarily taken for the attainment of a military purpose[421], [..] the measure was required for the purpose's attainment[422], […] the purpose was in conformity with international humanitarian law, and […] the measure itself was also otherwise in conformity with the law"[423].

3.2. Distinction and Proportionality

In order for it to be lawful, a measure undertaken under the premises of military necessity must also comply with the interlinked principles of proportionality and distinction[424].

These principles originate from the same normative framework[425], the former actually being a consequential emanation of the latter[426], and are premised on a fundamental and basic assumption of international humanitarian law: civilians and

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421 In this regard see, *inter alia*, *The Hostage Case*, *supra*, p. 66. By the same token see, inter alia, Matteo Fornari, *Le regole fondamentali nella conduzione delle ostilità*, *supra*, pp. 24 - 27. The *Goldstone Report* many examples of military actions performed in the absence of any military necessity, due to the lack of one or more of the elements hereby considered. In relation to the lack of military purpose one may recall, inter alia, paras. 50, 51, 198, 199, 389, 390, 882, 883 and 1323.

422 On this point see, *inter alia*, *Goldstone Report, supra,* paras. 53, 100, 1001, 1004 and 1929, excluding any applicability of the so called "operational necessity" invoked by the defendants of the so called *Peleus Case*. With reference to the doctrine of "operational necessity" see *U.K. v. Heinz Eck and four others* (*The Peleus Case*), available in United Nations War Crimes Commissions, *Law Reports of Trials of War Criminals, Vol. I*, London, 1947, Case 1, pp. 1 and 15. Accordingly see also Natalino Ronzitti, *Diritto internazionale dei conflitti armati, supra*, p. 185.

423 Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law, supra*, p. 139. Note that, even though the ICTY never tackled the issue of military necessity decomposing it in the four-pronged structure hereby advanced, a number of its judgments indirectly support this argument. To this end see, *inter alia*, ICTY, *Prosecutor v. Momcilo Perisic*, Trial Chamber Judgment of 6 September 2011, para. 96; ICTY, *Prosecutor v. Kupreškić and others*, Trial Chamber Judgment of 14 January 2000, para. 674; ICTY, *Prosecutor v. Baskic*, Trial Chamber Judgment of 3 March 2000, paras. 403-410 and 507-512. This latest judgment bears particular significance because it highlights that, if a given military operation is not undertaken for the achievement of a military purpose legitimate under international humanitarian law, then military necessity cannot be invoked in relation to all the ensuing damages to persons and property.

424 Accordingly see, inter alia, Mary Ellen O'Connell, *Combatants and the Combat Zone*, *supra*, p. 116, and Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in Yoram Dinstein and Mala Tabory, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Leiden, 1989, p. 273.

425 Jean Pictet, *Commentary on the APs*, para. 1967.

426 Accordingly see also Amichai Cohen, *Proportionality in Modern Asymmetrical Wars*, Jerusalem, 2010, p. 9. On the relationship between the principles of proportionality and distinction see also, *inter alia*, ICTY, *Prosecutor v. Kupreškić and others, supra*, para 524.

civilian objects cannot legitimately be targeted[427]. However, if civilian casualties and destruction of civilian objects derive as an unintended consequence of an attack, the military action may be lawful since the law of armed conflict does admit that a certain number of innocent lives may be involuntarily sacrificed to the war effort as a "collateral damage"[428]. As it emerges, while the principle of distinction is primarily concerned with the intent of the belligerents performing an attack, the principle of proportionality relates to its outcome, coming into play only when such attack causes civilians' deaths or destruction of civilian objects. Such principle is today codified in arts. 51(5)(b) of AP I, and reinforced by art. 57(2) (a) and (b) of AP I[429]. The ICRC has recognized the customary nature of the principle, underlying that it is forbidden to carry out disproportionate attacks[430]. As a consequence, every party to a conflict is bound to respect the principle of proportionality, thus abiding by it under every

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427 Accordingly see, *inter alia*, Stefanie Schmahl, *Targeted Killings – A Challenge for International Law?*, in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter, *The Right to Life*, Leiden, 2010, p. 254.

428 Accordingly the former Chief Prosecutor of the International Criminal Court had had occasion to state: "under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime". To this end see Luis Moreno-Ocampo, *Open Letter on the Iraq Case*, 9 February 2006, p. 5. With reference to the notion of collateral damages see Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (hereinafter, *Harvard Commentary on HPCR*), Harvard, 2010, p. 33 and Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict, With Commentary*, Sanremo, 2006, p. 22.

429 Note that the principle of proportionality is enshrined in a number of other instruments besides AP I. See, *inter alia*, *Protocol II to the Convention on Certain Conventional Weapons*, entered into force on 2 December 1983, art. 3 (3), *Rome Statute of the International Criminal Court*, *supra*, art. 8(2)(b)(iv). On the linkage between the principle of proportionality and obligations to undertake precautionary measures as set forth by art. 57(2) (a) and (b) of AP I see Ropert P. Barnidge, Jr., *The Principle of Proportionality under International Humanitarian Law and Operation Cast Lead: Institutional Perspectives*, in *Rutgers Law Record*, in William C. Banks, *New Battlefields/Old Laws: From the Hague Convention to Asymmetric Warfare*, New York, 2011, p. 277.

430 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 14, p. 46: "launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited". According to the ICRC, "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts" (*Ibidem*, pp. 46 and 47). Accordingly see also ICTY, *Prosecutor v. Kupreškić and others, supra,* para. 524: "These principles [distinction and proportionality] have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol". On the customary nature of the principle of proportionality see also, *inter alia*, Matteo Fornari, *Le regole fondamentali nella conduzione delle ostilità*, *supra*, pp. 36 and 37; Paolo De Stefani e Federico Sperotto, *Introduzione al diritto internazionale umanitario e penale*, *supra*, pp. 55 and 56.

circumstance[431] and in any kind of conflict, regardless of its international or non-international nature[432].

The principle of distinction has been defined by the International Court of Justice as a "cornerstone of international humanitarian law"[433]. This principle is now endorsed in a number of international instruments of a binding as well as a non-binding character[434]. It is now widely recognized that the principle of distinction has become a rule of customary international law[435]. As such, it is applicable to every kind of armed conflict[436]. The first corollary of the principle at hand is the ban to

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431 *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, (hereinafter *I Additional Protocol*), Preamble.

432 Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict, With Commentary, supra*, p. 22. In higher detail on the hermeneutic hurdles posed by the principle of proportionality with reference to the notions of attack and military advantage see ICRC, *Commentary on the APs, supra,* paras. 1979, 1980 and 2209; Antonio Cassese, *International Law, supra,* p. 418; Amichai Cohen, *Proportionality in Modern Asymmetrical Wars,* 2010, Jerusalem, pp. 10, 11 and 12. *Harvard Commentary on HPCR, supra,* at pp. 44; Michael N. Schmitt, Charles H.B; Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict, With Commentary, supra*, p. 23; Jason D. Wright, "*Excessive" Ambiguity: Analysing and Refining the Proportionality Standard,* in *International Review of the Red Cross*, Geneva, 2012, p. 820, 837 and 838; Matteo Fornari, *Le regole fondamentali nella conduzione delle ostilità,* pp. 37-39; Paolo de Stefani and Federico Sperotto, *Introduzione al diritto internazionale, supra,* p. 55.

433 ICJ, *Advisory Opinion on the Legality of the Use of Threat or the Use of Nuclear Weapons,* 8 July 1996, para. 78. In the same token, the ICRC has highlighted the importance of such principle with the following words: "It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 1 and in Geneva from 1864 to 19772 is founded on this rule […]". To this end see ICRC, *Commentary on APs, supra,* para. 1863. Accordingly see also Yoram Dinstein, *Legitimate Military Objectives under the Current Jus in Bello,* in *Israel Yearbook on Human Rights,* The Hague, 2002, pp. 31-34. Historically, the principle of distinction found express recognition, *inter alia,* in the *Lieber Code, supra,* arts. 15, 22 and 23, in the preamble of the *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight,* adopted in Saint Petersburg on 11 December 1868 (hereinafter the *1868 Saint Petersburg Declaration*), in art. 25 of the 1907 Regulations attached to the IV Hague Convention and art. 1 of the IX Hague Convention of 1907.This instruments did not codify a principle of distinction proper as we know it today but they did state that the means and methods of war resorted to should not lead to indiscriminate attacks against civilians. As a matter of fact, the Hague Regulations attached to Hague Convention IV established a set of rules aimed at protecting civilians from hostilities (arts. 25-28 and 42-56).

434 Matteo Fornari, *Le regole fondamentali nella conduzione delle ostilità, supra,* p. 46.

435 ICRC, *Commentary on APs, supra*, para. 1863. See, accordingly, ICTY, *Prosecutor v. Strugar and others, Trial Chamber Decision on Defence Preliminary Motion Challenging Jurisdiction*, 7 June 2002, paras. 18-21.

436 The lack of combatancy and related combatant status in armed conflicts not of an international character, however, renders the applicability of the principle of distinction is such a context highly problematic. On the status of members of armed forces and members of organized armed groups for

deploy weapons whose effects are naturally indiscriminate[437]. On the one hand, the principle obliges belligerents to attack exclusively military objectives[438]. The second prong of the principle of distinction relates to the demarcation between combatants and non-combatants: "an individual is either a civilian or a combatant. Humanitarian law protects those who seem to be in between categories so no one falls outside the scope of international humanitarian law"[439]. Its scope is therefore to ensure the maintenance of the "fundamental dichotomy"[440] between civilians and combatants. As a matter of fact, in case of doubt concerning the qualification of a person as a civilian or a combatant, such individual shall be considered a civilian and may not be object of attacks[441].

As it appears, the principle of distinction revolves around the crucial identification of civilians on the one hand and combatants on the other. *Geneva Convention IV*, *AP I* and *AP II* all provide a negative definition: a person who is not a combatant necessarily is a civilian. The definition of civilian is accordingly characterized in negative terms also under customary international law: "Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians" [442]. In general, therefore, a civilian is a person who does not belong to the armed forces of any state and does not take a direct part in military actions[443]. Since, according to art. 50 (1) AP I, a civilian is any person who does not fit within the classes of combatants as defined by art. 4 GC III

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the purpose of the law applicable to non-international armed conflict see in higher detail infra, Ch. V, para. 2.

437 ICJ, *Nuclear Weapons Advisory Opinion*, *supra*, para. 78.

438 Military objectives are defined under *AP I*, Art. 52 (2) as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". This definition is deemed to have become part of customary international law. To this end see Antonio Cassese, *International Law*, *supra*, p. 416. In general, on the definition of military objective and its implications see Antonio Cassese, *International Law*, *supra*; Noram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, in Andru E. Wall *International LawStudies, Legal and Ethical Lessons of NATO's Kosovo Campaign,* pp. 139-172; University Centre for International Humanitarian Law, *Targeting Military Objectives*, Geneva, 2005.

439 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, Oxford, 2011, p. 99.

440 Antonio Cassese, *International Law*, *supra*, p. 416.

441 *AP I*, Art. 50 (1). Accordingly see also Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 31.

442 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 5, p. 17. Note that according to the ICRC "armed forces" is to be broadly interpreted as to embrace not solely regular armed forces but also groups and units which are under a command responsible to a party of the conflict for the conduct of its subordinates.

443 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 29.

and art. 43 AP I[444], the crucial question to answer becomes the following: who is a combatant?

Once answered such question, the analysis will need to move on and explore two more critical issues:

i. can a person's status shift from civilian to combatant and *vice-versa*?
ii. under which circumstances does a civilian lose his immunity from attacks, if any?

3.3. Interlocutory Conclusions

Whereas international humanitarian law is premised on these three principles, rules governing the use of force are of such nature and concern such an object that their scope, permissive or restrictive as it may be, directly impacts on individuals' fundamental rights. As a consequence, the question that spontaneously arises is whether, in times of armed conflicts, such rights cease to exist or are otherwise suspended. If this is not the case, then, should we assess the legitimacy of a certain attack by reference to international humanitarian law, to human rights law or to both branches simultaneously? In other words, if the conditions for the existence of an armed conflict as outlined above are met and during such hostilities a state carries out an armed attack against a targeted person intentionally depriving him of his life, will such attack be lawful insofar as it complies with principles of necessity, proportionality and distinction only, or the existing obligations related to the rights of the targeted person impose further restrictions to the use of force?

In order to answer these questions we need first and foremost to understand which rights individuals bear *vis-à-vis* state actions.

[444] See accordingly, Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, an Introduction to International Humanitarian Law*, *supra*, p. 101.

4. THE RIGHT TO LIFE UNDER HUMAN RIGHTS LAW

(1) The Legal Basis of the Right to Life under Human Rights Law; (2) The core content of the right to life: limitations to the use of force in the case law of human rights monitoring mechanisms; (2.a) The Jurisprudence of the ECtHR; (2.b) The Jurisprudence of the IACtHR; (2.c) The HRC's Case Law; (2.d) Interlocutory Conclusions on the Core Content of the Right to Life under International Human Rights Law; (3) The procedural limb of the right to life: the positive obligation to investigate; (4) Interlocutory Conclusions

When it comes to fundamental rights granted by currently existing international law to individuals, the right to life is undoubtedly paramount inasmuch as it is prodromal to the enjoyment of any other right that States are bound to guarantee. By the same token, it has been suggested that the right to life is "the supreme right of the human being"[445], that it represents one of the basic values of any democratic society[446] and that, due to its fundamental character, it cannot be strictly construed[447].

The right to life, by definition, is the right coming first and foremost into play in any discourse around assassination and targeted killing, insofar as the very aim of

445 UN Human Rights Committee (hereinafter, HRC), *Case of Suarez de Guerrero v. Colombia*, Views of 31 March 1982, para. 12.2.

446 European Court of Human Rights (hereinafter, ECtHR), *Case of McCann v. U.K.*, Judgment of the Grand Chamber of 27 September 1995, para. 147. By the same token see also ECtHR, *Case of Soering v. the United Kingdom*, Judgment of 7 July 1989, para. 88 and ECtHR, *Makaratzis v. Greece*, Judgment of the Grand Chamber of 20 December 2004, para. 56. Accordingly, Douwe Korff, *The right to life, A guide to the implementation of Article 2 of the European Convention on Human Rights*, Strasbourg, 2006, p. 6: "The right to life is listed first because it is the most basic human right of all: if one could be arbitrarily deprived of one's right to life, all other rights would become illusory".

447 Inter-American Court of Human Rights (hereinafter, IACtHR), *Case of Villagrán Morales and others v. Guatemala* (hereinafter *Niños de la Calle*), judgment of 19 November 1999, para. 144: "es un derecho humano fundamental, cuyo goce es un prerrequisito para el disfrute de todos los demás derechos humanos. De no ser respetado, todos los derechos carecen de sentido. En razón del carácter fundamental del derecho a la vida, no son admisibles enfoques restrictivos del mismo". Accordingly see also, IACtHR, *Case of Hermanos Gomez Paquiyauri v. Peru*, Judgment of 8 July 2004, para. 128: "Este Tribunal ha establecido che el derecho a la vida es fundamental en la Convención Americana, por cuanto de su salvaguarda depende la realización de los demás derechos. Al no ser respetado el derecho a la vida, todos los derechos carecen de sentido". Accordingly see, *inter alia*, IACtHR, *Case of la Masacre de Pueblo Bello Vs. Colombia*, Judgment of 31 Juanuary 2006, *Case of Comerciantes Vs. Colombia*, Judgment of 5 July 2004, *Case of Aloeboetoe and Others v. Suriname*, Judgment of 10 September 1993.

such practices is to deprive a selected person of his or her life. Considered from this viewpoint, the analysis of such right does not require to go into details in all its facets and branches. It does however necessitate of a preliminary, cursory review of its core content, namely: which are its legal basis, what is the main protection the right to life grants to individual human beings against the use of lethal force by state agents and what are states bound to do whenever a deprivation of life occurs.

As it will be shown shortly, two sub-questions will be particularly relevant for the object of the current research. Such questions are strictly related to the nature of assassination and targeted killings as we know of them in these last years, that is, as practices involving an intentional deprivation of life of persons usually located outside the territory of the targeting State, or at least in a territory which is not under their direct control:

i. is there any factual or legal circumstance justifying an intentional deprivation of life by State agents at the detriment of an individual?
ii. are States bound by their obligations under international human rights law even when they act abroad?

Only once all these questions are properly answered, may we shift our focus to the strictly related issue of the applicability of such standards and tests in times of armed conflict, a matter that is of the utmost relevance for the remainder of our analysis considering that, as mentioned above, differing greatly from targeted killing, assassination is a practice that for our purposes is only relevant during war-time.

4.1. The legal basis of the right to life in international human rights law

The prominence of the right to life results from – and at the same time is the reason of – its enshrinement in each and any of the most important treaties on human rights concluded at both the universal as well as at regional levels.

The right to life is non-derogable in nature, that is, it cannot be suspended, it cannot be denied, even in times of war or other public emergencies[448]. Albeit non-

[448] ICCPR, art. 4, para. 2; ECHR, art. 15, para. 2; IACHR, art. 27, para. 2. See also United Nations Human Rights Committee (hereinafter HRC), *General Comment 29*, UN Doc. CCPR/C/21/Rev.1/Add.11, 2011, para. 7 and HRC, *General Comment 6*, 30 April 1982, paras. 1 to 3. By the same token, Economic and Social Council, *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, ECOSOC Res. 1989/65, 24 May 1989, Principle 1. Accordingly see, *inter alia*, Office of the High Commissioner for Human Rights (hereinafter, OHCHR), *Human Rights, Terrorism and Counter-terrorism*, Geneva, 2008, p. 31; Tullio

derogable, the right to life is not absolute. That is to say that, while in no occasion it may be derogated from, it is not protected in absolute terms and knows of some exceptions[449]. In fact, whereas significantly differing in some respects[450] and with the exception of the European Convention on Human Rights (hereinafter ECHR)[451], the main conventional instruments directly dealing with the right at hand, *i.e.* the International Covenant on Civil and Political Rights (hereinafter ICCPR)[452], the Inter-American Convention on Human Rights (hereinafter IACHR)[453] and the African Charter on Human and Peoples' Rights (hereinafter ACHPR)[454], all establish that no one shall be "arbitrarily" deprived of his or her life[455]. As it appears, then, they do not exclude in categorical terms the possibility that a person be killed by states. However, they restrict this possibility to non-arbitrary deprivations of life, therefore tying the respect or breach of such provisions to the meaning of arbitrariness. The determination of which deprivations of life actually violates these conventions, therefore, falls to be determined with reference to the meaning of "arbitrary".

In a somewhat different vein, the ECHR describes in higher detail under which exceptional circumstances a state may resort to force causing a loss of life whilst still being in compliance with its conventional obligations. According to art. 2 of the ECHR, a deprivation of life does not amount to a breach of conventional

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Scovazzi and Gabriella Citroni, *Corso di diritto internazionale, La tutela internazionale dei diritti umani*, Milano, 2013 pp. 24 – 30 and Douwe Korff, *The right to life, A guide to the implementation of Article 2 of the European Convention on Human Rights*, *supra*, p. 6. Note that, while the right to life may not be denied even in times of war or other public emergencies, under such circumstances the regime governing the use of force and the resulting actions leading to loss of lives significantly change. To this end see *infra*.

449 Accordingly see, inter alia, Tullio Scovazzi and Gabriella Citroni, *Corso di diritto internazionale, La tutela internazionale dei diritti umani, supra*, pp. 24 – 30; David Kretzmer, *Targeted Killing of Suspected Terrorists*, *supra*, p. 177.

450 For instance, human rights treaties greatly differ in their approach to the right to life in relation to the death penalty. Such aspects of the right to life will not be analysed in depth here as they are not object of specific concern for the current analysis.

451 *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted by the Council of Europe in Rome on 4 November 1950.

452 *International Covenant on Civil and Political Rights*, adopted by the General Assembly of the United Nations in New York on 19 December 1996.

453 *American Convention on Human Rights*, adopted at the Inter-American Specialized Conference on Human Rights in San José on 22 November 1969.

454 *African Charter on Human and Peoples' Rights*, adopted by the Assembly of Heads of State and Government of the Organization of African Unity in Nairobi on 27 June 1981.

455 ICCPR, art. 6, para. 1: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"; IACHR, art. 4, para. 1: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life"; ACHPR, art. 4: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".

obligations whenever it results as an unintended consequence of a use of force which is absolutely necessary under three specific cases: a) when force is resorted to in defence of any person from unlawful violence; b) when the use of force to is aimed at performing a lawful arrest or prevent the escape of a detainee; c) where the conduct of State officials causing the loss of life is undertaken in order to quell riots and insurrections[456]. The ECHR thus lists an all-encompassing number of exceptions establishing when an individual may lawfully be killed. However, even under these circumstances, the person's death is to result as an unintended outcome of the use of force, *i.e.*, under no circumstance a death may be the final aim of the use of force[457]. Moreover, an absolute necessity test applies to every use of force under the ECHR: the force used by the State should therefore be commensurate to the threat posed by the individual and under no circumstance may it be higher than that absolutely required to put an end to such threat.

A thorough refinement of these parameters as much as an extensive clarification of the meaning of "arbitrariness" characterizing the wording of the provisions on the right to life embodied in the other international instruments of human rights protection mentioned above has been conducted in the jurisprudence of their respective monitoring bodies. A brief overview of such a jurisprudence and case law discloses a tendency towards the convergence of the standards set forth under each of the abovementioned treaties, at least insofar as the obligation not to deprive a person of his life is concerned.

4.2. The core content of the right to life: limitations to the use of force in the case law of human rights monitoring mechanisms

a) The Jurisprudence of the ECtHR

In the *Case of McCann v. U.K.*[458] the ECtHR established that any use of force leading to deadly outcomes shall be no more than "absolutely necessary", such expression entailing "a stricter and more compelling test of necessity […] than that

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456 ECHR, art. 2: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection".

457 To this end, in higher detail, see *infra*.

458 ECtHR, *Case of McCann and Others v. The U.K.*, Judgment of 27 September 1995.

normally applicable when determining whether State action is necessary in a democratic society under paragraphs 2 of Articles 8 and 11 of the Convention"[459]. In addition, the Court made clear that the circumstances under which force may be resorted to are to be strictly construed due to the vital importance of the right to life. The ECtHR has also had occasion to clarify that art. 2, para. 2 ECHR that art. 2, para. 2 ECHR does not list situations where State agents may wilfully deprive a person of his life but rather situations where they can resort to force that, eventually and unintentionally, may turn out to be lethal[460]. A further refinement of the absolute necessity test was conducted by the ECtHR in the *Case of Alikaj v. Italy*[461], where the Court clarified that under no circumstance whatsoever a deprivation of life may be considered in line with States' obligations under the ECHR if the victim does not represent an actual and real threat for the life of others. This means, in other words, that the requirement of "absolute necessity" within the meaning of art. 2 ECHR can only be satisfied when the aim of the state agents who exercise lethal force is to save a person's life or physical integrity[462]. Finally, the ECtHR has also made clear that that, although no requirement of proportionality in the use of force is literally set forth in art. 2 ECHR, such principle is inherent to such provision and it is well established in the Court's case law[463].

b) The Jurisprudence of the IACtHR

Similarly, in the Case of *Zambrano Velez and others v. Equador*, the IACtHR clarified that State agents may resort to force only in exceptional circumstances, when any other course of action has proved useless. The Court has added that, even under these circumstances, the force employed must be strictly proportionate and that cases where IACHR allows for such force to be lethal are even more exceptional, the test for assessing whether a deprivation of life is or not arbitrary being one of absolute necessity in relation to the force that State agents are called to suffocate.

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459 *Ibidem*, para. 149. By the same token see, *inter alia*, ECtHR, *Case of Huohvanainen v. Finland*, judgment of 13 March 2007; *Erdogan and Others v. Turkey*, judgment of 25 April 2006 and *Kakoulli v. Turkey*, judgment of 22 November 2005.

460 ECtHR, *Case of Ergi v. Turkey*, Judgment of 28 July 1998, para. 79: "Paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to *use force* which may result, as an unintended outcome, in the deprivation of life". Accordingly see Tullio Scovazzi and Gabriella Citroni, *Corso di diritto internazionale, La tutela internazionale dei diritti umani*, *supra*, p. 236.

461 ECtHR, *Case of Alikaj v. Italy*, judgment of 29 March 2011, paras. 62 and 63.

462 *Ibid.* Accordingly, see also ECtHR, *Case of Andreou v. Turkey*, Judgment of 27 October 2009, paras. 48, 55 and 57; and *Case of Perisan and Others v. Turkey*, Judgment of 20 May 2010, paras. 79, 86 and 87.

463 ECtHR, *Case of Wasilewska and Kalucka v. Poland*, Judgment of 23 February 2010, paras. 42 – 45.

Such use of force, as a consequence, is in any case limited by principles of exceptionality, necessity, proportionality and humanity[464].

The IACtHR has consistently followed such criteria throughout its jurisprudence on cases involving violations of the right to life. First of all, the IACtHR considers that resort to force by State agents may be justified, and therefore a deprivation of life would not represent a breach of States' conventional obligations, only insofar as the use of force in question is no more than absolutely necessary[465]. That is, resort to lethal force is allowed exclusively when it is necessary to save a person's life or his physical integrity from significant injuries and, at the same time, it is strictly proportionate to the threats it contrasts[466]. Accordingly, the IACtHR has established that, in order to be in line with the IACHR any use of force must be exceptional, the circumstances permitting such use being strictly interpreted, and must abide by principles of proportionality, necessity and humanity[467]. Moreover, even when it is absolutely necessary to resort to violence, its use must be strictly proportionate to the threat it aims to contrast and may be in line with the IACHR only if any other possible less-restrictive course of action has been exhausted or, in the specific circumstances, is manifestly inadequate[468]. In addition, no resort to force in line with the standards set forth by the IACHR may be done with premeditation: according to the IACtHR, a deprivation of life may be the consequence of an action by State agents taken as an immediate response to an aggression, but it can never be pre-planned[469]. Finally, the only actions involving the use of force allowed by the IACHR are those carried out in the pursuit of a legitimate goal by a State agent in the exercise of its functions when so mandated by law[470]. These criteria, the IACtHR has made consistently clear, are to be followed under also in times of emergency. The universal nature of the right to life as well as its non-derogable character, in fact, imply that extra-judicial, summary or arbitrary executions may never tolerated. The

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464 IACtHR, *Case of Zambrano Vélez and Others v. Ecuador*, Judgment of 4 July 2007, paras. 83 – 85.

465 IACtHR, *Case of Montero Aranguren and Others v. Venezuela* (hereinafter *Retén de Catia*), Judgment of 5 July 2006, paras. 67 – 74.

466 IACtHR, *Case of Zambrano Vélez and Others v. Ecuador*, *supra*, paras. 83 – 85.

467 Accordingly, see also Inter-American Commission on Human Rights (hereinafter, IACmHR), *Report on terrorism and Human Rights*, 22 October 2002, paras. 87 – 89.

468 IACtHR, Case of *Penal Miguel Castro Castro v. Perú*, Judgment of 25 November 2006, paras.240 and 241; *Case of Retén de Catia v. Venezuela*, *supra*, paras. 67 – 74; *Case of Zambrano Vélez and Others v. Ecuador*, *supra*, paras. 83 – 85.

469 IACtHR, *Case of Nadege Drozema v. República Dominicana*, Judgment of 24 October 2012, para. 95: "en la medida en que una decisión que se adopta por anticipado y que descarta la posibilidad de ofrecer o aceptar la oportunidad de rendirse, determina la ilegalidad de dichas operaciones".

470 IACtHR, *Case of Zambrano Vélez and Others v. Ecuador*, *supra*, paras. 83 – 85 and *Case of Retén de Catia v. Venezuela*, *supra*, paras. 67 – 74. Accordingly see Tullio Scovazzi and Gabriella Citroni, *Corso di diritto internazionale, La tutela internazionale dei diritti umani, supra*, pp. 253 and 254.

IACtHR has had occasion to stress that this holds true even in such instances where victims are perceived by States as posing a threat to their security[471].

c) The HRC's Case Law

On its part, the United Nations Human Rights Committee (hereinafter HRC) has repeatedly averred that the test to establish what is an arbitrary deprivation of life under the ICCPR is one of absolute necessity, analogous to that applied by the ECtHR. In the *Case of Pedro Pablo Camargo v. Colombia*, the HRC found the State in violation of, *inter alia*, its obligations under art. 6 ICCPR because its agents had made intentional use of lethal force and the State failed to prove the existence of an absolute necessity to resort to such measures[472]. Similarly, in the *Case of Suarez de Guerrero v. Colombia*[473], concerning the extrajudicial execution of seven people during a raid by police forces due to their alleged responsibility, as members of a guerrilla organization, of having the kidnap of a former ambassador, the HRC stressed that the use of force by state personnel is regulated by a strict necessity test (*i.e.*, resort to force is only legitimate for the purpose of defending the life and limb of the State agents themselves or that of other people, or in order to effect a lawful arrest or prevent escape of a detainee), and that, in any event, the degree of force used is to be proportionate to the threat posed by the targets[474]. The HRC also made clear that, before deploying lethal force, state agents are under an obligation to warn their targets and give them the opportunity to surrender[475].

In general, the following conclusions concerning the conditions to the use of force may be drawn from the case law of the HRC and from its Concluding Observations[476]: lethal force must be deployed exclusively in situations where it is necessary in self defence or in defence of others, when other less-impacting courses of actions are not feasible to reach such result; even when necessary, the force used must be strictly proportionate; in any event, the addressee of the force deployed by state agents must first be warned and afforded a chance to surrender; the use of force

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471 By the same token see, inter alia, *Case of Mack Chang v. Guatemala*, 25 November 2003, paras. 139 – 142 and 151 - 158; *Case of Family Barrios v. Venezuela*, Judgment of 24 November 2011, paras. 48 – 50; *Case of Kawas-Fernández v. Honduras*, Judgment of 3 April 2009, paras. 72 – 79 and 108; *Case of Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Judgment of 24 November 2010, para. 122.

472 HRC, *Case of Pedro Pablo Camargo v. Colombia*, views of 31 March 1982, paras. 13.1 and 13.2.

473 HRC, *Case of Suarez de Guerrero v. Colombia*, *supra*.

474 *Ibidem.*, paras. 13.1 and 13.2.

475 *Ibidem*.

476 The same principles herewith reported may be found in, inter alia, HRC, *Concluding Observations of the Human Rights Committee on periodic report by the USA*, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para 30; *Concluding Observations of the Human Rights Committee on periodic report by the USA*, UN Doc. CCPR/C/79/Add.50, 3 October 1995, para 297.

shall comply with internal legislation which has to strictly control and limit the circumstances in which agents are allowed to resort to it[477].

d) Interlocutory Conclusions on the Core Content of the Right to Life under International Human Rights Law

Notably, these same principles are echoed by several instruments of international law of a non-binding character concerned with the issue of arbitrary deprivation of life, such as the *Principles on the Effective Prevention and Investigation of Extra-Legal, Summary or Arbitrary Executions*[478], the *UN Manual for Law Enforcement Officials*[479], the *UN Code of Conduct for Law Enforcement Officials*[480], the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*[481]. Thus, the latter states: "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life. [...] law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident"[482]. Significantly enough, these principles are not only referred to the conduct of law enforcement officials but to any agent of the State[483].

In light of all the above, it seems quite safe to conclude that the jurisprudence and case law of international human rights mechanisms tend to converge on the

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477 Accordingly see, *inter alia*, Ugur Ersen and Cinar Ozen, *Use of Force in Countering Terrorism*, Amsterdam, 2010, pp. 62 and 63 and OHCHR, *Human Rights, Terrorism and Counter-terrorism*, Geneva, 2008, p. 31.

478 ECOSOC, *Principles on the Effective Prevention and Investigation of Extra-Legal, Summary or Arbitrary Executions*, *supra*.

479 *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/ST/CSDHA/.12, 1991.

480 United Nations General Assembly (hereinafter GA), *UN Code of Conduct for Law Enforcement Officials*, GA Res. 34/169, 17 December 1979.

481 Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Doc. A/CONF.144/28/Rev.1, Havana, 7 September 1990.

482 *Ibidem*, Principles 9 and 10.

483 *UN Code of Conduct for Law Enforcement Officials*, *supra*, Commentary to Art. 1.

limitations imposed on states for the use of force. In particular, for the purposes of the present analysis, it is to be noticed that all those bodies impose an absolute necessity test, coupled with a requirement of proportionality.

Perhaps even more significantly, under all the main human rights instruments at the universal level as well as on a regional scale, deprivations of life may be the unintended outcome of state agents' use of force; under no circumstance, however, may it be the final aim of an operation. This is in itself sufficient to exclude the compatibility of the human rights regime with any killing intentionally perpetrated by state agents, all the more so when their intentionality is characterized by an enhanced *dolus* characterized by premeditation besides normal consciousness and intentionality.

4.3. The Procedural Limb of the Right to Life: the Positive Obligation to Investigate

As it emerges, all of these instruments, in spite of their differences, first and foremost tackle the issue of the right to life understood in its "negative" dimension: this means that they first of all impose on States a duty not to deprive anyone of his or her life, subject to the conditions mentioned above. Besides such negative dimension, however, the right to life entails a positive one: states cannot simply refrain from causing deaths, they also need to proactively undertake all possible measures to ensure that the right to life of all those within their jurisdiction is fully respected.

In the words of the IACtHR, "Due respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the protection due entails positive obligations to impede violations against said persons by third parties"[484].

States are thus bound by the additional obligation to prevent any violation of the right to life as well as to take all possible steps, once a violation has occurred, to clarify the events, investigate into a person's death, prosecute those believed to be responsible, try them and, if found guilty, sanction them.

Whilst the negative dimension of the right to life directly stems from a literal reading of conventional provisions dedicated to such right, positive obligations derive from a joint reading of such articles and the norms that require States to "respect and ensure respect" to each right enshrined in the respective treaties[485].

The nature and range of positive obligations have been clarified in the jurisprudence of international human rights mechanisms. It thus emerge that positive obligations stemming from a joint reading of the provisions dedicated to the right to life and the general clauses that require states to respect and ensure respect to all the rights enshrined in their respective instruments have several significant ramifications[486]. Most of these obligations are preventive in nature and they concern

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484 IACtHR, *Case of Masacre de Mapiripan v. Colombia*, Judgment of 15 September 2005, para. 114.

485 To this end see, *inter alia*, ECtHR, *Case of Semse Onen v. Turkey*, Judgment of 14 May 2002, para. 87.

486 In general, on positive obligations entailed by human rights see, *inter alia*, Tullio Scovazzi and Gabriella Citroni, *Corso di diritto internazionale, La tutela internazionale dei diritti umani*, *supra*, pp. 126 – 145; Sivlia Borelli, *Positive Obligations of States and the Protection of Human Rights,* in *Interights Bullettin*, London, 2006, pp. 101 – 103; Jean-Francois Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights, A Guide to the Implementation of the European Convention on Human Rights*, Strasbourg, 2007; Matthias Klatt, *Positive Obligations Under the European Convention on Human Rights*, in *Zeitschrift fur auslandisches offentliches Recht un Volkerrecht*, Heidelberg, 2011, pp. 691 – 719.

states' duty to undertake all the administrative, legal and judicial steps needed to guarantee the full enjoyment of the right to life of the individuals falling within their jurisdiction. What matters the most under the current analysis is, however, the positive obligations that states are bound to implement after a violation of a person's right to life has occurred, namely, the obligations stemming from the so called "procedural limb" of the right to life. In fact, in cases of targeted killings, not only states refrain from undertaking positive steps to protect the right to life of their targets but, obviously, they are directly and willingly involve in the deprivation of life of those individuals. However, should such a deprivation of life be of an arbitrary nature, the responsible state would be under an obligation to undertake an investigation into the facts, to prosecute those allegedly responsible for the violation of the targets' right to life and, ultimately, sanction them if found guilty.

In its *General Comment 31* the HRC has had occasion to clarify that "Article 2, paragraph 3 [ICCPR] requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. […] The Committee attaches importance to States parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways […]. A failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy. […] Where the investigations […] reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. […] Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States parties concerned may not relieve perpetrators from personal responsibility. […]"[487].

Accordingly, in its case law, the HRC has had occasion to reaffirm that state parties to the ICCPR have "a duty to investigate thoroughly alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified"[488].

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487 HRC, *General Comment 31*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 3; paras. 15 and 18.

488 HRC, *Vicente and others v Colombia*, views of 29 July 1997, para. 8.8.

International human rights mechanisms have consistently upheld that in undertaking to respect and to ensure respect to human rights states assume an obligation to carry out an effective investigation on gross human rights violations, such as violations of the right to life, to prosecute and sanction perpetrators[489], and to restore the rights violated affording victims integral reparations of the damages suffered[490].

According to international practice and jurisprudence, in order to be effective an investigation shall be prompt[491], thorough[492], independent[493] and impartial[494]. Moreover, it must be carried out *ex officio*, without victims' relatives having to launch a complaint[495].

If compared with other positive obligations, the obligation to undertake investigation, prosecution and judgment of those responsible for alleged human rights violations is characterized by two distinctive features. First of all, it is an obligation of means and not of results. This means that a state is not obliged to come to sanction a person for each and any violation of the right to life. What a state is

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489 ECtHR, *Case of Basayeva and others v. Russia*, Judgment of 28 May 2009, paras. 133-140; ECtHR, *Case of Varnava and others v. Turkey*, Judgment of 18 September 2009, paras. 128-133; ECtHR, *Case of Finucane v. The United Kingdom*, 1 July 2003, para. 71; IACtHR, *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, paras. 65, 116-119, 125 and 135; IACtHR, *Case of La Cantuta v. Peru*, 29 November 2006, para. 110; IACtHR, *Case of Goiburú and Others v. Paraguay*, Judgment of 22 Septmber 2006, para. 84; IACtHR, *Case Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, paras. 174 and 176.

490 IACtHR, *Case Goiburú and others v. Paraguay*, *supra*, para. 122.

491 HRC, *General Comment 31*, *supra*, para. 15; IACtHR, *Case of Heliodoro Portugal v. Panama*, Judgment of 12 August 2008, para. 143; ECtHR, *Finucane v. United Kingdom*, *supra*, para. 70; ECtHR, *Case of Çakici v. Turkey*, Judgment of 8 July 1999, paras. 80, 87 and 106; ECtHR, *Case of Mahmut Kaya v. Turkey*, 28 March 2000, paras. 106-07.

492 HRC, *General Comment 31, supra*, para. 15; HRC, *Case of José Vicente and Others v Colombia, supra*, para 8.8; IACtHR, *Case of Heliodoro Portugal v. Panama, supra*, paras. 115 and 144; ECtHR, Case of *Finucane v. The United Kingdom, supra*, para. 67.

493 HRC, *General Comment 31, supra*, para. 15; ECOSOC, *Principles on the Effective Prevention and Investigation of Extra-Legal, Summary or Arbitrary Executions, supra*, principle 9; IACtHR, *Case of Heliodoro Portugal v.Panama, supra*, para. 144; ECtHR, *Case of Finucane v. The United Kingdom, supra*, para. 68; ECtHR, *Case of Gülec v. Turkey*, Judgment of 27 July 1998, para 80; ECtHR, *Case of Ogur v. Turkey*, Judgment of 20 May 1999, para 91; ACmHPR, *Amnesty International et al. v. Sudan*, Communication no. 48/90, 50/91, 52/91, 89/93, 1999, para 51.

494 HRC, *General Comment 31, supra*, para. 15; HRC, *General Comment 20*, 10 March 1992, para. 14; ECOSOC, *Principles on the Effective Prevention and Investigation of Extra-Legal, Summary or Arbitrary Executions, supra*, Principle 9; IACtHR, *Case of Heliodoro Portugal v. Panama, supra*, para. 144; and ECtHR, *Case of Finucane v. The United Kingdom, supra*, para. 71.

495 IACHR, *Case of Radilla Pacheco v. Mexico, supra*, para. 143; IACtHR, *Case of Heliodoro Portugal v. Panama, supra*, paras. 115 and 143-145; IACtHR, *Case of Velásquez Rodriguez v. Honduras, supra*, para. 176; ECtHR, *Case of Hugh Jordan v. United Kingdom*, Judgment of 4 May 2001, para. 141.

bound to do is to undertake an investigation capable of leading to the identification of perpetrators and then proceed to their eventual judgment and following punishment. Moreover, the failure to abide by these obligation would also entail a violation of the victims' rights to an effective remedy and, in general, to their right to justice, due to the interlinks strongly tying the latter to the procedural limb of the right to life[496]. Notably, the violation of the procedural limb of the right to life read in connection with the right to an effective remedy is continuous in nature[497].

The obligation to investigate, try and sanction is therefore an obligation positive in nature that autonomously arises whenever there is a violation (or an attempted violation) to one of the substantive rights enshrined in human rights instruments. In cases of targeted killings and assassination such obligation comes to existence in relation to deprivations of life intentionally provoked by states who remain, however, under the duty to investigate any allegation of human rights violation and verify whether their actions indeed amount to a violation of the substantive limb of the right to life. If states do not undertake all the measures needed to comply with this obligation in accordance with the parameters outlined above they may for this reason only be considered responsible for a violation of the procedural limb of the right to life and, simultaneously, for a violation of the victims' right to justice.

Remarkably, whereas other positive obligations (in particular those related to prevention and protection of the human right to life) presuppose the exercise of state administrative and the legal authority on a given territory, the obligation to investigate may not be subjected to such restriction: in cases of alleged violations of the right to life of individuals abroad, a state is bound to undertake whatever procedural measure it is capable of in order to investigate the matter, due to the characterization of such obligation as one of means rather than one of results[498].

4.4. Interlocutory Conclusions

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496 *UN Principles on the Right to a Remedy, supra*, Principle 3. Accordingly see, inter alia, HRC, *Case of Bautista v. Colombia*, 23 November 2009, para. 8.6; *Case of Celis Laureano v. Peru*, views of 25 March 1996, para. 10; *Case of Sarma v. Sri Lanka*, views of 31 July 2003, para. 11; *Case of Hugo Rodríguez v. Uruguay*, views of 19 July 1994, para. 12.3; *Case of Vicente and others v. Colombia, supra*, para. 8.8; *Case of Blanco v. Nicaragua*, views of 18 August 1994, para. 11; *General Comment 20, supra*, para. 14.

497 Accordingly, HRC, *Case of Bousroual v. Algeria*, views of 15 March 2006, para. 9.11; *Case of Coronel and others v. Colombia*, views of 24 October 2002, para. 9.3; *Case of Vicente and others v. Colombia, supra*, para. 8.3; *Case of Celis Lauréano v. Peru, supra*, para. 8.4; *Case of Bautista v. Colombia, supra*, para. 8.3; *Case of Mojica v. Dominican Republic*, views of 15 July 1994, para. 5.6; and *Case of Arévalo v. Colombia*, views of 3 November 1989, para. 10.

498 With reference to the extra-territorial reach of human rights obligations see *infra*, Ch. II, para. 5.

All of the above, in relation to both the substantive and the procedural limb of the right to life, needs further specification as to the geographical and temporal scope of states' human rights obligations. In fact, the parameters outlined *antes*[499] imply in and by themselves that a state cannot intentionally deprive of his life an individual who is within that state's territory without violating such individual right to life. Accordingly, it has been underlined that "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. Thus, for example, a *shoot-to-kill* policy violates human rights law"[500]. If such a violation of the right to life occurs, the state involved is under a further obligation to launch an investigation into the facts, find those responsible, prosecute and sanction them; victims and their relatives have a correspondent right to an effective remedy. These rules governing the use of force and arbitrary deprivations of life must be implemented by states within their own territories and during peacetime.

Nonetheless, targeted killings in general and assassinations in particular may take place inside as well as outside the responsible State's own territory. More specifically, killings by assassination exclusively occur during war-time[501] and they might be perpetrated during armed conflicts regardless of their international or non-international character. Two further questions need therefore to be addressed:

i. is there any geographical limitation to State's obligations to respect and ensure respect to human rights?
ii. do provisions concerning the right to life as enshrined in human rights treaties still operate in times of conflict and, if the answer is in the affirmative, to what extent?

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499 See *supra*, in this same paragraph.

500 *Alston Report*, *supra*, para 33. In this regard, it has further been observed: "Much like invocations of 'targeted killing,' shoot-to-kill is used to imply a new approach and to suggest that it is futile to operate inside the law in the face of terrorism. However, human rights law already permits the use of lethal force when doing so is strictly necessary to save human life. The rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat".

501 See *supra*, Ch. II, para. 2.

5. HUMAN RIGHTS APPLICABILITY *RATIONE LOCI*

(1) Jurisdiction over State's own Territories; (2) Jurisdiction beyond States' Borders; (2.a) Jurisdiction qua Territorial Control beyond Borders; (2.b) Jurisdiction qua Control over Persons; (2.c) Adopting a Cause and Effect Model of Jurisdiction; (2.d) Twists and Turns: the Jurisprudence of the European Court of Human Rights; (3) Convergence towards a Functional Approach; (4) Interlocutory Conclusions

As shown in the previous paragraph[502], the fundamental right to life entails for States a number of negative as well as positive obligations *vis-à-vis* individual rights holders. While the temporal scope of such obligations has already been explored above[503], the question remains as to whether such obligation suffers any territorial limitation or, *rectius*, whether any spatial consideration may have influence on the identification of the pool of rights holders[504]. As a matter of fact, all the main human rights treaties dealing explicitly with the right to life also contain a general jurisdictional clause, whereby they limit the scope of their provisions to individuals within the jurisdiction of states parties[505]. In other words, as far as such human rights conventions are concerned, individuals are entitled to protection by a certain state only insofar as they fall within its jurisdiction[506]. Jurisdiction thus becomes a

502 See *supra,* Ch. II, para. IV.

503 *Ibidem.*

504 Note that in fact that any "geographical" consideration is actually servant to the need to identify to whom human rights obligations are due. In this same token see, *inter alia,* Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Oxfrod, 2009, p. 71.

505 It is just worth mentioning in this context that State jurisdiction has nothing to do with the jurisdiction or competence of the adjudicating and monitoring bodies of the relevant human rights conventions hereby considered. Accordingly, see *inter alia* Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, in *Leiden Journal of International Law*, Cambridge, 2012, p. 867.

506 To this end see ECHR, art. 1: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"; ICCPR, art. 2, para. 1, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; IACHR, art. 1: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.". Note that the jurisdictional clause contained in the ICCPR is slightly different form the other clauses hereby reported, naming both jurisdiction and territory at once. However, a disjunctive reading of such formula has been widely

normative criterion to identify the range of persons to whom States shall secure human rights[507].

As far as deprivations of life are concerned, then, one might wonder whether States resorting to assassination in the course of an armed conflict international in character that perform such conduct in an area where they lack any normative or factual power or control may be found in violation of their human rights obligations. Would in such case the targeting process itself constitute a sufficient nexus to regard the targeted individual as falling within the targeting state's jurisdiction? And what if the same conduct were undertaken by a state within its own formal boundaries in a territory that is however occupied by another State or is *de facto* under the full control of an organized armed group? Shall human rights law be considered totally silent in such cases due to the restrictions stemming from jurisdictional clauses?

5.1. Jurisdiction over States' Own Territories

The so called "extraterritorial application" of human rights has received considerable attention in the work of regional human rights courts as well as in that of UN monitoring bodies, besides being subject of extensive debates and analysis in literature[508]. While it is not the purpose of the present study to get into the meanders of such discussions, tackling the matter from the particular angle of the human right to life is key to the continuation of the current analysis since the applicability of human rights standards to deprivations of life perpetrated extraterritorially is

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accepted as its correct interpretation. Therefore, the expression "under jurisdiction and territory" is to be understood as under either one or the other. To this end see ICJ, *Wall Advisory Opinion*, *supra*, paras. 108, 109 and 217. See also, *inter alia*, Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in L. Henkin, *The International Bill of Rights, the Covenant on Civil and Political Rights*, New York, 1981, pp. 73-75 and John Cerone, *Out of Bounds? Considering the Reach of International Human Rights Law*, New York, 2006, pp. 3 and 4.

507 Accordingly see, inter alia, Maarten den Heijer, *Europe and Extraterritorial Asylum*, Oxford, 2011, p. 32 and Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, *supra*, p. 72.

508 For a thorough analysis of the subject see, inter alia, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties, Law, Principles and Policies*, Oxford, 2011; Karen Da Costa, *The Extraterritorial Application of Human Rights Trearties*, Leiden, 2013; Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, *supra*; Theodor Meron, *Extraterritoriality of Human Rights Treaties*, in *American Journal of International Law*, 1995, pp. 78-82; Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, in Gila Stopler, *Law & Ethics of Human Rights*, Berlin, 2013, pp. 47-71; Robert K. Goldman, *Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict*, in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013, pp. 104-124.

prodromal to any inquiry into assassination techniques from a human rights standpoint.

Due to the connotation of the aforementioned debate as one that revolves around the extraterritorial applicability of human rights treaties, a preliminary observation is in order. First and foremost, it should be noticed that the meaning of the term "jurisdiction" as it is employed in human rights treaties does not equate "territory"[509]. Even so, however, when speaking about jurisdiction in relation to human rights it should be kept into account that any State is presumed to have jurisdiction over individuals situated within its boundaries[510]. From a jurisdictional standpoint, therefore, any deprivation of life, including any episode of assassination, occurred within the territory of a state, say, in the context of an internal armed conflict, would not generate much debate around the applicability of a human rights convention to which such state is party to. Such conclusion, arguably, would hold true even if an assassination of such sort were to take place within a part of the state's territory escaping its full control, *i.e.* in a geographical location formally situated within the state's boundaries where however the state itself *de facto* does not exercise effective control or authority due to external factors such as a partial occupation of its territory by third sates or effective control over the territory exercised by separatist movements[511]. Such conclusion, at the state of the art, seems quite straight forward, with due account to the presumption that a state has jurisdiction for the purpose of human rights treaties throughout its entire territory[512]. No need therefore, in such a case, to inquire into the capability of a specific act to autonomously bring the persons it affects within the jurisdiction of the acting State[513].

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509 Accordingly see, inter alia, Andrea Giorgia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflicts*, in Orna Ben-Naftali, *International Humanitarian Law and International Armed Conflicts*, Oxford, 2011, p. 207.

510 ECtHR, *Case of Al-Skeini v. U.K*, Grand Chamber Judgment of 7 July 2011, para. 131; *Case of Ilascu and Others v. Moldova and Russia*, Judgment of 8 July 2004, paras. 313 and 328-331; *Case of Assanidze v. Georgia*, Judgment of 8 April 2004, para. 139. Accordingly see, *inter alia*, Maarten den Heijer, *Europe and Extraterritorial Asylum, supra*, p. 35.

511 ECtHR, *Case of Ilascu and Others v. Moldova and Russia, supra*, paras. 312, 330 and 331. However, see, contra, *Judge Nicolas Bratza and others, Partly dissenting opinion of Sir Nicolas Bratza joined by Mr Rozakis, Mr Hedigan, Mrs Thomassen and Mr Panţîru, attached to the Judgment of the Case of Ilascu v. Moldova and Russia.*

512 ECtHR, *Case of Ilascu v. Moldova and Russia, supra*, para. 312. See accordingly, Irini Papanicolopulu, *La nozione di giurisdizione ai sensi dell'Art. 1 della Convenzione europea dei diritti umani nella recente giurisprudenza della Corte europea dei diritti umani*, in Tullio Scovazzi, Irini Papanicolopulu e Sabrina Urbinati, *I diritti umani di fronte al giudice internazionale, atti della giornata di studio in memoria di Carlo Russo*, Milano, 2009, pp. 91-93.

513 Such need arises, instead, in cases of so called "personal jurisdiction".

5.2. Jurisdiction beyond States' Borders

All to the contrary, states do not normally have jurisdiction outside their own territory. Whereas within states' borders jurisdiction is one of the corollaries of sovereignty, in fact, outside such territory States do not usually exercise either normative or factual authority. The territorial model of jurisdiction[514] is, nonetheless, only one of multiple dimensions that jurisdiction may assume, different ones being the "personal"[515] and the "cause and effect" models. What is more, the presumption of the existence of a jurisdictional ratio between a State and all those persons who are within its territory is only one of the criteria for the establishment of the so called territorial model of jurisdiction. Under either of these models, indeed, a State whose conducts affect individuals situated outside its territory may in so doing bring them within its jurisdiction for the purpose of its human rights obligations. Thus, a control over foreign territory may entail for the occupying State the duty to respect its human rights obligations towards all the individuals who are situated within such area. On the other hand, a control over persons may in and by itself be sufficient to bring those affected by a State's conduct within the latter's jurisdiction, even in the absence of any control exercised by such State on the geographical location where it is acting[516].

In this vein, the HRC, the ECtHR and the IACtHR have all recognized in their case law and jurisprudence that their respective instruments may apply extraterritorially as their jurisdictional link with individuals affected by their conducts may be triggered by their control over either territory or persons[517]. This assessment, however sound it may be in general terms, is nonetheless not uncontroversial with regard to the requirements that those human rights monitoring mechanisms posit for the application of human rights obligations abroad. In other words, in their case law and jurisprudence, those bodies and courts have established different threshold criteria to verify whether a person falls within a State's jurisdiction and, therefore, whether such person may be considered as a right holder *vis-à-vis* the State responsible for the alleged violations of his human rights.

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514 Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Laws, Principles, and Policy*, *supra*, p. 118.

515 Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, *supra*, p. 863.

516 Accordingly see, *inter alia*, Maarten den Heijer, *Europe and Extraterritorial Asylum*, *supra*, p. 35.

517 Accordingly see, *inter alia*, Robert K. Goldman, *Extraterritorial Application of the Human Right to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict*, in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013, p. 106; Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, *supra*, p. 85; John P. Cerone, *Minding the Gap: Outlining KFOR Accountability in Post- Conflict Kosovo*, in *European Journal of International Law*, Firenze, 2001, p. 475.

The rationale behind the existence of limitation to the jurisdictional reach of States' conducts is that it would be untenable to require States parties to human rights treaties to both respect and ensure respect to the entire range of human rights thereby enshrined to any person around the world without any limitation. For a thing, because those States do not usually have any degree of control outside their territory. Such is the function of the jurisdictional clauses contained in any of the aforementioned treaties: guaranteeing that States are not burdened with obligations they could never manage to implement[518]. As a consequence, not each and any provision of every human rights treaty may be applied everywhere, under every circumstance. Thus, for instance, it is apparent that while it is possible to demand States not to do abroad what they could not do within their own territories[519], it would not be feasible to demand as well that they enforce rights on foreign territories where they do not exercise any power or control, either *de facto* or *de jure*[520]. Therefore, one thing is to say that human rights in general are applicable extraterritorially. One very different thing is to identify which obligations always have an extraterritorial reach. Different yet is to assess which degree of respect for human rights may be required to States in these situations, in particular in relation to the enforcement of positive obligations[521].

Understanding the jurisdictional nexus in this terms, that is in terms making the identification of the pool of human rights holders *vis-à-vis* State conducts dependent upon the factual relationship established between them by the specific actions (or omissions) of the State in each specific case, leads to a "divide and tailor" approach. Notably, in this regard, the jurisprudence of the ECtHR has come of late to

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518 Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties, supra*, p. 119.

519 See *infra*, Ch. II, para. 5, sub-paras. 5.3 and 5.4

520 Accordingly see, *inter alia*, ECtHR, *Case of Al-Skeini and Others v. U.K., supra*, para. 80, arguing that it would be unrealistic to demand States to guarantee the whole gamut of substantive rights stemming from the ECtHR in situations of occupation or other instances of control over foreign territory short of occupation. By the same token, Karen Da Costa, *The Extraterritorial Application of Human Rights Trearties, supra*, p. 83.

521 To this end see Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties, supra*, p. 72: "The tripartite typology of human rights obligations placing them on a continuum of obligations to respect, to protect and fulfil human rights is useful in illustrating the scope of applicability of human rights treaties beyond the state borders. Within their own borders states usually have the full scope of obligations, whereas in the circumstances of particular types of extraterritorial activity those obligations may be reduced, for example, only to the level of respecting, rather than undertaking positive action to protect or fulfil them". Accordingly see also John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, in *Vanderbilt Journal of Transnational Law*, Nashville, 2012, p. 1469. For a thorough analysis of the extraterritorial reach of human rights treaties on Economic, Social and Cultural Rights see Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties, supra*, pp. 291-366.

the conclusion that "whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'"[522]. This achievement, however, is less than uncontroversial[523], particularly in view of the stark contradiction between this reading and that endorsed by the same Court in its previous jurisprudence[524]. Its full repercussions on operations involving the use of force outside a State's own borders therefore need to be further explored in order to understand, in particular, which factual circumstances may give rise to the relevant jurisdictional nexus for the establishment a legal relationship between a State and an individual-rights-holder.

As it appears from the analysis conducted *antes*, due to the very nature of assassination and targeting practices in general, what matters most for the present study is to identify under which circumstances the intentional and deliberate use of lethal force beyond a State's borders may involve its jurisdiction *vis-à-vis* the victims of such force and, therefore, potentially entail a violation of that State's human rights obligations[525]. As a consequence, the object of the current analysis in relation to the

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522 ECtHR, *Case of Al-Skeini and Others v. U.K., supra*, paras. 136 and 137.

523 To this end see for instance Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention*, in *The European Journal of International Law*, Firenze, 2010, pp.1223-1246, arguing that "existing categories of extraterritorial jurisdiction can best be understood as limited exceptions to the rule of territorial jurisdiction because they all require some significant connection between a signatory state's physical territory and the individual whose rights are implicated".

524 In particular, in the *Case of Banković and Others v. Belgium and Others,* Grand Chamber Judgment of 12 December 2001, para. 75, the Court expressed the view that "the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure the rights and freedoms defined in Section I of this Convention can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question". On the contradiction between the stance uphold by the ECtHR in *Al-Skeini* and that maintained in *Banković* see *inter alia* Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, in *The European Journal of International Law*, Firenze, 2012, pp. 121-139.

525 It is worth noting that jurisdiction and responsibility are two very different issues: the former, as understood under human rights law (*i.e.* in its connotation as a relational link between a State and an individual affected by such State's acts and omission) is a prerequisite of the latter. In other words, even when it is established that a State has a jurisdiction *vis-à-vis* a given individual, such State may be found not in breach of its human rights obligations, either because the facts of the specific case cannot be attributed to the State itself or because, in the merits, such facts do not disclose a violation of fundamental rights at all. On the contrary, the opposite does not work: if a State does not have jurisdiction with regard to a certain person, then it may not be found responsible for violating such person's human rights. On the relation existing among between the notions of jurisdiction, attribution and responsibility see *inter alia* Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties, supra*, pp. 164 – 178 and Marko Milanovic, *Extraterritorial Application of Human Rights Treaties*, *supra*, pp. 41 – 53. That jurisdiction and

extraterritorial reach of human rights conventional obligations can be limited to strictly negative obligations and to those obligations, positive in nature, which are however a mere consequence of the negative ones (e.g. obligations concerning investigations into extrajudicial, summary or arbitrary killings).

a) Jurisdiction qua Territorial Control beyond Borders

Under the territorial model of jurisdiction, there is an "inherent logic"[526] to extend a state's human rights obligations to individuals situated in areas fallen under its control and authority. In the jurisprudence of international judicial and quasi-judicial mechanisms, such is the case in situations of military occupation[527] and effective overall control over territory. According to the International Court of Justice (hereinafter ICJ), which expressly endorsed the position of HRC[528], a regime of military occupation entails a duty for the occupying State to respect as well as secure respect to the human rights guaranteed by the ICCPR to all those residing in the occupied territories[529]. According to the ICJ, a teleological reading of the ICCPR as well as reference to the HRC's case law and to the *travaux préparatoires* of such treaty requires states exercising jurisdiction on foreign territory to comply with its provisions[530]. A similar conclusion had already been reached by the HRC with reference to the occupation of the Palestinian territories by Israel due to the effective control exercised by the State of Israel on such areas[531]. The ICJ further confirmed this view in a contentious case, namely the *Armed Activities Case*, where it found Uganda responsible for the acts of its military as well for a lack of vigilance in preventing human rights violations to occur in the occupied territory[532].

In the European system of human rights protection, the ECtHR has itself established in two cases concerning the occupation of Northern Cyprus by Turkey

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attribution are two different concepts which shall not be conflated has been most recently reaffirmed by the ECtHR itself in the *Case of Jaloud v. The Netherlands*, Grand Chamber Judgment of 20 November 2014, para. 154.

526 Maarten den Heijer, *Europe and Extraterritorial Asylum*, *supra*, p. 35.

527 In higher detail on the regime of occupation under international humanitarian law see *infra*.

528 HRC, *Concluding Observations on Israel*, UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, p. 7. Accordingly, Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, *supra*, pp. 206 and 213.

529 ICJ, *Wall Opinion*, *supra* paras. 78, 109, 112. Accordingly, see also Karen Da Costa, *The Extraterritorial Application of Human Rights Trearties*, *supra*, pp. 77 and 78.

530 ICJ, *Wall Opinion*, *supra*, paras. 78, 109, 112 .

531 HRC, *Concluding observations on Israel*, UN Doc. CCPR/C/79/Add.93, 18 August 1998, paras. 10 and 31 and HRC, *Concluding observations on Israel*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11. By the same token, see also HRC, *Addendum to the Second Periodic Report, Israel*, 4 December 2001, UN Doc. CCPR/C/ISR/ 2001/2, para. 8.

532 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 179 and 220.

that the undertaking of an effective control of a certain area, regardless of the legality of such control, entails a responsibility for the occupying State to secure the rights and guarantees granted by the ECHR to every person within such territory[533]. In particular, the ECtHR held that 'having effective overall control over northern Cyprus […] in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey"[534].

Differing from the HRC and the ICJ, in its Turkish cases the ECtHR did not expressly base its reasoning for the extension of conventional obligations to all individuals within Northern Cyprus on the notion of military occupation under international humanitarian law. Nonetheless, the ECtHR's decisions are rooted in the existence of a jurisdictional link between Turkey on the one hand and the persons situated in the occupied areas on the other because of that state's effective overall control. The rationale for such an extraterritorial extension of jurisdiction for the purposes of a human rights treaty is the same underlying the findings of the ICJ in the *Wall Opinion*: under these circumstances the state that asserts its control over territory exercises in that area public powers to some extent akin to those it exercises within its own borders and must therefore be capable of ensuring the rights protected by human rights treaties in a comparable fashion. In the ECtHR's words, "The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration"[535]. Such an assessment has been confirmed by the ECtHR in a more or less consistent fashion[536] in its following jurisprudence until the most recent cases related to the extraterritorial reach of the ECHR[537].

It thus appears safe to conclude that a deprivation of life perpetrated by a state which would amount to a human right violation within its territory would at the same

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533 ECtHR, *Case of Cyprus v Turkey*, Grand Chamber Judgment of 10 May 2001, paras. 56 and 77 and *Loizidou v. Turkey*, Grand Chamber Judgment on Preliminary Objections of 23 March 1995, para. 81.

534 ECtHR, *Case of Cyprus v Turkey*, supra, para. 77.

535 ECtHR, *Case of Loizidou v. Turkey*, Grand Chamber Judgment on Preliminary Objections of 23 March 1995, para. 62.

536 Note that the jurisprudence of the ECtHR on the issue has followed a rather twisted path not lacking some contradictions and inconsistencies. On this matter see, *inter alia*, Robert K. Goldman, *Extraterritorial Application of the Human Right to Life and Personal Liberty, Including* Habeas Corpus, *During Situations of Armed Conflict*, *supra*, p. 110. For a different point of view, however, see Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, *supra*.

537 ECtHR, *Case of Al-Skeini and Others v. U.K.*, *supra*, paras. 138 and 139; *Case of Ilaşcu and Others v. Moldova and Russia*, *supra*, paras. 314-316; *Case of Banković and Others v. Belgium and Others*, supra, para. 70.

time constitute a breach of such state's human rights obligations were it carried out in a territory falling under its effective overall control. Notably, such conclusion holds true in relation to the ICCPR as well as with regards to the ECHR.

b) Jurisdiction qua control over persons

Extending a similar reasoning to extraterritorial state activity in situations short of occupation is not, however, such a platitude. For a thing, because in such a different scenario the theatre of a state's activities is not actually placed under its full authority and the acting state cannot therefore normally exercise its public powers over the area where it operates. In the absence of this factual element, the entire rationale for spreading a states' human rights obligations to the population of the territories it occupies becomes groundless.

Nonetheless, even in the absence of control over territory, a state operating beyond its borders may with its actions bring individuals potentially affected by its conducts within its jurisdiction[538]. In other words, under certain conditions, a person may be considered within a state's jurisdiction for the purpose of human rights treaties because of the impact of the latter's conducts over him personally. The relational link tying the state and the individual, in such case, does not originate from the former's control over a territory but from the control it exercises directly on the affected individual. The question remains, however, whether intentional deprivations of life may be included among those circumstances that disclose a sufficient degree of state control over an individual; that is, a control that is sufficient to entail a jurisdictional connection between the acting state and the affected person. Such query would find an affirmative answer if any act of states affecting individuals on foreign territory were deemed capable of creating in and by themselves a jurisdictional nexus, following a cause and effect model of jurisdiction. The jurisprudence and case law of international human rights mechanisms on the point, however, is not yet consolidated and definitely not unanimous.

In general, the HRC, the IACmHR and the ECtHR have all established in their case law that states may have jurisdiction over persons within their "authority and control" (or "power and control", in the words of the HRC). However, notions of authority or power and control have been, at least originally, attributed different meanings and scope.

c) Adopting a cause and effect model of jurisdiction

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538 See, accordingly, John P. Cerone, *Minding the Gap: Outlining KFOR Accountability in Post- Conflict Kosovo*, *supra*, p. 478.

In a case concerning the extraterritorial actions of a State that, through its agents, deprived of their liberty some individuals on foreign soil, the IACmHR, after considering that "los derechos individuales son inherentes simplemente en virtud de la humanidad de una persona, todos los Estados americanos están obligados a respaldar los derechos protegidos de cualquier persona sujeta a su jurisdicción" [539], found that "En principio, la investigación no se refiere a la nacionalidad de la presunta víctima o a su presencia en una determinada zona geográfica, sino a que si en esas circunstancias específicas, el Estado observó los derechos de una persona sometida a su autoridad y control"[540]. In a following case concerning the shooting of two aircrafts outside the acting state's airspace the IACmHR confirmed such stance and pushed it even further: "La circunstancia de que los hechos hayan ocurrido fuera de la jurisdicción cubana no restringe ni limita la competenciaratione loci de la Comisión por cuanto como ya se ha señalado cuando agentes de un Estado, ya sean militares o civiles, ejercen poder y autoridad sobre personas situadas fuera del territorio nacional, continua su obligación de respetar los derechos humanos, y en este caso los derechos consagrados en la Declaración Americana" [541]. In so doing, the IACmHR in fact found the authority and control test satisfied with reference to a conduct – the shooting of aircrafts flying in international airspace – that had not been characterized by any physical custody over the victims of the relevant human rights violations. The shooting itself was therefore considered by the IACmHR as a sufficient factual source of the relational link bringing the victims within state jurisdiction.

Following the path thus traced, the IACmHR, in a further pronouncement, this time over alleged violations of the IACHR referred to extrajudicial killings perpetrated by a state on foreign territory, stated: "resulta decisivo para la Comisión el ejercicio de autoridad sobre las personas por parte de agentes de un Estado aunque no se lleve a cabo en su territorio, sin que se exija necesariamente la existencia de una relación legal formal o estructurada y prolongada en el tiempo para vincular la responsabilidad de un Estado por hechos cometidos por sus agentes en el extranjero. Al momento de analizar el ámbito de jurisdicción de la Convención Americana, es necesario determinar si existe un nexo de causalidad entre la conducta extraterritorial de un Estado y la alegada violación de los derechos y libertades de una persona"[542], adding "Lo anterior no significa que se derive necesariamente de la actuación extraterritorial de un Estado un deber de garantía del catálogo de derechos

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539 IACmHR, *Case of Coard and Others v. the United States*, Report N. 109/99, 29 September 1999, para. 37.

540 *Ibidem*. By the same token see also IACmHR, *The Haitian Centre for Human Rights and Others v. United States*, 13 March 1997, paras. 164-178.

541 IACmHR, *Case of Alejandre and Others v. Cuba* (hereinafter *Brothers to the Rescue*), 29 September 1999, paras. 23-25.

542 IACmHR, *Case of Ecuador v. Colombia*, Admissibility Decision of 10 October 2010, para. 99.

sustantivos establecidos en la Convención Americana, incluyendo toda la gama de obligaciones respecto a las personas que se encontraban bajo la jurisdicción del mismo por el tiempo que haya durado el control de sus agentes. En cambio, sí se desprende la obligación de que en el lapso de interferencia de los agentes de un Estado en la vida de personas que se encuentren en territorio de otro Estado, dichos agentes respeten sus derechos y en particular, su vida e integridad personal"[543]. Such an assessment, as it appears, ties the existence of jurisdiction to the existence of a causal nexus: under this model, therefore, jurisdiction extends well beyond territorial or personal control; every action affecting the rights of individuals extraterritorially entails in and by itself the jurisdiction of the acting state.

In a similar vein, the HRC has always maintained the view that jurisdiction shall be referred to the relationship existing between the acting state and the individual allegedly affected by its conducts, regardless of the location where they are carried out and irrespective of the State's *de jure* competence to perform such deeds[544]. In its General Comment n. 31, the HRC has confirmed that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party"[545].

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543 *Ibidem*, para. 100.

544 HRC, *Case of Celiberti de Caseriego v. Uruguay*, views of 29 July 1981, para. 10; *Case of Lopez Burgos v Uruguay*, views of 29 July 1981, para. 12; HRC, *Case of Vidal Martins v. Uruguay*, views of 23 March 1982, para. 7; *Case of Lichtensztejn v. Uruguay*, views of 31 March 1983. para. 6.1; *Case of Montero v. Uruguay*, views of 31 March 1983, para. 5; *Case of Nunez v Uruguay*, views of 22 July 1983, para. 6.1. Accordingly, see also HRC, *Concluding Observations of the Human Rights Committee on the Initial Report of the United States of America*, 3 October 1995, UN Doc. CCPR/C/79/Add.50, paras. 19 and 284; HRC, *Concluding Observations of the Human Rights Committee on the Second and Third Periodic Reports of the United States of America*, 3 October 1995, UN Doc. CCPR/C/79/Add.50, pp. 2 and 3; HRC, *Concluding Observations on the Republic of Iran*, UN Doc. CCPR/C/SR.1253, 30 July 1993, para. 63. Notably, several UN Special Procedures have expressed the same view concerning the extraterritorial reach of the ICCPR. To this end see, inter alia, *Report to the Commission on Human Rights on the Situation of Detainees at Guantanamo Bay*, UN Doc. E/CN.4/2006/120, 27 February 2006, para. 266 (arguing that US obligations under international human rights law extend to persons outside held in detention outside its territory); Martin Scheinin, *Report of Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, Addendum , Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3, 22 November 2007, p. 6, concluding that the US are bound to respect and ensure the rights guaranteed by the ICCPR to anyone within its power or effective control, even when they act outside their territory; *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments, Working Group on Arbitrary Detention and Working Group on Enforced or Involuntary Disappearances, Joint study on global practices in relation to secret detention in the context of countering terrorism*, UN Doc. A/HRC/13/42, p. 20, 19 February 2010.

545 HRC, *General Comment 31*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

Even so, the determination of which exactly is the extraterritorial scope of the ICCPR depends on the understanding of "power and effective control"[546]. Since the very first views it issued, the HRC has repeatedly made clear that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory"[547]. In line with such reasoning, in a dissenting opinion he attached to the *Case of Munaf v. Romania*[548], Mr. Walter Kälin stressed: "Thus, the test is not, as argued by the State party, whether it had custody of or authority over the author, or whether it relinquished custody of him to [the multinational forces in Iraq], but whether it had "power or effective control" over him *for the purposes of respecting and ensuring his Covenant rights*"[549].

Key to establish the existence of the degree of power or control over a person necessary for the detection of a jurisdictional link between such person and a given state is therefore a teleological reading of such formula: the power and control exercised by a state on a person is sufficient to engender its responsibility irrespective of any other condition inasmuch as such power and control entails the state's capability to respect and/or guarantee the rights of such person. If this is the *ratio* behind the HRC's view, then, it seems possible to conclude that a cause and effect model of jurisdiction similar to the one adopted by the IACmHR[550] governs as well the scope of applicability of the ICCPR extraterritorially insofar as a state who is capable of depriving an individual of its rights as established in the Covenant is sufficiently linked, for that reason alone, to the person potentially affected by its actions. If a state retains the capability of targeting and killing an individual outside its territory, it evidently enjoys over him "power or effective control" for the purposes of respecting (*rectius* disrespecting) his Covenant rights. Such a case impeccably shows how jurisdiction is neither territorial nor personal, but rather inherently functional: a state's capability of depriving targeted individuals of their lives amounts in that precise circumstance to authority and control over the potential victims and thus bring them within the targeting state's jurisdiction because of the

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546 Accordingly, Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, *supra*, p. 52.

547 HRC, *Case of Celiberti de Caseriego v. Uruguay*, *supra*, para. 10 and HRC, *Case of Lopez Burgos v Uruguay*, *supra*, para. 12.

548 HRC, *Case of Munaf v. Romania*, Views of 21 August 2009.

549 Mr. Walter Kälin, *Dissenting opinion on the Admissibility Decision of the Committee, attached to HRC, Case of Munaf v. Romania, supra* (emphasis added).

550 Accordingly, on the similarities existing between the rationale uphold by the HRC and that averred by the IACmHR see also Maarten den Heijer, *Europe and Extraterritorial Asylum*, *supra*, p. 43 and John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, *supra*, pp. 1481 and 1482.

relation of power it creates between the two. For so long as that relation exists, jurisdiction exists with it.

d) Twists and Turns: the Jurisprudence of the European Court of Human Rights

The case law of the ECtHR on the issue is far more complicated and twisted. For a thing, because the ECtHR indeed took into consideration a case of extraterritorial use of lethal force against individuals who were not held in custody by the acting States, thereby expressly excluding the applicability of a "cause and effect" model of jurisdiction, in blatant contradiction with the case law previously elaborated on the matter by the ECmHR[551].

The latter had indeed come to the conclusion that all state's acts amounting to an expression of that state's authority bring in and by themselves all those adversely affected into the state's jurisdiction, regardless of the *locus* where such acts may have been committed[552]. In the famous as much as controversial *Case of Bankovic and Others v. Belgium and Others,* however, the ECtHR flatly rejected such a reasoning and averred that: a) jurisdiction is primarily territorial[553]; b) only exceptionally extraterritorial acts may constitute exercise of state jurisdiction[554]; c) the obligation to secure conventional rights in areas subjected to occupation stem from the exercise of effective control over the territory[555]; d) a cause and effect model of jurisdiction does not fit art. 1 ECHR[556]; e) the positive obligation in Article 1 cannot be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question[557]; f) the ECHR operates "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting

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551 Maarten den Heijer, *Europe and Extraterritorial Asylum*, Oxford, 2011, p. 42.

552 ECmHR, *Case of Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, Decision on the Admissibility of 4 March 1991, para. 32: "authorized agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons […]. Insofar as, by their acts or omissions, they affect such persons […], the responsibility of the State is engaged". By the same token see, inter alia, ECmHR, *Case of X v. The Federal Republic of Germany*, Decision of 25 September 1965; *Case of X v. United Kingdom*, Decision of 15 September 1977; *Case of Stocké v. Germany*, Decision of 12 October 1989; *Case of Vearncombe v United Kingdom and Germany*, Decision of 18 January 1989; *Case of X. and Y. v. Switzerland*, Decision of 14 July 1977; *Case of W.M. v. Denmark*, Decision of 14 October 1992; *Case of Ramirez v. France*, Decision of 24 June 1996; *Case of Reinette v. France*, Decision of 2 October 1989; and *Case of Freda v. Italy*, Decision of 8 September 1997.

553 ECtHR, *Case of Bankovic and Others v. Belgium and Others*, para. 59.

554 *Ibidem*, paras. 67 and 71.

555 *Ibidem*, para. 70.

556 *Ibidem*, para. 75.

557 *Ibidem*, para. 75.

States. […] The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States"[558]. As it appears, such an approach to jurisdiction is way stricter than that adopted by the HRC, by the IACmHR and, ultimately, by the ECmHR in the very same European regional system before the *Bankovic Case*[559].

For the purposes of this study, there is no need to enter into detail in the discussion on the *Bankovic Case*[560]. What matters the most, instead, is that the ECtHR, in its following judgments, seems to have gradually departed from the conclusions it had drown in the *Case of Bankovic*[561], starting anew on the old path traced by the ECmHR[562] and endorsing a progressively broader understanding of jurisdiction that has actually overcome the "Bankovic doctrine"[563].

At first, the reasoning of the ECtHR extending state jurisdiction outside the territory of the acting states, and even outside the so called *espace juridique* of the ECHR, was merely premised on the consideration that arrest and physical coercion are exercises of authority and control over a person of such an intrusive nature that they plainly bring the victim within the jurisdiction of the state acting abroad for the purposes of the ECHR[564]. The factual background of following applications decided

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558 *Ibidem*, para. 80.

559 For a comparison between the decision of the ECtHR in the *Bankovic Case* and the decision of the IACmHR in the *Case of Alejandre and Others v. Cuba* see Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, *supra*, pp. 179 – 181.

560 For a thorough analysis of the Bankovic decision see, inter alia, M. O'Boyle, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on Life After Bankovic*, in Fons Coomans and Menno T. Kamminga, *Extraterritorial Application of Human Rights Treaties*, Antwerp, 2004, pp. 125 – 137; Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties, supra*, pp. 169 – 181; Karen Da Costa, *The Extraterritorial Application of Human Rights Trearties, supra*, pp. 125 – 160; Bernadette Rainey, Elizabeth Vicks and Clare Ovey, *The European Convention on Human Rights*, Oxford, 2014, pp. 90 – 93. For an in-depth analysis of the first jurisprudence of the ECtHR following the *Case of Bankovic* see, inter alia, Rick A. Lawson, *Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, in Fons Coomans and Menno T. Kamminga, *Extraterritorial Application of Human Rights Treaties, supra*, pp. 83 – 123.

561 Robert K. Goldman, *Extraterritorial Application of the Human Right to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict, supra*, p. 108; Maarten den Heijer, *Europe and Extraterritorial Asylum, supra*, p. 46; Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law, supra*, p. 57; and Armin Von Bogdandy, Rudiger Wolfrum and Christieane E. Philip, *Max Plank Yearbook of United Nations Law*, Heidelberg, 2014, p. 274.

562 See accordingly, *John P. Cerone, Minding the Gap: Outlining KFOR Accountability in Post- Conflict Kosovo supra*, p. 480.

563 Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law, supra*, p. 52.

564 ECtHR, *Case of Ocalan v. Turkey*, Grand Chamber Judgment of 12 May 2005, para. 95 (referring to physical control over person); *Case of Madvedyev v. France*, Grand Chamber Judgment of 29 March

upon by the ECtHR resembled the *Bankovic Case* more closely, and yet their outcomes were very different. In the *Case of Issa and Others v. Turkey*, the ECtHR held state agents may exercise such authority and control over persons abroad as to bring them within the state's jurisdiction[565] and that, in such cases, persons who are within the jurisdiction of a State party are within the "*espace juridique*" of the ECHR even when they are on the territory of a non-party State[566]. Perhaps even more significantly, in this judgment the ECtHR endorsed the view held by the HRC and by the IACmHR that "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory"[567].

Perfectly in line with such an assessment, in a following case concerning the aerial shooting and killing of seven men by a State party to the ECHR, the ECtHR found that the fire discharged from the helicopters was a sufficient basis for establishing the acting state's jurisdiction over the victims[568]. The ECtHR, in open contradiction with the *Bankovic Case*, fully embraced the "cause and effect" model of jurisdiction in the *Case of Andreou v. Turkey*, a further case involving the shooting carried out by state agents against a person who was not within such state's territory. In this instance, the ECtHR established that "the acts of Contracting States which produce effects outside their territory and over which they exercise no control or authority may amount to the exercise by them of jurisdiction within the meaning of art. 1 of the Convention. […] In these circumstances, […] the opening of fire on the crowed from close range, which was the direct and immediate cause of those injuries [sustained by the applicant outside the acting state's territory], was such that the applicant must be regarded as within the jurisdiction of Turkey within the meaning of Article 1"[569].

In the *Case of Al-Skeini and Others v. Turkey*, the ECtHR has had occasion to further elaborate on the ECHR's extraterritorial scope, definitely abandoning the *Bankovic* doctrine. After reaffirming that "Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory"[570], the Court adopted however an approach slightly more restrictive than that uphold in some of the cases mentioned above. It in fact confirmed that "in certain circumstances, the use of force by a State's agents operating outside its

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2010, para. 67 (referring to control over ship and persons); and *Case of Al-Saadoon and Mufdhi v. the United Kingdom*, Judgment of 30 June 2009, para. 88 (referring to control over detention facilities).

565 ECtHR, *Case of Issa and Others v. Turkey*, Judgment of 16 November 2004, paras. 71.

566 *Ibidem*, paras. 56 and 74.

567 *Ibidem*, para. 71.

568 ECtHR, *Case of Pad and Others v. Turkey*, Decision on the Admissibility of 28 June 2007, paras. 54 and 55.

569 ECtHR, *Case of Andreou v. Turkey*, Decision on the Admissibility of 3 June 2008, para. 3, (c).

570 ECtHR, *Case of Al-Skeini and Others v. U.K.*,*supra*, para. 132.

territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction" but it appeared to limit such principle to cases where the acting state exercises "physical power and control over the person in question"[571]. Nonetheless, most recently, the ECtHR, whilst reaffirming in principle the parameters outlined in the *Al-Skeini Case*, found that a state party had jurisdiction in connection to the shooting of a man who was passing through a checkpoint manned by such state's agents in foreign territory. In such instance, the ECtHR concluded that "the respondent Party exercised its jurisdiction […] for the purpose of asserting authority and control over persons passing through the checkpoint. That being the case, the Court finds that the death of Mr Azhar Sabah Jaloud occurred within the jurisdiction of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention"[572].

5.3. Convergence toward a Functional Approach

This decision, coupled with the other cases recalled above, shows that also in the European system states' conducts themselves may be capable of establishing at once jurisdiction and violation of conventional rights. This matches a general tendency detectable in the case law of international human rights bodies toward the adoption of a cause and effect model of jurisdiction.

As a matter of fact, the reason for the introduction of jurisdictional clauses in international human rights instruments was certainly never meant to allow States to violate human rights beyond their borders[573].

The ICJ judgment in the *Armed Activity Case* seems to be in line with such reasoning. The ICJ referred indeed to extraterritorial military actions including, among others, killings perpetrated in situations falling short of occupation where the victims were not in the physical custody of their executioners[574]. In relation to such actions, the ICJ found that occupation is only one of the possible scenarios that bring affected individuals within the acting State's jurisdiction. In this connection, the ICJ found the ICCPR as well as the ACHPR, among others, to be applicable, thus finding Uganda in violation of art. 7 ICCPR and arts. 4 and 5 ACHPR[575]. Such conclusion, it

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571 *Ibidem*, para. 136.

572 ECtHR, *Case of Jaloud v. The Netherlands*, Grand Chamber Judgment of 20 November 2014, para. 152.

573 Accordingly, *Michal Gondek, The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties, supra*, p. 119.

574 ICJ, *Armed Activities Case, supra*, para. 206.

575 *Ibidem*, paras. 217 and 220.

should be noticed, was reached with reference to activities that were undertaken in areas where Uganda had neither territorial control nor did it exercise control over persons and were therefore based on a cause and effect model of jurisdiction. The ICJ thus in fact concluded that military activities represent an exercise of state jurisdiction for the purpose of human rights treaties regardless of territorial or personal considerations[576].

To consider jurisdiction limited to effective control of an area by a state, or to physical authority, power or control over individuals by a state seems therefore to be an understatement. In fact, such conclusion appears in contradiction with the universal ethos of human rights. The HRC, the ECtHR and the IACtHR have all established that a State cannot do abroad what it cannot do on its own territory. If this is the rationale to be applied in the eyes of those monitoring bodies to issues of extraterritorial actions, at least as far as negative obligations are concerned, states should be deemed to bear jurisdiction over their actions abroad.

Arguably, all these monitoring bodies have confirmed that "*de facto* activity gives rise to *de jure* responsibilities"[577]. Moreover, the "power and control formula" resorted to by the HRC and by the IACtHR as much as the "authority and control" formula consistently used in the jurisprudence of the ECtHR are to be read into context. Does a physical coercion over a person in custody really represent a stronger link than the power to decide over life or death pertaining to a targeting state when deciding to assassinate a person? If read in a finalistic perspective, those formulas evidently refer to power and control for the purpose of respecting and ensuring respect to the rights enshrined in human rights conventions to which states are parties. This means that, when a state has the capability of ensuring respect of a certain human right it shall do so as much as it shall, under every circumstance, within and outside its borders, respect human rights by refraining to undertake any action potentially violating them.

Notably, this conclusion does not much differ from the arguments put forward by Judge Bonello of the ECtHR when speaking about the functional character of jurisdiction: "States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. These constitute the basic minimum functions assumed by every State by virtue of its having contracted into the Convention. A

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576 Accordingly see, inter alia, Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, *supra*, p. 211.

577 Maarten den Heijer, *Europe and Extraterritorial Asylum*, Oxford, 2011, p. 51.

"functional" test would see a State effectively exercising "jurisdiction" whenever it falls within its power to perform, or not to perform, any of these five functions. Very simply put, a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control. Jurisdiction means no less and no more than "authority over" and "control of". In relation to Convention obligations, jurisdiction is neither territorial nor extra-territorial: it ought to be functional"[578].

This understanding finds full confirmation in the case law of the ECtHR itself. Indeed, in the case *Isaak v. Turkey* the ECtHR established that, regardless of a lack of formal or *de facto* territorial control and to a lack of specific control over the persons involved, Turkish agents were bound to intervene in the UN-controlled buffer-zone between Cyprus and the Turkish occupied territory in order to protect a person who had been manhandled and severely beaten during a demonstration by other persons taking part to the event, and subsequently died as a consequence of the injuries thus reported. In this case, the ECtHR found Turkey responsible on the mere basis that its agents had the opportunity and capability of intervening to prevent the deadly outcome but they did not so. It has been rightly observed to this end that the ECtHR found in this case the existence of a jurisdictional nexus on the basis of a sort of "negative control" over person[579]. It is submitted here that this kind of "negative control" pursuant to which States may be found to have jurisdiction over persons abroad also on the basis of an omission is a direct consequence of a functional understanding of jurisdiction: a State have to secure rights (as much as it has to respect them) even in the absence of control over territory or authority and control over persons whenever it has the possibility and capability of doing so.

As it appears from the analysis conducted above, in fact, the territorial model of jurisdiction, as well as the personal and the cause and effect models are but mere phenomenology of the same underlying concept, expressions of specific jurisdictional links existing in certain cases between states and the individuals adversely affected by their conducts. Jurisdiction has a functional *esprit* that endorses all of those models.

A functional approach to jurisdiction therefore entails, on the one hand, that states cannot do abroad what they could not do on their own territories while

578 Giovanni Bonello, *Judge Bonello's Concurring Opinion attached to the Case of Al-Skeini v. The U.K.*, *supra*, 7 July 2011, paras 10 – 12. On a functional approach to jurisdiction see, in legal literature, Irini Papanicolopulu, *La nozione di giurisdizione ai sensi dell'Art. 1 della Convenzione europea dei diritti umani nella recente giurisprudenza della Corte europea dei diritti umani*, in Tullio Scovazzi, Irini Papanicolopulu e Sabrina Urbinati, *I diritti umani di fronte al giudice internazionale, atti della giornata di studio in memoria di Carlo Russo*, *supra*, p. 107.

579 Irini Papanicolopulu, *La nozione di giurisdizione ai sensi dell'Art. 1 della Convenzione europea dei diritti umani nella recente giurisprudenza della Corte europea dei diritti umani*, *supra*, p. 110.

simultaneously implying, on the other, that States are not required to ensure abroad the full spectrum of human rights that they are bound to grant to all the individuals within their borders. As far as procedural obligations are concerned, finally, states remain under an obligation to carry out investigations into alleged gross violations of human rights[580] even when such violations are perpetrated abroad[581].

5.4. Interlocutory Conclusions

All of the above brings about fundamental repercussions for practices of targeted killing in general and assassination in particular. Some authors have indeed suggested that, whereas a finding in favour of the existence of a jurisdictional nexus also in these cases would be a desirable outcome, at the state of the art targeted killings on foreign territory would always escape the targeting state's jurisdiction due to the lack of territorial control or physical custody over the targets[582]. As a consequence, so the argument goes, remedies to this undesirable gap of protection are to be searched for and advanced *de lege ferenda*[583].

However, the analysis conducted above shows that targeted killings on foreign territory do create a normative nexus between the target and the targeting state capable of bringing the former within the jurisdiction of the latter, due to the functional *esprit* of jurisdiction. Such a conclusion is not a simple *de lege ferenda* advancement of the monitoring bodies' case law on the issue but it rather represents a *lex lata* statement in line with a thorough understanding of their jurisprudence[584].

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580 See *supra*, Ch. II, para. 4.

581 Note that in the case of *Case of Gray v. Germany*, Judgment of 22 May 2014, the ECtHR seems to have embraced this approach, declaring the case admissible regardless of the fact that the procedural obligations of the respondent state had actually been triggered by a substantive violation of the right to life of an individual abroad. The case was related to the violation the of the procedural limb of the right to life of the applicants' father. The latter's doctor, who was allegedly responsible for medical malpractice, after giving wrong drugs to the victim in the U.K. made return to Germany, his home country. Having Germany refused to extradite the doctor to the U.K. to face prosecution, the applicants lodged with the ECtHR application n. 49278/09, complaining under Art. 2 ECHR for a violation of the procedural limb of the right to life.

582 To this end see Robert K. Goldman, *Extraterritorial Application of the Human Right to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict, supra*, p. 110, arguing that A contracting party, however, would incur no responsibility if its agents targeted and killed a person in another State whose territory, at the time, was not subject to its effective control. Unlike a detainee who is killed in custody, the person so attacked would be remediless under the Convention. This result creates a glaring and unseemly gap in legal protection. In a similar vein see also Cedric Ryngaert, *Clarifying the Extraterritorial Application of the European Convention on Human Rights*, in *Utrecht Journal of International and European Law*, Utrecht, 2011, p. 60.

583 *Ibid.*

584 Accordingly see *Yuval Shany, Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law, supra*.

Moreover, even though the functional approach to jurisdiction were to be considered too far-fetched at the state of the art, if a state cannot do abroad what it cannot do on its own territory, then it is a mere logical consequence of such a statement that targeting and killing individuals abroad does represent a conduct bringing those individuals within the jurisdiction of the targeting state for the purposes of the human rights treaties[585].

It can therefore be concluded that targeting practices, and in particular assassination among them, do generate a relational nexus between targeting states and targeted individuals bringing the latters within the jurisdiction of the formers for the purposes of human rights treaties. This ultimately implies that states shall comply with their human rights obligations even when acting outside their territories and, in particular, when performing targeted killings. Keeping well in mind that a finding of jurisdictional does not *per se* entail legal responsibility of the states involved, it should be noticed that this conclusion does not in itself exclude the lawfulness of targeting practices *tout curt*. What it does, however, is to posit that such practices shall fully respect human rights obligations regardless of geographical considerations.

585 Marko Milanovic, *Extraterritorial Application of Human Rights Treaties*, *Law, Principles and Policies, supra*. Note that this approach is more restrictive than the functional model proposed *supra* in so far as it does not directly link the existence of a jurisdictional nexus between states and individuals to the formers' capability to respect or ensure respect to the latters' rights. However, also according to the model proposed by Milanovic a targeted killing operation may be per se sufficient to bring the target within the jurisdiction of the targeting state. For a similar conclusion see also, *inter alia*, Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford, 2010, pp. 193-235.

6. INTERPLAYS BETWEEN HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW: REPERCUSSIONS ON THE RULES GOVERGNING THE USE OF FORCE

(1) The Role of Human Rights in Times of Conflict; (2) Lex Specialis; (2.a) Lex Specialis as a Principle of Norm Conflict Resolution; (2.b) Lex Specialis as an Interpretive Tool; (3) Interpreting Single Sets of Rules through the Lex Specialis Principle; (4) Between International Humanitarian Law and Human Rights Law: the Right to Life at the Intersection; (4.a) "Arbitrary" Killings in Times of Armed Conflict; (4.b) Using Human Rights Law to Understand International Humanitarian Law; (5) The Impact of Human Rights Law on Targeted Killing and Assassination; (6) Interlocutory Conclusions.

Whilst in a peaceful environment state agents are bound by the strict parameters on the use of force framed under the *corpus juris* of international human rights law[586], and international humanitarian law is the legal regime specifically designed to regulate the conduct of hostilities[587], the question remains whether the applicability of the latter displaces – in part or as a whole – the validity of the former in times of armed conflict[588].

Much ink has been spent and many words have been written in the last years on the relationship existing between international humanitarian law and international human rights law[589]. No consensus exists however, at the current stage, on the way

586 *Supra*, Ch. II, paras. 4 and 5.

587 *Supra*, Ch. II, paras. 2 and 3.

588 On the different origins but converging aims of these two legal regimes see Vera Gowlland-Debbas and Gloria Gaggioli, *The Relationship Between International Human Rights and Humanitarian Law: an Overview*, in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013, p. 78; Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*, p. 898; Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, in *International Review of the Red Cross*, Geneva, 2008, p. 600; Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, in *International Review of the Red Cross*, Geneva, 2008, p. 501.

589 In general on the interaction between international humanitarian law and human rights law see, *inter alia*, Orna Ben-Naftali, *International Humanitarian Law and International Armed Conflicts*, *supra*; Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013; Christian M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regtional Intergovernmental Human Rights Bodies*, in

these two legal regimes interplay. For the scope of the present analysis, we need not go through the linkages of these two bodies of law and through the challenges they pose in general terms. We rather need to assess what implications their interaction bears with specific reference to the right to life and the intentional use of lethal force by State agents. Nonetheless, this paragraph cannot but depart from brief references of the whole discourse revolving around the complementary applicability of the two branches of international law at hand.

While it would be an overly simplistic conclusion to state that human rights law in general offers a higher standard of protection to the human beings if compared with the parallel regime of international humanitarian law[590], a focus on the specific norms respectively dictated under these two branches of international law in relation to the protection of human life in light of the principles outlined above[591] shows that restrictions to the use of lethal force under the standards of international humanitarian law are generally more relaxed than those provided by international human rights law. Put in simple terms, while wilful resort to lethal force represents the rule under the first of these two regimes, it is instead the exception according to law enforcement parameters. How can these two bodies of law coexist if, on the face of it, they appear to be in blatant contradiction with regard to the right to life?

Fritz Kalshoven and Yves Sandoz, *Implementation of International Humanitarian Law*, The Hague, 1989; Matthew Happold, *International Humanitarian Law and Human Rights Law,* in Christian Henderson and Nigel White, *Research Handbook on International Conflict and Security Law*, Cheltenham, 2012; Marco Sassòli and Laura Loson, *The legal relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflict* in *International Review of the Red Cross*, Geneva, 2008; Marco Sassòli, *Le DIH, une lex specialis par rapport aux droit humains?*, in Auer, Flukiger, Hottelier, *Les droits de l'homme et la constitution, Etudes en l'honneur du Professeur Giorgio Malinverni*, Geneva, 2007; Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, in *Israel Law Review*, Cambridge, 2007; Louise Doswald-Beck, *The right to life in armed conflict: does international humanitarian law provide all the answers?*, *supra*; Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, in *International Review of the Red Cross*, Geneva, 2005; Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence?*, in *European Journal of International Law*, Firenze, 2008; John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations, supra*.

590 Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, in *The European Journal of International Law*, Firenze, 2008, p.182.

591 *Supra*, Ch. II, paras. 1-5.

6.1. The Role of Human Rights in Times of Armed Conflict

Different theories exist on the ways international humanitarian law and international human rights law interplay[592]. The prevailing model at the state of the art is that these two regimes simultaneously apply rather than hampering each other[593]. That human rights law continues to apply alongside international humanitarian law is confirmed by a consistent body of jurisprudence of international judicial and quasi-judicial bodies[594] as well as by State practice[595], besides clearly

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592 In particular, three main theories may be identified on the point: a) traditionally, the separation theory was dominant, positing the existence of two different branches of law, mutually exclusive, applying respectively during peace and wartime. This understanding was challenged by the introduction of human rights in the landscape of international law with the UN Charter. Nonetheless, the two branches remained neatly separated in practice. Due to the developments of the two subjects, the separation theory may now be considered overcome; b) Giving consideration to human rights also during times of armed conflict as a branch that can indeed complete and augment international humanitarian law is the theory of complementarity, according to which these two bodies of law do not remain completely apart but, at the same time, do not merge; c) A final theory concerning the interplays between the two legal regimes at hand is the integration theory which makes reference to and stems from the embodiment of international humanitarian law principles in human rights law treaties, such as the Convention on the Rights of the Child, ultimately leading to the establishment of a human right law for armed conflict situations. To this hand, in general, see Hans-Joachim Heintze, *Theories on the Relationship Between International Humanitarian Law and Human Rights Law*, in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013, p. 53.

593 Accordingly see, inter alia, Theodor Meron, *Convergence of International Humanitarian Law and Human Rights Law*, in D. Warner, *Human Rights and Humanitarian Law*, The Hague, 1997, p. 102; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. I, supra*, 2005, p. 299; Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, in Orna Ben-Naftali, *International Humanitarian Law and International Armed Conflicts*, Oxford, 2011, p. 95; Francisco Forrest Martin, Stephen J. Schnably and others, *International Human Rights and Humanitarian Law, Treaties, Cases, and Analysis*, Cambridge, 2011, p. 529; John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations, supra*, p. 1448; Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?, supra*, p. 162; Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law, supra*, pp. 506 and 507.

594 To this end see, inter alia, ICJ, *Nuclear Weapons Advisory Opinion, supra*; *Wall Advisory Opinion, supra*; *Case of the Armed Activities, supra*; HRC, *Concluding Observations on The United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev1, 18 December 2006; *Concluding Observations on the United Kingdom*, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008; *Concluding Observations on the Democratic Republic of Congo*, UN Doc. CCPR/C/COD/CO/3, 26 April 2006; *Concluding Observations on Belgium*, UN Doc. CCPR/CO/81/BEL, 12 August 2004; *Concluding Observations on Colombia*, UN Doc. CCPR/CO/80/COL, 26 May 2004; *Concluding Observations on Sri Lanka*, UN Doc. CCPR/CO/79/LKA, 1 December 2003; *Concluding Observations on Israel, supra*, 21 August 2003; *Concluding Observations on Guatemala*, UN Doc. CCPR/CO/72/GTM, 27 August 2001; *Concluding Observations on The Netherlands*, UN Doc. CCPR/CO/72/NET, 27 August 2001; *Case of Sarma v. Sri Lanka*, views of 31 July 2003; *Case of Bautista v. Colombia*, views of 13

emerging from the presence of derogation clauses in human rights treaties[596] and references to human rights in conventions of international humanitarian law[597].

6.2. "Lex specialis"

However sound this stance may be in theory, the way international humanitarian law and human rights law interact in practice remains to be established. That is to say, the conclusion reached above is useful inasmuch as it rejects the flawed assumption that human rights do not play any role in times of armed conflicts. The interlinked question it does not answer, however, is which consequence the simultaneous interplay of the two branches of international humanitarian law brings

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November 1995 and *Case of Suarez de Guerrero v. Colombia*, *supra*; ECtHR, *Case of Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005; Case of *Isayeva v. Russia*, Judgment of 24 February 2005; *Case of Ergi v. Turkey*, *supra*; Case of *Ahmet Ozkan and others v. Turkey*, Judgment of April 6, 2004; *Cyprus v. Turkey*, *supra*; IACtHR, *Case of Velasquez v. Guatemala*, *supra*; IACmHR, *Case of Coard and Others v. the United States of America*, *supra*; *Case of Alejandre v. Cuba*, *supra*; *Case of Victor Saldano v. Argentina*, Judgment of 11 March 1999. Accordingly, Hélène Tigroudja, *The Inter-American Court of Human Rights and International Humanitarian Law*, in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013, p. 467. On the practice of treaty bodies applying human rights in situations of armed conflicts, also extraterritorially, see Robert K. Goldman, *Extraterritorial Application of the Human Right to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict*, *supra*, p. 106.

595 Frome the late 60s the United Nations General Assembly (GA) started to consistently adopt resolutions concerning the respect for human rights in situations of armed conflicts. To this end see, *inter alia*, GA Res. 2444(1968); GA Res. 2597(1969); GA Res. 2546(1969); GA Res. 2252(1967); Res. 2444(1968); GA Res. 2647(1970); GA Res. 2675(1970); GA Res. 2853(1971); GA Res. 3032(1972); GA Res. 3102(1973); GA Res. 339(1974); GA Res. 3500(1975); GA Res. 3525(1975); GA Res. 50/193(1995), GA Res. 46/135(1991); and GA Res. 52/145(1997). Analogously, in the very same period the Security Council (SC) started adopting the same view on the applicability of international human rights law in times of armed conflict. To this end see, *inter alia*, SC Res. 237(1967); SC Res. 1019(1995) and SC Res. 1034(1995). For more recent resolutions of the SC on the issue see, *inter* alia, SC Res. SC Res. 1635(2005); 1649(2005); SC Res. 1653(2006); and SC Res. 1882(2009). Accordingly see also, *inter alia*, *Report of the Secretary General on Respect for Human Rights in Armed Conflicts*, UN Doc. A/7720, 20 November 1969 and *Report of the Secretary General on Respect for Human Rights in Armed Conflicts,* UN Doc. A/8052, 18 September 1970.

596 ICCPR, art. 4; ECHR, art. 15, para. 2; IACHR, art. 27, para. By the same token, on derogation clauses see *inter alia* Tullio Scovazzi e Gabriella Citroni, *Corso di diritto internazionale, Parte III*, *supra*, pp. 30 – 39; Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflicts*, in Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law*, Oxford, 2011, pp. 202 and 204; Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law, supra*, p. 95 and Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, *supra*, p. 507.

597 *AP I*, art. 72; *AP II*, Preamble.

about, especially when the two of them entail actually or seemingly contrasting obligations for States bound by them.

It has been suggested that, where the two legal regimes at hand come at odds, then their inconsistencies should be overcome through reference to conflict of norm solving principles. While being just one among many others criteria of norm conflict resolution[598], the principle *lex specialis derogat legi generali* covers a significant role in this field due to its widespread use as the chief tool to articulate the relationship between international humanitarian law and human rights law[599] and is therefore largely dominant in the international discourse on the subject[600].

After all, this is the criterion constantly referred to by the ICJ when the Court has had occasion to deal with this issue. The ICJ has indeed averred time and again that in times of armed conflict "both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration"[601], the latter regime being the applicable *lex specialis*[602].

However, what the maxim *lex specialis derogat legi generali* means remains quite obscure in this specific regard[603].

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598 Other principles of norm conflict resolution are for instance the hierarchically superior norms (*jus cogens*), UN Charter precedence over contrasting conventions (Art. 103 UN Charter), conflict clauses in treaties and the *lex posterior* criterion. To this end see in higher detail Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, *supra*, p. 95.

599 Jean d'Aspremont and Elodie Tranchez, *The Quest for a Non – Conflictual Coexistance of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle ?,* in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013, p. 225.

600 Accordingly see Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters*, *supra*, p. 603 and Martti Koskenniemi, *The Function and Scope of the Lex Specialis Rule and the Question of "Self Contained Regimes"*, Doc. ILC(LVI)/SG/FIL/CRD.1, 7 May 2004, p. 4.

601 ICJ, *Armed Activities, supra*, para. 216. Accordingly, see also ICJ, *Nuclear Weapons Advisroy Opinion, supra*, para. 25 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter, *Wall Advisory Opinion*), 9 July 2004, para. 106.

602 ICJ, *Nuclear Weapons Advisory Opinion, supra*, para. 25. By the same token, ICJ, *Wall Opinion*, supra, para. 106 and *Armed Activities, supra*, paras. 216 – 220. Accordingly see, inter alia, Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, *supra*, p. 212.

603 Accordingly see, *inter alia*, Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*, p. 899; Martti Koskenniemi, *The Function and Scope of the Lex Specialis Rule and the Question of "Self Contained Regimes"*, *supra*, p. 4; Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, *supra*, p. 523; Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, *supra*, p. 213.

At the outset, in the analysis of this subject, we are confronted with a twofold problem. First of all, is the maxim *lex specialis derogat legi generali* a mere criterion of norm conflict resolution or may it also be viewed as an interpretative principle? Once addressed this issue, the additional question to be answered is whether the term *lex* is to be referred to single norms or to entire legal regimes. That is, which criteria are to guide the interpreter when trying to understand which *lex* is *specialis*?

a) Lex Specialis as a Principle of norm conflict resolution

The *lex specialis* principle has been traditionally understood as a conflict of norm solving criterion[604]. Allegedly, the rationale behind the Latin maxim is that "special rules are better able to take account of particular circumstances"[605]. Read as a criterion of norm conflict resolution, the *lex specialis* principle entails that when two norms regulate the same subject matter in diverging ways and it is not possible to detect an hermeneutic option that would conciliate their meanings, then, the norm that is most specific in the given case is the one that finds application. This precludes any possible application of the more general norm, but only to the extent of the *lex specialis*'s scope, while leaving it completely intact for the wider range of conducts not covered by the former[606]. Analytically, the two norms may be portrayed as two concentric circles, the smaller of which is endowed with all properties of the other and is further characterized by specifying elements. As it appears, the principle at hand has deep roots in logic and due to this intrinsic characteristic of its it is so well suited to apply as a principle of conflict of norm resolution[607].

b) Lex Specialis as an Interpretive Tool

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604 Accordingly see Jean d'Aspremont and Elodie Tranchez, *The Quest for a Non – Conflictual Coexistance of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?*, *supra*, p. 225 and Martti Koskenniemi, *The Function and Scope of the Lex Specialis Rule and the Question of "Self Contained Regimes"*, *supra*, p. 4.

605 International Law Commission, Study Group on Fragmentation, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, para. 60.

606 Jean d'Aspremont and Elodie Tranchez, *The Quest for a Non – Conflictual Coexistance of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?*, *supra*, p. 225.

607 Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters*, *supra*, p. 604, pointing out that: "When the legal consequences of two norms regulating the same situation are mutually exclusive, specialty in the sense of logic implies that the norm that applies to certain facts must give way to the norm that applies to those same facts as well as to an additional fact present in that situation. […]It is the norm with the more precise or narrower material and/or personal scope of application that prevails".

However, it should be underlined that the *lex specialis* principle may come of use also as an interpretative tool and, in particular, as a method of interpretation that permits the integration of different systems of law[608], as is the case with reference to many provisions of international humanitarian law and international human rights law[609].

As a principle operating at the level of interpretation, then, the *lex specialis* criterion is logically employed a step before its usual understanding as norm conflict solving tool, that is, as a principle that kicks in only after any other hermeneutic venue has proved incapable of reducing apparently conflicting rules to an harmonic integration. And, as an interpretative tool, it serves the principle of systemic integration enshrined in the *Vienna Convention*, art. 31, para. 3, (c)[610], which provides that a treaty is to be interpreted in its "normative environment" rather than in a vacuum.

It has been pointed out, to this end, that it is indeed along the lines of the principle of systemic integration that interpreters have been usually operating when resorting to the *lex specialis* maxim in order to clarify the interplays between international human rights law and international humanitarian law[611].

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608 International Law Commission, *Conclsions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, in *Yearbook of the International Law Commission, Vol. II*, 2006, para. 5: "The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolustion in international law". See also *ibidem*, paras. 18 – 23.

609 International Law Commission, Study Group on Fragmentation, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, supra*, para. 56. Accordingly, on the systemic integration of these two legal regimes, see Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, in *Israel Law Review*, 2007, Jerusalem, p. 6; Jean d'Aspremont and Elodie Tranchez, *The Quest for a Non – Conflictual Coexistance of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?*, *supra*, p. 234; David Kretzmer, *Targeted Killings of Suspected Terrorists: extra-judicial executions or legitimate means of defence?*, *supra*, p. 171; Rene Provost, *International Human Rights and Humanitarian Law*, 2005, Cambridge, p. 350; and Philippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, in *Yale Human Rights and Development Law Journal*, New Heaven, 1999, pp. 85 – 105.

610 *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, Art. 31, para. 3, (c): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. […] There shall be taken into account, together with the context: […] any relevant rules of international law applicable in the relations between the parties".

611 Jean d'Aspremont and Elodie Tranchez, *The Quest for a Non – Conflictual Coexistance of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?*, *supra*, p. 238.

Accordingly, when faced with this matter the ICJ chose to follow a conciliatory interpretation of the two legal regimes, both in its *Nuclear Weapons* and *Wall Advisory Opinions* as well as in the *Armed Activities Case*[612]. The ICJ, in fact, did not conclude for a collision of the two branches of international law, and therefore it did not apply a method of norm conflict resolution, but it rather chose an interpretation that prevented a conflict between them to arise. The *lex specialis* principle, in this context, was used by the ICJ in order to interpret one set of rules in light of the other, thus harmonizing international humanitarian law and human rights law and interpreting each of them in light of the other[613].

In these cases, the ICJ deemed the international humanitarian law paradigm as being *specialis* to human rights law due to its specific object and field of application and therefore elected it as the ultimate interpretative standard to take into account for the integration of the two regimes.

Such an understanding of the maxim is actually the only one that may grant complementarity[614] of the two legal regimes, and therefore let them mutually reinforce or otherwise reciprocally influence each other, rather than having one displace the other[615]. Under the guise of an interpretative tool the *lex specialis* principle thus embodies a complementarity approach[616] that facilitates a systemic integration and reciprocal harmonization of the two legal regimes[617].

As a matter of fact, human rights monitoring bodies have endorsed this understanding consistently affirming that the two branches of international law are complementary and interpreting human rights in the light of international humanitarian law in times of armed conflicts. In such cases these bodies have taken into account international humanitarian norms alongside human rights provisions, in accordance with art. 31, para. 3 *Vienna Convention on the Law of Treaties*, therefore adopting the view that these two bodies of law may also "become integrated to

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612 ICJ, *Nuclear Weapons Advisory Opinion, supra*, para. 25; *Wall Opinion, supra*, para. 106; and *Armed Activities, supra*, para. 216.

613 Jean d'Aspremont and Elodie Tranchez, *The Quest for a Non – Conflictual Coexistance of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?*, *supra*, p. 239.

614 HRC, *General Comment 31*, *supra*, para. 11.

615 Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, *supra*, p. 521.

616 *Ibidem*, p. 524.

617 Hélène Tigroudja, *The Inter-American Court of Human Rights and International Humanitarian Law*, *supra*, p. 472.

specify their scope or their content"[618], albeit not adopting a uniform parameter for the integration of the two legal regimes[619].

As it appears, therefore, the principle of *lex specialis* has a double nature. It may be understood, as it has traditionally been, as a criterion of norm conflict resolution. Accordingly, when two norms come to clash and it is not feasible to interpret them in such a way that would grant them applicability one alongside the other, the more specific one displaces the general which does not find any application whatsoever on the range of facts and conducts covered by the former. Alternatively, the *lex specialis* criterion may be understood as an interpretative tool that grants applicability to the two norms or sets of norms simultaneously. In this latter scenario, the value of the principle is to identify, with reference to the specific circumstances characterizing a given case, which norm is the more specific and which one, accordingly, is to be elected at parameter of interpretation in light of which the other provisions are to be read and understood.

As far as the interplays between human rights law and international humanitarian law are concerned, it seems more appropriate to adopt the *lex specialis* principle as a criterion of interpretation, rather than as a conflict of norm solving criterion, at the very least insofar as the conflict between the two regimes is merely

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618 IACtHR, *Case of the Mapiripan v. Colombia, supra*, para. 115. Accordingly see Laurence Burgorgue-Larsen and Amaya Ubeda De Torres, *The Inter-American Court of Human Rights, Case Law and Commentary*, Oxford, 2011, p. 327.

619 Thus, the HRC and the IACtHR have both explicitly and consistently resorted to international humanitarian law to interpret human rights provisions enshrined in their respective treaties, while both refusing to give to international humanitarian law direct application. To this end see, *inter alia*, HRC, *Concluding Observations on Israel*, *supra*, para. 15; IACmHR, *Case of Coard and Others v. United States, supra*, para. 57 and *Case of Las Palmeras v. Colombia,* 20 Ferbuary 1998, para. 29; IACtHR, *Case of Las Palmeras v. Colombia, supra*, para. 33; *Case of Hermanas Serrano Cruz v. El Salvador,* Judgment of 23 November 2004, para. 111; and *Case of Masacre de Mapiripan v. Colombia, supra*, para. 115; and *Case of Bamaca Velasquez v. Guatemala,* Judgment of 25 November 2000, para. 207. The ECtHR has never directly applied rules of international humanitarian law either, and, in addition, it usually avoid to make any explicit reference to such legal regime while nonetheless arguably taking it into account in order to assess the background against which a certain alleged violation of human rights is to be evaluated. To this end see, *inter alia*, ECtHR, ECtHR, *Case of Ergi v. Turkey, supra*, para. 79; *Case of Isayeva and Others v. Russia, supra*, 171, 178 and 199; *Case of Isayeva v. Russia, supra*, paras. 187 and 189. To this end note however that contrasting theories exist as to whether the ECtHR has actually ever resorted to international humanitarian law or not. In the affirmative see, inter alia, Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, *supra*, p. 166; for an opposite view see William Abresch, *A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya*, *supra*, p. 746. For an in depth and contextual analysis of the case law reported above see, *inter alia*, Vera Gowlland-Debbas and Gloria Gaggioli, *The Relationship Between International Human Rights and Humanitarian Law: an Overview, supra*, p. 87; Lindsay Moir, *The European Court of Human Rights and International Humanitarian Law,* in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law,* Cheltenham, 2013, p. 480.

apparent and therefore the Latin maxim may prove adequately suited to avoid a conflict of norms and integrate the two legal systems. This conclusion finds further confirmation in the fact that, reasoning otherwise, one of the two legal systems would always derogate (*i.e.*, entirely displace) the other, without any further ado, and deprive it of any application when overlapping, running *contra* the whole concept of *complementarity* endorsed by human rights bodies and by the ICJ[620], besides violating the general principle of law *ut res magis valeat quam pereat*.

Established all of the above, however, the question remains as to how the most specific norm may be identified in specific cases, that is: when is a regime, or a norm, to be qualified as *lex specialis vis-à-vis* another one?[621].

6.3. Interpreting Single Sets of Rules through the *Lex Specialis* Principle

Among the examples usually mentioned as prototypes of the conflict existing in some areas between international humanitarian law and international human rights law is the possibility to kill enemy combatants under the former regime confronted with the strict parameters restricting the use of force under the latter. Such alleged conflict of norm is sometimes argued to be of an irresolvable nature[622].

The reference to such example in a way greatly helps the present analysis, as it drives our focus towards a comparison between single norms or, at the very least, towards restricted sets of rules, rather than relating legal regimes as wholes. As a matter of fact, it would not be tenable to compare the two regimes in their entireties. It has been observed that "a body of law as such cannot be considered as *lex specialis*"[623], provided that the principle "does not indicate an inherent quality in one branch of law, such as humanitarian law, or of one of its rules"[624] and therefore the Latin maxim applies between single sets of rules and not between entire legal regimes[625].

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620 See *supra*, in this same paragraph.

621 Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, *supra*, p. 502.

622 Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, *supra*, pp. 118 - 121.

623 Vera Gowland-Debbas and Gloria Gaggioli, *The Relationship Between International Human Rights and Humanitarian Law: an Overview*, *supra*, p. 86.

624 Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters*, *supra*, p. 604. Accordingly see, inter alia, Philip Alston, *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"*, in *European Journal of International Law*, Firenze, 2008, p. 192.

625 Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, in *International Review of the Red Cross*, *supra*, p. 524.

It may in fact be true that specific norms of international humanitarian law do represent *lex specialis vis-à-vis* certain matters. It is also true, however, that as far as other issues are concerned, human rights norms are fairly better suited than corresponding norms of international humanitarian law are, and they might therefore very well be the relevant *lex specialis*[626]: this is undeniable, by way of example, with reference to judicial guarantees provided for by art. 3, para. 1(d) Common to the *Geneva Conventions* and the corresponding but more precise judicial guarantees provided for under human rights law[627].

On these basis it is now widely accepted that the identification of what constitutes *lex specialis* cannot be reached in abstract terms of legal regimes (for example comparing international humanitarian law as a whole to international human rights law as a whole) but needs to be understood in more concrete terms through a comparison of the single rules and norms which may be relevant case by case[628].

This conclusion finds support in the case law of the ICJ itself. In its *Nuclear Weapons Opinion*, indeed, the ICJ has not taken into account the relationship between human rights law and international humanitarian law in general terms but with reference to specific provisions[629]. On the one hand, in fact, it is true that, in general terms, human rights treaties apply also in times of conflict. Nonetheless, under such circumstances, especially when acting outside their territory, states are not required to abide by the whole range of human rights obligations binding them during peacetime and, analogously, they are not demanded to implement them to the same extent[630]. Imposing the same standard of protection in peace as well as in wartime in general terms would amount to burden states with unrealistic duties and would ultimately be counterproductive for the protection of individuals. Therefore,

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626 Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, *supra*, p. 600.

627 Vera Gowlland-Debbas and Gloria Gaggioli, *The Relationship Between International Human Rights and Humanitarian Law: an Overview*, *supra*, p. 86.

628 Christopher Greenwood, *Scope of Application of Humanitarian Law*, in Dieter Fleck, *The Handbook of International Humanitarian Law*, *supra*, p. 75; Gloria Gaggioli and Robert Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, in *Israel Yearbook on Human Rights*, Gerusalem, 2007, pp. 122. Accordingly see also ILC, Study Group on Fragmentation, *The Function and Scope of the Lex Specialis Rule and the Question of "Self Contained Regimes"*, *supra*, p. 5.

629 ICJ, *Nuclear Weapons Advisory Opinion*, *supra*, para. 25: "In 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".

630 John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, *supra*, p. 1494.

when saying that human rights law applies also in times of armed conflicts, the ICJ could not have made reference to their entire scope. On the other hand, when stating that international humanitarian law is the relevant *lex specialis*, the ICJ has not made reference to such regime as a whole since, as we have seen, it is not always the case that international humanitarian law norms are more to the point when compared with human rights provisions.

Accordingly, what is more useful is to avoid a comparison between the two regimes in their entirety, but rather sort out which is the existing relation among single provisions belonging to each branch of international law. Thus, in the abovementioned *Nuclear Weapons Opinion*, the ICJ has scrutinized the applicability in armed conflict of a very specific norm of the human rights regime, namely the right to life granted under art. 6 ICCPR, and it has done so keeping into account relevant provisions of international humanitarian law as a tool to interpret what is and what is not an arbitrary deprivation of life during armed conflicts[631]. According to the ICJ, in fact, while Art. 4 ICCPR provides that no derogation from art. 6 ICCPR may be admitted even in time of "public emergency", what is and what is not an "arbitrary" deprivation of life in times of conflict is to be ascertained with reference to the relevant rules of international humanitarian law inasmuch as "applicable *lex specialis*".

Reference to single norms rather than entire legal regimes affords the possibility to draw some cursory determinations. No problem of interpretation or of norm conflict resolution arise in relation to those sets of norms which lead to the same conclusions under both regimes. In these instances, human rights law and international humanitarian law actually reinforce each other, states being burdened by complementary obligations since one set of norms adds on to the other. As a matter of fact, it has been noticed that international humanitarian law norms and human rights provisions hardly ever come to a full-out conflict, and therefore there is often no need to resort to the maxim *lex specialis derogat legi generali*[632]: in most cases, when overlapping, international humanitarian law and human rights law ultimately lead to the same conclusions[633].

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631 Accordingly, see *Marko Milanovic, Norm Conflicts, International Humanitarian Law, and Human Rights Law*, *supra*, p. 98.

632 Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, *supra*, p. 214, arguing that the ICJ followed indeed exactly this approach when stating that the meaning of "arbitrary" under art. 6 ICCPR is to be determined with reference to international humanitarian law.

633 Accordingly see Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters*, *supra*, pp. 600 and 613, referring in particular to norms related to the humane treatment of prisoners and judicial guarantees. By the same token, Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, *supra*, p. 166.

More troublesome is however the assessment of which is the applicable law when human rights provisions and the laws of war do not entirely match and, at the very least on the face of the matter, tend to collide, as it often happens in relation to the rules on the use of force enshrined in the two branches.

6.4. Between international humanitarian law and human rights law: the right to life at the intersection

It has indeed been held that the law of targeting under international humanitarian law and the guarantees afforded to the right to life under human rights law are an example of unresolvable norm conflict[634] because, allegedly, under international humanitarian law, combatants may be attacked at any time, if not *hors de combat*, while "the IHRL [international law of human rights] necessity standard may be relaxed somewhat to take into account the fact of armed conflict, but it is hard to see how it can be totally extinguished"[635].

The apparent contrast existing between targeting rules under international humanitarian law and the protections afforded to the right to life under human rights law is however unconvincing as an example of irresolvable conflict of norms.

As we have seen above[636], we are before a conflict of norms which cannot be reduced and needs to be resolved by reference to a conflict of norm solving principle when there is no way to interpret at least one of the two apparently contrasting provisions so as to grant applicability to the two of them at the same time[637].

This does not seem to be the case with the relationship between the human right to life and international humanitarian law, at least not with reference to the rules governing the use of force under the two regimes.

Before proceeding any further, an additional specification on the point is in order. The right to life on the one hand and provisions governing the law of targeting on the other can be further divided into subsets of more precise norms. Thus, one thing is to speak about the right to life of civilians and compare it with rules of engagement governing combatants' operations whereas a whole different thing is to

634 Orna Ben-Naftali, *International Humanitarian Law and International Armed Conflicts*, *supra*, p. 7.

635 Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, *supra*, pp. 118 - 121.

636 *Supra*, Ch. II, para. 6, sub-paras. 6.1-6.3.

637 Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law, supra*,, p. 105: "When two norms can be interpreted harmoniously, they generally are".

speak about the right to life of people involved in hostilities and compare them with standards governing targeting rules under international humanitarian law.

a) "Arbitrary" Killings in Times of Armed Conflict

Quite naturally, the discourse concerning respect of human rights in times of armed conflict is largely dominated by analysis revolving around the protection afforded to civilians and belligerents' compliance with their obligations *vis-à-vis* civilians[638].

It may be true that in such cases there is indeed an irresolvable conflict of norms. That is, under human rights standards, there could be in principle no "collateral damages". When the victim is a civilian who has nothing to do with the war and yet is killed solely because of his vicinity to a military objective, he his deprived of his inherent right to life with no further qualms. On the other hand, under international humanitarian law, the notion of collateral damages is well established and this regime does provide that, if the principles of necessity, distinction and proportionality are respected, the State responsible for such deprivation of life cannot be blamed of any wrongdoing.

This is but one example of possible instances where human rights guarantees diverge from humanitarian law obligations. However, such example refers to unintentional killing of civilians and we need not go into this issue in detail. The scope of the present analysis revolving around assassination, in fact, leads us to a different even though related subset of obligations stemming from the general provisions granting the right to life to each and any individual, combatants included, *vis-à-vis* obligations related to the employment of lethal force wilfully addressed against selected targets.

Specifically focusing on this issue, it should be noticed, at the outset, that in relation to targeting rules international humanitarian law and human rights law do not always diverge[639]. Suffice it to recall that, once in the hands of the enemy, a

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638 See to this end, by way of example, Dan Kuwali, *"Humanitarian Rights": How to Ensure Respect for Human Rights and Humanitarian Law in Armed Conflicts,* in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013, stating "This chapter terms humanitarian rights as the symbolic doctrine and methodology regarding the protection of fundamental human rights and humanitarian norms in order to enhance the protection of civilians in armed conflicts" and thus restricting the "constructive complementarity" of the two legal regimes to the benefit of civilians.

639 To this end see, e.g., Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, *supra,* p. 225, suggesting that in fact "the differences of tools and reasoning that exist between the two branches of international law [i.e.,

soldier may under no circumstance be tortured or otherwise subjected to cruel, inhuman or degrading treatments or punishment. As we have shown *antes,* this is an area where both international humanitarian law and human rights law converge[640]. A further example of converging guarantees concerns captured combatants who are at once object of protection from the angle of international humanitarian law and subjects of rights according to international human rights law. Analogously targeting rules governing the laws of war on the subject prohibit any attack on persons who are *hors de combat*: it would be quite hard to rebut the assumption that there is a violation of the right the life when a surrendered soldier or one who is otherwise out of combat for the purposes of international humanitarian law is shot and killed at point blank by an enemy. Once more, international humanitarian law prohibits such occurrence as much as international human rights law does, with the consequence that in such instance the two legal regimes at hand mutually reinforce each other[641].

The lack of deviation of the two regimes is not restricted to obligations protecting the individual. As we have seen, human rights instruments themselves contain derogation clauses which open the door in human rights conventions for international humanitarian law considerations so that norms belonging to this regime in fact inform human rights provisions of their content.

The *lex specialis* paradigm will therefore play a role in this case as an interpretative tool, in line with art. 31, para. 3, (c) of the *Vienna Convention* on the Law of Treaties, rather than as a conflict of norm solving principle, detecting in international humanitarian law the interpretative paradigm to be used to assess the legality or lack thereof of a given killing perpetrated during wartime. Such consequence stems directly from derogation clauses contained in human rights treaties which cannot therefore be considered as criterion of norm conflict resolution but are, all to the contrary, clauses that avoid a full out conflict between the two regimes and operate as a membrane whose function is to let the two systems reciprocally permeate each other.

Whereas there is a difference between art. 6 ICCPR and art. 4 IACHR on the one hand and art. 2 ECHR on the other, insofar as the latter lists a mandatory number of exceptions to the general prohibition to deprive a person of his life instead of providing in more general terms that resort to lethal force is forbidden when "arbitrary", art. 15 ECHR does clarify that art. 2 ECHR shall not be derogated from "except in respect of deaths resulting from lawful acts of war". It follows that, in

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human rights law and international humanitarian law] do not lead to substantive divergences or even to incompatibilities".

640 *Supra*, Ch. II, paras 1-4.

641 Accordingly see Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters, supra*, p. 613.

principle[642], in times of conflict what is a lawful deprivation of life is to be determined, even in the European system, with reference to the relevant rules of international humanitarian law.

If thus construed, the relationship between human rights and international humanitarian law in the context of the right to life implies that killings which are lawful under the latter regime may not be considered arbitrary under the former, not because international human rights law finds no application in times of conflicts, or because its scope is limited or otherwise displaced by international humanitarian law – as it would be if we were to adopt conflict of norm solving principles which trump the applicability of one provision in favour of the other –, but because the latter does contribute to a clarification of the former.

This interpretation finds confirmation in the fact that the right to life is non-derogable even in situations of armed conflict[643]. This means that the right to life remains fully in place. In this scenario, what taking into account international humanitarian law standards[644].

A few straight forward conclusions may be drawn from the above. Arguably, nobody could uphold that killing a combatant on the battlefield while still embracing weapons would amount to a violation of his human rights. Not because such combatant no longer enjoys his right to life or he has forfeited it for the time he is deployed in combat, but because the act of depriving him of his life is justified under the circumstances where it occurs. This is so much so that, it has been suggested, killings that may be defined as arbitrary during armed conflict are "those that contradict the humanitarian laws of war"[645]. Prove of the convergence of international humanitarian law and human rights law in this field is the fact that such killing would be unlawful under the former regime and, consequently, also under the latter, if it were perpetrated against a combatant who has already surrendered.

Even though to date human rights bodies have never had the occasion to directly rule on cases brought before them by combatants or members of armed

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642 It is to be stressed that this determination remains, at the moment, merely theoretical, considering that art. 15 ECHR has never been invoked by any of the contracting parties. One shall therefore wander what regime is to be applied in cases where a conflict originates *de facto* but the parties involved still refrain from making any declaration pursuant to art. 15 ECHR. In such case, from the writer's point of view, Conventional obligations should fully apply and the warring parties bound by the ECHR should not benefit from any relaxed standard of protection for individual rights.

643 See *supra*, Ch. II, para. 4.

644 Accordingly see, *inter* alia, Amnesty International, *"Targeted Killing" Policies Violate the Right to Life*, London, 2012, p. 5.

645 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl, 2005, p. 108.

groups alleging a violation of their right to life, the principles that may be drawn from a number of decisions and principles expressed on related issues[646] point at the conclusion that, international humanitarian law norms do not trump rules governing the right to life under human rights law but they further elaborate them[647]. In fact, even with reference to the law of targeting there is no real conflict between humanitarian law and human rights law[648], insofar as the latter branch of international law finds its real meaning only when read in light of the former due to derogation clauses provided by its own treaties. Therefore, the fact that targeting rules under international humanitarian law afford the possibility to wilfully kill certain persons under certain circumstances does not mean that the victims of such actions have no right to live any longer, it simply means that the use of lethal force at their detriment is justified under the specific circumstances of hostilities, and it is so under both regimes, given their respective integration.

b) Using Human Rights Law to Understand International Humanitarian Law

Does all the above mean that when it comes to restrictions on the use of force during armed conflicts international humanitarian law is always to be elected as the interpretative standard, with the consequence that human rights should always be interpreted in a way completely consistent it?

This would be the case if international humanitarian law were always *lex specialis vis-à-vis* international human rights law or if the *lex specialis* criterion were to assume the meaning of a conflict of norm solving principle entirely depriving the human rights regime of its applicability to conflict-related deprivations of life. But, as we have seen, this is not the case in relation to the human right to life[649].

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646 To this end see in general, inter alia, HRC, *General Comment 6*, supra; *Case of Camargo v. Colombia*, supra; *Case of Baboeram v. Suriname*, supra; IACmHR, *Report on the Situation of Human Rights in Peru*, 1 March 1996; *Case of Juan Carlos Abella v. Argentina*, Judgment of 18 November 1997; *Case of the Ríofrío Massacre*, *supra*; IACtHR, *Case of Velásquez Rodríguez v. Honduras*, *supra*; *Case of Neira Alegría and Others v. Peru*, Judgment of 19 September 1996; *Case of Bamaca-Velasquez v. Guatemala, supra*; *Case of Zambrano Velez and Others v. Ecuador, supra*; ECtHR, *Case of McCann and Others v. UK, supra*; *Case of Ergi v. Turkey, supra*; Case of Yasa v. Turkey, supra; *Case of Kaya v. Turkey*, *supra*; and *Case of Avsar v. Turkey*; *Case of Isayeva, Yusupova and Bazayeva v. Russia*; and *Case of Isayeva v. Russia*.

647 Accordingly, Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence?*, *supra*, pp. 168 – 172.

648 Accordingly, Jean d'Aspremont and Elodie Tranchez, *The Quest for a Non – Conflictual Coexistance of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?*, *supra*, pp. 233 and 234, underlying that "there can be no conflict of norms short of direct and strict incompatibilities and further stressing: "if we focus on the often discussed issue of the right to life, in that case IHL and HRL are not conflicting sets of norms since only HRL imposes obligations: IHL does not prescribe killing, it just permits the fact of killing in time of wars".

649 *Supra*, Ch. II, para. 6, sub-paras. 6.1-6.3.

The issue that more closely concerns the current analysis, that is, the question of fundamental rights of those who are intentionally targeted by a belligerent party with the aim of depriving them of their lives, persons who usually take part to hostilities or, at the very least, are said by the targeting party to do so, is generally less debated than the related questions concerning the human right to life of civilians[650].

It is important to recall in this connection that soldiers belonging to regular armies, combatants in general but also members of armed groups and *guerrilla* fighters, do not forfeit their human rights at the very moment of wearing a uniform or embracing arms. Notably, even while fighting, individuals do not give up their fundamental rights. They do not forfeit their right to life, which is instead universal not only insofar as it belongs to every human being but also inasmuch as it accompanies every person for the entire duration of his life. Being an inherent quality of the human being, the right to life cannot be either relinquished nor traded[651]. Intentional resort to lethal force in combat is lawful not because victims no longer enjoy their right to life or somehow suspend it for a certain period of time, but because their killing is justified under the specific circumstances surrounding and characterizing the agent's conduct, that is, the context of hostilities. Legally speaking, this is a whole different thing.

This bears crucial consequences with regard to the impact of international human rights law on targeting practices. Indeed, in general the application of the principle of *lex specialis* as an interpretative tool, in accordance with derogation clauses characterizing human rights treaties and with the principle of systemic integration dictated by the *Vienna Convention* on the Law of Treaties, leads to elect

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650 Note that, strictly speaking, it would be improper to define all of the persons falling within this category as combatants due to the unwillingness of States to recognize such status and all strings attached to members of armed groups. To this end see, *inter alia*, Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, *supra*, p. 527, arguing: "it is relatively uncontroversial that the rules regulating the conduct of hostilities – for example, distinction, proportionality, precaution – are part of customary international humanitarian law applicable to non-international armed conflicts. […] The difficulty is that there is no combatant status in non-international armed conflict". To this end see also Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters*, *supra*, p. 601.

651 Accordingly see, *inter alia*, Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, *supra*, p. 95: "human beings embroiled in armed conflict retain those rights that are inherent in their human dignity". Contra, see William Abresch, *A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya*, in *European Journal of International Law*, Firenze, 2005, p. 757; Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge, 2010, p. 34 and Lindsay Moir, *The European Court of Human Rights and International Humanitarian Law*, *supra*, p. 482, holding that combatants trade their right to life for their right to kill.

international humanitarian law to the parameter of interpretation on which falls the identification of lawful – and therefore non-arbitrary – killings in times of conflict.

However, it would be overly simplistic to state that human rights are always to be interpreted in light of international humanitarian law and that the *vice-versa* never applies[652]. Such an assessment, in fact, would amount to qualify *a priori* the latter regime as the one better suited, under every circumstance, to address events occurred in the context of armed conflict. This is not the case[653]. It is in fact generally accepted that international humanitarian law norms sometimes contain concepts the interpretation of which necessarily needs to make reference to human rights law[654]. In particular, in a number of situations also related to the right to life, the *lex specialis* principle demands international humanitarian law to be interpreted in the light of human rights provisions because of the particular adherence of the latter to the specific subject of concern.

International humanitarian law, indeed, is not always fully precise in so far as the description of conducts it allows or restrain is concerned, and in some grey areas it may not be self-sufficient to determine whether a certain killing amounts to a breach of its provisions or not[655]. The issue thus becomes more puzzling when human rights parameters concerning the conduct the lawfulness of which is to be evaluated is not in clear contradiction with international humanitarian law because rules of international humanitarian law themselves are uncertain as to the lawfulness or lack thereof of a given killing. This kind of doubt typically concerns situations of non-international armed conflicts or occupation, where international humanitarian law is not so well developed as it is in relation to armed conflicts international in character[656]. In these situations, it is generally accepted that human rights law may be

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652 Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*, p. 882.

653 *Ibidem.*

654 Vera Gowland-Debbas and Gloria Gaggioli, *The Relationship Between International Human Rights and Humanitarian Law: an Overview*, *supra*, p. 79, making reference to the judicial guarantees required by art. 3, para. 1(d) Common to the GCs.

655 Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters*, *supra*, p. 601.

656 William Abresch, *A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya*, *supra*, p. 747, stating that "The rationale that makes resort to humanitarian law as lex specialis appealing - that its rules have greater specificity - is missing in internal armed conflicts". Accordingly, Marco Sassoli and Lawura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where it Matters*, *supra*, pp. 601 and 602; and Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, *supra,* p. 225. On the applicability of customary international humanitarian law to internal armed conflicts see, in general, Jean-Marie Henkaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge, 2005. As for similarities in the application of human rights standards in situations of military occupation see, *inter alia*, Cordula

used to fill gaps and areas scarcely regulated by international humanitarian law[657] or to provide interpretation to norms belonging to the latter's principles, when not crystal clear[658].

In line with the above reasoning, it has been suggested that "the restatement of the Martens clause in the Protocol I [additional to the Geneva Conventions] incorporates other international agreements into the Geneva Conventions, - which include human rights treaties establishing use of force standards during armed conflicts"[659]. Such interpretation gears the application of the laws of war to other fields of international law and, in so doing, it gives room to interpret international humanitarian law in the light of, inter alia, human rights law provisions. In other words, this means that, while in certain respects, in the context of hostilities, the laws of armed conflict surely may be viewed as *lex specialis* when compared to human rights law, for certain other cases the opposite may be true.

Theoretically, this could go two ways: on the one hand, it may be argued, international humanitarian rules in this field operate against the background of human rights norms. Under such approach, human rights norms represent the general rule, the laws of armed conflict represent the exception to the general rule and therefore should be strictly understood. If this is the case, when there is a doubt in the interpretation of one norm of international humanitarian law or in the interpretation of the interplays of more norms of international humanitarian law and such doubt cannot be solved within the realm of interpretation of such system, then what is in the background (human rights law) resurfaces and becomes the rule applicable to the unclear situation. A different and yet possible angle is that there is no general and particular rule. Human rights and humanitarian law are simply two different bodies of law that impact one another ceteris paribus. None of them lays on the background, none of them is in the spotlight: they simultaneously interact and permeate each other. If so, then, international human rights provisions are to be interpreted in light

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Droege, *Elective Affinities? Human Rights and Humanitarian Law*, *supra*, p. 537; Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*, p. 892 and Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, *supra*, p. 164.

657 Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, *supra*, p. 95.

658 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. I*, Cambridge, 2005, p. 299.

659 Rights International, *Memorial Amicus Curiae submitted to the International Criminal Tribunal for Former Yugoslavia*, 3 March 2003. The so called *Martens Clause* reads as follows: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience". On the Martens Clause, in general, see www.icrc.org.

of international humanitarian norms, so that what is arbitrary is to be defined with reference to the latter body. At the same time, such body of law, if and when unclear, is to be interpreted in light of the former, so as to enhance at the maximum possible height individual guarantees. In both cases, international humanitarian law cannot operate in a vacuum. Provisions of international human rights law affect its interpretation, its application, its results.

In a way, such view offers the possibility to re-interpret in an evolutionary perspective norms of international humanitarian law in the light of norms of human rights law as much as the derogation clauses contained in human rights treaties do in reverse. This is to say that the possibility, *rectius*, the necessity, to take into account, in the interpretation of a conventional provision, "any relevant rules of international law applicable in the relations between the parties"[660], does not only operates one way but it rather makes the Geneva Conventions as well as its additional protocols living instruments that are necessarily influenced by the evolution of other fields of law, such as international human rights law. If mechanisms mandated with the monitoring and application of human rights treaties must take into consideration norms of international humanitarian law when adjudicating on human rights violations occurred in the context of an armed conflict, then when interpreting norms of international humanitarian law we should as well keep into account human rights norms[661].

6.5. The Impact of Human Rights Law on Targeted Killings and Assassination

Since the right to life is intransgressible and, as recalled *antes*, continues to find full application in times of armed conflicts, not only is such right to be interpreted in light of international humanitarian law but, when the latter is not clear enough, international humanitarian law itself "must be interpreted in the light of the development of international law in the field of human rights"[662].

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660 *Vienna Convention on the Law of Treaties*, Art. 31, para. 3, let. c).

661 Accordingly see also Hans-Joachim Heintze, *Theories on the Relationship Between International Humanitarian Law and Human Rights Law,* in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law*, *supra*, p. 53 and Vera Gowlland-Debbas and Gloria Gaggioli, *The Relationship Between International Human Rights and Humanitarian Law: an Overview*, in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law, supra*, p. 78.

662 Paola Gaeta, *Are Victims of Serious Violations of International Law Entitled to Compensation?*, in Orna Ben-Naftali, *Internatinal Humanitarian Law and International Human Rights Law*, *supra*, p. 319.

Thus, whereas the determination of what is an arbitrary deprivation of life during war time is to be determined with reference to international humanitarian law, when the rules set forth under this body of law are not *per se* sufficiently clear in their determinations, one cannot overlook human rights norms as an instrument of interpretation.

Under international humanitarian law, it is not clear whether a member of an armed group may be targeted and killed when, even though not *hors de combat* or surrendered, he is not involved in active hostilities and his arrest is feasible. Such lack of clarity also characterizes the conditions posed by international humanitarian law to the premeditated killing of enemy combatants or other persons involved in the war effort who are neither *hors de combat* nor under the physical custody of their perpetrators. That is, in situations of targeted killing. What is not clear, in this kind of scenarios, is when and under which circumstances such targeted killings may be qualified as assassinations and, therefore, represent a breach of the targeting states' obligations under international humanitarian law as well as a violation of the targets' human rights. In particular, given that the international prohibition against assassination is customary in nature and that its exact contours are not well defined under international humanitarian law[663], the question remains as to which are the consequences of using international human rights law principles on the right to life as an interpretative tool in the identification and definition of a rule of customary international humanitarian law.

Reference to human rights law may entail several restrictions to international humanitarian law in a number of ways. In this vein it has already been recognized in international jurisprudence that "[t]he laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation."[664]. Thus, international human rights law may add extra conditions further limiting international humanitarian law prohibitions on attack[665]. These extra conditions may extend their effects upon the most diverse rules of international humanitarian law concerning the law of targeting. Thus, for instance, they may impose restrictions to the geographical scope of application of international humanitarian law, thus limiting the areas where targeting may actually take place. On the other, they might directly affect the core content of the specific norm banning assassination having a direct impact on its notion and some concepts, such as that of treachery, commonly characterizing it.

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663 See *supra*, Ch. I.

664 ICTY, *Prosecutor v. Kunarac*, Appeals Chamber Judgment, *supra*, para. 60.

665 Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*, p. 899 and 900.

After all, it has been pointed out, the lack of a prohibition of direct attacks against combatants in international humanitarian law does not generate a corresponding right to kill them everywhere and at every time unless *hors de combat*[666]. In this vein, Jean Pictet suggested: "If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil"[667]. The application of human rights law principles related to the human right to life to these assessments may provoke a shift of balance towards an integrated regime that is more protective for those who are subjected to targeted attacks.

In fact, as we have seen, under human rights law it is not possible to intentionally kill somebody, at the very least not with pre-meditation. Targeted killings, under the law enforcement regime, are therefore not a viable option. In particular, according to international human rights law a deprivation of life cannot be lawful unless more than absolutely necessary[668]. This stance finds further confirmation in that all the decisions taken by human rights monitoring bodies concerning the use of lethal force by states against rebels converge towards the conclusion that if a person can be arrested, than there is no necessity to deprive him of his life and therefore a targeted killing in such a case would amount to an arbitrary deprivation of life[669].

Considering that assassination, however it may be defined, is at the very least a pre-meditated killing of a targeted person, the question remains as to what exactly are the repercussions of a human right oriented interpretation of notions of international humanitarian law crucial to its determination.

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666 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 288.

667 Jean Pictet, *Development and Principles of International Humanitarian Law*, Geneva, 1985, p. 75.

668 See *supra,* Ch. II, para. 4.

669 Accordingly see Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*, p. 885 and Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, *supra,* p. 534.

7. CONCLUSIONS

As we have seen at the beginning of this paragraph, international humanitarian law solely applies during armed conflicts. Such legal regime is therefore triggered under three circumstances, namely, international armed conflicts as defined by art. 2 common to the 1949 Geneva Conventions, including campaigns for national liberation; armed conflicts of a non-international character satisfying the requirements of art. 1(1) and (2) of AP II; and armed conflicts of a non-international character falling within the scope of art. 3 common to the 1949 Geneva Conventions and responding to the requirements of organization and intensity set forth by the ICTY in the *Tadic Case*.

When such conditions are met, a crucial question for the present analysis is: where can the parties to an armed conflict legally strike? On the issue there is no international consensus. However, it seems possible to theorize that, while international humanitarian law is not strictly limited to the territories of active hostilities, this assessment only refers to some provisions of international humanitarian law which have the aim to protect persons from being targeted, not also to provisions allowing for attacks. This is of course in line with the object and scope of the laws of armed conflict, i.e. the creation of restraints to the brutalities of war. This same ratio cannot be turned onto its head and applied a contrario. Although international humanitarian law applies throughout the whole territories of belligerent states, armed attacks shall be confined to zones of active hostilities or else located in proximity of such zones.

Moreover, also when conducting attacks within zones of active hostilities belligerents are bound by three main principles, namely the principles of necessity, distinction and proportionality. The principles of military necessity and distinction are the ones mostly relevant when discussing of the lawfulness of targeting practices and, especially, of assassination. The exact contours of their notions, even though of a long standing character, are somehow blurred and no international consensus exists on the ramifications their implications give rise to. In particular, both of them have a dual nature, being inherently restrictive behind their apparent permissive attire. How restrictive they are, however, is not easily determinable, the former in relation to its protective nature, the latter in relation to the identification of the dichotomy targetable fighter/protected civilian.

These principles are nonetheless not the only ones to be taken into account when assessing the legitimacy of a military attacks, mainly due to the presence of fundamental individual rights and, in particular, of the right to life inherent to the human being, which may further restrict the range of permissible targeting operations. In particular, a thorough consideration of the regime of international human rights law may be of use for a further refinement of the abovementioned

principles, as well as for the interpretation of some rules of international humanitarian law directly related to the notion of assassination.

The right to life, enshrined as it is in the most important human rights conventions at the universal level as well as at the regional one, represents the pre-condition for the enjoyment of any other fundamental rights, pertains to every human being and can never be suspended. Nonetheless, it knows of some exceptions: in particular, in spite of some differences characterizing the formulation of the right to life in the texts of relevant human rights treaties, it is commonly accepted that every person is protected against any arbitrary deprivation of life. This implies that, in times of peace, any deprivation of life escaping an absolute necessity test represents a violation of international law and entails the responsibility of the state involved vis-à-vis the victim and his or her relatives. Accordingly, lethal force may be used exclusively in exceptional circumstances. Even then, it is absolutely necessary to resort to force only when the same result may not be obtained in any other way. At the same time, the amount of force used shall be proportionate to the threat posed by the victim's action, i.e., no more than that strictly needed to obtain the maximum effect with the minimum risk for the victims' life itself and only when the victim's behaviour represents an actual threat for the life of state agents or that of people protected by them. Also in these cases, moreover, the use of force is to be considered lawful only inasmuch as death is its unintended outcome.

Additionally, the right to life is characterized by a procedural limb: this means that every time there is even just an allegation of a violation of the right to life states are bound to undertake positive steps and, in particular, to launch an ex officio, prompt, thorough, independent, impartial investigation into the allegation. While being an obligation of means rather than one of results, such obligation is strictly interconnected with the victims' right to an effective remedy, and its violation is per se sufficient to give raise to an autonomous and additional responsibility of the involved states if they fail to abide by it.

The protection afforded by human rights instruments to the right to life, in particular those concerning the so called negative dimension of such right, is not limited by geographical boundaries or other territorial considerations. In fact, whereas all such instruments require states to respect and ensure respect to the fundamental rights they enshrine within their jurisdiction, their respective monitoring bodies all agree that states cannot do abroad what they could not do within their own territories. This means that states cannot possibly be required to enforce on third states' territories the entire range of human rights that they are bound to grant on their own territories but, on the other hand, they cannot intentionally deploy lethal force outside their territories when they could not do it within their own boundaries. This assessment would be per se sufficient to exclude that states may lawfully target and kill individuals outside their territories in situations of peace. What is mostly important to underline, however, is the rationale behind such appraisal: jurisdiction

in human rights treaties represents a link between a state duty-bearer and range of individual rights-holders. Such nexus is inherently functional. That is, not only individuals enjoy a negative protection against state action even when they are situated outside the concerned states' territories; they are also entitled to the positive measures that states are bound to grant them as soon as they come to be in a relation with a certain state that is capable of enforcing and ensuring their rights. Thus, states are not only bound to respect human rights when acting abroad, but are bound to prevent their violations, to investigate them, to sanction those responsible and to compensate the victims of human rights violations every time they are capable of doing so.

All of the above is crucial to assess the role that human rights law may play with regard to assassination. In fact, it is true that the notion of assassination rooted in the legal regime of international humanitarian law and not in that of international human rights. However, the fundamental right primarily affected by practices of assassination is the right to life. Considering that international human rights law poses firm restrictions to the use of lethal force, that such restrictions remain into full force when states operate outside their borders and that human rights law continues to apply also in times of war, a clarification of the interplays between this branch of international law and international humanitarian law is crucial to understand whether, at the end of the day, human rights provisions may impact on the applicability of the ban on assassination.

As shown above, the way the two legal regimes at hand interact is still object of considerable debate, in general terms. However, as far as the right to life is concerned, in particular with reference to targeting rules, it is clear that what is an arbitrary deprivation of life in times of armed conflicts falls to be determined with reference to international humanitarian law due to its specific object and purpose as well as to the more detailed rules such regime provides on the issue. In brief, rules of international humanitarian law governing targeting practices are generally to be considered lex specialis if compared with international human rights provisions concerning the right to life. This does not mean that the former displaces the latter. All to the contrary, thanks to the presence of derogatory clauses in human rights treaties, these two regimes are not in open contrast as far as most targeting practices are concerned. Thus, rather than setting aside human rights law, international humanitarian law becomes a parameter of interpretation that, with its provisions, pours in the corresponding norms of human rights and fills them in with its adjusted meaning.

To identify the lex specialis principle as an interpretative criterion rather than a conflict of norm solving parameter is crucial insofar as it holds valid until the laws of armed conflict remain in fact specialis. When instead the former proves incapable of self-sufficiency due to the lack of clarity of certain norms, the latter kicks in anew and may as well serve as a parameter of interpretation to clarify the scope of the

vague provisions. This is the case with assassination. Indeed, as shown in the previous chapter, such notion is not and never has been crystal clear under international humanitarian law. Thus, in the current paragraph it has been shown that it is possible to identify a silver lining between international humanitarian law and international human rights law which fully integrates which fully integrates these two regimes in relation to targeting rules and, more to the point, in relation to assassination. According to this line of thinking the latter regime should serve as an interpretative tool to inform the meaning of a provision – the ban on assassination – belonging to the former.

Taking steps from this assessment, what we shall see in the following paragraph is which impact a human-rights-law-oriented interpretation may have on the notion of assassination in different contexts – such as in international armed conflicts, armed conflicts not of an international character and situations of occupation – as well as, in higher detail, on notions of international humanitarian law that have traditionally been related to assassination itself, such as perfidy, treachery and outlawry.

CHAPTER III

Rules of International Humanitarian Law Related to the Use of Lethal Force Against Selected Individuals

1. INTRODUCTION

Questioned about the legality of killing former Iraqi dictator Saddam Hussein during wartime, Abraham Chayes, then Professor of Harvard Law and legal adviser to the U.S. State Department during the Kennedy Administration, replied as follows: "If Saddam was out leading his troops and he got killed in the midst of an engagement, well, that's one thing. But if he is deliberately and selectively targeted, I think that's another, and if we're going to start to build a new order under the rule of law, I think we ought to start applying it to ourselves"[670].

In this reply rests the very essence of the present research's attempt to understand whether targeted killing is nowadays a lawful practice, even in times of war, or whether the long standing prohibition of assassination impinges restrictions on targeting practices that forbid to single out an individual and designate him for sure death.

It therefore seems appropriate, in a chapter dedicated to existing rules of warfare which pose restrictions to the possibility to resort to premeditated lethal targeting practices, to take steps from Professor's Chayes commitment to the rule of law. Such pledge indeed mirrors the *esprit* that once inspired the absolute prohibition of assassination under the international law of armed conflicts, a practice considered unlawful due to its ultimate purpose of leaving the enemies no chances of survival.

Assassination as a method of warfare indeed lifts the veil upon the traditional anonymity of forces engaged in hostilities and strongly leans toward a personalization of conflicts, potentially making the extermination of the enemy rather than a victorious outcome of the confrontation their ultimate object.

It is perhaps due to these reasons that the *Oxford Manual* provided that "It is forbidden: (a) To make use of poison, in any form whatever; (b) To make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender; (c) To attack an enemy while concealing the distinctive signs of an armed force; (d) To make improper use of the national flag, military insignia or uniform of the enemy, of the flag of truce and of the protective signs prescribed by the "Geneva Convention"[671]. It is in the very same spirit that Lassa Oppenheim so strongly condemned assassination, stating with no further ado that "no assassin must be hired, and no assassination of combatants be committed; a

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670 ABC television broadcast of 4 February 1991, Nightline: Why Not Assassinate Saddam Hussein?, reported in Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 347.

671 *1880 Oxford Manual*, *supra*, Art. 8.

price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted"[672].

The previous chapters have shown how assassination in wartime is not thoroughly defined in the realm of today's laws of armed conflict and hinted at the possibility to apply a human rights oriented reading of the laws of armed conflict related to the use of lethal force in times of armed conflict in order to provide an adjourned interpretation of its meaning[673].

An exegetic path that, it is suggested here, is not only possible to undertake but, to the contrary, is the only feasible one from a strictly theoretical perspective in line with principles of intra-systemic integration. However, before resorting to intra-systemic interpretative means, something that will be done in the following paragraphs and chapters, one ought to identify which rules exactly in the realm of the laws of war are to be interpreted.

Thus, first and foremost, it should be inquired whether the armed conflict paradigm still knows of provisions that forbid conducts potentially falling within the notion of assassination. Providing an answer to this question is the purpose of the present paragraph, which revolves around laws of armed conflicts already existing, generally accepted and, to some extent, clear in their scope. It thus aims at the identification of a minimum core of rules embodying fixed principles which, regardless of any further consideration, forbid certain specific conducts which limit the belligerents' right to kill selectively identified persons.

Such analysis is relevant for a twofold reason. On the one hand, it shall help in the identification of the lowest threshold protection against wartime lethal force to be afforded to any individual, regardless of his or her status, by detecting which killings of pre-identified individuals are necessarily unlawful, be it due to the method or to the means used to perform the deed. On the other hand it shall give a step forward in answering the dilemma whether the prohibition of assassination amounts to the simple sum of all such proscriptions or it still bears an autonomous meaning that adds to such proscriptions some further limitation.

Indeed, reviewing the developments in the field of international humanitarian law during the XX century and, in particular, the evolution of autonomous sets of norms governing specific methods and means related to the use of force, some commentators have come to the conclusion that "there probably is no independent

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672 Lassa Oppenheim, *International Law: A Treatise*, *supra*, p. 341.

673 See supra, Ch. I and Ch. II.

war crime of assassination"[674] and, more significantly, "there is no longer any convincing justification for retaining a unique rule of international law that treats assassination apart from other uses of force"[675].

It is submitted here that this would be true if the ban on assassination were limited to the sum total of other specific prohibitions. If this were the case, in fact, it would not bear much significance from a legal perspective to maintain a norm that lacks self-sufficiency: assassination would in such a case represent no more than a descriptive definition embracing a series of conducts already *per se* unlawful rather than a term of art. And since such a definition would not add anything to the legal regime we are analysing, only constituting a common minimum denominator to other conducts otherwise characterized by different preconditions as well as by different effects, it would be useless to resort to it. As a matter of fact, in strictly legal terms the theorization of notions and definitions which are not strictly needed should always be avoided since it practice would only complicate things rather than making them swifter; with the ultimate consequence that also in this case, as much as in the case of assassination during peace time[676], it would bear no significance to resort to the term assassination if not in a descriptive fashion, with no further legal consequences attached[677].

However, as the next paragraphs will show, whereas some rules belonging to the body of international humanitarian law related to this topic are indeed widely accepted and thoroughly defined in their content, others are not. Thus, a further aim that this chapter will tend to pursue is to outline deficiencies affecting those sets of norms, suggesting that the complimentary applicability of human rights law may indeed prove valuable to some extent to refine their content. As will be observed in detail, some of these oriented interpretations would actually lead to unveil the existence within nowadays international rules of norms that, in their combined significance, tend to confirm the continuous and actual value of the traditional understanding of the rule banning assassination, further refining its scope.

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674 A.P.V. Rogers and Dominic McGoldric, *Assassination and Targeted Killing, The Killing of Osama bin Laden*, in *International and Comparative Law Quarterly*, Cambridge, 2011, p. 780.

675 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. iii. See, accordingly, and Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 683, suggesting, contrary to what will be argued in this paragraph, that assassination "serves no purpose since an act constituting assassination would be prohibited in any event by the norm against the use of perfidy".

676 See supra, Ch. I, para. II.

677 See, accordingly, Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, in David Wippman & Matthew Evangelista, *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, 2005, p. 170.

In order to fulfil the declared purpose of this chapter, therefore the following steps will be crucial:

i. Sustain an effort to identify among existing rules of international humanitarian law those more closely related to assassination;
ii. Clarify their scopes;
iii. Understand whether the customary prohibition of assassination is to be limited to that set of rules or there is more to it than the sum of single provisions.

To this end, this analysis will take steps from the prohibitions of treachery and perfidy, traditionally associated to assassination and nowadays claimed by some to be the only prohibition to inform the scope of such allegedly "loaded" term (para 3.2). This study will then pass on to take into account the exact scope of denial of quarter, exploring in particular the width of protection offered by the attack exemption enjoyed by persons *hors de combat* (para. 3.3). Following this analysis, a few punctual rules historically strictly related to assassination will be examined in order to clarify whether prohibitions of outlawry, bounties and other offers of rewards and keeping assassins in pay may be said to be still valid today (para. 3.4). Finally, specific attention will be devoted to the absolute prohibition of poison for two reasons. First, poison has been traditionally associated with assassination because of its efficiency, and therefore no discourse of assassination can avoid to touch upon this subject. Second, and most significantly, the ban on poison was one of the first restrictions on means and methods of warfare to come on the scene of international law, centuries before the laws of armed conflict were even codified. Exploring which is the rationale for this long-standing absolute ban, it is submitted here, may provide a very useful insight on the rationale that led to the strictly related prohibition of assassination a few centuries later, a rationale that may hold true also now and, as such, may prove crucial in understanding the contours of such prohibition.

2. PERFIDY AND TREACHERY

(1) Prohibitions of Perfidy and Treachery: Scope of application; (1.a) Prohibition of perfidy: relevant definition and content; (1.b) Treachery: notion; (2) Ruses of War; (3) Assassination *qua* Perfidy and Treachery; (4) Interlocutory Conclusions.

The first rules that come naturally into consideration in every serious discourse concerning the role of assassination in nowadays laws of war are those concerning perfidy and treachery[678]. This is partly due to the fact that assassination has traditionally been framed, *inter alia*, as a conduct that impinges upon considerations of good faith and trust between the belligerents as well as upon considerations of chivalry and military honour[679]. In strictly legal terms, as we have seen[680], this connection led to the codification of rules that often directly linked assassination to treacherous conducts, aimed at misleading an adversary, gain his confidence and trust only to betray them and strike a fatal blow that could have not been achieved otherwise[681]. Whereas treachery was initially seen as one only of the possible conducts that may integrate the scope of assassination[682], the ties between these two figures have progressively grown so strong that some authors have come to consider the former as an indispensable precondition, even as a constitutive element of the latter, or at the very least as its salient feature[683]. Thus, it has been argued, "assassination under customary international law is understood to mean the selected

678 See, accordingly, Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 371, pointing out that "the prohibition of perfidy (or treachery) is of central importance to the wartime definition of assassination in the US American discussion, where the perfidious/treacherous character of a politically motivated killing is said to provide the element of illegality inherent in the notion of assassination".

679 Jean Pictet, *Commentary on the APs*, *supra*, § 1485.

680 See *supra*, Ch. I.

681 Accordingly see, inter alia, Richard D. Rosen, *Targeting Enemy Forces in the War on Terror*, in *Vanderbilt Journal of Transnational Law*, Cambridge, 2009, p. 702 and Mark V. Vlasic, *Assassination and Targeted Killing – A Historical and Post-Bin Laden Legal Analysis*, *supra*, p. 276.

682 Significantly, treachery was understood only as one of other possible methods qualifying a conduct as assassination in Art. 148 of the *Lieber Code*, in the 1874 *Brussels Declaration* as well as in the 1880 *Oxford Manual*. Accordingly see Mark V. Vlasic, *Assassination and Targeted Killing – A Historical and Post-Bin Laden Legal Analysis*, *supra*, pp. 276 and 277.

683 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 305. Accordingly see also Michael N. Schmitt, *Fault Lines in the Law of Attack*, in *Michael N. Schmitt, Essays on Law and War at the Fault Lines*, p. 184, William C. Bank and Peter Raven-Hansen, *Targeted Killing and Assassination: the U.S. Legal Framework*, *supra*, p. 677 and Mark V. Vlasic, *Assassination and Targeted Killing – A Historical and Post-Bin Laden Legal Analysis*, *supra*, pp. 277 and 278.

killing of an individual enemy by treacherous means"[684], treachery being understood as "a breach of a duty of good faith toward the victim"[685]. It therefore seems imperative for the purpose of the present study to take steps from the analysis of the prohibition of treachery and perfidy under international law in order to assess first of all which conducts fall within their scope, to further evaluate whether they are tantamount or entail different concepts and, finally, if it is really possible to restrict the notion of assassination to treacherous selective killings or whether, to the contrary (as it will be argued *infra*), this conflation of the two figures represents a misconception of the traditional prohibition of assassination.

2.1. Prohibitions of Treachery and Perfidy: Scope of application

Under the current laws of armed conflict, treacherous and perfidious attacks are prohibited in absolute terms[686]. The prohibition of treachery and perfidy represents a long-standing, customary rule of international humanitarian law[687] which has also been expressly codified in the great majority of national military manuals and in a number of treaties and declarations governing the laws of armed conflicts. The rationale of such prohibition(s) is rooted in the principle of good faith between belligerents: "The prohibition of perfidious or treacherous warfare follows from the generally acknowledged legal maxim that the requirements of good faith must be observed in international practice"[688]. Put in very simple terms, the prohibition at hand forbids "killing, injuring or capturing an adversary by resort to perfidy"[689].

Whereas a simple reference to this prohibition as framed in treaty law would be affected by the usual limitations characterizing conventional rules (*i.e.* scope of application restricted to states parties only and to the scope of any specific treaty at hand), the ban on treachery and perfidy is binding for any state as well as non-state actor involved in an armed conflict due to its customary nature.

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684 Patricia Zengel, *Assassination and the Law of Armed Conflict, supra*, p. 18. See accordingly Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law, supra*, p. 306 and W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, *supra*, p. 5.

685 Patricia Zengel, *Assassination and the Law of Armed Conflict, supra*, p. 18.

686 Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, Oxford, 2010, p. 268.

687 *Ibidem*.

688 Dieter Fleck, *Ruses of War and Perfidy*, in *Revue de droit penal militaire et de droit de la guerre*, Bruxelles, 1974, p. 277.

689 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 65. Accordingly, Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, *supra*, p. 267.

Moreover, the prohibition(s) of treachery and perfidy finds application in any kind of conflict, regardless of the international or internal nature of any given armed confrontation. Accordingly, the ICTY has made specific reference to perfidy in order to show how general rules of customary international law applicable to international armed conflicts may evolve to find application into conflicts of a non-international character[690]. Notably, the ICTY reached such conclusion with reference to national case law which was referred to acts performed by armed groups, thus making clear that the prohibition is not limited to the conducts of state actors but is relevant and binding for anyone involved in the hostilities[691].

Whilst the customary nature of the prohibition at hand as well as its applicability to international and non-international armed conflicts alike are undebated, finding wide support in both academic works[692] and jurisprudence[693], its exact content does deserve some deepening. In particular, whilst up until now the prohibitions of perfidy an treachery have been treated in this work as one and the same ban, in the following paragraphs they will be treated separately in order to see whether they may really be conflated or, to the contrary, whether one of the two actually stretches further than the other to cover, and forbid, a wider range of conducts.

a) Prohibition of Perfidy: Relevant Definition and Content

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690 ICTY, *Prosecutor v. Dusko Tadic*, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, *supra*, para. 125: "State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations".

691 The reference made by the ICTY in the mentioned *Tadic Case* was to Supreme Court of Nigeria, *Nwaoga Case*, 1972, which convicted for murder two persons belonging to the Biafran rebel group who, disguised in civilian clothes, had killed a previously selected person behind the line of battle.

692 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 65. Accordingly see, inter alia, Dieter Fleck, *Ruses of War and Perfidy*, in *Revue de droit penal militaire et de droit de la guerre*, Bruxelles, 1974, pp. 274-276; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts*, *supra*, p. 230; Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 372; D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, *supra*, pp. 227 and 228; Ingrid Detter, *The Law of War*, Farnham, 2013, p. 333.

693 ICTY, *Prosecutor v. Tadic*, Appeals Chamber Judgment, *supra*, para. 125; Germany's Federal Administrative Court, *Chechen Refugee case*, 2010; Israel's Supreme Court, *Public Committee Against Torture in Israel v. Israel*, 2006; US Intermediate Military Government Court at Dachau, *Hagendorf case*, 1946; Corte Constitucional de Colombia, *On the Constitutionality of the 1977 Additional Protocol II*, 1995.

Perfidy has traditionally been understood as any act inviting the confidence of adversaries only to gain a tactical advantage and exploit such situation to catch them off-guard[694]. Perfidy can therefore be seen as a "breaking of faith"[695]. In particular, there is widespread consensus that its notion is nowadays mirrored by the provision of Art. 37 *AP I* to the *1949 Geneva Conventions* which, after expressing the ban on perfidy as previously reported, reads: "[…] Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. […]"[696].

Three are the elements of perfidy defined under Art. 37 API: a) the intentional betrayal of confidence by the targeting agent; b) the faith placed by targeted party, relying on rules of international law; c) the instrumental character of the perfidious conduct, which is relevant only insofar as it is directly linked to the killing, injuring or capturing of an individual[697].

The first of the said three constitutive elements of perfidy may be split into two different conducts or else satisfied in two alternative ways. The adversary's confidence may in fact be reached, on the one hand, making him believe that he is entitled to protection under international law; on the other, the adversary may be tricked into believing that the targeting party is exempted from direct attack.

The definition provided by Art. 37 AP I is not limited to the general notion of perfidy reproduced *antes*, but goes on to offer four examples of perfidious conducts, namely: "1) feigning a desire to negotiate under a truce or surrender flag; 2) feigning incapacitation by wounds or sickness; 3) feigning civilian, non-combatant status; and 4) feigning protected status by the use of signs, emblems or uniforms of the United Nations, neutral states, or other states not party to the conflict. This list has no aspiration to be exhaustive"[698].

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694 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, *supra*. To the same end see also Francoise Bouchet-Saulnier, *The Practical Guide to Humanitarian Law*, Lanham, 2014, p. 481 and Stefan Oeter, *Methods and Means of Combat*, in Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford, 1995, p. 199.

695 Jean Pictet, *Commentary to the Protocols Additional to the Geneva Conventions*, *supra*, Commentary to Art. 37, § 1483.

696 *AP I*, Art. 37. Accordingly, see inter alia, Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law*, 12 February 2004, p. 11; Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, *supra*, p. 401; W. Hays Parks, *Special Forces Wear of Non-Standard Uniforms*, in *Chicago Journal of International Law*, Chicago, 2003, pp. 493-560; Will H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction and Special Operations in International Armed Conflict*, in *Military Law Review*, Charlottesville, 2003, 94-140.

697 See, accordingly, Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law*, *supra*, p. 16 and Eric David, *Principes de droit des conflits armés*, Brussels, 2002, p. 391.

698 *AP I*, supra, Art. 37, para. 2.

As the wording of Art. 37 AP I itself makes clear, the list of perfidious conducts it provides is merely explanatory, with the consequence that other behaviours not expressly enlisted may entail perfidy. Such an assessment finds confirmation in the report of the drafting committee which stressed that "it selected a short list of particularly clear examples"[699]. The list is therefore open-ended. Nonetheless, the test to understand whether any other conduct may or may not be labelled as perfidious remains the one set forth in Art. 37, para. 1, with the consequence that the salient elements of perfidious behaviours are all to be identified in such provision.

Accordingly, the vast majority of national military manuals mention as an uncontroverted example of perfidy the feigning of incapacitation, such as pretending to be injured, pretending to be affected by an illness, feigning to be *hors de combat* or dead, if done with the intent to betray the enemy's confidence. Other examples include improper use of the white flag of truce, simulation of protected status by using the distinctive emblems of the Geneva conventions, simulation of protected status by using UN emblems or uniforms as well as further internationally recognized emblems, simulation of civilian status, simulation of protected status by using flags or military emblems, insignia or uniforms of neutral or other states not party to the conflict[700]. Most of such military manuals therefore define perfidy as a betrayal of good faith by active conducts inviting the enemy's confidence[701]. It is possible to notice that none of these examples, which are much more than those provided by the letter of Art. 37, pose particular problems if confronted against the background of Art. 37, para. I. What they all have in common is, in fact, the intentional betrayal of the target's reliance on the existence of a legal or factual relationship of good faith between the targeting party and the enemy himself.

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699 W. A. Solf, *Article 37*, in M. Bothe, K. J. Partsch, W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Leiden, 1982, p. 236.

700 *ICRC Study on Customary International Humanitarian Law*, s*upra*, Practice Relating to Rule 65.

701 To this end see, inter alia, 1989 Argentina's Law of War Manual, 1994 Australia's Commanders' Guide, 1994 Australia's Defence Force Manual, 2006 Australia's LOAC Manual, 1994 Belgium's Teaching Manual for Officers, Belgium's Teaching Manual for Soldiers, 2006 Cameroon's Instructor's Manual, 2001 Canada's LOAC Manual, 2005 Canada's Code of Conduct, 2007 Côte d'Ivoire's Teaching Manual, 1989 Ecuador's Naval Manual, 2001 France's LOAC Manual, 1992 Germany's Military Manual, 2006 Germany's Soldiers' Manual, 1995 Hellenic Navy's International Law Manual, 1998 Israel's Manual on the Laws of War, 2006 Israel's Manual on the Rules of Warfare, 1997 Kenya's LOAC Manual, 2005 Military Manual of the Netherlands, 1992 New Zealand's Military Manual, 2007 Spain's LOAC Manual, 1991 Sweden's IHL Manual, 1981 UK LOAC Pamphlet, 2004 UK LOAC Manual, 1976 US Air Force Pamphlet, 1995 US Naval Handbook. Unless otherwise specified, in this note as well as in the remainder of this study, the relevant provisions of national military manuals and codes referred to are those reported in the updated ICRC database on customary international humanitarian law.

Quae cum ita sint, the focus of the present analysis must necessarily shift to the first paragraph of the provision at hand. When analysing the definition thereby provided it should be noticed, first and foremost, that the protection afforded by the prohibition of perfidy is not limited to certain categories of individuals but extends to any person, be them combatants or civilians, regardless of any consideration related to their eventual participation in to hostilities[702]. Thus, this norm forbids perfidious means and methods of warfare regardless of the status of the potential victims of the attack. This understanding corresponds to the rationale already embodied by the *1874 Brussels Declaration* which outlawed "murder by treachery of individuals belonging to the hostile nation or army"[703], thus extending its protection to every individual, civilians included.

Furthermore, it should be underlined that the definition of perfidy embodied in Art. 37 AP I is characterized by an inherent limitation: perfidy is not forbidden *per se* but as a method of killing, injuring or capturing. Thus, acts inviting the adversary's confidence amount to the forbidden conduct of perfidy only if undertaken jointly with the material element of an actual killing[704]. This consideration has led some authors so far as to consider failed attempts at perfidious killings as legitimate conducts. In particular, it has been argued, "perfidy does not become unlawful if – for whatever reason – the intent fails to produce the outcome of killing, injuring (or capturing) an adversary"[705]. Nonetheless, this conclusion appears to be too far-fetched. It is true that Art. 37 AP I forbids to "kill, injure or capture an adversary by resort to perfidy", without making any reference concerning the lawfulness or lack thereof of attempted killing, injuring or capturing. However, for one thing, it should be observed that systemically, no other conduct forbidden by the laws of war specifies whether its attempted (but failed) undertaking is legitimate or not, and yet, nobody could credibly argue that the attempt to breach established rules of international humanitarian law is to be deemed as a lawful conduct. In fact, whereas domestic criminal systems do need to specifically criminalize attempted crimes when they deem it appropriate to sanction them, such need responds to a different logic from the one underlying international law and cannot be a-critically applied in this context. Here it would appear more appropriate, due to the values at stake, to afford a full-scale protection and consider unlawful any move aimed at the breach of existing rules. In accordance with this line of reasoning, the *ICRC*

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702 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law, supra*, p. 306.

703 *1874 Brussels Declaration, supra*, Art. 13.

704 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitarian Law, supra*, p. 94.

705 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra*, p. 232. Accordingly see also Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitarian Law*, *supra*, p. 94.

Commentary to AP I states: "First, it seems evident that the attempted or unsuccessful act also falls under the scope of this prohibition. Secondly, a treaty should not be interpreted so as to conflict with a peremptory norm of general international law, and therefore it should not be interpreted in this way"[706]. If we add to this conclusion that the relevant conventions in this regard are humanitarian in nature and recall that treaties are to be interpreted in light of their object and scope, it appears rather evident that any credible hermeneutic option should tend toward an enhancement of the protection left somehow unclear by the text of a certain provision rather than depriving victims of armed conflicts of existing protections.

A strictly related issue revolves around the identification of the relevant moment to assess whether a combatant's disguise is in compliance with the rules and customs of warfare: would it be perfidious to feign civilian status only for the time needed to get to a certain location, and once there perform the actual killing under no disguise? Or shall such conduct be considered lawful insofar as the targeting agents are uniformed or carry arms openly in the immediacy of the deed? Again, would it be considered perfidious for a combatant to camouflage as a civilian immediately after the killing, in order to gain a safe way out from the location where the deed has been performed? A relevant normative reference to solve this problem may be found in Art. 39, AP I, which expressly prohibits "the use of the flags, insignia or uniforms of the adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations"[707]. Even though some authors suggest that Art. 39 has not attained the status of customary rule of international law and that it is not therefore binding on states that are not parties to such protocol[708], the *ICRC Study on Customary International Humanitarian Law* has clarified that conducts that may very well fall within the scope of the prohibition of perfidy when used in order to mislead an enemy, such as the improper use of the flag of truce or that of distinctive emblems, are in themselves outlawed by different, autonomous norms of customary international humanitarian law[709].

Nonetheless, the finding that these are customary rules of international law does not entirely help in solving the problem: one thing is to say that these norms are binding for all parties to a conflict, regardless of the treaties ratified by them. One entire different thing is instead to argue that the violation of those norms would *per*

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706 Jean Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987 (hereinafter the *Commentary on the APs*), § 1493 at p. 433.

707 AP I, Art. 39, para. 2.

708 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 310.

709 There is no need to go here into detail on the said provisions as they do not strictly relate to the object of this study, if not insofar as they may be relevant for the treacherous killing. However, such provisions find their main normative sources in Art. 23 (f) of the *1907 Hague Regulations*, and Arts. 38 (1) and (2) and 39, *AP I*. For a thorough analysis of such provisions see Study on Customary International Humanitarian Law, supra, Rules 58 – 63.

se entail the perfidious nature of a killing facilitated by them. Such an interpretation would seem to be in contrast with the letter of the prohibition of perfidy enshrined in Art. 37, pursuant to which the feigning of the status is only relevant for a finding of perfidy insofar as it directly serves the purpose of the targeting operation. These would therefore eventually be additional and autonomous violations at best. Thus the question remains as to whether perfidy may be entailed by the feigning of status in any given step of the targeting operation considered as a whole, or only by the feigning of status in the very moment of the attempt at a target's life.

On the one hand, considering the latter option would deprive of almost any vigour the provision against perfidy, since it would be useless to consider the feigning of status relevant only in the very moment when lethal force is used. It would mean endorsing the lawfulness of operations that only give the target a split of a second heads up before being killed, when his faith is actually already doomed. On the other hand, however, considering as perfidious any deceit undertaken during an entire operation, which may actually take place over a lapse of weeks or months with the involvement of numerous personnel covering different roles, from combat functions in the field to intel gathering, would set an excessively stringent standard. By this same token, it has been noticed that "examples of the use of enemy uniforms are constantly reported in recent times, the cases in point being […] task forces approaching the enemy in false uniforms with the intention of not removing this camouflage until immediately before opening fire. During the second world war, such ruses were repudiated as perfidious because the use of enemy uniforms was regarded as forbidden in all circumstances"[710].

A proper solution to this dilemma should be found in a principle of direct causation. International jurisprudence actually helps in this regard: after the Second World War Otto Skorzeny was arrested and charged with war crimes because he and his German troops went behind enemy lines wearing US uniforms during the Battle of the Bulge. Once there, they conducted acts of sabotage[711]. His acquittal suggests that there must be a direct causational link between the impermissible disguise and the killing in order for the latter to be characterized as perfidious. To this end, it has been suggested that, had Skorzeny committed acts of violence while so disguised, he would have never been acquitted. In line with this reasoning, it has been observed that "in order to be a breach of Art. 37 the act of perfidy must be the proximate cause of the killing, injury or capture. A remote causal relation will not suffice. Thus, it would not be a perfidious act to kill an adversary during an engagement even though

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[710] Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, in Michael N. Schmitt and Wolff Heintschel von Heinegg, *The Conduct of Hostilities in International Humanitarian Law, Volume II*, Farnham, 2012, p. 544.

[711] On this episode see also Hilaire McCoubrey, *International Humanitarian Law, Modern Developments in the Limitation of Warfare*, Aldershot, 1998, p. 215.

the attacker was able to take part in the engagement only because, on a previous occasion, he had avoided death or capture in an ambush by pretending to be *hors de combat* because of unconsciousness"[712]. Such an assessment, proves very helpful in settling any issue related to feigning of protected status in one operation and further engagement in following, different operations even though it admittedly leaves some space for interpreting what a direct causation is, doubts however that seem possible to solve only on a case by case basis[713].

In sum, it should be concluded that, as it appears, the prohibition codified in Art. 37 *AP I* encompasses killing and injuring the enemy by inviting his confidence, suggesting that either the enemy himself or the attacker is entitled to protection under international humanitarian law. A perfidious killing thus described may be perpetrated by either soldiers or civilians. The value it aims to protect is good faith and the genuine undertaking of combat operations. The conduct characterizing such deed consists of an positive attempt at a target's life, accomplished through the advantage gained solely by feigning a protected status or by letting the enemy believe he is entitled to protection; the actor's *mens rea* should consist of the willingness to invite the enemy's confidence with the intent to betray it and kill him as a result. These constitutive elements of the conduct have been singled out in similar terms in the *Elements of Crimes for the International Criminal Court* in relation to the crime of "treacherously killing or wounding"[714]. Notably, there should be a direct causal relation between the feigning of protected status inviting the victim's confidence and the detrimental effect of the action in order for any such act to be qualified as perfidious. Attempts at perfidious killings should be considered perfidious themselves.

b) Treachery: Notion

Treachery may very well be made dependent upon deceit as much as perfidy is. In fact, it has been argued that the "test of treacherous conduct […] is the assumption of a false character, whereby the person assuming it deceives his enemy and so is able to commit a hostile act, which he could not have done had he avoided the false pretences"[715].

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712 W. A. Solf, *Article 37*, in M. Bothe, K. J. Partsch, W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, *supra*, p. 235.

713 For classes of persons immune from attack see *supra*, Ch. II, para. 2.

714 *Statute of the International Criminal Court*, Arts. 8(2)(b)(XI) and 8(2)(e)(IX). Note however that serious doubts shall be cast upon the equation between treachery and perfidy suggested by some due to the different scope of such notions.

715 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 19.

Nonetheless, deceit is only one of the many possible conducts falling within the scope of treachery. As such, it is not one of its constitutive elements. Thus, it has been conceded by the same authors placing such stress on the question of deceit that treachery may be entailed by other actions, such as treacherous requests for quarter, false surrender or the feigning of death, injury or sickness in order to put an enemy off guard[716]. Notably, however, a list restricting treachery to these conducts (which all consist of feigning protected status in order to trick a target into believing that his perpetrator is exempted from attack) brings such definition drastically close to the definition of perfidy embraced by Art. 37 AP I. Should therefore be a-critically concluded that perfidy and treachery are one and the same?

This conundrum arises since at the beginning of the XX century international instruments dealing with this subject matter did not make reference to perfidy but to treachery. The notion of perfidy was in fact introduced in international instruments for the first time with Art. 37 of *AP I* to the *1949 Geneva Conventions*[717]. The *Hague Regulations annexed to the 1907 Hague Convention IV*[718] forbad to "kill or wound treacherously individuals belonging to the hostile nation or army" without however expanding on the concept of treachery itself[719]. Notably, since its very promulgation *Hague Convention IV* has attained the status of customary international law, and its attached *Regulations* with it[720]. Nonetheless, the prohibition of treachery itself is not thoroughly defined under international law[721].

Nowadays, the terms treachery and perfidy often seem to be used as synonyms[722]. Not only due to the abovementioned conflation of the two, defined in a very similar fashion by, respectively, *AP I* to *the 1949 Geneva Conventions* on the one hand and by the *Elements of Crimes for the International Criminal Court* on the other; but also because the great majority of national military manuals which forbid treachery and perfidy used them as interchangeable terms, as does most of the doctrine dealing with these issues[723].

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716 *Ibidem*.

717 Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations, supra*, p. 268.

718 *Hague Convention IV respecting the Laws and Customs of War on Land*, The Hague, 18 October 1907.

719 *Hague Regulations, supra*, Art. 23, (b).

720 Nuremberg International Military Tribunal, *Judgment and Sentences*, supra, pp. 248 and 249. Accordingly see, inter alia, Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law, supra*, p. 303.

721 W. Hays Parks, *Memorandum on Executive Order 12333 and Assassination, supra*, p. 5.

722 Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester, 2000, p. 145 and Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law, supra*, p. 16.

723 To this end see, for instance, UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, p. 390, suggesting that the definition of perfidy may be used as guidance to the meaning of treachery in internal armed conflicts.

However, Art. 23, (b) of *The Hague Regulations* also enlisted among prohibited conducts the "improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention"[724]. As it appears, then, the framers of the 1907 Hague Conventions did not mean to confine treachery to what is today understood as perfidy, but to provide it with a broader, whilst not thoroughly defined, meaning.

As a matter of fact, if the notion of treachery were to be confined to what is today understood as perfidy a number of instances traditionally understood as assassination (allegedly by reference to their treacherous nature) would escape its definition. Thus, an understanding of treachery that would link it both ways to deceit appears to be overly broad and too stringent at once. It is overly broad on the one hand as there are indeed permissible means of deceit, such as legitimate ruses of war[725], which do not entail treachery; it is too stringent, on the other, since this view conflates perfidy and treachery.

It is generally recognized that this is not the case. In fact, there is a general understanding to the effect that perfidy as defined under Art. 37 AP and previously reported is narrower a notion than treachery[726]. It has been observed, to this end, that the range of Article 37 *AP I* seems to be narrower than that of Article 23, (b) of *The Hague Regulation* 23(b) inasmuch as, for instance, bribing an enemy soldier to assassinate his commander would be allowed under the former but forbidden by the latter[727]. Such an act, in fact, would not involve any reliance by the victim on any protection of international law applicable in armed conflict, and therefore would be excluded by the ambit of perfidy[728].

Moreover, conflating these two notions would lead to a sort of *interpretatio abrogans*, depriving of any significance the notion of treachery and, with it, Art. 23(b) of the *Hauge Regulations*. Such a conclusion may not be reached. The commentary to Art. 37 of *AP I*, in fact, clarifies that "this Part does not aim to replace the Hague Regulations of 1907, but is concerned with developing them, and thus it is clear that the prohibition on the treacherous killing or wounding of individuals belonging to the nation or the army of the enemy, as formulated in Art.

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724 *Hague Regulations*, *supra*, Art. 23, (f).

725 See *infra*, Ch. III, para. 2, sub-para. 2.2.

726 Accordingly see, *inter alia*, Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, in Rain Liivoja and Andres Saumets, *The Law of Armed Conflict: Historical and Contemporary Perspectives*, Tartu, 2012, pp. 87 and 88.

727 M. Bothe, K. J. Partsch, W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, *supra*, p. 235.

728 Accordingly, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra*, p. 232.

23(b) of the Regulations, has survived in its entirety"[729]. The same logic *a fortiori* is to be applied to the *ICC Statute* and its *Elements of Crimes,* considering in particular that the purpose of the *ICC Statute* is not to create a new ground for international humanitarian law but to criminalize certain conducts that run contrary to the principles underpinning this subject matter.

It therefore seems inappropriate to confine the scope of treachery to the more limited one characterizing perfidy[730].

Being hardly possible to understand how far the prohibition of treachery stretches with reference to conventional provisions dealing with this matter (and related commentaries), exogenous factors should be taken into account. Thus, reference is due to permissible ruses of war, given that such lawful techniques used to gain a tactical advantage over the enemy are in a sort of continuum with treachery and perfidy so that the former end where the latter starts[731]. A demarcation between legitimate ruses of war and treacherous or perfidious attempts at the enemies' integrity is as old as the ban on treachery itself. As we have had occasion to see[732], already Ayala distinguished between permissible deceptions useful to trick the enemies on the one hand and "frauds and snares" on the other[733]. The same holds true for all the other authors who dealt with the matter in the following years and centuries[734].

2.2. Ruses of War

Perfidy and treachery on the one hand and permissible ruses of war on the other share deep similarities. In particular, as highlighted by the AP I to the 1949 Geneva Conventions themselves, both conducts "are intended to mislead an

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729 *Commentary on the APs*, *supra*, § 1488 at p. 431.

730 Accordingly, Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?, supra,* p. 901. See also, inter alia, Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law, supra*, p. 617 and Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra,* p. 88.

731 See, acoordingly, Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, *supra*, p. 405 and Hilaire McCoubrey, *International Humanitarian Law, Modern Developments in the Limitation of Warfare, supra*, p. 214, suggesting that "Tactical deception is a […] troublesome issue, defined by the distinction between ruses, which are lawful, and perfidy, which is not".

732 *Supra*, Ch. I, para. 2, sub-para. 2.7(b).

733 Balthazar Ayala, *supra*, §§ 84 and 85

734 To this end see, inter alia, Alberico Gentili, *De Iure Belli Libri Tres, supra*, § 168 and Hugo Grotius, *De Hure Belli Ac Pacis Libri Tres, supra*, §653.

adversary or to induce him to act recklessly"[735]. However, in contrast to treachery and perfidy, under international law ruses of war are expressly allowed[736] insofar as they do not infringe the laws of armed conflicts[737].

State practice and *opinion juris*, besides a conspicuous body of conventional provisions, establish this as a rule of customary international humanitarian law[738]. Whereas the provision endorsed by Art. 37 AP I does not figure among the rules applicable to non-international armed conflicts pursuant to *AP II* to the *1949 Geneva Convention*, it should nonetheless be stressed that it finds full recognition also in such a varied context due to its recognition in the great majority of national military manuals sections relevant to the conduct of hostilities in internal conflicts. Moreover, there is no state practice on this issue that points to an opposite conclusion[739].

The rationale allowing for ruses, making them different from perfidy, lays in that such tactics do not alter the good faith between belligerents[740]. To this end, it has been noticed that "good faith between belligerents is essential as a rule of conduct in warfare. In civilized warfare, a belligerent is entitled to rely on certain basic rules of behaviour in relation to the enemy. […] Otherwise the restraint of law will inevitably be withdrawn from the conflict, which will then degenerate into excesses and savagery, because in no case would either party be able to place the slightest

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735 AP I, Art. 37, para. II.

736 *Hague Regulations*, *supra*, Art. 24: "Ruses of war and the employment of measures necessary for obtaining information about the enemy are considered permissible", AP I, Art. 37, para. II: "Ruses of war are not prohibited", International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (hereinafter *1994 Sanremo Manual*), 12 June 1994, Para. 110: "Ruses of war are permitted". See accordingly, inter alia, William Boothby, *Does the Law of Targeting Meet Twenty-first-Century needs?*, in Caroline Harvey, James Summers and Nigel D. White, *Contemporary Challenges to the Laws of War*, Cambridge, 2014, p. 217.

737 Accordingly, Terry D. Gill and Dieter Fleck, The Handbook of the International Law of Military Operations, Oxford, 2010, p. 405; Francoise Bouchet-Saulnier, The Practical Guide to Humanitarian Law, supra, p. 481; and Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitarian Law, supra*, p. 95. As for military manuals expressing this point in identical or similar terms see *1994 Australia's Defence Force Manual*; *1983 Belgium's Law of War Manual*; *2006 Cameroon's Instructor's Manual*; *1999 Canada's LOAC Manual*; *2007 Cote d'Ivoire's Teaching Manual*; *1989 Ecuador's Naval Manual*; *1998 Israel's Manual on the Laws of War; 2005 Netherlands' Military Manual*; *1992 New Zealand's Military Manual*; *2004 Peru's IHL Manual; 2007 Spain's LOAC Manua*l; *1991 Sweden's IHL Manual*; *1981 UK's LOAC Pamphlet*; *2004 UK's LOAC Manual*; *1956 US Field Manual*; *1976 US Air Force Pamphlet*; *2007 US Naval Handbook*. See accordingly, *ICRC Study on Customary International Humanitarian Law, supra*, Rule 57.

738 *ICRC Study on Customary International Humanitarian Law, supra*, Rule 57.

739 *Ibidem*.

740 See, accordingly, Nils Melzer, *Targeted Killing in International Law, supra*, p. 413, pointing out: "ruses of war [are] acts which intend to mislead an adversary or to induce him to act recklessly, but which neither invite the confidence of an adversary with respect to protection under IHL nor otherwise violate IHL".

credence in the word of the other. It is, therefore, an axiom in warfare that no ruse of war may impinge on the good faith which one belligerent owes another, or violate any agreement, expressed or understood, which has been arrived at between them"[741]. This foundation is well mirrored in the current codification of the rule allowing ruses of war in the context of the laws of armed conflicts as such norm provides that ruses are allowed when they are not perfidious "because they do not invite the confidence of the adversary"[742]. Such a link between the negative definition of permissible ruses of war and the lack of betrayal of the adversary's confidence is mirrored in most military manuals. Thus, for instance, *Sweden's International Humanitarian Law Manual* of 1991 states: "In certain circumstances, ruses of war may become almost tantamount to perfidy. Here the important difference is that ruses of war are not based on betrayal of the adversary's confidence. Instead, the intention of a ruse is to mislead the adversary, which can lead to incorrect deployment of his forces or to reckless actions which, for example, prematurely reveal his forces, intended tactics or assault objectives"[743].

However, the *ICRC Commentary to API* stresses that "There remains a sort of grey area of perfidy which is not explicitly sanctioned as such, in between perfidy and ruses of war. This grey area forms a subject of permanent controversy in practice as well as in theory"[744]. Notably, such an assessment finds confirmation in some military manuals which concede that the demarcation line between permissible ruses and perfidy is sometimes blurred[745]. So much so that, it has been suggested, "the

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741 Morris Greenspan, *The Modern Law of Land Warfare*, Berkeley, 1959, p. 319.

742 AP I, Art. 37.

743 Accordingly, see also, inter alia, *The Military Manual of the Netherlands of 1993*, providing that: "Ruses of war may be used […] Ruses of war are defined as behaviour which is intended to mislead an enemy or to induce him to act recklessly, but which do not violate any rules of the humanitarian law of war. Such behaviour is not treacherous because it does not inspire the confidence of the adversary with respect to protection under the humanitarian law of war"; *Peru's IHL and Human Rights Manual of 2010*, which states: Ruses of war […] are acts whose objective is to mislead the enemy and to induce him to act recklessly but which do not violate any norm of international law and which are not perfidious because they do not appeal to the adversary's good faith regarding the protection afforded by international law; and *Spain's LOAC Manual of 2007* stating: "In order to fulfil their mission, commanders attempt to conceal their intentions and actions, using stratagems and ruses of war. Ruses of war are a legitimate method of warfare, combining deception and trickery to mislead an adversary or induce him to act recklessly or take the wrong decision. However, some ruses of war are prohibited, when they involve perfidy, that is, if they appeal to the good faith of the adversary with the intention of betraying him, misleading him into thinking that certain persons or objects cannot be attacked because they are protected by the law of armed conflict; e.g. the use of an ambulance to transport munitions".

744 *Commentary on the APs*, *supra*, § 1493 at p. 433.

745 To this end see, for instance, *1956 US Field Manual*: "the line of demarcation between legitimate ruses and forbidden acts of perfidy is sometimes indistinct".

distinction between ruses of war and perfidy may become the principal legal question of operational military lawyers"[746].

It is submitted here that such area of controversy exists due to the abovementioned lack of exact correspondence between the notions of treachery and perfidy. As it appears, in fact, reference to the invitation of the adversary's confidence squarely falls within the latter's notion but is at the same time limited to it, as it cannot be considered as a constitutive element of treachery. Similarly then, suggestions that "a ruse is a deception that does not rely on an implication of international legal protection"[747] and that "ruses of war, while involving deception, do not involve the abuse of protected status"[748] prove very useful in tracing a demarcation between permissible ruses of war and perfidy, further refining the definition of the latter as geared around deceit and protected status, but do not help in tracing a clear-cut line between ruses of war and treachery.

Observed from an empirical standpoint, ruses of war embrace those artifices, stratagems[749] and methods of deception which "over time have been accepted as legitimate methods of fighting"[750], used to mislead the enemy and induce him to act recklessly so as to gain an advantage. Thus, they embrace a very wide range of conducts: forces involved in armed conflicts often resort to "non-standard uniforms, camouflage patterns, or civilian clothes as legitimate ruses or means of deception during operations, including during armed conflicts"[751]. These methods are not in themselves leading to a finding of either perfidy or treachery whenever they are not linked with a direct causal nexus to killing, injuring or capturing enemies.

Accordingly, in an attempt to trace the line that divides treacherous conducts from permissible ruses of war, it has been noticed that "the fact that an act of deception is soon followed by an hostile act is in itself not always indicative"[752]. Thus, camouflage, decoys, mock operations and misinformation are all examples of permissible ruses. It has been correctly pointed out that there are countless other

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746 Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, pp. 87 and 88.

747 Hilaire McCoubrey, *International Humanitarian Law, Modern Developments in the Limitation of Warfare*, *supra*, p. 216.

748 A.P.V. Rogers, *Law on the Battlefield*, Manchester, 2012, p. 42.

749 Notably, an historical collection of examples of ruses of war may be found in a pivotal work authored by the Roman Senator and Governonr Sextus Julius Frontinus (40 – 103 AD) and titled *Stratagemata*.

750 1994 Australia's Commanders' Guide.

751 Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, Oxford, 2010, p. 401.

752 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 546.

examples of legitimate ruses of war[753]. Similarly, ambushes, surprise attacks, false intelligence, dummy installations, removal of landmarks, false signals or codes, camouflaging of uniforms and vehicles, fake attacks and retreats, pretended inactivity, decoy equipment, as well as manipulation of electronic signals, dissemination of false information, transmission of bogus signals, moving landmarks, removal of badges[754] are all to be considered permissible ruses insofar as they do not invite the enemy's confidence that either the targeting party or the target himself are entitled to protection under international law[755]. A typical example of a permissible ruse of war is that of a combatant on the field that feigns his death in order to avoid capture. Such ruse would turn into perfidy, however, if it were resorted to in order to kill an adversary[756].

For how complete this list of examples may be, it does not seem sufficient to build a case for a clear-cut distinction between permissible ruses of war and treachery. Indeed, ruses of war seem to embrace "all acts of war aimed at inducing the enemy to compromise its position or to expose himself to danger"[757]. Since such a broad notion include both permissible and prohibited ruses, and could also be referred to perfidious or treacherous acts, a further distinction should be traced between legitimate and non-legitimate ruses. Such a demarcation is to be identified with reference to the characterizing elements of perfidy and treachery. Permissible ruses of war are therefore to be defined as lawful deceptions which do not involve the simulation of a protected status[758]. The demarcation between ruses and perfidy thus lays in that the former do not invite the adversary's confidence, as the latter does. In particular, "ruses of war are permissible if they do not take improper advantage of the protection afforded by a provision of international law"[759].

The distinction between ruses and treachery, however, remains rather unclear: whereas ruses of war are generally understood as the opposite of treacherous

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753 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra*, p. 240.

754 See to this end, inter alia, A.P.V. Rogers, *The Law on the Battlefield*, *supra*, pp. 41 and 42. Notably, most of the reported examples and some more are enlisted in an explanatory list provided by the *2004 UK LOAC Manual*, para. 5.17.3. For historical examples of some of the reported conducts see, inter alia, Hilaire McCoubrey, *International Humanitarian Law, Modern Developments in the Limitation of Warfare*, *supr*a, p. 216.

755 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 535.

756 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitarian Law*, *supra*, p. 95.

757 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 536.

758 Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, Oxford, 2010, p. 269.

759 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 536.

conducts[760], this assertion, does not help refining the exact contours of any of the analysed acts as it restates, from an opposite angle, that one of these conducts ends when another starts, but it does not identify where such point does, in fact, lay.

[760] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitarian Law*, *supra*, p. 95.

2.3. Assassination *qua* Treachery and Perfidy

A controversy sparked by a killing that took place a few years ago may help in clarifying to what extent the debate conducted until this point is essential to the very notion of assassination. In 2008, an Israeli operation in Damascus led to the killing of a person allegedly belonging to the Hezbollah, namely Imad Mughniyah. This was a targeted killing inasmuch as the Israeli Mossad intentionally and deliberately targeted Mughniyah, premeditating a plan solely aimed at achieving his death and reaching such purpose planting a bomb in a parked car on a street of Damascus. The episode received some media coverage in 2015, when indications emerged that the U.S. had actually been involved in the operation at some level[761].

The legal controversy it triggered revolves around perfidy, treachery and permissible ruses[762] since some suggest that planting a weapon inside a civilian vehicle amounts to perfidy whereas others argue that it does not and yet maintain that the attack was unlawful while other again maintain that surprise attacks of this kind are in perfect compliance of the laws of war. Letting aside for the moment the question of whether the episode at hand may have been consider to fall within the context of an ongoing international armed conflict and assuming, for theoretical purposes only, that it did[763], depending on the solution to the qualification of the episode as an instance of perfidy or of a permissible ruse of war one could qualify it, respectively, as an unlawful killing, and therefore as an assassination, or as a perfectly legitimate military operation.

Under the rules examined *antes*, "surprise alone can never constitute assassination"[764]. Such a conclusion could hardly be rejected as surprise attacks are

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761 The Washington Post, *CIA and Mossad Killed Senior Hezbollah Figure in Car Bombing*, 30 January 2015 and Times of Israel, *Imad Mughniyeh Was Killed in Joint Mossad, CIA Operation*, 31 January 2015.

762 Many scholars participated to debates concerning this episode posting articles in various blogs of international law. For instance, see Roger Bartels, *Killing With Military Equipment Disguised as Civilian Objects is Perfidy*, 20 March 2015, Roger Bartels, *Killing With Military Equipment Disguised as Civilian Objects is Perfidy – Part II*, 23 March 2015 and Kevin Jon Heller, *No, Disguising Military Equipment As Civilian Objects to Help Kill Isn't Perfidy*, 24 March 2015, all available at www.justsecurity.org

763 If the episode under discussion did not fall within the armed conflict paradigm, in fact, it would be improper to speak about perfidy and, in general, about international humanitarian law rules as such legal regime would not find application at all and the killing at hand would be easily qualified as an extra-judicial execution. This conclusions, shared by this author, may be reached in two different ways: excluding the existence of an international armed conflicts in the first place; arguing that, even in the presence of an international armed conflict geographical restrictions limited the applicability of the hostilities paradigm in the location where the killing took place. In particular, on geographical considerations see infra, Ch. V, para. 3.

764 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 307.

an inherent part of the art of war and so they have been since times immemorial. The reason why surprise alone cannot constitute assassination is that surprise attacks, including ambushes[765], do not amount to either perfidy or treachery, as they do not entail a betrayal of confidence nor they fall within any specific prohibition that may be characterized by a presumption of treachery such as denial of quarter, outlawry or placing a price on an enemy's head[766]. Indeed, neither the prohibition of perfidy nor that of treachery are regarded as prohibiting operations that depend upon the element of surprise[767]. Thus, for instance, the *1956 US Field Manual* considers that that "absolute good faith with the enemy must be observed as a rule of conduct but this does not prevent measures such as using spies and secret agents, encouraging defection or insurrection among the enemy civilian population, corrupting enemy civilians or soldiers by bribes"[768]. The commentary to Art. 115 of the *British Army Manual* goes even further and underlines, in connection with assassination, that "it is not forbidden to send a detachment or individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces"[769]. If it were otherwise, many wartimes killings should be deemed unlawful without any further consideration. Think, by way of example, of a sniper shooting enemies from afar or of an ambush on the enemy's marching column, or again of a missile strike from the air or from an off-shore vessel. These are all examples of sudden, legitimate attacks.

Contrary to what some authors suggest[770], however, while helping in tracing a first boundary between permissible ruses (in the form of surprise attacks) and treasonable deceit, this assessment remains compatible with a broad understanding of the prohibition of treachery (and, therefore, with a broad understanding of the prohibition of assassination) as it only confirms that sudden and surprise attacks are not banned. In particular, it confirms that such attacks are not banned even when directed at specific individuals[771].

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765 See, accordingly, Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, *supra*, p. 172.

766 See infra, Ch. III, paras. III and IV.

767 W. Hays Parks, *Memorandum on Executive Order 12333 and Assassination*, *supra*, p. 5.

768 1956 US Field Manual.

769 *British Army Manual*, *supra*, Commentary to Art. 115.

770 W. Hays Parks, *Memorandum on Executive Order 12333 and Assassination*, *supra*, p. 5.

771 See, accordingly, Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 373, arguing that "the prohibition of perfidy does not prevent States from carrying out operations of targeted killing that depend upon the element of surprise, such as uniformed commando raids, the placing of explosive devices behind enemy lines and attacks from camouflaged positions or properly marked military aircraft". Note however that, while the quoted author's logic applies generally to surprise attacks, his conclusion that such a logic tend to allow surprise targeted killings wherever and whenever they take place is hereby under question.

However, the problem remains that a ruse, even though permissible in principle, may still integrate the material element of assassination if used to kill a previously selected target, under certain conditions.

For instance, as we have seen, bribing enemies is not in and by itself contrary to current laws of war[772]. Corruption itself is not understood as a breach of good faith. Therefore, killing by bribing an enemy does not amount to a breach of good faith. And yet, as seen *antes*, it is considered treacherous and, henceforth, an assassination. Accordingly, paying off enemy soldiers and mandate them to kill one of their comrades has traditionally been understood as an hypothesis of treachery and, therefore, as an assassination[773]. Similar considerations may hold true for other specific means and methods of warfare, such as for the use of poison[774].

The debate revolving around the qualification of the killing of Imad Mughniyah by the Israely Mossad with the complicity of U.S. CIA agents is really, after all, a debate about perfidy. The two main opposing views are that: a) yes, the killing was perfidious because the bomb was disguised in a civilian vehicle and therefore invited the confidence of the targeted person and betrayed it; and b) no, the killing was a mere surprise attack because there was no active interaction with the victim inviting his confidence, that therefore the civilian car where the bomb was placed was a mere component of the setting whereby the operation was taking place and that the victim could not reasonably expect to be granted any protection under international law: having no breach of faith, there would be therefore no perfidious conduct.

These two opposite views seem difficult to reconcile since they endorse two diametrically different conception of the same concept and neither treaty nor customary international law on that concept (*i.e.* on perfidy) is capable of providing a valuable and conclusive solution.

There may be, however, a third standpoint to analyse this matter: as much as the bribing of an enemy to kill one of his comrades would not amount to perfidy because there would be no reasonable expectation of protection from actions of fellow soldiers under international law, and yet it could be qualified as a treacherous conduct, also in the case of a bomb disguised in a civilian vehicle the finding that no perfidy is involved does not imply in and by itself that the operation should be

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772 *1956 US Field Manual*.

773 *Supra*, Ch. III, para. 2, sub-para. 2.1. W. A. Solf, Article 37, in M. Bothe, K. J. Partsch, W. A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, *supra*, p. 204 and Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra*, p. 232.

774 To this end see *infra*, Ch. III, para. 4, sub-para. 4.5.

deemed lawful. If the act were to be considered treacherous, albeit not perfidious, then the killing would be unlawful and amount to assassination. If it were to be considered as a permissible ruse of war, instead, it would be qualified as a legitimate military operation.

According to the analysis conducted above, if one were to consider that there is no invitation of trust and corresponding breach of good faith in the killing of Imad Mughniyah, then the conduct should be classified as a permissible ruse of war because it would fall foul of the parameters required for the existence of perfidy. But here lays the pickle, as an act may not be perfidious and yet be treacherous. This instance seems therefore to squarely fall within the ambit of that "grey area" between permissible ruses and treachery. Such a reading is corroborated by the fact that, ultimately, "black letter law leaves treachery undefined"[775].

Significantly, the *ICRC Commentary to AP* I helps a great deal in placing this issue in perspective, clarifying that "if any doubt should remain regarding the basic meaning, Art. 1 (*General principles and scope of application*), paragraph 2, should suffice to resolve these doubts. This emphasizes particularly that, in cases not covered by the Protocol […], combatants remain under the protection of the principles of humanitarian law derived from established custom, from the principles of humanity and the dictates of public conscience"[776]. It is submitted here that this principle should point the interpreter towards the adoption of a cautionary approach, whereby conducts falling in such grey areas where doubts exist as to their lawfulness should simply be refrained from undertaking them. This seems all the more opportune considering the rationale of the longstanding prohibition of treachery: "Some degree of confidence in the enemy's way of thinking must be preserved even in wartime since, failing this, no peace could be concluded and hostilities would escalate into a war of extermination"[777]. In line with this assessment is also the fact that treachery "destroys men's last ties with one another when almost all other ties have already been destroyed by their inability to live at peace together [and thus it] spits in the face of the law's rock-bottom assumption of universal kinship"[778]. Operations such as the one under scrutiny, if conducted on a large scale, may indeed very well lead to that very war of extermination that the norm aims to prevent.

2.4. Interlocutory Conclusions

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775 Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, p. 91.

776 *Commentary on the APs*, *supra*, § 1495 at p. 433.

777 Immanuel Kant, *Zum Ewigen Frieden, Ein Philisiphiscer Entwurf*, 1795, p. 1.

778 Geoffrey Best, *War and Law since 1945*, Oxford, 1994, p. 289.

As it appears from all the above the concept of treachery is not thoroughly defined under international law as it stands today. Whereas it is generally accepted that its scope is broader than that of perfidy and narrower than that of ruses of war, this lack of clarity does lead to uncertain answers in some particular circumstances. Notably, the use of force against pre-selected individuals, especially when not directly engaged in hostilities and far removed from any hot battlefield, squarely falls within such grey areas. For this reason, coming to a shared understanding of the exact scope of treachery would be crucial for any qualification of the lawfulness of targeting practices in general and for the identification of instances of assassination in particular.

It has been underlined in the previous chapter that even when targeting parameters are concerned, in the absence of crystal-clear rules, the default legal regime of human rights law may kick in, either autonomously or as an interpretive tool to help solve a conundrum affecting the interpretation of the laws of war.

In this respect, one of the very first ways in which human rights law may come of help in refining the notion of treachery is to consider whether or not the sincere belief of the targeted party that he enjoys "protection under international law applicable in armed conflict" may or may not stem from the general context where the person is, rather than being induced by the opposing belligerent party. When the "protection under international law applicable in armed conflict" wording was framed, it was most likely referred exclusively related to the laws of war, properly so called. As a consequence, inviting the confidence of the other party simply meant to trick that party into believing that either the assailant or the party itself enjoyed protected status. However, it is submitted here that this construction does not any more cover the whole range of possible conducts inducing someone to believe that he enjoys "protection under international law applicable in armed conflict". Indeed, following the emergence of human rights law, protected status becomes under some circumstance, such as the one analysed above, the default-status: *i.e.*, it may thus be argued that, the current frame of international law can make it treacherous to direct a lethal, surprise attacks against a person who is not located anywhere near a theatre of actual hostilities because "international law applicable in armed conflict" may not be limited to the regime of international humanitarian law but extends to any rule of international law that finds application in times of armed conflict, as it would otherwise run contrary to the entire logic of contemporary applicability of human rights and humanitarian law at war. In fact, the commentary to Art. 37 *AP I* reads such provision in light of Art. 2 *AP I*, thus clarifying that "this last concept refers to the rules applicable in armed conflict set forth in international agreements […] and the generally recognized principles and rules of international law which are

applicable to armed conflict. This is a relatively wide interpretation, and consequently the definition of perfidy extends beyond the prohibition formulated in the first sentence"[779].

In relation to Art. 23(b) of the *Hague Regulations* it has been observed that "A soldier may claim protection on account of his good faith only in those exceptional cases where belligerent acts are prohibited in view of a special relationship between him and the adversary"[780]. This implies that it is forbidden to take advantage of the adversary's good faith, but only when there is an active interaction, *i.e.* good faith has been deliberately created by the targeting party, between the targeting party and the victim[781]. Whereas it is believed that due to this reason episodes such as the one recounted above may not fall within the notion of perfidy which, by definition, requires the assailant to act in order to trigger his adversary, the rationale underlying the recalled paragraph of the *Commentary to the Additional Protocols* may indeed open the door for the existence of "omissive" treacherous conducts, consisting in letting the adverse party believe to be protected against attack in a certain environment while he is actually, factually not.

This would explain why corrupting a combatant of the adverse party to kill somebody may be considered treacherous even in the absence of any breach of good faith and direct interaction between the two parties, as well as it would explain why placing an explosive device in a street (or on a civilian vehicle, for that matters) located hundreds of miles away from an ongoing armed conflict may be qualified as an act of treachery, even admitting that a person may lawfully be targeted there[782]. After all, as we have had occasion to see, at its very origins the concept of treachery was extended to cover attacks conducted against defenceless persons, especially when the attack was designed to leave the person no chances of survival[783].

One of the main weaknesses of the suggested interpretation is that it may lead to a conflation of factual and juridical factors as to the "protection" enjoyed by the target. Indeed, if the applicable legal regime(s) indeed protect him, then an attack upon him would be unlawful regardless of its treacherous nature. If those legal

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779 Jean Pictet, *Commentary on the APs*, *supra*, § 1499 at p. 435.

780 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 542.

781 See accordingly Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 372.

782 Note that, as will be further explained in the course of this work, the present author does not share the thesis that targeted killing of combatants or fighters may lawfully take place outside zones of active hostilities. Thus, under this author's view, the reported example concerning the explosive device would indeed amount to an assassination, regardless of considerations related to treachery: it would amount to assassination insofar as it is a premeditated killing of a designated individual outside of the context of hostilities and yet bearing a causal nexus with an ongoing armed conflict. To this end see infra, Ch. V, para. 3.

783 See supra, Ch. I, para. 2.

regimes do not, in fact, offer such protection, then it would be hardly possible to envisage a scenario where the attacking party may "simulate" the applicability of a more protective legal regime while actuating under a less restrictive one. If this is the case, then it could be more convincing to simply conclude that it would simply be treacherous to conduct pre-planned attacks against selected individuals where the applicable legal regime grants an individual full protection against lethal force. While this conclusion may certainly be shared, however, the question would then fall to be determined by reference to when, and where exactly can a person be said to enjoy full protection from lethal attacks, thus turning to the question of engagement and disengagement from hostilities and geographical restraints to the field of battle[784].

As it appears, reaching a completely satisfactory answer in this regard is hardly possible in the absence of a treaty definition of the relevant conducts[785]. The conundrum here lays in that either the notion of treachery is way wider than that of perfidy and is therefore not limited to betrayal of a state of confidence and good faith artificially created by the attacking party or, if treachery and perfidy are to be considered tantamount, then assassination necessarily embraces conducts that escape the scope of both notions. As shown in the course of this paragraph, indeed, if we adopt a narrow interpretation of treachery, then different conducts may characterize assassination. If not, these conducts may fall within treachery as a broader notion. Either way, these reflections and lines of interpretation are fundamental as they may be shifted from one (treachery) to the other (assassination) with no troubles. A possible, third line of reasoning may be the following: even embracing a broad notion of treachery, assassination remains something more. In fact, even admitting that outlawry, offers of reward for the death of a person and poisoning may suit the prohibition of treachery, other limitations to the right to kill may not. In particular, it seems hard to argue that targeting behind enemy lines and denial of quarter may fit the notion of treachery itself, even in its broadest possible interpretation. It is therefore to an in-depth analysis of these conducts that we shall now turn.

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784 On these issues see the in-depth analysis conducted under Ch. V, para. 3.

785 It is true that, as already mentioned during this paragraph, treachery is today defined by the Elements of the Crime of the Statute of the International Criminal Court in the same way is perfidy is under AP I. Nonetheless, it has already been stressed how it is widely accepted that under nowadays laws of war treachery endorses conducts that do not fall within the notion of perfidy and this belief continues to hold true in the absence of a specific derogation or amendment able to coordinate the two concepts.

3. DENIAL OF QUARTER

(1) General Scope of Application; (2) Attack Exemption: Persons *Hors de Combat*; (2.a) Defencelessness and Being "In the Power of" an Adverse Party; (2.b) No Longer Taking Part in Combat; (2.c) Ban on Orders that No Survivors Be Left; (3) Rationale *qua* Assassination; (4) Interlocutory Conclusions

An entire chapter of the *ICRC Study on Customary International Law* is devoted to the analysis of the rules pertaining to the general category of denial of quarter[786], highlighting the criticality of this issue for the entire legal regime governing the laws and customs of war. A set of rules, this one, whose essence revolves around the tenets that hostilities shall be conducted avoiding unnecessary brutality and, therefore, sparing as many lives as possible. In other words, a set of rules that forbids to conduct hostilities with the aim to leave no survivors, even among combatants.

Among the first rules making an appearance in the context of warfare[787], those concerning the prohibition to deny quarter were endorsed by the very first written instruments concerned with the subject matter and forged in such a fashion as to prevent war from becoming either a matter of revenge or a non-sense bloodshed. Thus, the *Lieber Code* stated that "It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter"[788], the *1874 Brussels Declaration* provided that it would be especially forbidden "The declaration that no quarter will be given"[789], while the *1880 Oxford Manual* clarified that "It is forbidden: […] To injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves"[790].

As it appears, since their very first conception these rules were meant to pose restrictions on the belligerents' right to resort to lethal force, both as a protection of certain categories of persons incapable or unwilling to defend themselves and as a general ban on methods of warfare that, intended to leave no possibility of survival to

786 *ICRC Study on Customary International Humanitarian Law*, Chapter 15.

787 See supra, Ch. I.

788 *Lieber Code, supra,* Art. 60.

789 *1874 Brussels Declaration, supra,* Art. 13 (d).

790 *1880 Oxford Manual, supra,* Art. 9. In a similar vein see also Institute of International Law, *Manual of Naval War*, Oxford, 9 August 1913 (hereinafter *1913 Oxford Manual of Naval War*), Art. 17.

the enemy, would be contrary to the basic tenets of the laws of warfare, namely distinction, proportionality, necessity and, ultimately, humanity. It is in this connection that this set of rules deserves particular reflection when considering the range of limitations implied by the ban on assassination in nowadays laws of warfare. Such connection is made all the more evident from the fact that the *1907 Hague Regulations* referred to denial of quarter and treacherous killings in the very same provision[791].

3.1. General Scope of Application

The reported long standing tradition of the rules prohibiting to attack persons *hors de combat* and their corresponding duty to grant quarter, as well as the numerous conventional provisions[792] mirroring them and a granitic body of state practice, including formal provisions embodied in several military manuals, make of the prohibition to deny quarter a norm of customary international law[793].

Furthermore, these rules apply in both international and non-international armed conflicts alike. Such assertion is comforted by the endorsement of such rules in *AP II* additional to the *1949 Geneva Conventions*[794] and their reproduction in further codifications of the laws of war such as the *Sanremo Manual*[795] and the *Manual on the Law of Non-International Armed Conflict*[796]. Finally, the *Rome Statute* of the International Criminal Court makes it a war crime to declare that no quarter will be given in both international and non-international armed conflicts[797].

As the laws of war evolved in the course of the XXth century, the basic prohibition to deny quarter progressively came to be based on three distinct pillars, namely the ban on orders that no quarter will be given[798], the proscription to attack persons *hors de combat* and the limitation against attacks directed at persons

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791 *Hague Regulations*, *supra*, Art. 23.

792 *Hague Regulations*, *supra*, Art. 23, (c) and (d); *AP I*, *supra*, Arts. 40 and 41; *AP II*, *supra*, Arts. 4 and 7.

793 See accordingly Theodor Meron, *International Humanitarian Law from Agincourt to Rome*, in *International Law Studies Series*, US Naval War College, 2000, p. 301 and Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 367.

794 *AP II*, *supra*, Arts. 4 and 7.

795 *1994 Sanremo Manual*, *supra*, Art. 43.

796 *The Manual on the Law of Non-International Armed Conflict With Commentary*, *supra*, § 2.3.1.

797 *ICC Statute*, *supra*, Arts. 8(2)(b)(xii) and 8(2)(e)(x).

798 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 46: "Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited".

parachuting from aircrafts in distress[799]. Since the latest of such rules is basically a corollary of the second one, those two provisions will be discussed together.

As far as the prohibition to deny quarter proper and the prohibition to direct attacks against persons *hors de combat* are concerned, it should be noticed at the outset that they are framed in a more complex way that one could infer at first glance and therefore it seems appropriate to proceed to analyse the range of such prohibitions one by one.

3.2. Attack Exemption: Persons *Hors de Combat*

It has been argued that "the main aim of the prohibition on denial of quarter is to protect combatants when they fall into enemy hands by ensuring that they will not be killed" [800]. As a matter of fact, Rule 47 of the *ICRC Study on Customary International Humanitarian Law* reads "Attacking persons who are recognized as *hors de combat* is prohibited"[801]. Such rule protects both regular combatants, civilians taking part in hostilities as well as persons of uncertain status, without any exception in either time or place[802]. Moreover, it mirrors the traditional understanding that persons who are no longer able to take part in combat and defend themselves may not be made object of direct attack[803].

Accordingly, it is believed that the rationale behind the prohibition to adopt a general stance that no quarter will be given lays in that such practice would run counter the principles established in Art. 3 common to the *1949 Geneva Conventions*[804] as it would lead to the killing of people *hors de combat*[805]. Such

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799 *Ibidem*, Rules 46, 47 and 48.

800 ICRC, *How Does Law Protect in War?*, 16 March 2011, available at https://www.icrc.org/en/document/how-does-law-protect-war-0 p. 45.

801 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 47.

802 Jean Pictet, *Commentary on the APs*, *supra*, § 1606 at p. 483. See accordingly, Geoffrey S. Corn, Laurie R. Blank and Others, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, in *U.S. Naval War College, International Law Studies*, Newport, 2013, p. 584, pointing out the expansion of protection inherent to the expression "persons hors de combat" if compared with the 1907 Hague Regulation's terminology of "enemy hors de combat". For the purpose of this statement the expression "persons of uncertain status" does not allege to the existence of a third hybrid category between civilians and combatant not better defined by international humanitarian law. It merely refers to persons whose status is uncertain insofar as the opposing belligerent party is momentarily unable to ascertain whether they are civilians or combatants.

803 *Lieber Code*, *supra*, Art. 71; *1874 Brussels Declaration*, *supra*, Art. 15(c); *1880 Oxford Manual*, *supra*, Art. 9(b); *1907 Hague Regulations*, *supra*, Art. 23(c); *AP I*, Arts. 41(I) and 85(III)(e); *ICC Statute*, Art. 8(2)(b)(VI).

804 *1949 Geneva Conventions*, Common Art. 3.

being the reason, not much room would appear to be left, *prima facie*, for an extensive interpretation of the prohibition at hand that would lead to the protection of persons not strictly speaking disabled, such as defenceless people or people located behind enemy lines, however far from the front of battle.

It is submitted here that this conclusion is, however, overly simplistic and, ultimately, flawed.

A significant interpretative hurdle posed by the provision at hand seems indeed to be the definition of the classes of persons that may be defined as *hors de combat*. In general terms, "a person *hors de combat* is a person who is no longer participating in hostilities, by choice or circumstance"[806]. Such expression has been traditionally referred to persons who are in the power of the enemy[807], persons who are defenceless due to unconsciousness, shipwreck, wounds or sickness[808], persons who make their intention to surrender clear[809]. This understanding is undisputed and forms part of customary international law[810]. This definition largely mirrors the one provided by Art. 41 *AP II*. The definition of the category of people *hors de combat* expressed in such terms is also agreed upon by the vast majority of military manuals. Therefore it should be considered that combatants unable or unwilling to fight are undoubtedly *hors de combat* and consequently they are exempt from attack. Such category includes: those who are captured; those who have offered unconditional surrender, those who have risen their arms as an indication of such intention, laid down their weapons or displayed the white flag of *parlamentaires*; those who are unconscious or have otherwise been wounded, sick, shipwrecked.

As far as surrender is concerned, then, there is widespread consensus that it entails a communication offered by the surrendering party, be it an entire unit or a single combatant, as well as the ability of the other party to receive it. In the absence of these two conditions, *i.e.* when the surrendering party does not make clear its intentions or else when the opponent does not receive the communication of surrender, the laying down of arms is to be considered as void and the surrendering party is not exempt from attack. In fact, it is possible that in the heat of battle the attacker does not notice the opposing party's surrender or is simply incapable of

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805 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 46.

806 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 47.

807 *AP I*, Art. 41, para. 2.

808 *1907 Hague Regulations*, *supra*, Art. 23(c); *1949 Geneva Conventions*, Common Art. 3; AP I, Art. 41, para. 2.

809 *1907 Hague Regulations*, *supra*, Art. 23(c); *1949 Geneva Conventions*, Common Art. 3; AP I, Art. 41, para. 2.

810 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 47: it is prohibited to direct attacks at "(a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape".

stopping an assault that has already started before a last-minute offer of laying off arms. This implies that the offer of capitulation shall be done in a timely manner, so that it can be acted upon. In any such case, that is when the communication of surrender is properly and timely done, as well as received by the opponent, the latter cannot refuse surrender[811].

Finally, a person is to be considered wounded or sick, whether military or civilian, when he is in need of medical assistance or care due to trauma, disease or other physical or mental disorder or disability. Shipwrecked persons are those who, either military or civilians, are in danger at sea due to a misadventure occurred to either them, their vessel or aircraft.

However helpful the explanatory list of those falling within the protection afforded by this provision may be, the reference to persons "in the power of an adverse party" actually reiterates the same uncertainty that the illustrative catalogue was intended to solve. Three main questions thus remain, in spite of the clarifications conducted above: a) what is the exact width of the expression "in the power of the adversary" and does it include defenceless persons?; b) do combatants no longer taking an active part to combat fall within the notion of *hors de combat*? b) does the prohibition to take out a person who is willing to surrender entail an obligation on part of the attacking party to offer such a choice?

a) Defencelessness and "Being in the Power of an Adverse Party"

As for the exact moment when a person falls into the enemy's power, the Commentary to Art. 41 *AP I*, albeit conceding that this matter "remains subject to interpretation" [812], states: "Some consider that having fallen into the power means having fallen into enemy hands, *i.e.*, having been apprehended. This is virtually never the case when the attack is conducted by the airforce, which can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender (for example, in the case of an attack by helicopters). In other cases land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat. […] A defenceless adversary is *hors de combat* whether or not he has laid down arms. Some delegations considered that this situation was already covered by the Third Geneva Convention. If so, those concerned are protected both as prisoners of war and by the present provision. In this sense there is an overlap. On the other hand, others considered that the Third Convention only

811 See, accordingly, A.P.V. Rogers, *Law on the Battlefield, supra*, pp. 56 and 57.

812 *Commentary on the APs, supra*, § 1602 at p. 481.

applies from the moment of the actual capture of the combatant, and that therefore the present provision constitutes the only safeguard in the interim"[813].

It has been argued that "the Commentary demonstrates that this expansion [*i.e.* the inclusion in the list of the category "in the power of an adverse party"] is, in effect, merely a consolidation of existing protections for wounded, sick and ship-wrecked"[814].

This assessment does not seem accurate. For starters, because it would be utterly illogic to add in an international treaty especially dedicated to this subject matter a specific set of persons entitled to protection, under a new and different heading, only to reiterate a protection that already exists. An interpreter shouldn't engage in a reading that deprives of significance what he is interpreting or, at the very least, makes it redundant. Moreover, such solution cannot be shared because nowhere in the *Commentary to AP I* it seems possible to find indications that hint at such an assessment. Finally, and most significantly: as made evident by the reported passage of the commentary, the dispute at the time of drafting of *AP I* was not that much about the fact that defenceless persons would be covered by a protection afforded under international humanitarian law in the form of an attack exemption, but rather revolved around the fact that they be granted such protection as prisoners of war or as *persons hors de combat*. No question was posed that could undermine the fact that a defenceless person is, in any event, entitled to attack exemption. This reading finds confirmation in a different passage of the commentary concerning medical and religious personnel. In an *obiter dictum* located in a broader explanation related to the special protections they are entitled to, the Commentary explicitly equates to "fall in the power of the adverse Party" with a situation in which "the latter is able to impose its will upon them" [815]. The commentary goes on to state that "the same [protection] applies to any unarmed soldier, whether he is surprised in his sleep by the adversary, on leave or in any other similar situation. Obviously the safeguard only applies as long as the person concerned abstains from any hostile act and does not attempt to escape"[816].

In a different passage the commentary goes on to clarify: "In fact it is not only because a person of the adverse Party is wounded, or partially handicapped, that this obligation arises, but because he is incapable of defending himself. In this respect the text goes back to the wording of Article 23(c) of the Hague Regulations, which prohibits especially the killing or wounding of an enemy who no longer has

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813 *Ibidem*, § 1612 at p. 485.

814 Geoffrey S. Corn, Laurie R. Blank and Others, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, *supra*, p. 585.

815 *Commentary on the APs*, *supra*, § 1614 at p. 486.

816 *Ibidem*, § 1614 at p. 486.

the means of defence"[817]. Thus, the category of persons "in the power of the adverse party" is necessarily adding to the more restrictive notions of surrendered persons on the one hand and that of wounded, sick or shipwrecked on the other. After all, the drafting of the two *Protocols Additional to the 1949 Geneva Conventions* followed a report of the Secretary General of the United Nations which explicitly stressed: "It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied"[818]. Accordingly, it has been noticed, Art. 41 AP I is framed in such a way as to extend protection to combatants who have no longer any weapons, without need for any expression of surrender on their part as well as to those who have no longer any means of defence[819]. In line with the suggested reading, it has also been correctly pointed out that "under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless"[820].

This stance is confirmed by state practice. In general terms, the great majority of national military manuals associate the notion of persons *hors de combat* with that of persons who are no longer in a position to fight, resembling a protection *ratione personae*: on the face of it, such prohibition does not aim at governing a given method of combat but rather provides an attack exemption for classes of persons. Prove of it be that most of military manuals do associate the prohibition to attack persons *hors de combat* with the prohibition to make civilians object of attack[821]. Thus, in line with the reading suggested above, it should be noticed that some military manuals translate the prohibition on denial of quarter not merely into an obligation to spare the lives of those who have already been captured or are wounded, shipwrecked or sick, but rather as a ban on targeting directly defenceless persons and persons who are considered *hors de combat* inasmuch as they are subject to the will of the targeting party, regardless of whether or not they have been already physically apprehended.

Contrary to this conclusion, statements from the U.S. strongly suggest that persons who are merely defenceless do not fall within the category of persons

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817 *Ibidem*, supra, § 1620 at p. 488.

818 UN Secretary-General, *Report on Respect for Human Rights in Armed Conflict*, 18 September 1970, UN Doc. A/8052, para. 107.

819 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, in *New York University School of Law Public Law and Legal Theory Research Paper Series*, New York, 2013, p. 24.

820 Michael Bothe, Karl J. Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, supra*, p. 219.

821 See, *inter alia*, *1994 Australia's Defence Force Manual* and *2006 Australia's LOAC Manual*, para. 7.8.

protected by the norms at hand. In particular, it has been pointed out that "The *opinio juris* of the United States is that quarter must not be refused to an enemy who communicates an offer to surrender […] A combatant who appears merely incapable or unwilling to fight, e.g., because he has lost his weapon or is retreating from the battle, but who has not communicated an offer to surrender, is still subject to attack"[822].

Nonetheless, many national military manuals and criminal codes move in the opposite direction, suggesting if not expressly stating that the protection afforded by the rules at hand extends to anybody who has no or no longer means of defence[823]. In this same spirit other manuals, such as *Peru's Human Rights Charter of the Security Forces*, state that "it is prohibited to kill defenceless persons"[824]. Others make it clear that a state of defencelessness is alternative and additional to that of surrendered combatants, extending the protection afforded by the provision to the former category[825]. Others again focus on the ability of the attacked person to defend himself rather than resting the provision on the factual assertion of defencelessness, thus sanctioning whoever "kills or wounds an enemy who has surrendered or laid down his arms, or for any other reason is incapable of defending, or has ceased to defend, himself"[826]. Attacks directed against people "incapable or unwilling to fight" have even been defined in State practice as a "disgraceful conduct of a cruel, indecent or unnatural kind", besides being obviously unlawful[827].

The disjunctive formula adopted leaves no doubts that the incapability of defending oneself is to be considered as a criterion additional to that of surrender.

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822 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 47.

823 To this end see, *inter alia*, *2003 Bosnia and Herzegovina's Criminal Code*: " Whoever in violation of the rules of international law in time of war or armed conflict kills or wounds an enemy who has laid down arms or unconditionally surrendered or has no means of defence, shall be punished"; *2003 Burundi's Law on Genocide, Crimes against Humanity and War Crimes*, "[The following are] considered as war crimes: […] f) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion"; *1997 Croatia's Criminal Code*, "[whoever] kills or wounds an enemy who has laid down arms, or has surrendered at discretion, or has no longer any means of defence [commits] a war crime"; *1997 Kenya's Manual on the Law of Armed Conflicts*, "It is forbidden to kill or wound someone who has surrendered having laid down his arms or who no longer has any means of defence"; *1965 Senegal's Penal Code*, as amended in 2007, "killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion".

824 *1991 Peru's Human Rights Charter of the Security Forces*.

825 *1994 Slovenia's Penal Code*, "[whoever] kills or wounds an enemy who has laid down arms or surrendered unconditionally or who is defenceless [commits] a war crime".

826 *1957 Ethiopia's Penal Code*. See accordingly, the *2000 United Arab Emirates Regulations on Disciplinary Penalties*.

827 *Report on the Practice of India, Commentary on India's Army Act*.

Moreover, it has been reported that in certain states traditional customs prohibits to attack an enemy whenever the latter cannot fight back the attacker[828].

All the above-mentioned hints at the existence in the international community of a diffuse *opinio juris* according to which a defenceless person and, in general, any person not able to fight an attacker back is shielded from direct attacks. Consequently, defenceless combatants as well as combatants who are unwilling or unable to fight and those who are to be deemed "in the power of the enemy" due to the latter's overwhelming superiority in fire power or any other factual circumstance constitute a class of persons protected by the norms on denial of quarter additional to that of people who have surrendered and that of those who are *hors de combat* due to unconsciousness, sickness, wounds or shipwreck.

b) "No Longer Taking Part in Combat"

The notion of persons *hors de combat* deserves further scrutiny in relation to one more aspect. Besides the traditional commonly shared understanding reported *antes* and in addition to the doubts casted upon such limited interpretation until this point, in fact, it should be noticed that *hors de combat* is an expression that may also be read in a contextual fashion, *i.e.* as an expression that refers not only at classes of persons (such as the wounded, the shipwrecked, the sick, the surrendered or the defenceless) but also to persons, combatants and civilians taking direct part in hostilities alike, who are physically outside the context of hostilities or, generally, outside the frame of belligerency.

Such reading of the expression *hors de combat* is not a mere theoretical construction. All to the contrary, it stems from a careful scrutiny of national military manuals, that often refer to enemy combatants who are "no longer taking part in combat" as to *persons hors de combat*. Notably, the focus, is not on a person's involvement in the general ongoing war effort, but rather on his participation in actual combat. Also those codes that make reference to hostilities rather than to "combat", in fact, often do so specifying that combatants may be considered *hors de combat* whenever they "do not take a direct part in hostilities". Thus, for instance, Belgium's manual reads "enemy combatants who are no longer part in combat may be neutralized and captured. To kill them would not bring any advantage in combat"[829]. In the same vein the Netherlands' Military Manual expressly links the prohibition to target persons not involved in actual fighting with their fundamental rights, stating that "The humanitarian law of war provides for the safeguarding of fundamental human rights of certain categories of persons who are not involved in

828 ICRC Somalia, *Spared From the Spear, Traditional Somali Behaviour in Warfare*, Mogadishu, 1998.

829 *Belgium's Teaching Manual for Soldiers*.

the fighting, or no longer taking part in combat"[830], whereas Armenia's Penal Code makes it a crime to direct attacks against "a person who has clearly ceased to participate in military actions"[831].

All these provisions should be interpreted in the sense that, regardless of membership to an organized armed group, to the maintenance of a continuous combat function[832], or to membership in a regular army, the necessary precondition to legitimately direct attacks at an enemy is the latter's direct involvement in combat, or else, his direct participation in hostilities at the moment when the attempt to deprive him of his life takes place.

Such suggestion, admittedly, runs contrary to the mainstream legal theory on the point. It has been held, for instance, that "With the rise of a centralized authority, those fighting on behalf of a sovereign came to be viewed as instruments of that authority. This principle is the basis of the modern concept of combatancy, which treats participation in warfare as a group activity. The targeting of combatants is based on their status within a group"[833]. Status, thus, as automatic attribution of responsibility to a person due to his allegiance with a party to the armed confrontation and combat as a group activity. Displayed by uniforms in traditional armies. Not always displayed but attributed by membership (or continuous combat function, depending on the exact theory endorsed) in organized armed groups. In line with this theory, it is argued that once a person has combatant status, he or she is targetable everywhere, at every moment. The targeted person does no longer enjoy any exemption from direct attack, lest he is otherwise to be considered wounded, sick, shipwrecked or else he has been apprehended by the other party to the conflict. This status-restrained concept of lawful targeting is currently advanced by some States[834] and agreed upon by some commentators[835].

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830 *2005 Netherlands' Military Manual*.

831 *2003 Armenia's Penal Code*. Accordingly see also, *inter alia, 2007 Burundi's Regulations on International Humanitarian Law*; *1999 Central African Republic's Instructor's Manual*; *2005 Ireland's Basic LOAC Guide*; *2003 Bosnia and Herzegovina's Criminal Code*; *2010 Peru's Military's and Police Criminal Code*; *2004 Peru's IHL Manual*; *2010 Peru's IHL and Human Rights Manual*.

832 On the notion of "Continuous combat functions" see *infra*, Ch. V, para. 2.

833 Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, *supra*, pp. 143 and 144.

834 Harold Hongju Koh, US Department of State, *Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law*, 25 March 2010, stating: "First, some have suggested that the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. […] Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects". Notably, the latest version of the Department of Defense, Law of War Manual make explicit reference to such a position in indicating that military operations may be directed

However, as shown before, the lawfulness of an attack would not seem to be a matter of mere status but also a matter of degree of involvement in hostilities, *i.e.* a matter of context.

In line with the interpretation suggested here, a different approach to the matter has been suggested, pursuant to which an individualist approach to combatancy should be adopted[836]. According to this theory, members of the military or individuals affiliated to armed groups could not be made object of direct attack when not "killing, or immediately about to kill, other human beings" because, short of such actions, it is alleged, they would not be participating in an armed confrontation and, therefore, their tacit consent to the loss of immunity from attack would be lacking. As a consequence, it should be possible to resort to lethal force only against persons "engaged in an attack or in a military operation preparatory to an attack"[837].

Even though such an approach could indeed be too restrictive, because it would impede any attack directed at rear area personnel engaged in support activities inextricably linked with combat functions, such as logistic activities, it emerges from the provisions of national manuals reported above that persons not taking direct part in hostilities, including members of national armies, should be deemed as a category of persons who benefit from attack exemption additional to the class of persons *hors de combat* as usually understood. Such assertion, notably, is not in contrast with the reality of warfare that "rear area personnel may properly participate in rear area security operations and […] they have no special protection against being the object of attack"[838]. In fact, as long as members of the armed forces are operating in a combat function they remain targetable also in rear areas. They should enjoy an exemption from attack, however, whenever, afar from battlefield zones, bearing their activities no link with combat functions other than their status, they do not, in fact, take part to that group activity that combatancy represents.

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against individual enemy combatants. To this end see United States, *2015 Law of War Manual*, § 5.5.6.4.

835 To this end see, inter alia, Michael N. Schmitt, *Fault Lines in the Law of Attack*, *supra*, p. 184, suggesting that "whether or not a leader may be attacked depends on his or her status"; Geoffrey S. Corn, Laurie R. Blank and Others, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, *supra*, p. 588; and Professor Kenneth Anderson, *Declaration at Rules of Engagement: the Legal, Ethical and Moral Challenges of the Long War*, conference held on 4 February 2014 available at www.carnegiecouncil.org.

836 Colm McKeogh, *Innocent Civilians: The Morality of Killing in War*, New York, 2002.

837 *Ibidem*, p. 172.

838 Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, *supra*, p. 240.

This reading, as well as the hermeneutic hurdles it brings about, finds thorough confirmation in *Israel's Manual on the Law of War*, which makes it abundantly clear that "The laws of war do set clear bars to the possibility of harming combatants when the combatant is found outside the frame of hostilities"[839]. The question remains as to whether the expression "outside the frame of hostilities" may or may not be interpreted in such a way as to equate behind the lines of battle or outside the combat zone. *Israel's Manual on the Rules of Warfare* seems to give a step ahead towards an extensive interpretation of such expression, pointing out the rationale beneath the rule: "The moral argument for this is that as long as the soldier is participating in the military effort, he knowingly risks his life. When he is clearly asking to surrender and exit from the fight or while he is incapable of participating in combat actively, there is no moral justification in attacking him, nor is there any military reason to do so"[840]. Whereas this assertion could be interpreted restrictively, so as to be limited to the conditions of combatants who have surrendered or are otherwise wounded, shipwrecked or sick, there is no reason why the same *ratio* cannot be extended to other combatants who are not taking active part in combat. The *Manual* remarks that the exact scope of the frame-of-hostilities paradigm remains somehow unclear, stressing that whether a combatant may be regarded as leaving the sphere of hostilities "is a difficult question to answer". However, it does comfort a broader understanding of this notion when it makes a decisive reference to the criterion of active participation to hostilities, stressing that the relevant test to verify whether a combatant is in the frame of hostilities or not is to assess whether he "take[s] an active part in the fighting". Notably, nonetheless, the Manual goes on to state: "Which circumstances define a combatant as "out of the theatre of war"? Is a soldier who is attacking in hand-to-hand combat range required to hold his fire in the presence of an enemy combatant who raises his hands? This is a difficult question to answer"[841], thus leaving the question open to interpretation.

c) Ban on Orders that No Survivors Be Left

The general prohibition of denial of quarter has further ramifications and the linkage between denial of quarter and assassination becomes even more clear when the former is considered in its formulation that a party to the conflict cannot conduct hostilities with the intention of leaving no survivors. In fact, the sanctity of quarter under international humanitarian law has been traditionally translated into a rule that hinders orders to the effect that there shall be no survivors from a military

839 *1998 Israel's Manual on the Laws of War*.
840 *2006 Israel's Manual on the Rules of Warfare*.
841 *2006 Israel's Manual on the Rules of Warfare*.

confrontation. The rule has been framed in this guise in international instruments[842] as well as in the great majority of national military manuals[843] and legislations[844].

The rule that prevents a belligerent from conducting hostilities with the intention of leaving no survivors protects from threats of extermination not only civilians but also combatants, and, in particular, those combatants who are actually engaged in hostilities over a certain period of time. The fundamental value of such rule in the general context of international humanitarian law has been underlined as follows: "It is obvious that if there is no quarter, in other words, no survivors, there will be no wounded to be retrieved and cared for, no shipwrecked persons to be rescued, and no prisoners to respect and treat humanely"[845]. Thus, an order to give no quarter has a double effect. On the one hand, as shown above, it protects those who already are out of combat. On the other hand, it protects combatants from extermination, even when they are engaged in hostilities, because an order to that effect would deprive them of any chance of surrender and, thus, survival.

Most notably, the rule at hand is not exclusively concerned with the execution of survivors fallen in the enemies' hands: the letter of the law does not speak about the protection of those who have survived to prior attacks, but rather proscribes to conduct hostilities on the basis that there be no survivors left. This is an entirely different concept. The focus here is not much on the outcome of an operation involving the use of lethal force but rather on the attacking party's intent. On the one hand, in fact, the rule does not in itself outlaw operations that do not leave survivors at all. Thus, for instance, if a Marching military column is attacked by air forces and such attack does not leave anyone alive, the attack is not unlawful, assuming it does abide by the generally accepted principles of the laws of war such as necessity, distinction and proportionality. On the other hand, the norm at hand does outlaw attacks conducted with the intention of exterminating the enemy, when such intention is met by the facts. Therefore, if the above-mentioned hypothetical aerial attack directed at a Marching military column is indeed undertaken with the ultimate goal of killing everybody taking part to the March, then the attack is unlawful

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842 *AP I*, *supra*, Art. 40 and *AP II*, *supra*, Art. 4.

843 *1989 Argentina's Law of War Manual*; *1983 Belgium's Law of War Manual*; *1995 Benin's Military Manual*; *2007 Burundi's Regulations on International Humanitarian Law*; *2006 Cameroon's Instructor's Manual; 1999 Central African Republic's Instructor's Manual; 1995 Colombia's Basic Military Manual; Cote d'Ivoire's Teaching Manual 2007; 2001 France's LOAC Manual; 1992 Germany's Military Manual; 1997 Kenya's LOAC Manual; 1993 Netherlands' Military Manual; 2010 Peru's IHL and Human Rights Manual; 2001 Russian Federation's Regulations on the Application of IHL; 2007 Sierra Leone's Instructor's Manual; 2007 Spain's LOAC Manual; 1996 Togo's Military Manual; 2004 Ukraine's IHL Manual; 2004 UK LOAC Manual*.

844 *2003 Armenia's Penal Code; 1995 Australia's Criminal Code Act; 2003 Bosnia and Herzegovina's Criminal Code; 1997 Croatia's Criminal Code; 1889 Finland's Criminal Code; 2004 France's Code of Defence, 1994 France's Penal Code; 1994 Slovenia's Penal Code; 2009 US Military Commission Act* (§ 950(b)(6)).

845 Jean Pictet, *Commentary on the APs*, *supra*. § 1591.

because conduct as well as intent meet the threshold requirement for denial of quarter.

This reading of denial of quarter has been upheld by domestic as well as international jurisprudence. In particular, the Colombian Constitutional Court has averred that the final aim of the denial of quarter prohibitions is to protect human life and dignity, therefore banning the possibility to intentionally cause death outside active combat: "bien podría negarse un subalterno a obedecer la orden impartida por su superior se ella consiste […] en ocasionar la muerte fuera de combate, pues semejantes conductas, por su sola enunciación y sin requerirse especiales niveles de conocimientos jurídicos, lesionan de manera abierta los derechos humanos y chocan de bulto con la Constitución"[846].

A well-known example of breach of the norm related to denial of quarter provides further confirmation for the suggested interpretation: an instruction known as the *Commando Order* was issued by Adolf Hitler in 1942 and later on condemned by the International Military Tribunal at Nuremberg as unlawful. Such order stated: "From now on all enemies on so-called commando missions in Europe or Africa challenged by German troops, even if they are in uniform, whether armed or unarmed, in battle or in fight, are to be killed to the last man"[847]. This instruction was supposed to remain secret, suggesting that those who issued it were aware of its contrariety to the laws and customs of war. Even more significantly, the order was deemed unlawful even though it expressly referred to all commando units involved "in battle or in fight", and not only to those who had already surrendered or had already been made prisoners of war.

Accordingly, many military manuals do understand the prohibition of denial of quarter to entail a ban to orders that no prisoners be taken[848]. Notably, the *2006 Israel's Manual on the Rules of Warfare* postulates that "the military interest tends towards getting the enemy to surrender and breaking it instead of war "to the bitter end", even regardless of the morality thereof, since, from the military point of view, it is clearly more desirable for the enemy's soldiers to surrender rather than continue fighting an enemy soldier against whom additional effort has to be invested in order if he is to be overcome [sic]"[849]. Some other manuals even go so far as to state that

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846 Corte Constitucional de Colombia, *Case T-409*, Judgment of 8 June 1992. Accordingly, Corte Constitucional de Colombia, *Case C-225/95*, Judgment of 18 May 1995; and Corte Constitucional de Colombia, *Case C-578*, Judgment of 4 December 1995.

847 Adolf Hitler, *Commando Order*, Berlin, 18 October 1942.

848 *1994 Australia's Commanders' Guide, 1994 Australia's Defence Force Manual, 2006 Australia's LOAC Manual; 1999 Canada's LOAC Manual, 2001 Canada's Code of Conduct; Cote d'Ivoire's Teaching Manual 2007; 1995 Hellenic Navy's International Law Manual; 1992 New Zealand's Military Manual; 1996 South Africa's LOAC Manual*.

849 *2006 Israel's Manual on the Rules of Warfare*.

the prohibition to deny quarter *per se* entails a duty for the attacking party to "give the enemy the opportunity to surrender"[850]. Understood in such terms, the rule at hand equates a refusal of quarter to a refusal to spare lives. Thus, banning the former necessarily entails an obligation not to elaborate a plan that would leave the enemy with no chances of survival. This, in turns, implies that whereas deaths necessarily result from armed confrontations, a deprivation of life cannot be the ultimate aim of a military operation.

It has been pointed out that "A skeptic [sic] might object that the prohibition on the denial of quarter is unlike the other rules because it protects combatants once they have laid down their arms or surrendered"[851]. In fact, it has been argued, for instance, that "in the case of targeted killings this [the prohibition of conducting hostilities on a no-survivor basis] simply means that the attacking forces must remain receptive to a declaration of surrender should the opportunity arise, and that they must absolutely suspend attacks against persons who have fallen *hors de combat*"[852]. It should be noticed, however, that the rule analysed *antes* in relation to the prohibition to direct attacks at persons *hors de combat* plays a fundamental role in the determination of the exact scope of the (additional and autonomous) facet of denial of quarter under scrutiny here: systematically speaking, in fact, it may play a high value as a tool of *interpretatio legis*[853]. In other words, it may prove to be a valuable if not decisive element to determine the exact scope of Rule 46. Indeed, if such norm already covers the protection afforded to those combatants who are *hors de combat* due to sickness, unconsciousness or wounds, then the application of the legal principle *ut res magis valeat quam pereat* would point at a broader understanding of present rule. That is, among different possible readings of the latter, one should choose the interpretation that prevents a complete overlap of the two norms, so as to avoid depriving one of the two of any legal significance. In fact, if two norms are the same, one of them is superfluous. One of the two, therefore, shall add something to the other. If this is true, then, one may infer that the prohibition enshrined in Rule 46 does not only refer to denial of quarter to persons affected by sickness, unconsciousness or wounds but covers a more general limitation. Namely, the limitation to conduct hostilities with the aim to leave no survivors. A concept that would not then simply cover hostilities as a whole, but also single attacks, in line with the *esprit* of the *Saint Petersburg Declaration* that "the only legitimate object of war is to weaken the military forces of the enemy"[854].

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850 *2009 Mexico's IHL Guidelines*, § "Basic rules of conduct in armed conflict".

851 Ryan Goodman, *The Power to Kill or to Capture Enemy Combatants, supra*, p. 17.

852 Nils Melzer, *Targeted Killing in International Law, supra*, p. 371.

853 Whereas interpretatio juris only refers to the interpretation of the single provision, the concept of interpretatio legis is broader and it refers to a systematic reading of a given provision grounded on the analysis of its interrelationship with other norms belonging to the same legal regime.

854 *1868 Saint Petersburg Declaration*, Preamble.

After all, the very same *esprit* was mirrored by the *Commentary* accompanying the *Draft Additional Protocols* which noted, in connection with the protection shielding persons *hors de combat*, that "[The] underlying principle is that violence is permissible only to the extent strictly necessary to weaken the enemy's military resistance, that is, to the extent necessary to place an adversary *hors de combat* and to hold him in power, but no further"[855]. As such, the prohibition to order that there be no survivors would in and by itself preclude the possibility to plan an attack aimed at killing a given person since in such case there would indeed be no purpose other than that of leaving no survivors at all. Accordingly, it has been pointed out that "LOAC [...] not only prohibits the act of denying quarter once the fight is over. It also prohibits a declaration, or threat, to deny quarter to enemy combatants while they are engaged in hostilities"[856].

The fact that the facet of denial of quarter concerned with the ban on leaving no survivors is indeed a distinct and additional prohibition from that related to the protection of persons *hors de combat* finds full confirmation in the Commentary to Art. 40 *AP I*. After clarifying that such provision "appeals to [combatants'] humanitarian sentiment and represent that side of man where his instincts as a human being still prevail over those controlling him as a combatant"[857], indeed, the Commentary goes on to report on the *travaux preparatoires* of the optional protocol and points out the following considerations: "with the conduct of military operations others saw it as a provision concerned less with the safeguard of combatants who were *hors de combat*, which is actually the object of Article 41 (Safeguard of an enemy *hors de combat*)" [858].

This is not to say that the rule as endorsed by *AP I* does not take into account the rapid technical evolutions constantly taking place in the realm of weaponry and combat techniques. However, as the commentary makes clear, these evolution should remain confined by the scope of existing laws: "[…] Independently of the points raised thus far, there is no doubt that in our age of extraordinary technical achievements with a proliferation of the most lethal weapons throughout the world, this article also raises a problem with regard to weapons, both conventional and others […] Article 40 does not imply that the Parties to the conflict abandon the use of a particular weapon, but that they forgo using it in such a way that it would amount to a refusal to give quarter. In other words, the rule of proportionality also applies with regard to the combatants, up to a point. The deliberate and pointless extermination of the defending enemy constitutes disproportionate damage as

855 *Commentary on the APs*, *supra*, § 44.

856 Ryan Goodman, *The Power to Kill or to Capture Enemy Combatants*, *supra*, p. 17.

857 *Commentary on the APs*, *supra*, § 1588 at pp. 473 and 474.

858 *Commentary on the APs*, *supra*, § 1598 at p. 477.

compared with the concrete and direct advantage that the attacker has the right to achieve. It is sufficient to render the adversary *hors de combat*. The prohibition of refusing quarter therefore complements the principle expressed in Article 35 (Basic rules), paragraph 2, which prohibits methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[859].

It is indeed pursuant to these considerations that the Commentary to Art. 40 *AP I* comes to the following conclusion: "[…] Article 40 is emphatic, and it is timely: any order of "liquidation" is prohibited, whether it concerns commandos, political or any other kind of commissars, irregular troops or so-called irregular troops, saboteurs, parachutists, mercenaries or persons considered to be mercenaries, or other cases. It is not only the order to put them to death that is prohibited, but also the threat and the execution, with or without orders"[860]. A similar principle is applicable in other contexts. In particular, it has been suggested that unarmed non-state combatants whose participation to military operations remains indirect such as those who "carry out reconnaissance missions, transmitting information, maintaining communications and transmissions, supplying guerrilla forces with arms and food, hiding guerrilla fighters […] As a general rule, combatants of this category, whose activity may indicate their status, should be taken under fire only if there is no other way of neutralizing them"[861]. Some commentators have rightly understood this assessment as suggesting the existence of a principle obliging belligerent parties to adopt a least harmful means approach: "if such combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed"[862].

A significant body of *opinion juris* stemming from national codes and manuals as well as from courts' judgments on this issue seems to point to the same assessment.

Thus, significantly, the Netherlands *Humanitair Oorlogsrecht: Handleiding, Voorschift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005*, reads: "The individual is entitled to respect for his life, physical, mental and moral integrity and whatever is inseparable from his personality. Examples: […] The life of an enemy who surrenders must be spared"[863] and then goes on to frame a clear duty to offer enemies' a chance to surrender: "Quarter means that an opponent must be given the opportunity to surrender and thereby survive. It is thus forbidden to order that no one shall survive, to threaten an opponent with this, or to wage war on this

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859 *Ibidem*, § 1598 at p. 477.

860 *Ibidem*, §§ 1594 and 1595 at p. 476.

861 *Ibidem.*

862 Ryan Goodman, *The Power to Kill or to Capture Enemy Combatants, supra*, p. 43.

863 *2005 Netherlands Military Manual*, § 0224(d).

basis"[864]. In a similar even though more concise vein other manuals simply state that it is forbidden "to declare that no mercy will be shown"[865]. Notably, the *US Manual for Military Commission* reads in this regard: "Denying Quarter. Any person […] who, with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be punished as a military commission under this chapter may direct", making clear that the prohibition of denial of quarter remains breached not only in relation to refusals to accept surrender but also with reference to "no survivors" policies[866]. In relation to this latest point, the *2005 Iraq's Law of the Supreme Iraqi Criminal Tribunal* expressly qualifies any declaration "that no person will be left alive" as a serious violation of the laws and customs of war.

3.3. Rationale *qua* Assassination

The threshold of the prohibition of denial of quarter thus outlined finds punctual confirmation in various sentences issued by national courts. As will be shown hereinafter, these sentences are particularly significant for the present work for two reasons. First, because they have direct repercussions on targeting practices imposing drastic restrictions to conducts commonly used nowadays to direct lethal attacks against pre-selected individuals. In so doing, they establish a direct nexus with the prohibition of assassination. Second, they provide a further, conclusive confirmation that the prohibition on denial of quarter under international humanitarian law does not merely aim at protecting civilians or combatants affected by shipwreck, sickness or injury, but also stand as a fundamental guarantee against the use of lethal force introducing contextual, geographical and finalistic parameters.

One of the most significant pronouncements to this hand has been adopted by the Colombian Constitutional Court. Taking steps from the consideration in times of armed conflict the only legitimate purpose is for belligerents to weaken the enemy, the Court has first of all averred that there is no reason whatsoever to extend the belligerents' right to attack their enemies also to those who do not fight: "si la guerra busca debilitar militarmente al enemigo, no tiene por qué afectar a quienes no combaten, ya sea porque nunca han empuñado las armas (población civil), ya sea porque han dejado de combatir (enemigos desarmados), puesto que ellos no

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864 *Ibidem*, §0408.

865 *Nigeria's Soldiers' Code of Conduct*.

866 *2010 US Manual for Military Commissions*, Part IV, Crimes and Elements.

constituyen potencial militar […]"[867]. What is particularly revealing in this finding is that, according to the Court, protection from direct attack should not only be conferred to civilians and combatants who have ceased to take part in hostilities once and for all, but also to combatants that are merely unarmed, or else defenceless. Also striking in the Court's assessment is its rationale: these persons (civilians and defenceless combatants alike) may not be attacked insofar as they do not have "military potential".

The Constitutional Court of Colombia goes on to underline that "El artículo 4º del [Secundo Protocolo Adicional] recoge esa regla, esencial para la efectiva humanización de cualquier conflicto armado, puesto que establece que los no combatientes, estén o no privados de libertad, tienen derecho[s fundamentales]"[868], thus making express reference to the fundamental rights of combatants (besides, of course, to those of civilians) and therefore directly establishing an operative linkage between the laws of armed conflict and human rights law, the latter informing of its scope and purpose the former in its entirety. Such a direct link is made if possible even stronger in yet another parapgraph of this sentence where the Constitutional Court "considera que las anteriores normas destinadas a proteger a la población civil, a los combatientes desarmados, así como a los heridos, enfermos y náufragos, armonizan plenamente con la Constitución, y en particular con la protección de la vida, la dignidad y la libertad de las personas […], valores que aparecen como uno de los fundamentos esenciales del Estado colombiano"[869]. The Court further stresses that the scope of Art. 4, *AP II* is not restricted to the protection of non-combatants but extends the fundamental guarantees of international humanitarian law to every person being aimed at the protection of life, dignity and personal integrity: "El artículo 4º del [secundo Protocolo Adicional] no sólo ordena una protección general a los no combatientes sino que, en desarrollo al artículo 3º común a los Convenios de Ginebra de 1949, consagra una serie de prohibiciones absolutas, que pueden ser consideradas el núcleo esencial de las garantías brindadas por el derecho internacional humanitario. Así, el numeral 1º prohíbe ordenar que no haya supervivientes. Por su parte, el numeral 2º literal a) señala que están prohibidos "los atentados contra la vida, la salud y la integridad física o mental de las personas, en particular el homicidio y los tratos crueles tales como la tortura y las mutilaciones o toda forma de pena corporal". […] Finalmente, el literal h) prohíbe la amenaza de realizar cualquiera de estos actos mencionados. La Corte considera que estas prohibiciones encuentran perfecto sustento constitucional […] Estas prohibiciones del derecho internacional humanitario, por su vínculo evidente y directo con la protección a la vida, la dignidad y la integridad de las personas, tienen además una consecuencia constitucional de gran trascendencia, puesto que ellas implican una

867 *Corte Constitucional de Colombia*, Sentencia No. 225-95, para. 28.

868 *Ibidem*, para. 28.

869 *Ibidem*, para. 33.

relativización, en función de estos trascendentales valores constitucionales, del principio militar de obediencia debida […]"[870].

The recalled orientation, notably, is an in-depth elaboration of principles already established in the jurisprudence of the Constitutional Court of Colombia in the previous years, and thus gives birth to a consistent case law on these issues[871]. Notably, these pronouncements lean towards a recognition of the three dimensions of denial of quarter outlined above. In contextual terms, the make clear that defenceless persons, even if they are combatants, cannot be attacked. In geographical terms, they make clear that hostilities cannot be conducted outside a proper battlefield. In finalistic terms, they endorse the view that not even in war is it possible to fight to the bitter end: the ultimate aim can never be to kill a combatant, but to weaken the enemy. Since also combatants maintain an inherent human dignity, they cannot be targeted and killed when they are not engaged in hostilities since in that very moment they do not represent military potential, they do not pose a threat. They are, in other words, mere human beings, as any other. As a consequence, targeting them with lethal force is contrary to the laws of armed conflict if they death is the only aim of the operation. When this is not the case, *i.e.* the final aim remains to weaken the general war-capability of the enemy through selective killings, then combatants are considered as means to an end and, once more, this deprives them of their inherent dignity as human beings.

The concepts expressed by the Constitutional Court of Colombia, albeit rather unique in the international panorama, do not nonetheless stand completely alone. Thus, the Belgium's Court-Martial of Brussels has had occasion to take cognizance of a case concerning the deprivation of life of an unarmed Congolese woman by a member of the Belgian army who had been ordered to "shoot all suspect elements on sight" when located in a particular zone closed to civilian access. The Court-Martial found that interpreting the ordered he had received as instructions to take no

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870 *Ibidem*, paras. 34-36.

871 Corte Constitucional de Colombia, *Sentencia T-409/92*, 8 July 1992. In this occasion the Court had expressed the view that: "Así, en virtud del criterio que se deja expuesto, bien podría negarse un subalterno a obedecer la orden impartida por su superior si ella consiste en infligir torturas a un prisionero o en ocasionar la muerte fuera de combate, pues semejantes conductas, por su sóla enunciación y sin requerirse especiales niveles de conocimientos jurídicos, lesionan de manera abierta los derechos humanos y chocan de bulto con la Constitución. […] Según el Convenio de Ginebra I, del 12 de agosto de 1949, aprobado por la Ley 5a. de 1960 (Diario Oficial No. 30318), que las Altas Partes Contratantes se comprometieron a respetar y a hacer respetar "en todas las circunstancias", existen infracciones graves, contra las cuales los estados han de tomar oportunas medidas. Entre ellas se enuncian, a título de ejemplo, "el homicidio intencional, la tortura o los tratos inhumanos, incluidos los experimentos biológicos, el hecho de causar deliberadamente grandes sufrimientos o de atentar gravemente contra la integridad física o la salud, la destrucción y la apropiación de bienes, no justificadas por necesidades militares y efectuadas a gran escala, ilícita y arbitrariamente" (artículo 50)".

prisoners and killing every suspect the accused had been responsible for murder[872]. Most significantly, the Court noted: "As interpreted by the accused in practice – viz. the right or even the obligation to kill an unarmed person in his power – the order was patently illegal. Executing or causing to be executed without prior due trial a suspect person or even a rebel fallen into the hands of the members of his battalion was obviously outside the competence of Major O., and such an execution was a manifest example of voluntary manslaughter. The illegal nature of the order thus interpreted was not in doubt and the accused had to refuse to carry it out […] The act perpetrated by the accused constitutes not only murder within the meaning of Articles 43 and 44 of the Congolese Criminal Code and Articles 392 and 393 of the Belgian Criminal Code, but is also a flagrant violation of the laws and customs of war and the laws of humanity"[873].

This understanding finds further support in State practice. In its oral pleadings before the ICJ in the *Nuclear Weapons* case Australia observed that not even self-defence is a justification for "ordering that there shall be no enemy survivors in combat"[874]. In 1990, in a letter addressed to the UN Secretary-General in the context of the Gulf War, Kuwait condemned the instructions given and measures taken by Iraqi authorities, qualifying as "savage practices" the order to execute "every Kuwaiti military man should he fail to surrender to Iraqi forces"[875]. Notably, this complaint did not merely relate to the rights of combatants who had surrendered but explicitly referred to those of combatants who had not surrendered, thus implying that either Iraqi forces had an obligation to offer the possibility to surrender or that in any event they could have not "executed" overpowered enemies, even when the latter were neither surrendering nor shipwrecked, wounded or sick.

All of the above relates to limitations to the use of lethal force embodied in the legal regime of international humanitarian law. However, as stressed before, in times of armed conflict, and particular in case of armed conflicts of a non-international character, human rights law remains applicable and this body of law needs to be coordinated with the laws of armed conflict proper. The Preamble of *AP II* expressly establishes a link between these two legal paradigms by direct reference to human rights law[876]. The commentary to this treaty further clarifies that the *International Covenant on Civil and Political Rights* represented a source of inspiration for its drafting[877] and, for what matters the most here, stresses: "[the prohibition of denial of quarter] is aimed at protecting combatants when they fall into

872 Belgium's Court-Martial, *The Sergeant W. Case*, 1966.
873 *Ibidem.*
874 ICJ, *Nuclear Weapons Advisory Opinion*, *supra*, *Australia's Oral Pleadings*.
875 Kuwait, *letter to the UN Secretary General*.
876 *AP II*, Preamble.
877 *Commentary on the APs*, *supra*, § 4516 at p. 1369.

the hands of the adversary by prohibiting a refusal to save their lives if they surrender or are captured, or a decision to exterminate them"[878]. It also adds: "Protection of enemies hors de combat is in a way the final stage of the present rule on quarter, in the sense that the prohibition against ordering that there will be no survivors affects the concept of military operations even before the enemy is hors de combat"[879]. And then goes on to state: "The prohibitions are explicit and do not allow for any exception; they apply 'at any time and in any place whatsoever'. They are absolute obligations"[880].

As it appears, it is the commentary to *AP II* itself that opens the door to a human rights oriented interpretation of the provisions at hand. This understanding is corroborated by a report on the respect for human rights during armed conflict issued by the UN Secretary-General in 1970, which stated in particular that a) It should be prohibited to kill or harm a combatant who has obviously laid down his arms; or b) who has obviously no longer any weapons, without need for any expression of surrender on his part. The same report then goes on to clarify that "only such force as is strictly necessary in the circumstances to capture him should be applied"[881]. Whereas this last sentence is often recalled in debates related to the existence (or lack thereof) of an obligation to capture rather than kill[882] the preceding paragraph shows that the question is not only one of resorting to the last harmful means when circumstances so permit, but rather one of obligations to leave the adverse party the possibility to survive an attack, by offering a chance to surrender whenever clearly overpowered by the attacking party. Notably, this reading seems autonomously sufficient to rule out any feasibility of targeting practices whose final aim is the death of the adversary, at least when such practices are maintained outside combat.

All this finds confirmation in one more specific existing rule related to persons *hors de combat* is in order. It is generally accepted that "The prohibition on attacking a person recognized as *hors de combat* applies in all circumstances, even when it is difficult to keep or evacuate prisoners, for example, when a small patrol operating in isolation captures a combatant. Such practical difficulties must be overcome by disarming and releasing the persons concerned, according to Additional Protocol I"[883]. Most significantly, "in the particular situation where combatants are

878 *Ibidem*, § 4525 at p. 1371.

879 *Ibidem*, § 4526 at p. 1371.

880 *Ibidem*, § 4528 at p. 1372.

881 UN Secretary-General, *Report on Respect for Human Rights in Armed Conflict*, UN Doc. A/8052, 18 September 1970.

882 To this end see infra, Ch. V, para. 4.

883 *ICRC Study on Customary International Humanitarian Law, supra*, Rule 47. See accordingly, *inter alia, 2007 Burundi's Regulations on International Humanitarian Law; 2001 Canada's LOAC Manual; 2001 France's LOAC Manual*, "When the capturing unit is not able to evacuate its prisoners or to keep them until the evacuation is possible, the unit must free them while guaranteeing its own

taken as prisoners of war under battle conditions, when evacuation is not practicable, they should be released, and the necessary precautions taken to ensure their safety. One example might be a small reconnaissance unit which has ventured far into enemy territory"[884]. This is the general rule applicable to persons falling "within the power of an adverse Party under unusual conditions of combat which prevent their evacuation"[885]. This rule stems as a natural corollary from the general prohibition to do harm to prisoners of war. It however goes on to unveil one more detail about the balance required between military needs and humanitarian needs. In such cases practices of targeted killing and, in particular, assassination, would render the provision in fact useless. Indeed, it is quite hard to understand why it should be better to kill an individual that may be captured rather than capturing him and only then deprive him of his life. Unless of course such prohibition were to be read in terms that would make compulsory capture over killing wherever possible. With the consequential obligation to release the captured person if extraction were to result not feasible in the specific circumstances due to tactical or other pragmatic considerations on the ground. On a similar and yet different vein, considering how much harder things may get with a prisoner, when facing an alternative between capturing or killing an enemy, in operational reality the choice will almost always fall on the latter. However, providing that a unit which cannot extract a captured enemy combatant must release him without harming him, international humanitarian law endeavours to enlarge the scope of protection[886]. This protective *esprit* of the cannot surely be turned onto its head and make of this provision an incentive to kill in any given context rather than take captives. This surely cannot be the practical effect of the denial of quarter prohibition.

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and the prisoners' security"; *2005 Ireland's Base LOAC Guide; 2006 Israel's Manual on the Rules of Warfare; 1997 Kenya's LOAC Manual; 2009 Mexico's Army and Air Force Manual; 2005 Netherlands Military Manual*, "If a person falls into the adversary's hands and the conditions of battle prevent that person from being removed as a prisoner of war, that person must be released"; *2007 Spain's LOAC Manual; 1987 Switzerland's Basic Military Manual*, "If a commando raids an enemy post and captures soldiers by surprise without being able to take them along with it in its retreat, it shall not have the right to kill or injure them. It may disarm them, but it shall free them"; *1956 US Field Manual*.

884 *2005 Netherlands Military Manual*, §0408.

885 *AP I*, Art. 41, para. III.

886 *AP I*, Art. 41(3). In the same vein see Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terror*, in *Harvard Law Review*, Harvard, 2005, pp. 2653 and 2659-2661 and Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 19.

4. SPECIFIC PROHIBITIONS RELATED TO ASSASSINATION

(1) Introduction: Other Prohibitions Related to Assassination; (2) Hiring assassins; (3) Outlawry and Proscription; (4) Bounties and Rewards; (5) The Relationship between Poison and Assassination; (5.a) Nature and Scope of the Prohibition; (5.b) Rationale underlying the absolute ban on poison; (6) Interlocutory Conclusions.

4.1. Introduction: Other Prohibitions Related to Assassination

In accordance with the more restrictive theories which picture assassination as a mere reflection of treacherous killings, it has been argued that "treachery in the law of assassination […] means a breach of confidence in status, not in method"[887]. It is however exactly the following prohibitions, namely the prohibition to keep assassins in pay, that of outlawry and that of putting a price on an enemy's head that undisputedly confute such assessment, as they do show how assassination may very well have everything to do with method rather than with mere status.

Truth being told, it has been suggested that none of the abovementioned rules has ever been construed in the past as forbidding *tout court* attacks directed at a particular enemy. On the contrary, according to such theory, they would have always been construed as treacherous forms of killing[888]. Under such view, as a consequence, those prohibitions may therefore be inferred as a direct derivation from the broader prohibition of treachery.

The fact that the aforementioned practices, when adopted, are usually resorted to on a large scale rather than with reference to an individually selected person may hardly be questioned. This does not mean, however, that the object of each and any of them is the killing of a specifically identified person. Outlawing several enemies or hiring an assassin to conduct more than one killing does not make such practices any less individual-centred, it just discloses a party's systematic rather than occasional resort to targeted killings, thus increasing such party's liability in proportion to the sum total of the single killings performed in this fashion. In other

887 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 313.

888 By this token see, inter alia, Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law*, *supra*, p. 13: "In sum, IHL permits the singling out of an individual combatant as a target provided the attack is carried out without treachery or perfidy".

words, killing with these methods more people does not change the nature of the act, it just makes the case for multiple assassinations.

As for the relationship of treachery with the aforementioned conducts under the laws of war, it has been pointed out that its direct derivation from Art. 23(b) of the *Hague Regulations* makes of assassination a concept that embraces the recruitment of killers, placing prices on enemies' heads, offering rewards for their capture "dead or alive", proceeding to the proscription or outlawry of enemies, besides and in addition to treacherous simulation of protected status or treacherous requests for quarter[889]. Under this perspective, assassination would not be confined to treacherous killings since, as it appears, it would embrace conducts adding to the basic prohibition of treachery.

After all, neither outlawry, the hiring of assassins, or the offer of rewards for enemies "dead or alive" relate to the status of the target, nor to that of the attacker. Therefore, the stigma of unlawfulness linked to these practices as well as the qualification of killings performed on their basis as assassination have nothing to do with treachery, if such notion is understood as a betrayal of confidence and good faith ingenerated by in the victim by the actions of the attacking party. In fact, it is apparent that none of the conducts under scrutiny imply a direct breach of confidence or good faith on the part of the belligerent eventually hiring an assassin, placing bounties on the targeted enemy's head or declaring that he is an outlaw.

Once more, the pickle seems to lay in that deriving the normative strength of all these prohibitions from the prohibition of treachery implies that there may be treacherous conducts even in the absence of any act inviting the adversary's confidence and good faith on part of the attacking party. Therefore, either it is accepted that treachery is way broader than perfidy and embraces the most disparate conducts, or assassination should be construed as something more, capable of including conducts that escape the stringent requirement characterizing the more restrictive understanding of treachery and that, most definitely, do not fit today's definition of perfidy. Among such conducts are those treated in the present paragraph. It is therefore necessary to make direct reference to them in order to understand their roots, their meaning for today's laws of warfare and which relationship they bear with treachery on the one hand and with the prohibition of assassination on the other.

4.2. Hiring assassins

889 Morris Greenspan, *The Modern Law of Land Warfare*, Berkeley, 1959, p. 317. See accordingly, *Commentary on the APs*, *supra*, § 1488 at p. 431, note 6.

It is generally accepted, nowadays, that the prohibition to employ assassins to kill an enemy stands still regardless of the passage of time and the evolution witnessed in state practice in these last years.

The reason for the preservation of this rule, according to some contemporary commentators, is to be searched in an inherent link of such prohibition with treachery[890]. The reason why its rationale must be traced back to the prohibition of treachery, so goes the argument, is that the hired hitmen would more likely than not avoid to wear the emblem of the commissioning State's armed forces while performing its deed[891]. Yet, if this were the entire rationale of the ban on the employment of professional assassins, such prohibition would not be absolute in nature, but confined to assassins acting in treacherous ways and thus finally conflate with another prohibition.

Academic writings dating to the beginning of the last century confirm that the prohibition to keep assassins in pay was instead considered as an autonomous rule. Some of the most influential authors of the time, indeed, deemed such prohibition to be additional to the ban on treachery, rather than being a part of it. Thus, Hersh Lauterpacht held that "no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted"[892], making clear that all those conducts, however interlinked, are tantamount to autonomous violations of the laws of war.

The main problem posed by this rule is, once more, of a definitional nature. Since assassination is not defined, what is the typical act of an "assassin"? May special forces be characterized as "assassins in pay" when mandated with targeted killing missions and specifically trained for that purpose? Or should 'assassins' be restricted to professional, civilian hit-men whose employment is banned by the present rule in order to avoid civilians' involvement in hostilities? Would this be the case, then, at the very least, for private contractors?

A first, partial answer to these doubts concern special commando units. It should be noticed that the prohibition at hand does not in any way hinder belligerents from deploying special operation forces, mandated with peculiar and highly delicate

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890 Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, pp. 88 and 89, arguing in particular that both Oppenheim and Lieber before him considered this conduct to fall within the scope of treachery.

891 Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law*, *supra*, p. 13.

892 Lassa Oppenheim, *International Law: A Treatise*, *supra*, p. 341.

missions. Thus, it is commonly accepted that "There is no legal prohibition on using special operations forces in military operations. Importantly, there is no special law for special operations forces"[893]. This bears two important consequences. First, special operations forces may lawfully act so much as they respect the laws and customs of war as any other combatant does. They are therefore allowed to use different non-standard uniforms and camouflage patterns, thereby including civilian clothes, as legitimate ruses of war[894]. Second, and conversely, were such forces to assume civilian attires while engaging in an attack, such attack would thereby become perfidious or treacherous in nature, and therefore unlawful. Such unlawfulness, however, would not derive from the character of the forces conducting the attack but would rather stem from the nature of their actions.

If this answer closes a door, it however immediately opens another one: what if commando units are specifically employed to conduct a targeted killing? If the killing itself amounts to assassination, it seems pretty straight forward that the whole operation would be characterized as an unlawful one. The hermeneutic hurdles concern however the opposite situation: is the fact itself of mandating a special unit with the killing of a selected person tantamount to hire assassins and therefore liable to fall within the scope of the prohibition under discussion? Indeed, once accepted that the prohibition to hire professional assassins is not confined to the realm of treacherous killing, the interpreter is left to wonder why should such conduct be forbidden to the hiring of assassins whereas at the same time accepting that armies may train themselves special forces mandated with the commission of the exact same deeds.

4.3. Outlawry and Proscription

Whereas not being either endorsed by the *1907 Hague Regulations* or enlisted among the examples of perfidy outlined in Art. 37, *AP I*, the prohibition of outlawry is yet another rule of the laws of war related to assassination which has attained customary status[895].

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893 Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, *supra*, p. 345. See, accordingly, Sascha-Dominik Bachmann, *Targeted Killings: Contemporary Challenges, Risks and Opportunities*, *supra*, p. 6.

894 W. Hays Parks, *Special Forces Wear of Non-Standard Uniforms*, in *Chicago Journal of International Law*, 2003, pp. 493-560; Will H. Ferrell III, *No Shirt, No Shoes, No Status: Uniforms, Distinction and Special Operations in International Armed Conflict*, *supra*, pp. 94-140.

895 See accordingly, inter alia, Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, *supra*, p. 173.

Oppenheim described its ban in absolute terms, establishing a parallelism between it and proscription: "proscription and outlawing are prohibited"[896]. The *Lieber Code* defined outlawry as an outrage abhorred by the laws of war in the same measure as by the laws of peace, stating: "The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor […] Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism"[897].

This prohibition is of major relevance for any attempt to define the meaning and status of existence of an envisaged prohibition of assassination under today's laws of war inasmuch as the former has traditionally been understood to necessarily entail the latter. In fact, "many domestic military manuals continue to interpret assassination as *outlawry* and prohibit the offering of rewards"[898]. The *1958 UK Military Manual* even considered the prohibition of outlawry as a direct consequence of a general prohibition of assassination stating that the former was forbidden "in view of the prohibition of assassination"[899].

Thus, if the prohibition of outlawry is still to be considered into force, the interpreter should wonder which relationship exists between this norm and tactics of targeted killing as deployed nowadays during wartime. Any reflection in this regard ultimately depends upon the inherent content and limitations of the prohibition of outlawry itself, which has never actually been clarified beyond the scope of the *Lieber Code*'s definition.

What rises some doubts in this connection is that the terms of the above-reported notion leave more than some space open to interpretation, which actually may lead in this case to radically different conclusions. In a rather conservative fashion, in fact, it could be argued that the prohibition of outlawry does not in itself restrain targeted killing since targeting individual members of the enemy forces is an activity that only relates to the targets' status and does not regard any ascriptions of responsibility, which represents an essential element of outlawry. An opposite interpretation is however possible. Since targeted killings are defined as a deliberate, intentional and, most of all, premeditated form of killing which necessarily entail a target selection-phase and a consequent decision that the selected individual is wanted dead, such an elaborated activity may squarely fall within the prohibition to

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896 Lassa Oppenheim, *International Law: A Treatise*, *supra*, p. 341.

897 *Lieber Code*, *supra*, Art. 148.

898 Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, *supra*, p. 173 (emphasis added).

899 *1958 UK Military Manual*, supra, § 116.

proclaim a person an outlaw, closely resembling in all its details an execution not preceded by trial.

After all, listing persons to be deprived of their lives mirrors exactly what proscription is, historically as well as etymologically[900]. The fact that proscription and outlawry are so often associated would actually point the interpreter towards the latter definition of the relevant conduct. If this were the case, the fact itself of maintaining so called "kill-lists" would be contrary to the laws of armed conflict insofar as in breach of the prohibition of outlawry.

The supposed derivation of the norm at hand does not seem to actually help in clarifying much further its intimate significance. As it happens for all the other conducts under scrutiny in this paragraph, some commentators have tried to tie the concept of outlawry to that of treachery.

Thus, it has been argued, "General Order 100 [*i.e.* the so called *Lieber Code*] did not create a new category; instead […] it merely attempted to include outlawry as a form of treachery"[901]. Others have however stressed that Lieber's formulation "treats outlawry and assassination as connected but really dwells on the offers of rewards, rather than the method of the killing or the status of the persons executing it"[902]. Moreover, as it appears, outlawry has nothing to do with the betrayal of the enemy's legitimate confidence instilled by the targeting that either he or the attacker is entitled to protection under international law. Accordingly, it has been observed, "although often equated with treachery, such practice does not necessarily involve a breach of good faith and, therefore, is better examined under the heading of denial of quarter"[903].

Therefore, once more[904], the crucial choice is between accepting a notion of treachery which conflates with that of perfidy (which would clearly exclude from the scope of treachery conducts such as outlawry) or, to the contrary, accepting that treachery may come to embrace an extremely broad range of conducts, thereby including outlawry. In the first case, outlawry would certainly escape such a limited notion based on good-faith. In the second the problem would then shift back to the definition of treachery which, in that understanding, would seem to embrace the most diverse conducts. Therefore, under the first scenario assassination would extend far

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900 To this end see, for instance, Appianus, *Appiani Hostoria Romana*, L. IV, C. II, §§ 8-11 and Appianus, *Bellum Civile*, L. I, C. XI, § 95 for an account of tabulae proscriptiones (i.e. proscription lists) in Rome and clarifying that enlistment in the proscription lists would entail loss of any right, denial of quarter and rewards for everybody bringing the enlisted person back dead or alive.

901 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law, supra*, p. 302.

902 A.P.V. Rogers, *Law on the Battlefield, supra*, p. 53.

903 Nils Melzer, *Targeted Killing in International Law, supra*, p. 369.

904 On this point see *supra*, previous para.

beyond the borders of treachery. Under the second scenario, treachery could actually be viewed as the underlying feature common to all hypothesis of assassination but his contours would be so stretched (and so blurred) that this characterization would actually be of no avail in defining what assassination is, simply changing the question into what treachery is.

The only certainty in this regard is that one cannot endorse a limited understanding of treachery (restricted to a breach of a duty of good faith) and claim at the same time that treachery is a constitutive element of assassination, thus also limiting the latter to breaches of good faith.

More helpful may prove to look at the rationale underlying the norm at hand. It has been suggested that "at the root of the objection to outlawry probably is the fact that it would encourage non-combatants to attack members of the opposing armed forces and thus undermine the rule of distinction"[905]. Such an assessment is hardly questionable, at least insofar as outlawry is understood as providing anybody, civilians included, with authority to kill the outlawed individual.

An additional point should however be in order: on the practice of creating proscription list or, as they have been defined in recent news articles, kill-lists[906], it has been acutely observed that "ascriptions of criminality violate the fundamental assumption that soldiers are *innocent*, while collaboration can undermine the war convention with treachery [...] While Lieber's prohibition did not make its way into the Geneva Conventions, its spirit lingers on in many military manuals. […] The objection to named killing cannot be that enemy soldiers are simply slain without trial, for that is the way of war. Rather, it is the presumption that underlies assassination, namely that specific enemy soldiers are, in some way, guilty of outlawry that rankles Lieber. Named killing places certain soldiers outside the laws regulating human behaviour and armed conflict. Lieber reserves his wrath for the proclamation and the murder that follow. There are no grounds for tagging specific soldiers for murder. The logic behind Lieber's consternation turns on the innocence of enemy soldiers. […] Once we name soldiers for killing, however, we upset this innocence with precisely the argument that Lieber presents. Naming names assigns guilt and, as Lieber suggests, proclaims soldiers outlaws. In doing so, named killing places war itself beyond convention. If one side can declare another's soldiers outside the law, then others are free to follow suit. The war convention disintegrates,

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905 A.P.V. Rogers, *Law on the Battlefield*, *supra*, p. 53.

906 See for instance, among many others, Jo Becker and Scott Shane, *Secret Kill List Proves a Test of Obama's Principles and Will*, in *New York Times*, 29 May 2012, available at www.nytimes.com; The Guardian, *Obama's Secret Kill List – The Disposition Matrix*, available at www.guardian.co.uk and Al Jazeera, *The United States Outdated Terror List*, 24 January 2014, available at www.aljazeera.com.

and armed conflict is no longer amenable to Lieber's effort to regulate war by the force of enlightened principles of reason"[907].

Under this understanding, outlawry would not merely consist of an invitation extended to anybody to deprive a person of his or her life, being thus ultimately based on the principle of distinction and the consequent need to keep civilians uninvolved in hostilities. It would instead find deeper roots in a more general rationale: that of preventing belligerent parties from placing anybody outside the protection of the law, even during wartime. This would imply, on the one hand, that for the crimes a combatant perpetrates such a combatant is to be prosecuted, tried and sanctioned. Not killed. As a combatant, moreover, he remains innocent inasmuch as all the other combatants, unless found guilty of behaviours that breach the laws of war. Such a reading entails that belligerent parties may lawfully kill enemy combatants but they ought to do so as a part of the war effort, not to either punish or sanction them for their alleged criminal or moral responsibilities. At the same time, on the other hand, this reading would imply that listing people for death amount in and by itself, in any event, to a personalization of war which contravenes the entire paradigm of the laws of armed conflict.

As a matter of fact, somebody may not only be placed outside of the protection of the law by declaring that anyone is allowed to legitimately kill him under whatever circumstances. Placing somebody outside of the protection of the law means depriving such person of his legal rights, *inter alia*, by excluding his right to a trial and any judicial review of the decision that sanctions his death. It is only natural that nobody is entitled to a trial while engaged in battle or else involved in acts of direct participation in hostilities in a theatre of war. It is however equally natural that, outside those circumstances and locations, in the era of drone warfare, enlisting a name in a special roster of persons appositely searched to be killed amounts exactly to depriving such person of any possible refuge as well as any possible legal guarantee against a state-sanctioned death.

It is indeed widely accepted that this prohibition continues to be valid today and it may have wider practical repercussions than one may imagine at first glance. To the scope of application of this provision, indeed, may very well be reduced some practices characterizing the U.S. approach to the war on terror first and to the international armed conflict with Iraq later.

As far as the first of these instances is concerned, most notably, the U.S. president George W. Bush declared in September 2001 that the person held responsible for the 9/11 terrorist attacks, Osama bin Laden, was "wanted, dead or

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907 Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, *supra*, p. 326.

alive"[908]. Only a few years later, at the outburst of the Iraqi war the U.S. issued a list of those most wanted persons and distributed to coalition soldiers a 55 cards-deck featuring the leaders of the Iraqi regime, transmitting the message that those persons should be pursued and be brought back "dead or alive"[909]. In relation to this practice, a member of the CIA's 2001 Afghanistan Task Force has admitted that "this strays dangerously close to those prohibited means of killing. Were the statement more than a figure of speech, it would constitute outlawry, rendering any resulting deaths as assassination under international law"[910].

4.4. Bounties and Rewards

Strictly related to questions of outlawry and hired assassins is the practice of offering rewards for an enemy's death.

In simple terms, according to the rule banning bounties "a price may not be put on the head of an enemy individual"[911]. The prohibition seems to be rooted in considerations of chivalry and honour, besides considerations of stringent humanitarian nature. Thus, already when the *Lieber Code* was drafted the perceived immorality of offering rewards for the killing of an enemy was translated into a formal, legal prohibition[912], one that continues to be part of customary international law today. In particular, the prohibition to put a price on an enemy's head "remains part of contemporary international humanitarian law interpretations of assassination"[913].

Adding to the historical roots of this rule, its rationale is further motivated in that "any order to kill a specific person which excludes the option of suspending the attack when that person falls *hors de combat* is unlawful [...]. The same must

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908 Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, pp. 91 and 92.

909 See to this end CNN, *U.S. Issues Most Wanted List*, 11 April 2003, available at http://edition.cnn.com/2003/WORLD/meast/04/11/sprj.irq.wanted.cards/.

910 Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, in *Boston College International and Comparative Law Review*, Boston, 2003, p. 30.

911 Lassa Oppenheim, *International Law: A Treatise*, supra, p. 341.

912 Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, *supra*, p. 172.

913 *Ibidem*, p. 172.

logically apply to the practice of offering a price for the killing of an individual or for his or her capture *dead or alive*"[914].

As it appears, contrary to the reconstructions conducted by some authors and arguing that "offering a bounty or a reward for the death of one's enemy is also regarded as treacherous"[915], the prohibition at hand has nothing to do with the prohibition of treachery, not at least if treachery is associated with a breach of good faith. The opposite conclusion is derived from the fact that the prohibition at hand was allegedly included as an example of treachery in the *1880 Oxford Manual*[916]. However, the manual makes no reference to offers of rewards or bounties for retrieving an enemy dead or alive: it does enlist among treacherous conducts that of keeping assassins in pay. Whereas hiring assassins and offering rewards for enemies' dead or alive surely have some contact points, the former and the latter have always been two different and autonomously proscribed conducts under the laws of war.

Moreover, it is worth noticing that offering bounties does not *per se* involve any betrayal of the enemy's confidence and good faith. As a consequence, such prohibition may be viewed as additional to the prohibition of treachery, and not as a mere part of it unless, as already suggested antes, it is acknowledged that the concept of treachery is unleashed from that of good faith (and, therefore, of perfidy) and may be so wide as to include very diverse conducts. In line with this reading, it has been suggested that the offer of rewards for enemies "dead or alive" would invite to deny quarter and thus the prohibition at hand could be justified under a different provision of international humanitarian law[917].

Be that as it may, differing from the two conducts analysed above, this conduct does not pose any hermeneutic hurdle and a literal reading of it proves to be more than sufficient to understand its content thoroughly.

4.5. The Relationship between Poison and Assassination

In general terms, the choice of a particular weapon to kill an individual has usually no impact on the qualification of such killing as assassination. This has two implications: first of all, a killing conducted with an otherwise lawful weapon may

914 Nils Melzer, *Targeted Killing in International Law, supra*, p. 369. See, accordingly, *ICRC Study on Customary International Humanitarian Law*, Rule 65 and Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law, supra*, p. 15.

915 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law, supra*, p. 308.

916 *Ibidem.*

917 *British Manual, supra*, Commentary to Art. 116.

indeed amount to assassination depending on the method characterizing the deprivation of life, on the surrounding circumstances and on the framework in which such killing takes place. Thus, for instance, there is no doubt that a treacherous killing of a pre-selected person may be qualified as assassination even though it is performed with a perfectly lawful combat knife. On the other hand, however, "the use of illegal weapons would not necessarily render an act assassination"[918].

Poisonous weapons represent the grand exception to this general rule. Poison, indeed, has traditionally been understood as a prohibited weapon and, more significantly, as a weapon whose employment to kill a selected individual would give rise to assassination, regardless of any other factor related to either the victim's status-determination or method of used to administered the poison. After all, the very term assassination, as elucidated in the first chapter of the present work, derives from *Hashishiyyin* usually resorting to poisonous daggers to perform premeditated killings of selected persons[919]. The use of poison for assassination has not come of age with the passage of time. On the contrary, it has been recently employed for killings during both peace[920] and wartime[921]. In the latter scenario, it is held here, such a use would render the ensuing death an assassination.

a) Nature and Scope of the Prohibition

The ban on poison is amongst the oldest prohibition on means and methods of warfare[922]. Historical sources show how poison has been consistently banned throughout history as a specific method of assassination or in relation (and in addition) to other methods of assassination[923]. Ayala, Gentili, Grotius and De Vattel all made reference to poison as a forbidden weapon in times of war[924]. This ban on

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[918] Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law, supra*, p. 313.

[919] See supra, Ch. I, para. 2, sub-para. 2.5(c)

[920] See for instance Canada CBC, *The Sadistic Poisoning of Alexander Litvinenko*, 19 December 2006 and BBC, *Litvinenko, a Deadly Trail of Polonium*, 21 January 2016.

[921] See for instance, the attempted killing of Khaled Meshal by Israeli Mossad agents in 1997 and the killing of Chechen warlord Khattab in 2002 operated by the Russian secret service. On these episodes see, inter alia, Rommel J. Casis, *Predator Principles: Laws of Armed Conflict and Targeted Killings*, in *Philippine Law Journal*, Quezon City, 2011, pp. 373 and 374.

[922] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2016, p. 78; William Boothby, *Weapons and the Law of Armed Conflict*, Oxford, 2016, p. 9.

[923] As reported in Ch. I, poison prohibited under both Greek and Roman laws, it was forbidden in the traditional *Hindu Code of Manu*, it was banned in the *1132 Lateran Council* and thereby compared to crossbows and arbalests. See accordingly, Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, 2016, p. 53.

[924] See supra, Ch. I, para. 2, sub-para. 2.7

poison and poisonous weapons was codified in the *Lieber Code*[925], in the *1874 Brussels Declaration*[926], in the *1880 Oxford Manual*[927], in the *1907 Hague Regulations*[928].

The absolute character of this provision was described in the following terms: "the rule that poisoned arms and poison are forbidden […] does not lose binding force even if [its] breach would effect an escape from extreme danger or the realization of the purpose of war"[929].

The vast majority of military manuals report the prohibition at hand and so do national legislations. No report of use of poison or poisonous weapons is recorded. States have never argued for the lawfulness of such means.

The *ICRC Study on Customary International Humanitarian Law* reiterates that "The use of poison or poisoned weapons is prohibited"[930] and affirms that this is a norm of customary international humanitarian law applicable to both international[931] and non-international armed conflicts[932].

The International Court of Justice has had occasion to state that poison and poisonous weapons "have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate"[933]. As it appears, this definition is rather tautological. Actually, the ICJ itself conceded that there is no agreed definition of the term "poison". Accordingly, a

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925 *Lieber Code*, *supra*, Art. 16: "Military necessity does not admit of cruelty […] It does not admit of the use of poison in any way"; Art. 70: "The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare".

926 *1874 Brussels Declaration*, *supra*, Art. 13 (a): According to this principle are especially forbidden: Employment of poison or poisonous weapons".

927 *1880 Oxford Manual*, *supra*, Art. 8 (a): [it is forbidden] "to make use of poison, in any form whatever".

928 *1907 Hague Regulations*, *supra*, Art. 23 (a): "It is especially forbidden: to employ poison or poisonous weapons".

929 Hersch Lauterpacht, *Oppenheim's International Law, Vol. II*, 1955, p. 232.

930 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 72 and International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflicts, with Commentary*, Sanremo, 2006, § 2.2.2 (hereinafter *Sanremo Manual on Non-International Armed Conflicts*). Accordingly see, inter alia, Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations*, *supra*, pp. 271 and 272. Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 374.

931 ICJ, *Nuclear Weapons Advisory Opinion*, *supra*, paras. 80 – 82; UN General Assembly, *Respect for Human Rights in Armed Conflicts. Existing Rules of International Law Concerning the Prohibition or Restriction of use of specific weapons*, UN Doc. A/9215, 7 November 1973, pp. 115 - 118. See, accordingly, *Harvard Commentary on HPCR*, *supra*, pp. 70 and 71.

932 ICTY, *Prosecutor v. Tadic*, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, *supra*, paras. 119 and 127.

933 ICJ, *Nuclear Weapons Advisory Opinion*, *supra*, para. 111.

U.S. court has had occasion to find: "There is lack of a consensus in the international community with respect to whether the proscription against poison would apply to defoliants that had possible unintended toxic side effects, as opposed to chemicals intended to kill combatants. The prohibition on the use of 'poison or poisoned weapons' in Article 23(a) of the 1907 Hague Regulations is certainly categorical […] but its scope is nevertheless undefined and has remained so for a century. As the International Court of Justice ("ICJ") has acknowledged in an authoritative interpretation of Article 23(a), that provision nowhere defines the critical term "poison," and "different interpretations exist on the issue" [934].

Whereas there is no agreed definition, poison may be understood in general terms as embracing "all substances that can harm humans or animals through a chemical reaction on or in the body"[935]. It is thus understood that the prohibition of poison entails an absolute ban on poisoning bullets or other weapons and ammunitions, as well as food and drink of the adverse party[936].

Albeit some doubts remain as to the exact definition of poison, the consensus on the existence of this prohibition is so widespread that there is no need here for further discussion on this point.

b) Rationale underlying the absolute ban on poison

What remains particularly relevant for the present research is to explore the rationale underlying the prohibition of poison and poisonous weapons under international humanitarian law.

After all, from the point of view of pure military necessity (at the very least in its permissive dimension) and convenience, poison could be an extremely efficient weapon. A weapon, moreover, that could be used in complete accordance with laws of war principles such as distinction and proportionality and that, if properly resorted to and exclusively administered to enemy combatants, could even help to reduce the detrimental effects of war on the civilian population[937]. It could be, in other words,

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934 U.S. Court of Appeals for the Second Circuit, *Agent Orange Case*, 2008.

935 *Harvard Commentary on HPCR, supra*, p. 70. Accordingly see also *Terry D. Gill and Dieter Fleck, The Handbook of the International Law of Military Operations, supra*, p. 272.

936 ICRC, *Study on Customary International Humanitarian Law, supra*, Rule 72.

937 Of course, poison could also potentially be used, all to the contrary, as an exceedingly disproportionate weapon, affecting natural resources as well as the civilian population and causing unnecessary damages to both at the same time. To this end see, inter alia, M. Cottier, *Article 8(2)(b)(xvii)*, in Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2008, p. 413 and Frederick M. Lopez, *The Protection of Water Facilities under International Law*, Oslo, 2003, pp. 4-13. However, almost every weapon can be used in an indiscriminate fashion. To the contrary, poison is particularly suited to be administered discriminately.

the prototypical "smart weapon", as some have alleged unmanned aerial vehicles to be in relation to targeted killings[938]. Why, then, is the use of poison so strongly rejected by the laws of war?

A first point to underline in this regard is that poison is banned *per se*, regardless of any consideration related to principles of distinction and proportionality. Moreover, as correctly stressed by the *ICRC Study*, "this prohibition exists independently of the prohibition of chemical weapons"[939]. This is to say that, whereas chemical weapons are surely prohibited, the ban on the use of poison and poisonous weapons does not stem as a corollary of that prohibition. Rather, the ban on poison historically and ontologically pre-exists that on chemical weapons. Similarly, the prohibition exists independently from the prohibition of asphyxiating gases[940]. In addition, the prohibition on poison and poisonous weapons does not extend to every weapon which bears poisoning effects but is rather restricted to those "whose intrinsic and essential nature is to poison"[941]. This understanding is expressed in similar terms in several military manuals, among which, notably, that of the U.S.[942]. The relevance of this consideration rests in that it does introduce a reference to the final outcome of the deployment of a certain weapon, thus clarifying that the prohibition of poison and poisoned weapons does not outlaws any action which accidentally results in the poisoning of the opponents but only the use of weapons which are by their nature poisonous, and are therefore used with a clear intention to produce a result the poisoning of the enemy.

All the above is significant in two respects: first, it further helps in refining the scope of the forbidden conduct; second, in that the long-standing prohibition of poison is self-sustaining or, in other words, autonomous from any other specific prohibition on chemical or bacteriological weapons introduced in the last century. In relation to the rationale of the prohibition of poison, this helps in discarding any thesis that anchors the ban on poison to other existing norm or considers it as a mere actuation of the principle of distinction and proportionality[943]. The fact that the prohibition of poison is independent from issues of distinction and proportionality, finds punctual confirmation in national military manuals. A cursory analysis of these instruments shows, first of all, that "the prohibition applies to any use of poison"[944],

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938 Michael L. Gross, *Assassination: Killing in the Shadow of Self-Defense*, *supra*, p. 99.

939 ICRC, *Study on Customary International Humanitarian Law*, *supra*, Rule 72.

940 On the distinction between poison and asphyxiating gases see William Boothby, *Weapons and the Law of Armed Conflict*, Oxford, 2016, pp. 107-111.

941 UN General Assembly, *Respect for Human Rights in Armed Conflicts*, *supra*, p. 118.

942 U.S. Department of Defence, *Law of War Manual*, § 6.8.1.

943 *2006 Australia's LOAC Manual*: "Poison or poisoned weapons are illegal because of their potential to be indiscriminate". Accordingly, see also, inter alia: *2001 Canada's LOAC Manual*; *2007 Cote d'Ivoire's Teaching Manual*.

944 *UK Manual on the Laws of Armed Conflict*, 2004, §§ 6.19 and 6.19.1.

and therefore is not restricted to operations indiscriminate in nature or out of proportion. Second, poison is the prototypical example of a weapon that is illegal in and by itself[945].

These considerations, however, may simply serve this negative function, without helping any further in the clarification of the reasons that brought to the ban of poison.

It is perhaps the very historical roots of this prohibition that makes it so complicated to accurately trace back the reasons upon which it stands: the abhorrence displayed towards the employment of poison and poisoned weapons in almost every era of history and every social context tends to turn this prohibition something of a self-evident dogma. However, just as any other normative phenomenon, also the prohibition of poison must have a rational justification, especially considering its absolute nature.

The few commentators who have attempted to formulate hypothesis in this regard have generally come to three tentative conclusions. Some argue that "the use of poison invariably involves treachery"[946]. Looking at the prohibition on poison as framed in the 1880 Oxford Manual, where the rule was preceded by the expression "as the struggle must be honourable", it has been suggested that the rationale (or at least part of the rationale) of the present rule is to be identified in considerations of military honour[947]. Finally, another understanding reconnects the prohibition on poison and poisonous weapons to the principle that "considering that the use of a weapon which increases uselessly the pain of people who are already placed out of battle and causes their deaths necessarily is beyond the scope of this purpose, and considering that the use of such a weapon is thus contrary to humanity" embodied in the *Saint Petersburg Declaration*[948].

It is submitted here that, whereas none of these arguments would probably prove sufficient to back the ban on poison in absolute terms, their joint interactions does and that in any case, a thorough analysis of historical sources as well as military manuals show that the latter view is by and large the prevailing one.

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945 *U.S. Air Force Pamphlet*, 1976: "A weapon may be illegal per se if either international custom or treaty has forbidden its use under all circumstances. An example is poison to kill or injure a person". Accordingly see also U.*S. Manual for Military Commissions*, 2010, § IV.

946 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 313.

947 William Boothby, *Weapons and the Law of Armed Conflict*, *supra*, p. 105.

948 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, 2016, p. 321.

Indeed, it has been pointed out that considerations of the indiscriminate effects and excessive suffering deriving from certain uses of poison would hardly justify its absolute prohibition, arguing that "one could point to types of poison, or come up with scenarios for using poison, that would not be ruled out by the principle of discrimination or by the principle against superfluous injury"[949]. Such a stance is hardly questionable. In fact, as we have seen *antes*[950], the absolute prohibition of poison found its historical rationale in the belief that such a weapon was dishonourable as it would permit to kill an opponent without any risk for the attacker[951] as well as becaue it would not leave any chace of survival to the victim. Not so straight forward is, however, the conclusion that such a view reaches in relation to today's ban on poison. According to this understanding, indeed: "what is quite clear is that the ban on poison and bows had little, if anything, to do with humanitarian sentiments. […] Yet, under the contemporary law of armed conflict, the "dishonourable" character of a weapon is insufficient, without more, to impact its legality"[952]. Whereas this conclusion may be right to a certain extent, it is exactly because of this very same consideration that the prohibition of poison needs to stand upon additional justifications.

Accordingly, some national and international practice shows that the reference to excessive injury or suffering may indeed include the fact that a weapon designed to leave no means of survival to its victim can be outlawed due to this reason alone. Thus, Burundi's Regulations on International Humanitarian Law expressly stat: "It is prohibited to use poison or poisonous weapons because these weapons inevitably lead to death, or may cause superfluous injuries which generally lead to death"[953].

In line with this rationale, the South African Constitutional Court has had occasion to stress: "The same has to be said of the use of poison to bring about the death of opponents […] Such means of warfare are abhorrent to humanity and forbidden by international law. The use of poison to eliminate opponents in armed conflict has long been prohibited"[954]. A direct link with the principle of humanity is also established by the French *Law of Armed Conflicts Teaching Note* which enlists

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949 Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, p. 84.

950 See *supra*, Ch. I.

951 See, accordingly, Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, p. 85.

952 *Ibidem*, p. 86.

953 *Burundi, Regulations on International Humanitarian Law*, 2007.

954 South African Constitutional Court, *Case of Basson II*, 2005, para. 180.

poison among the weapons that "are totally prohibited by the law of armed conflict" "owing to their inhuman nature or to their excessive traumatic effect"[955].

The understanding that the rationale for the absolute prohibition of poison lays in its unavoidable deadly outcome finds farther confirmation in international State practice.

Thus, in occasion of the *Nuclear Weapons Opinion*, Egypt lodged with the International Court of Justice a written statement stressing the existing "prohibition against the use of weapons which render death inevitable or cause unnecessary suffering" and further referring to poison as one of the weapons that are forbidden pursuant to this rationale[956]. Notably, this statement refers to weapons that render death inevitable and is not limited to "unnecessary suffering". The very same rationale applicable to weapons is to be applied to methods of combat. As a matter of fact, this statement reflects *verbatim* the prohibition enshrined in 2007 Burundi's Regulation on International Humanitarian Law. A similar stance has been uphold by the Kuwaiti military, viewing the prohibition of poison as a corollary of both principles of military honour and humanitarian considerations[957]. Similarly, referring to the prohibition of poison in the written statement it submitted to the ICJ in occasion of the *Nuclear Weapons Advisory Opinion*[958], Sweden explicitly anchored the norm at hand to the work of Hugo Grotius, whose analysis reflected the understanding that the ban on poison is due to its inevitably deadly effects[959]. In so doing, Sweden made clear that the rationale and purpose of the provision has not significantly changed since its first introduction in the realm of international law. As a matter of fact, the statement of the U.S. in that very occasion implicitly reflected the view that poison is banned due to its deadly effect, as it did not make any reference to either its indiscriminate reach or its potential to cause unnecessary injuries and superfluous suffering. It rather focused in general terms on "weapons that carry poison into the body of the victim [or] designed to kill or injure by the inhalation or other absorption into the body of poisonous gases or analogous substances", thus unveiling the belief that the reason to keep on banning its use largely lay in its ultimate lethal effect, regardless of any other circumstantial considerations.

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955 *France, Law of Armed Conflict Teaching Note*, 2000. See accordingly also *France, Law of Armed Conflict Manual*, 2001.

956 ICJ, *Nuclear Weapons Advisory Opinion, supra*, *Japan's Written Statement*, 1995.

957 *ICRC Study on Customary International Humanitarian Law, supra*, Practice Relating to Rule 72.

958 ICJ, *Nuclear Weapons Advisory Opinion, supra*.

959 Hugo Grotius, De Jure Belli ac Pacis. In higher detail to this end see *supra*, Ch. I, para. 2, sub-para. 2.7.

Note that this reading of the prohibition does in effect follow suit its traditional understanding: it has indeed been argued that "from a humanitarian perspective, the poisoning of a weapon which is already capable of rendering combatants *hors de combat* serves no military purpose by uselessly aggravating wounds"[960]. That is, in other words, a weapon which may place an enemy out of combat should not be used to kill him. If this is the case, as it is, then from this consideration directly descends the ban on weapons and methods of warfare whose very nature is to leave no survivors. Once more, in accordance with this reading, the UN General Assembly has had occasion to note: "The illegality of this method of warfare [*i.e.*, poison] is also related to the prohibition of unnecessary suffering. If a soldier is put out of action by a bullet, there is no reason why his suffering should be aggravated by the action of a poison which serves no military purpose"[961].

Indeed, the commentary to Art. 35 *AP I* establishes a direct link between the prohibition of poison and the principle protecting from unnecessary consequences persons affected by armed conflicts (including combatants), clarifying that such principle is not limited to unnecessary suffering but also relates to unnecessary deaths means and methods that render death inevitable. Thus, the *Commentary to AP I* cites poison among the examples relevant for the concrete application of the principle that the only scope of warfare is to disarm the enemy[962].

4.6. Interlocutory Conclusions

The inherent link between assassination and the four practices examined under this paragraph derives from the specific reference made to them by instruments dealing with the topic of assassination and establishing express ties between them. Art. 23 of the *Hague Regulations*, whilst merely prohibiting treachery and avoiding any mention of outlawry, bounties and assassins in pay, has been construed as proscribing such conducts[963]. Thus, the *US Field Manual* provides that [Article 23(b) of the Hague Regulations should be] "construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as

960 *Harvard Commentary on HPCR, supra*, p. 71.

961 UN General Assembly, *Respect for Human Rights in Armed Conflicts*, *supra*, p. 119. It should be noted that in this very same document the UN General Assembly also linked the ban on poison of considerations related to perfidy and treachery, without however explaining why should poison be treacherous in itself.

962 *Commentary on the APs*, *supra*, paras. 1411 and 1419.

963 Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, p. 89.

well as offering a reward for an enemy dead or alive"[964]. The same prohibition is reiterated in the latest version of the *US Law of War Manual* under the heading "Bribery or offering of rewards" which reads "rewards may not be offered for the killing of enemy persons"[965]. The manual then goes on to explicitly recall the 1956 *Manual on the Law of Land Warfare* with a provision named "Prohibition on Offering Rewards for Enemy Persons Dead or Alive" which states: "It is forbidden to place a price on the head of enemy persons or to offer a reward for enemy persons "dead or alive."[966]. The manual clarifies that the rationale underneath the prohibition at hand lays in that such practice would encourage denial of quarter and invite private persons to take part to the hostilities. In similar terms, the *Old British Military Manual* defined assassination in the following terms: "the killing or wounding of a selected individual behind the lines of battle by enemy agents or partisans, and the killing or wounding by treachery individuals belonging to the opposing nation or army, are not lawful acts of war. […] In view of the prohibition of assassination, the proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy dead or alive is forbidden"[967].

As it emerges from a thorough analysis of the aforementioned conducts, their history, rationale and scope confirms that they are tied to the traditional prohibition of assassination. Significant, in this regard, is that they are always practices supposed to limit methods and means of resort to lethal force in cases of individualized killings. What also characterizes all of these conducts is that they have all been connected in more or less explicit terms to the prohibition of treachery but, as shown at length in the present paragraph, none of them is actually geared around a betrayal of confidence or good faith instilled by the targeting party. This leads the analysis back to the factor outlined at the end of the previous paragraph, which is that whereas it seems feasible to reconnect these prohibition to the more general prohibition of treachery, the latter is however to be understood in broad terms as something different from what is today known as perfidy.

Partly different, in this regard, is the conclusion stemming from a thorough analysis of the ban on poison.

In combination with reasons of military honor, at least one of the reasons that led to the absolute prohibition of poison, indeed, is that its use would render the death of the targeted person inevitable and it could be use outside direct confrontations, *i.e.* in moments when the poisoned person is not directly involved in combat related activities. In accordance with this considerations, a commentator has

964 U.S. Department of the Army, *US Field Manual on the Law of Land Warfare*, 1956, § 31.
965 U.S. Department of Defense, *Law of War Manual, supra*, § 5.26.3.
966 U.S. Department of Defense, *Law of War Manual, supra*, § 5.26.3.1.
967 UK War Office, *British Military Manual*, 1958, § 115.

underlined that "poison, even when used in a sufficiently discriminating manner against combatants, may violate the prohibition against superfluous injury and unnecessary suffering. This would be the case if the particular type of poison used would render the death of the targeted combatant inevitable or would have particularly gruesome effects on him or her"[968], also stressing however that the absolute ban on poison also stems from considerations of chivalry: "the knightly class had found poison despicable […] because it could be used to kill an opponent without personal risk"[969].

Confirming this rationale is that poisons are generally defined in military manuals as "substances that cause death or disability with permanent effects when, in even small quantities, they are ingested, enter the lungs or bloodstream, or touch the skin"[970]. Notably, it is impossible to find either here or anywhere else in the recalled official legislation any reference to the rationale justifying the norm. However, this provision is clearly referred to any kind of poison, regardless of whether or not a given poison does or does not cause any kind of suffering.

Potentially, poison would be the prototypical weapon to conduct targeted killings. Yet, it is at all forbidden. Historical sources show that the rationale for the absolute prohibition of poison is to be searched in that such a weapon is capable of rendering the death of the targeted combatant inevitable.

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968 Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, p. 85.

969 *Ibidem*. Notably, this author infers from such consideration that "the ban on poison and bows had little, if anything, to do with humanitarian sentiments" (Ibid. at p. 86). In support for such reading he recalls passages from both Grotius and the Second Lateran Council of 1139. As shown antes (Ch. I, para. 2, sub-para. 2.6), however, the Second Lateran Council attempted to introduce a prohibition on any weapon whose final outcome would be to leave to the target no chances of survival. Read in such context, the humanitarian nature of the absolute prohibition of poison cannot be denied. Similarly, albeit it is true that Grotius focused his attention on the poisoning of monarchs, he did the same when speaking with assassination in general. As shown in that regard (Ch. I, para. 2, sub-para. 2.6), Grotius's concern was not rooted that much in considerations related to the use of such methods by commoners as it was in preventing resort to methods of warfare which could lead to the death of a person when the latter was defenseless and far removed from the battlefield. Indeed, applying the same rationale recalled by the author a contrario, one should come to the determination that Chivalry alone, intended as the lack of personal risk, would not suffice to justify an absolute prohibition of poison, as it would have not banned the use of, for instance, poisoned swords in combat. Therefore, it is submitted here, chivalry and humanitarian considerations are indeed inextricable in this matter and they do both play a fundamental role in the absolute ban on poison. This consideration is further reinforced by the fact that not even the introduction of aerial warfare or long-range weapon technologies in more or less recent times has displaced the ban on poison or in any ways altered its absolute character.

970 U.S. Department of Defence, *Law of War Manual*, § 6.8.1. See, accordingly, *1976 US Air Force Pamphlet*, §§ 110-131.

In this regard, the analysis of the prohibition of poison proves more valuable inasmuch as it leads to the identification of a set of rationales that the prohibitions of outlawry, hiring assassins and offers of rewards for the death of an enemy do not permit to unveil. It is submitted that the same rationale may be the one at the basis of the traditional prohibition of assassination. The question therefore remains as to whether this rationale may be extended to inform such prohibition and if this should be consider to be consistent with today's practices. It is with this in mind that the current study will now turn to the analysis of past and present state practice most closely related to the prohibition of assassination.

5. CONCLUSIONS

Most of the authors who have explored the issue of assassination maintain that this conduct is necessarily characterized by treachery. This chapter has shown that this is not the case or, at least, that it cannot be the case if the definition of treachery is restricted to that of perfidy. Arguably, the two are not the same, the former's scope being much wider of the latter's.

A completely satisfactory answer in this regard is hardly possible to reach considering that absence of a treaty definition of treachery. After an in-depth historical and contextual analysis of assassination and treachery, however, this chapter has demonstrated that either the notion of treachery is way wider than that of perfidy and is therefore not limited to betrayal of a state of confidence and good faith artificially created by the attacking party or, if treachery and perfidy are to be considered tantamount, then assassination necessarily embraces conducts that escape the scope of both notions. This finds full confirmation in that a number of conducts traditionally prohibited because of their inherent links with assassination actually escape a limited understanding of treachery, whereas they could fall in that understanding of treachery that embraces all attacks designed to catch a pre-selected enemy individual defenceless and off-guard.

This understanding seems to find further confirmation in the prohibition of denial of quarter. As shown at length above, this prohibition in fact is multifaceted, entailing on the one hand protection for persons *hors de combat* while also outlawing orders that no survivors be left. The rationale and scope of both proscriptions actually reinforce the view that assassination may be construed as a pre-planned premeditated lethal attack against a designated individual when the latter is in no position to defend himself. This conclusion directly flows from the consideration of persons "in the power of the enemy" or persons upon which a belligerent is able to impose its will as persons *hors de combat*, as well as it derives from an understanding that the protection to be afforded to those "no longer taking part in combat" actually extends to all those who are not involved in situational fighting, regardless of their status, at least when they are not within military objectives or in close proximity to hot battlefields.

It has been suggested that "[t]he prohibition of denial of quarter cannot possibly be interpreted to prevent belligerents from resorting to surprise attacks of instantaneous lethality or to employ units or weapons systems which are incapable of taking prisoners, if such action is justified by military necessity and otherwise in compliance with IHL […] In sum, in order for the prohibition of denial of quarter to be breached, the means and methods employed by a State would actually have to be calculated so as to ensure the complete extermination of the opposing forces, including the wounded and sick and those attempting to surrender". Two problems

rise with such characterization: the firs proposition rightly asserts that belligerents are not prevented from surprise attacks of instantaneous lethality. But the point made by Proloux, and after all by the principle enshrined in the *Saint Petersburg Declaration*, does not concern either the element of surprise or the deadly outcome: it concerns the will, the aim of the attacking party. Such aim cannot be to leave the targeted person no chance of survival. It is however the very nature of targeted killing to deprive the targeted persons of their lives. Whereas this may be acceptable on the field of battle, it surely is not when the enemy is not involved in an activity posing a direct threat to the targeting party.

As to the suggestion that denial of quarter only entails a prohibition of extermination, then, it is submitted here that even if such a proposition were agreed upon, the reality is that a targeted killing amounts indeed to an extermination insofar as the design of a targeted killing is to deprive of their lives the totality of the persons targeted: if the person targeted is one, and one is killed, then a 100% of those targeted are indeed deprived of their lives. It is mere logic that this equates with an order to not leave survivors and it is therefore an extermination proper. After all, this is not only statistical data or else a mere theoretical qualm: States are developing technologies that would allow them to target dozens when not hundreds of people at the very same time. Were such technologies to be deployed, then several targeted killings may be conducted simultaneously. The result would be the willful, premeditated death of the totality of persons attacked. This would make the 100% statistics recalled above not about a single enemy but about hundreds of persons at once. Such an operation could not possibly escape the notion of extermination, after all intended as a series of assassinations simultaneously conducted.

It is therefore submitted here that it is also based on the rationale of the prohibition on denial of quarter that the prohibition of assassination has indeed retained its status as a customary law of international law whose scope goes well beyond that limited understanding of it as a perfidious killing. This conclusion is further reinforced by reference to the shared rationale that first led to the prohibition of poison and to the prohibition of assassination, which is after all the expression of a general principle banning means and methods of warfare of a nature that does not leave the adversaries any chance of survival.

CHAPTER IV

State Practice

1. INTRODUCTION

As mentioned at the very beginning of this study, the ongoing legal debate around the legitimacy of targeted killing was catalysed by an ever-increasing resort to such techniques in these last year in relation to counter-terrorism operations, especially those carried out by Israel at first, those performed by the U.S. later and, at last, those that saw a more or less active involvement of the U.K.

U.S. led killings in this framework have risen most of controversies due to both the scale of the U.S. program and the means mainly used to conduct such deprivations of life, *i.e.* Unmanned Aerial Vehicles, otherwise known as drones.

It is generally accepted, within this discourse that U.S. use of deadly armed force against previously selected individuals – be it by drone strikes or by special commando units – have caused several victims among high-level Al-Qaeda operatives[971] as well as among civilians who had nothing to do with Al-Qaeda at all[972]. In particular, the latter occurrence has sparked much controversy and harsh criticism has been expressed by public media[973] and by the civil society[974]. In the

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971 To this end see, *inter alia*, Bill Roggio and Alexander Mayer, *Senior Al Qaeda and Taliban Leaders Killed in US Airstrikes in Pakistan, 2004 – 2012*, in *Long War Journal*, 26 January 2012, available at http://www.longwarjournal.org/pakistan-strikes-hvts.php, reporting in particular the death of Al-Quaeda's supposed leader in Afghanistan and Pakistan, Sheikh Fateh Al Masri, the targeted obliteration of an alleged senior Al-Qaeda operative named Mustafa al Jaziri; the killing of Al-Qaeda's chief finance officer Mustafa Abu Yazid, the deprivation of life of Quari Mohammad Zafar, wanted due to his purported involvement in a 2006 attack at the US Consulate in Karachi, as well as the targeted killing of alleged Al-Qaeda militants more or less involved in the 1998 US embassies bombings in Tanzania and Kenya. On these and other episodes of targeted killing of persons supposed to have some degree of affiliation with Al-Qaeda either in Pakistan or in Afghanistan see also, among many other sources, NBC News, *CIA Drone Said to Kill Al-Qaida Operative*, 14 May 2005, and CNN News, *US Airstrikes in Pakistan Called Very Effective*, 18 May 2009.

972 Aislinn Simpson, *Pakistani Fury as Suspected US Drone Attack Kills 12*, in *Telegraph*, 12 September 2008, and Reprieve, *Drones*, available at www.reprieve.org.

973 The News International, *60 Drone Hits Kill 14 Al-Qaeda Men, 687 Civilians*, 10 April 2009; Owen Bowcott, *Drone Attacks in Pakistan Are Counterproductive, Says Report*, in *The Guardian*, 25 September 2012; David Cortright, *The Scary Prospect of a Global Drone Warfare*, in CNN, 19 October 2011; Paul Harris, *Drone Attacks Create Terrorist Safe Havens, Warns Former CIA Official*, in *The Guardian*, 5 June 2012, available at http://www.theguardian.com/world/2012/jun/05/al-qaida-drone-attacks-too-broad; Bureau of Investigative Journalism, D*rone War Exposed – The Complete Picture of CIA Strikes in Pakistan*, 16 December 2011; Marina Fang, *Nearly 90 Percent Of People Killed In Recent Drone Strikes Were Not The Target - U.S. Drone Strikes Have Killed Scores Of Civilians In Afghanistan, Pakistan, Yemen and Somalia*, in *The Huffington Post*, 20 October 2015, available at http://www.huffingtonpost.com/entry/civilian-deaths-drone-strikes_us_561fafe2e4b028dd7ea6c4ff; Glenn Greenwald, *Chilling Legal Memo From Obama DOJ Justifies Assassination of US Citizens*, in *The Guardian*, 5 February 2013, available at http://www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo; Tom Junod, *The*

legal discourse, these concerns are mainly dealt with in connection to the principle of distinction and civilians' immunity from attacks[975]. In this regard, it has been underlined that civilians remain fully entitled to protection until and for so long as they do not take direct part to hostilities, the sanctity of the principle of distinction under international humanitarian law has been remarked, debates have been conducted on the qualifications of persons as civilians or combatants and the criteria driving such assessment, and some reflections have been advanced on the principle of proportionality between civilian casualties of drone strikes and proper combatants/fighters killed in such attacks. The problem related to civilian casualties of targeted killings have been most notably addressed by all the UN Special Rapporteurs dealing with this matter[976]. In this connection, in particular, "The Special Rapporteur began an inquiry in January 2013 with the aim of evaluating allegations that the use of remotely piloted aircraft, or drones, in extraterritorial lethal counter-terrorism operations (including in the context of asymmetrical armed conflict) has resulted in disproportionate levels of civilian casualties, and to make recommendations concerning the duty of States to conduct independent and impartial investigations"[977].

None of these considerations are however strictly related to assassination under the laws of armed conflict. As shown above, such crime, if as a crime it can still be regarded under nowadays laws of war, has not much to do with civilian casualties, lingering instead on the premeditated killing of a pre-selected person regardless of his or her status[978]. Thus, the killing of a given civilian may amount to

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Lethal Presidency of Barack Obama, in *Esquire*, August 2012, available at http://www.esquire.com/news-politics/a14627/obama-lethal-presidency-0812/.

974 Heba Aly, *The View from the Ground: How Drone Strikes Hamper Aid*, in *IRIN: Humanitarian Aid News and Analysis*, 18 March 2014, available at https://www.irinnews.org/ar/node/253319; Amnesty International, *Will I Be Next? US Drone Strikes in Pakistan*, London, 2013; Reprieve, *You Never Die Twice*, London, 2015; Human Rights Watch, *Between a Drone and Al-Qaeda, The Civilian Cost of US Targeted Killing in Yemen*, Washington D.C., October 2013; Open Society Justice Initiative, *Death By Drone, Civilian Harm Caused by U.S. Targeted Killings in Yemen*, New York, 2015.

975 Columbia Law School: Human Rights Clinic, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions*, New York, 2012; International Human Rights and Conflict Resolution Clinic, Stanford Law School and Global Justice Clinic, New York University School of Law, *Living Under Drones*, New York, 2012; Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan – The Legal and Socio-Political Aspects*, New York, 2015; Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in Simon Bronitt, *Shooting to Kill, The Law Governing Lethal Force in Context*, 2012.

976 *Alston Report*, *supra*; *Emmerson Report*, *supra* and *Heyns Drone Report*, *supra*; UNOHCHR, *Statement by Ben Emmerson, UN Special Rapporteur on Counterterrorism and Human Rights Concerning the Launch of An Inquiry Into the Civilian Impact, and Human Rights Implications of the Use of Drones and Other Forms of Targeted Killing for the Purpose of Counter-Terrorism and Counter-Insurgency*.

977 Ben Emmerson, *UN SRCT Drone Inquiry*, available at unsrct-drones.com.

978 See above, Ch. I.

assassination insofar as it is pre-selected. In this regard, the qualification of a person as a civilian or as a fighter-legitimate military target becomes crucial but only because in certain circumstances where the specific targeting of a person bearing combatant status may not amount to an extrajudicial execution, the targeting of a civilian mistakenly considered as a fighter may indeed be.

It will be shown in the present paragraph that current state practice related to targeted killings is generally characterized by the pre-selection of individuals suspected of some involvement in some kind of "terrorist" activities and their subsequent "elimination". In relation to the main driver of such tendency, namely the U.S., it has been argued that the process leading to the designation of a person as a potential target for killing (*i.e.* as a name eligible to be placed on the list of those who are to be deprived of their lives) "goes far beyond any process given to any target in any war in American history"[979].

This argument is hardly questionable. What is worrisome, however, is the reason that makes it so true: never before has a state made of its proscription lists an official policy since never before has it been possible to conduct hostilities (or, as so often seems to happen this days, military operations in situations short of armed conflict) so largely relying on one-by-one individual killings. What is argued here is that, besides the practicalities, such option has never been considered before also because it has always been associated with assassination under international humanitarian law, making it unlawful as well as practically impossible. In fact, even when policies similar to those that are currently employing in target selection and killing have been resorted to, States have strongly denied their responsibility rejecting any involvement into such plans on factual grounds, rather than arguing for the lawfulness of such practice.

Whereas the practical reasons hindering the resort to systematic and widespread individual killings of pre-selected individuals have now been largely overcome, mainly due technological advances in this field[980], the legal limitations to such actions have not ceased to pose restrictions to the conduct of hostilities. All to the contrary, the undergoing "humanization of international law"[981] would *prima facie* seem to make such restrictions more compelling than ever before.

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979 Jack Goldsmith, *Fire When Ready*, in *Foreign Policy*, 19 March 2012, available at http://foreignpolicy.com/articles/2012/03/19/fire_when_ready.

980 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, European Council on Foreign Relations Doc. ECFR/84, 2013, p. 4.

981 Theodor Meron, *The Humanization of Humanitarian Law*, in *The American Journal of International Law*, 2000, pp. 239-278 and Theodor Meron, *The Humanization of International Law*, Leiden, 2006.

This holds true even in times of armed conflicts. In 2013 US deputy chief of mission in Sanaa (Yemen) from 2004 to 2007, Nabeel Khoury, wrote: "Drone strikes take out a few bad guys to be sure, but they also kill a large number of innocent civilians. Given Yemen's tribal structure, the US generates roughly 40 to 60 new enemies for every AQAP [Al-Qaeda in the Arabian Peninsula] operative killed by drones"[982]. This statement well-exemplifies the twofold problem with targeted killings even in the framework of hostilities. No questions about the fact that the first major problem with targeted killings conducted through drone technology, to which Nabeel Khoury makes reference in his statement reported above, lays with the massive amount of innocent civilians killed in such drone strikes. This issue raises concerns under both the principles of distinction and proportionality under international law and it may very well be in and by itself ground to deem many drone strikes war crimes. Not to mention the fact that such operations would fall foul of any military necessity parameter whatsoever, were it verified that every lethal operations conducted against AQAP members in fact produces 40 to 60 new enemies[983].

This point however does not concern that much targeted killings in themselves as it relates to eventual breaches of international humanitarian and human rights law parameters in the way such targeted killings are conducted. Evidently, such an assessment depends on a case by case analysis and does not reveal any intimate relationship between targeted killings on the one hand and assassination on the other.

What surely is more enlightening in this connection is the assessment, which would seem to be regarded in a positive fashion by Nabeel Khoury's words reported above, that targeted killings, in the form of drone attacks, actually do "take out a few bad guys to be sure". Well, contrary to *prima face* appearances it is this suggestion to be the most problematic under a rule of law perspective. Centuries of evolutions in civil liberties and fundamental rights have finally come to frame our laws (national and international ones) in such a way that nobody, not even the most draconian dictatorial regimes, may openly admit that they "take out" those who they consider to be "bad guys". Not, at the very least, without a shred of judicial proceeding proving their guilt or innocence. And even in this case, most of the countries in the world

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982 Vice News, *Exclusive: How the UK Secretly Helped Direct Lethal US Drone Strikes in Yemen*, 7 April 2016, available at https://news.vice.com/article/exclusive-how-the-uk-secretly-helped-direct-lethal-us-drone-strikes-in-yemen.

983 In this sense, the former chief of the US military's Joint Special Operations Command has publicly acknowledged that the US drone policy “seems like a panacea to the messiness of war [but] is not that at all" since drone strikes generate a “tremendous amount of resentment” against those deploying such strategy. To this end see *inter alia* Reprieve, *Parliament to Hear Concerns Over Government's 'Kill Policy' Today*, 9 December 2015, available at http://www.reprieve.org.uk/press/parliament-to-hear-concerns-over-governments-kill-policy-today/.

have now come to ban the death penalty even for the most heinous of crimes, regardless of whether or not the ones who are charged with them are found guilty. Significantly, this holds as true during peacetime as it does in times of armed conflict.

The laws of armed conflicts, in fact, forbid to kill enemies due to the fact that one party of the hostilities consider the other party's combatants or fighters as "bad guys". This would ultimately fall within the prohibition of outlawry examined above[984]. To be sure, this ban does not even come from a human rights oriented reading of the laws of war: it is enshrined in the armed conflict paradigm in itself and intimately linked to the public nature of war and anonymity of those persons who take part to it. Were this to be the rationale - declared or undeclared as it may be - of targeted killings as they are performed these days, therefore, such technique would not differ at all from a traditional understanding of assassination and should be declared unlawful for that reason only without further ado.

Nonetheless, in the last years more and more countries have been turning to practices of targeted killing, holding that they actually differ from assassination at all, being instead a permitted course of action at the very least in times of armed conflict, if not even under a law enforcement model.

The scope of the present research is in part more limited, as it does not consider either issues of *jus ad bellum* alone nor the lawfulness of premeditated uses of lethal force under a law enforcement paradigm that, as previously briefly indicated, are hereby assumed to be unlawful under every circumstance due to the difficulties in reconciling premeditation with the restrictions posed to the use of lethal force by human rights law[985].

Following the theoretical analysis of the relevant laws of war provisions conducted under the previous chapter, the focus will now shift on state practice and *opinio juris* in an attempt to identify critical changes in either one or both of them as well as the drivers of those evolutions.

What triggers this effort is the need to answer questions such as what does the silence of the treaties governing this matter means in relation to assassination? Does it imply that the customary norm prohibiting such practice shall be deemed superseded nowadays? In particular, taking into account the latest trends of State practice concerning public, systematic campaigns of elimination of suspected terrorists? Or is this State-practice only relevant inasmuch as it amounts to an interpretation restricting the range of the traditional prohibition of assassination?

984 See *supra*, Ch. III, para. 4, sub-para. 4.3.

985 See *supra*, Ch. II.

Does the prohibition of treacherous killings add to the prohibition of assassination or, to the contrary, the two notions shall be understood as conflating?

As will be shown in the next paragraphs, before the last decade compiling lists of people "wanted dead or alive" has consistently been characterized as a practice linked to extrajudicial executions. It will also be shown that, in a similar fashion, use of lethal force outside conventional theaters of conflicts with the final aim of depriving an individual not directly involved in hostilities at the moment of the action leading to his death has been a practice largely condemned by the international community.

It will therefore be suggested that a radical change in approach took place, gradually, after the beginning of the new century. In this spirit, the practice of states currently resorting to systematic policies of targeted killing will be reported as well as the theoretical framework they suggest to exist in support of such practices. By this token, it has been noticed, "while assassination has met with disfavour among traditional observers, commentators have, more recently, sought to justify targeted killings with an appeal to both self-defence and law enforcement. […] While named killings might be defensible on the grounds that there are no other ways to disable combatants when they fight without uniforms, the costs, including the cost of targeted killing emerging as an acceptable convention in its own right, should be sufficient to view the practice with a good deal of caution"[986].

With a view to maintain such cautionary approach towards practices whose final aim is to deprive individuals of their lives once and for all, an analysis will finally be conducted of the judgments over cases of targeted killings delivered until this moment in various domestic jurisdictions. It will be shown that in most of the targeting states' jurisdictions victims are deprived of access to justice through reference to avoidance doctrines and the paradox of such situation will be highlighted. As a U.S. court has correctly pointed out, "Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?"[987]. This effort will be undertaken with the aim of highlighting the possible formation of a new *opinio juris* about targeted killing practices. It will also prove useful because, as it will be argued, depriving victims of access to justice actually bears repercussions on their substantive rights, as it equates to placing them outside

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986 Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, *supra*, p. 323.

987 United States District Court for the District of Columbia, *Al-Aulaqi v. Obama*, Judgment of 7 December 2010, p. 2.

the protection of the law or else, making them outlaws, turning the practice of killing them selectively into an act of outlawry in breach of the international humanitarian law norms enucleated in the previous paragraphs.

All of the above should serve as a test to assess whether, as some authors have suggested, "[a]lthough assassination under international law was originally prohibited, changes over time began to permit selective targeting of individuals. Consistent with the above interpretation, it could therefore be argued that without an obligation of good faith to the individual, such targeting is not treacherous"[988] and if, therefore, most of the targeting practices currently commonly used are indeed in conformity with international law.

[988] Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, in *Georgia Journal of International and Comparative Law*, Athens (U.S.A), p. 18.

2. STATE PRACTICE: TWISTS AND TURNS

(1) Targeting Individuals Directly before 9/11; (1.a) Practice in the First Half of the XX Century; (1.b) Practice Post WW II: the U.S.; (1.c) Practice Post WW II: Other States; (1.d) Interlocutory Analysis of State Practice before the Turn of the Century; (2) The Approach of the International Community to Targeted Killing before the Turn of the Century; (2.a) The Position of the UN Security Council; (2.b) The International Court of Justice; (2.c) The Work of the Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions; (2.d) Interlocutory Analysis: The Stance of the International Community before the Turn of the Century;

2.1. Targeting Individuals Directly before 9/11

It has been a traditional position of political thinkers and legal theorists that war is a state of armed hostility between sovereign states and their governments, not between their peoples or citizens[989]. Such position found confirmation in the *Lieber Code* distinction between permissible deception in war and treacherous conducts[990]. The very same rationale holds true not only in relation to the belligerent parties' civilians but also with regard to their combatants. In this connection, it has been argued that "individuals may be made the subject and object of combat actions only when and in so far as they have a military status. At the same time, it can be concluded from this doctrine that a fighting soldier is not without rights and that he should be granted protection under international law as far as possible"[991].

This position arguably mirrors well established principles of customary international law. After all, when proposed to assassinate Napoleon in 1806 the British government not only had the person who had advanced the idea of such plot arrested, but it even made the French aware of the threat[992].

In 1865, following the killing of Abraham Lincoln, the then U.S. Attorney General James Speed declared that the culprit Wilkes Booth had acted as a "public

989 Russeau, *Du contrat social*, 1762, Ch. 14.

990 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 539. On treachery and ruses as methods of conflict see *supra*, Ch. III, para. 2.

991 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 539.

992 Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester, 1993, p. 137.

enemy", he qualified such action as an assassination and he declared that it was contrary to the laws of war[993]. Even more significantly, he explicitly made reference to Vattel's definition of assassination[994], thus endorsing a very broad notion of such concept[995].

It is this same underlying rationale that inspired Johann Caspar Bluntschli's to conclude, in his 1867 textbook of international law named *Das modern Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, that combatants could be killed only in combat and that killing enemies not engaged in combat would amount to an unlawful murder[996]. Some 45 years later another notable commentator confirmed this stance, clarifying that not even "[t]he most imperative military necessity could not justify the use of poison, or the torture of a prisoner of war, or assassination"[997].

a) Practice in the first half of the XX century s

Such granitic perception started shaking, however, with the passage of time. Thus, already during the XX century it was noted that "the traditional rule that hostilities must be confined to open combat and must not involve the wilful killing of individuals not engaged in the general confrontation between the parties to the conflict is still valid in principle, but is being increasingly eroded – if not completely thwarted – by the practice of employing sabotage squads and task forces in modern guerrilla warfare"[998].

As an example of such alleged evolution, reference is often made to the post-World War II prizing of a British officer for killing a Nazi general after introducing himself in the German headquarters camouflaged as a civilian[999].

Such example, however, should be contextually analyzed: it thus emerges that, first of all, even during such conflict direct attempts at pre-selected enemies' lives were not so lightly undertaken and, in any event, that they were perceived to be restricted by international law parameters. Secondly, even though it may perhaps be argued to a certain extent that state practice concerning the targeted killing of individuals have changed over time, it surely cannot be said that, pursuant to the reported example, killing by a sudden attack made possible only by the attacker's civilian attire should be considered lawful. As we have previously seen, in fact, such

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993 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 17.
994 See *supra*, Ch. I, para. 2, sub-para. 2.7(e).
995 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 17.
996 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 538.
997 James M. Spaight, *War Rights on Land*, *supra*, p. 8.
998 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 542.
999 W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, *supra*, p. 3.

deed does amount, as it has always done in old as well as more recent history, to a breach of the prohibition of treachery and perfidy. This illustration is therefore of no value to scrutinize and establish the evolution of state practice with reference to pre-planned killing of selected enemy combatants as it remains clear that the prizing of a person who acted in such fashion actually makes a foul of the law, rather than fostering compliance with it.

Other examples dating back to the second world war have been suggested to show a countering practice.

Thus, for instance, it has often been pointed out that on 18 April 1943 the US has indeed targeted Japanese Admiral Yamamoto following intel suggesting his precise location, killing him in an aerial ambush over the Bouganville jungle, while he was in flight between Rabaul and Buin[1000]. Still in 1943, a British commando was dispatched at Beda Littoria to lead an attack on Nazi Field Marshal Rommel with the aim to kill or capture him[1001]. Again, it is reported that, during the so called battle of the Bulge, the Germans aimed at kill or capturing US General Eisenhower[1002].

Of the three examples thus recounted, however, the last two make reference to instances where the planned use of force was less-than-specific (kill-or-capture operations) and it was in any case to be delivered within the framework of either an active confrontation/battle (the German attempt on Eisenhower's liberty or life) or within military establishments (the British attempt at Rommel's liberty or life). As such, these episodes are not entirely representative of premeditated killing (since when there is an option to capture, the killing is not premeditated by definition) and in any case they only refer to attacks carried out in zones of active hostilities, when not in direct battle.

It is true that the commentary to Art. 115 of the British Manual clarifies that it would not be possible to qualify either as a treacherous attack or as an assassination the commando raid on Rommel's African Army at Beda Littoria since the commandos involved in that undertaking were wearing uniforms and the aim of the attack was to win over the enemy's centre of command. Notably, however, the military mission in this case was generally aimed at the Nazi's infrastructure thereby located, including Rommel but not limited to his targeted killing. Moreover, such

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1000 Joseph B. Kelly, *Assassination in Wartime*, in US Department of the Army, *Military Law Review*, Washington, 1 October 1965, p. 102. Ford, *Political Murder From Tyrannicide to Terrorism, supra*, p. 275. Ward, *Norms and Security: The Case of International Assassination, supra*, p. 114. Patricia Zengel, *Assassination and the Law of Armed Conflict, supra*, p. 127. Leslie C. Green, *The Contemporary Law of Armed Conflict, supra*, p. 330.

1001 Joseph B. Kelly, *Assassination in Wartime, supra*, p. 102.

1002 *Ibidem*.

operation was conducted in any case in the context of hostilities against a belligerent party's combatant (*i.e.* pursuant to a status-based assessment), on a proper battlefield zone (as the territory where it occurred was under *de facto* control of the adversary's armed forces) and it was addressed at a person who was devoted to military activities when targeted (*i.e.* a person having a direct belligerent nexus when he underwent the attack)[1003].

The killing of admiral Yamamoto differentiate from the other two episodes for two main reasons: a) there was no option to capture rather than kill; b) when his airplane was taken down he was not immediately in a zone of active hostility but he was *en route* between two such zones. In fact, Yamamoto's killing is the episode that is perhaps the most renowned in this connection, also due to the express reference repeatedly made to it by the U.S. administration in recent times[1004]. This episodes therefore fits the definition of a premeditated killing afar from the battlefield.

In a way, this episode remains therefore the most controversial. According to some authors the attack on Admiral Yamamoto "clearly was permissible under international law" since he had combatant status as a member of the Japanese armed forces and he was attacked openly by U.S. military airplanes[1005]. Others have suggested that "the American assassination of Admiral Yamamoto during World War II was probably legal by today's standards"[1006]. Other authors again maintain that, under today's parameters, such operation would fall foul of the prerequisites posed by the law and that therefore it should be deemed unlawful, arguing that in nowadays international law the only applicable legal regime afar from the battlefield is human rights law[1007]. This controversy, however, may perhaps be resolved making reference to the context surrounding the killing of Yamamoto as well as to the

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1003 For an alternative reading of this episode see *inter alia* A.P.V. Rogers and Dominic McGoldrick, *Assassination and Targeted Killing: The Killing of Osama Bin Laden*, in *International and Comparative Law Quarterly*, Cambridge, 2011, p. 780. Note however that even these authors concede that " The *Manual* (1958) goes on to distinguish the case of the attack by British commando forces on the headquarters of General Rommel at Beda Littoria in 1943 since it was carried out by military personnel in uniform, had as part of its objective the seizure of Rommel's operational headquarters, including his own residence, and the capture or killing of enemy personnel therein", albeit then ignoring in their analysis that when Rommel was targeted he was located inside a legitimate military objective – his headquarters – and was involved in activities directly related to the conduct of hostilities.

1004 To this end see Eric Holder, *Attorney General's Speech at Northwestern University Law School*, 5 March 2012. As for the current legal theory underlying U.S. targeted killing see in higher detail *infra*, Ch. IV, para. 4, sub-para. 4.1.

1005 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 17.

1006 Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law*, *supra*, pp. 12 and 13.

1007 Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, in *Journal of National Security Law and Policy*, Washington D.C., 2010, pp. 343-361.

precise circumstances characterizing it. As to a contextual reading of the episode, it should be noticed that such killing took place in the framework of an international armed conflict. In particular, such a widespread armed conflict that armed hostilities proper took place in most parts of the world. In this general context, it appears relevant to further notice that Admiral Yamamoto was not himself in a zone of active hostilities when he was killed, but he was aboard a military aircraft, flying in his official capacity, between two regions that were at the core of Japanese military activities. That is, when Admiral Yamamoto was taken down he fully maintained a contextual belligerent nexus, besides having a proper combatant status as Commander in chief of the Japanese Air Forces. He therefore fulfilled at once the criterion for legitimate targets (as he was a combatant), that for a direct and contextual belligerent nexus (as, when targeted, he was involved in an activity directly related to the ongoing armed conflict) and, finally, satisfied a geographic test, considering the international nature of the conflict at issue and its *de facto* global reach.

The three examples thus reported are not the only ones linked to the II World War that may be relevant under the current study. Thus, for instance, SS General Reinhar Heydrich was killed by two individuals belonging to the London-based "free Czechoslovak Army", who had been appositely trained for such mission by the British and parachuted in Czechoslovakian territory from an airplane of the British Royal Air Force. The salient element of this episode is that the two Czechoslovak combatants were camouflaged as civilians when they threw a bomb in Heydrich's car. It is pursuant to such feigning of civilian status that most commentators characterize the incident as one of assassination, forbidden by international law due to its treacherous nature[1008]. Moreover, albeit in an occupied territory, when targeted Heydrich was not on a proper battlefield and in any event the non-uniformed assassins did not carry their weapons openly"[1009].

Some authors have disputed such characterization, challenging its underlying reasoning and claiming that "treachery requires a betrayal [but] the nature of the obligation that was betrayed [in this case] is elusive"[1010]. Nonetheless, as shown in the previous chapter[1011], even the narrowest notion of perfidy embraces the feigning of civilian status as a forbidden conduct. Most notably, as seen *antes*, the concept of treachery is actually broader than that and therefore there is no doubt that this episode, and any other similar to the one reported, is to be classified as a killing by

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1008 Joseph B. Kelly, *Assassination in Wartime*, *supra*, p. 104. See accordingly Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law*, *supra*, p. 13.

1009 Jason D. Soderblom, *Time to Kill? State Sponsored Assassination and International Law*, *supra*, p. 13.

1010 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 30.

1011 See *supra*, Ch. III, para. 2.

treachery and, as such, as an assassination. In line with this assessment, the 1958 British Manual of Military Law itself has reported Heydrich's killing as an example of assassination[1012] due to the treacherous nature of the action combined to the target selection[1013].

Those suggesting that the killing of Heydrich may not qualify as an assassination argue that, were the two man dispatched to perform the deed "hidden inside a parked vehicle along Heydrich's anticipated route or, in classic cartoon fashion, disguised […] as two trees by the side of the road" then "there would have been no question but that they were acting within the bounds of international law"[1014]. Significantly enough, such reasoning, viewed from a broader perspective of treachery and, in general, assassination, may actually be turned onto its head: would such sort of killing be lawful, if in fact they did not much differ from Heydric's assassination? The answer could actually be a negative one. Indeed, a contradiction may be viewed in this questioning of the unlawfulness of Heydric's assassination: accepting this view, indeed, one should conclude that also Abraham Lincoln's killing was, at the end of the day, a legitimate act. Something that no one could conceivably allege and that those suggesting this reading of the Heydrich's killing deny themselves. From the similarities thus outlined one should actually draw the opposite conclusion. That is, also camouflaging and surprise attacks nowadays could actually fall within the prohibition of assassination insofar and as long as they are conducted outside a battlefield properly so called against a person that is not directly involved in military activities at the time he is being targeted. After all, the whole "doctrinal" controversy sparked by the episode of the parked-car booby trap recounted above does in fact stem from a very similar scenario[1015], *i.e.* the setting of an explosive device hidden within a civilian environment outside a proper battlefield.

It is apparent that the analysis conducted so far has left out any reference to the most "problematic" individual in the context of the II World War, saving it for last. In the last phases of WW II the British elaborated so called "Operation Foxley", a set of various plots to kill Adolf Hitler. Such plots included, inter alia, plans to send in a sniper with the task of killing Hitler during his morning walks, to take him out with a Bazooka, to poison him or to try accomplishing the deed through an explosive suitcase appositely delivered to him[1016]. It is also reported that UK officials involved in the elaboration of such plots did not discussed over the legality of such measure as

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1012 UK, *Manual of Military Law*, 1958.

1013 See, accordingly, Joseph B. Kelly, *Assassination in Wartime*, *supra*, p. 104.

1014 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 31.

1015 See *supra*, Ch. III, para. 2.

1016 UK National Archives, Declassified Documents, *Operation Foxley*, 1944, Doc. HS 6/624.

much as they did over the opportunity and effectiveness of this sort of solution[1017]. Nonetheless, this should not imply that they believed such measure to be in compliance with the laws of war. First, because they themselves defined such plots as assassinations[1018]. Second, and perhaps bearing a higher evidentiary weight to this end, because among the measures contemplated was the use of poison, a means of warfare that was widely recognized to be unlawful already at the time. The fact that the British did not discuss about the lawfulness of these plots, therefore, does not disclose the existence of a real consensus among UK officials about the compatibility of the measures discussed with the laws of war. It rather proves that they simply did not care about the lawfulness or lack thereof of such attempts. In fact, correspondence in this regard by UK Lt. Col. R. H. Thornley shows that, at the end of the day, he did consider assassination to be as tantamount to murder[1019]. More revealing about the perceived unlawfulness of assassination at the time remains therefore the well-known assessment dating to 1939 that assassinating Hitler would have been "unsportsmanlike"[1020]: the proposed plan was to resort to sniper fire in order to kill Hitler in Berlin in March 1939, *i.e.* six months before the invasion of Poland and the contextual beginning of the ensuing World War II. This reference holds even more value if such simple statement is contrasted against the horrors that operators were otherwise used to witness during World War II.

As it appears, whereas it is true that the II World War saw the advent of new kinds of guerrilla warfare with an increased involvement of resistance movements in hostilities[1021], this evolution did not trump reticence towards targeting and killing pre-selected individuals suspected of belonging to the countering belligerent party, within or outside the context of armed hostilities.

b) Practice Post WW II: the U.S.

In subsequent years this reticence remained or, at the very least, large-scale programs involving the use of premeditated lethal force against selected individuals were kept secret and publicly denied.

1017 Uri Friedman, *Targeted Killings: A Short History - How America came to embrace assassination, in Foreign Policy*, 13 August 2012, available at http://foreignpolicy.com/2012/08/13/targeted-killings-a-short-history/.

1018 Marjorie Miller, *Britain Reveals Plot to Kill Hitler*, in *Los Angeles Times*, 24 July 1998.

1019 Marjorie Miller, *Britain Reveals Plot to Kill Hitler*, in *Los Angeles Times*, 24 July 1998.

1020 James MacManus, *Britain's Secret Plan to Shoot Hitler Could Have Prevented War - but the government decided it was 'unsportsmanlike'*, in *Mirror*, 22 February 2016.

1021 Jorge Palacios, *Los Guerrilleros en el Derecho Humanitario*, in *Juridica. Anuario del Departamento de Derecho de la Universidad Iberoamericana*, 1973, p. 619.

One good such example may be traced to U.S. led the Phoenix Program. The Phoenix Program was a method of counterinsurgency aimed at the "neutralization" of Viet Cong operatives in South Vietnam during the U.S. involvement in the Vietnam War[1022]. According to official sources, "The Phoenix" was "a set of programs that sought to attack and destroy the political infrastructure of the Lao Dong Party [the Viet Cong Infrastructure] in South Vietnam"[1023]. However, admittedly, in order to disrupt the Viet Cong Infrastructure, "a preferred tactic was to kill local government officials as a warning for others not to come back"[1024]. In this regard, the Phoenix Program has been defined as a "plan for intensive targeted killing pursued by the Americans during the Vietnam War"[1025]. It is reported that in the framework of the Phoenix Program more than 26,000 Viet Cong were targeted and killed by US Navy Seals and Provincial Reconnaissance Units operating in enemy territory[1026].

Whereas the assertion that the Phoenix Program as a large-scale targeted killing plan should be deemed *per se* unlawful due to its contrariety to the laws of war and human rights law[1027] has been highly criticized[1028], cables dating back to the time the Phoenix Program was run show its real nature, describing the operations undertaken under its auspices as follows: during the war in Vietnam, South Vietnamese government hit-teams operated at night in a campaign of terror against key Viet Cong leaders, assassinating them in the region of the Mekong River delta[1029].

As a matter of fact, regardless of which one is the correct factual assessment, it is submitted here that two considerations deserve particular attention and may be attached heightened significance for the purpose of the present analysis. First of all,

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1022 For a thorough report of the Phoenix Program see in particular Dale Andrade, *Ashes to Ashes: The Phoenix Program and the Vietnam War (Issues in Low-Intensity Conflict Series)*, Lexington, 1990.

1023 Col. Andrew R. Finlayson, *A Retrospective on Counterinsurgency Operations*, in *Studies in Intelligence*, *Journal of the American Intelligence Professional*, Washington, 2007.

1024 Dale Andrade and Lieut. Col. James H. Willbanks, *CORD/PHOENIX Counterinsurgency Lessons from Vietnam for the Future*, in *Military Law Review*, Charlottesville, 2006, p. 17.

1025 Tal Tovy, *The Theoretical Aspect of Targeted Killings: The Phoenix Program as a Case Study*, in *Journal of Military and Strategic Studies*, Calgary, 2009, p. 2.

1026 Uri Friedman, *Targeted Killings: A Short History*, *supra*.

1027 Satish Kumar, *CIA and the Third World: A Study in Crypto-Diplomacy*, 1981, New Delhi, p. 102 and William Blum, *Killing Hope: U.S. Military and the CIA Interventions since Wolrd War II*, 1995, Monroe, pp. 131 and 132.

1028 Tal Tovy, *The Theoretical Aspect of Targeted Killings: The Phoenix Program as a Case Study*, *supra*, p. 12.

1029 Joseph B. Kelly, *Assassination in Wartime*, *supra*, p. 110, reproducing cables from AP Correspondent Malcolm W. Browne of 14 June 1964.

while it was running, the Phoenix Program was shrouded in secrecy[1030]. Whereas such secrecy may have been justified under policy considerations and effectiveness-related necessities, the fact that the entire operation was not initially acknowledged hints at the belief within the U.S. administration itself that the operation presented more than a few legal downfalls and criticalities. Moreover, also those academic studies that tend to justify the Phoenix Program do so suggesting that it was not indeed an extermination plan but that it was rather used as a means of "pacification" that would induce those targeted to surrender before actually engaging in killing operations[1031]. In so doing they actually avoid to tackle the legal permissibility of targeted strikes aimed at the elimination of guerrilla suspects and rather try to trump the factual grounds in relation to which such a legal assessment should be conducted.

The fact that the program was perceived as unlawful already when it was undertaken but that those running it intended to carry it on regardless of considerations related to its legality is best mirrored in the reported words of the then U.S. president. Indeed, noting that the Viet Cong did employ "assassination techniques", Richard Nixon made clear his intention to act in reciprocity and thus purportedly stated "we've got to have more of this. Assassinations. Killings"[1032]. Most notably, moreover, the unveiling of the Phoenix Program was one of the main factors leading to the adoption, in 1976, of Executive Order 11905 concerning the "prohibition of assassination"[1033] within the U.S. domestic legal system.

In the context of the Cold War, the U.S. often resorted to proxy-wars and further strategies to avoid deploying ground troops also in other contexts. One such strategy, perhaps the most significant in relation to the present study, has been the so called "Salvador option", consisting in "sending CIA and Special Forces operatives to create, arm, train and finance assassination teams and death squads"[1034]. Thus, not only throughout the Vietnam War but up until the 1991 Gulf War the U.S. "continued to carry out assassination, 'snatch' or capture operations and other military attacks"[1035].

In response to rumors and public indiscretions related to so called assassination plots allegedly orchestrated by the U.S., in 1975 a Select Committee to Study Governmental Operations led by US Senator Frank Church was mandated to

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1030 See, in general, Mark Moyar, *The Phoenix and the Birds of Prey: The CIA's Secret Campaign to Destroy the Viet Cong*, Annapolis, 1997.

1031 To this end see for instance Dale Andrade, *Ashes to Ashes: The Phoenix Program and the Vietnam War (Issues in Low-Intensity Conflict Series)*, *supra*.

1032 Mark Moyar, *The Phoenix and the Birds of Prey: The CIA's Secret Campaign to Destroy the Viet Cong*, Annapolis, 1997, p. 167.

1033 To this end, in higher detail, see *infra* in the present chapter.

1034 Phyllis Bennis, *Drones and Assassination in the US's Permanent War*, in Marjorie Cohn, *Drones and Targeted Killing, Legal Moral and Geopolitical Issues*, Northampton, 2015, p. 53.

1035 *Ibidem*.

inquire into the US government-sponsored attempts to kill political and military leaders abroad and evaluate the legality and morality of such practices[1036]. The "Church Committee" concluded that the U.S. were involved in several assassination plots and found that, absent an armed conflict, the pre-meditated killing of foreign leaders should not be an instrument of US foreign policy as "incompatible with American principle, international order, and morality"[1037]. It did not however absolutely exclude the possibility to resort to assassination, considered to be a viable option in case of imminent danger threatening the life of the nation[1038].

Even before the Church Committee published its report, CIA directors issued internal memos instructing CIA personnel to refrain from plots aiming at taking the life of foreign leaders[1039]. Abiding by the recommendations issued by the Church Committee, in 1976 U.S. President Gerald Ford issued Executive Order 11905 which outlawed "political assassination"[1040]. The ban was revised and re-issued in very similar terms by U.S. president Carter in 1978, under Executive Order 12306. It was finally U.S. president Ronald Regan to issue the current version of the ban, *i.e.* Executive Order 12333, on 4 December 1981.

The relevant section of the order reads: "no person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination"[1041]. The Executive Order further provides that “no agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order”[1042]. Notably, the Executive Order did not provide a definition of either the term "political" or "assassination"[1043]. Commentators have moreover underlined that it did not expressly forbid other kind of lethal operations abroad[1044]. What is even more problematic is the actual applicability of the ban to wartime killings. It has been noticed in this regard that, regardless of the considerations advanced by Dick Cheney when he relieved Michael J. Dugan as Air Force Chief of Staff, relating to the concern that targeting and killing Saddam

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1036 Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, in *Boston College International and Comparative Law Review*, Boston, 2003, p. 19.

1037 Church Committee, *Alleged Assassination Plots Against Foreign Leaders*, 1975, p. 1.

1038 Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, *supra*, p. 21.

1039 *Ibidem*.

1040 *Executive Order No. 11905*, 1976, Section 5.

1041 *Executive Order No. 12333*, 4 December 1981, § 2.11.

1042 *Ibidem*, § 2.12.

1043 Robert A. Rowlette Jr., *Assassination is Justifiable Under the Law of Armed Conflict*, Newport, 2001, p. 8; Stephen J. Berg, *The Operational Impact of the U.S. Assassination Ban*, Newport, 2001, p. 2.

1044 Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, in *Boston College International and Comparative Law Review*, *supra*, p. 21.

Hussein directly during wartime could be contrary to E.O. 12333[1045], the ban's applicability to wartime killings is at the very least controversial[1046].

Considering that the work of the Church Committee was what finally prompted the enactment of the ban, a look at its report in this regard proves more than useful. In fact, none of the five episodes of assassination or attempted assassination taken into consideration by the Committee in its report, namely the killing or attempted killing of Patrice Lumumba, Fidel Castro, Rafael Trujillo, Ngo Dinh Diem and Rene Schneider, were referred to the context of hostilities, and were indeed more concerned with the public roles maintained by the targets of such attempts. Following this line of reasoning, it may perhaps be possible to conclude that the ban on assassination posed by E.O. 12333 actually does not aim at restraining the possibility to target and kill enemy combatants or fighters during wartime[1047]. As a consequence, the adoption of the executive order within the U.S. domestic legal system may not prove so crucial in evaluating the existence of an *opinio juris* contrary to "assassination" during war time. Pointing to an opposite conclusion, it has indeed been noticed that in recent years the executive order has been interpreted in a way that allows the U.S. to individually target its "enemies" without such practice being considered as an infringement[1048].

Regardless of the applicability of Executive Order 12333 to premeditated killing of selected individuals during wartime, however, the U.S. stance seemed to be sufficiently crystallized at the the end of the 1980s-beginning of the 1990s also in this regard. Thus, U.S. president Bush argued that U.S. military officers in Panama supporting the coup attempt of 3 October 1983 refrained from undertaking the targeted killing of General Manuel Noriega because that would have amounted to assassination[1049].

More recently the U.S. attacked military targets in Tripoli and Benghazi, including Colonel Muammar Qaddafi's headquarters in the al-Azziziya Barracks. The U.S. reported this attack to the U.N. Security Council pursuant to Article 51 U.N. Charter. They thus claimed the attack to be a measure of "self-defence" in response to a series of acts sponsored by the Libyan government and allegedly amounting to an armed attack against the U.S. In its characterization of the use of armed force against Qaddafi's headquarters as self-defence, the U.S. made particular

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1045 On Executive Order 12333 see *infra*, in this same paragraph.

1046 Alvin W. Keller Jr., *Targeting the Head of State During the Gulf Conflict, A Legal Analysis*, Newport, 1992, p. 1.

1047 *Ibidem*, p. 4.

1048 Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, *supra*, p. 19.

1049 Robert A. Rowlette Jr., *Assassination is Justifiable Under the Law of Armed Conflict*, *supra*, p. 8; Stephen J. Berg, *The Operational Impact of the U.S. Assassination Ban*, *supra*, p. 3.

reference to the terrorist attacks on U.S. soldiers in a Berlin discotheque that had taken place earlier that year. It is difficult to verify the civilian impact of such actions: Libya alleged that 36 civilians and one soldier died; other reports suggest that all those deceased were military personnel. Qaddafi was uninjured, safe in an underground bunker.

The targeting of Qaddafi's headquarters arguably made of this attack an "assassination" attempt. Nonetheless, U.S. officials made every effort to deny that they were targeting Colonel Qaddafi directly[1050]. In fact, in relation to such episode Secretary of State George Schultz declared: "we have a general stance that opposes direct efforts of that kind, and the spirit and intent was in accord with *those understandings*" (emphasis added)[1051].

This example is particularly revelatory of how the U.S. approach to the matter at issue has actually turned entirely in recent years. It could in fact be argued that at the time the U.S. was not engaged in an armed conflict with Libya and that, therefore, the targeting of Qaddafi's headquarters in Tripoli has nothing to do with the laws of armed conflict. Nonetheless, as reported, the U.S. justified its use of force under self-defence pretences. Now, notoriously, the use of force in self-defence is a *jus ad bellum* justification. Just as notorious is the fact that, once the conditions for use of force *ad bellum* are met, then the force actually deployed in such context must comply with *jus in bello* requirements in order for any such given action to be lawful under international law. As for the first of this assessments, the U.S. claimed compatibility with *jus ad bellum* criteria turns the question to the second requirement, that is compliance with *jus in bello*. It is exactly in this connection that the U.S., in order to allege the strikes compliance with international law categorically denied any intent to target and kill Col. Qaddafi directly. What it alleged, was that the attacks aimed at hindering future attacks from Libya both deterring them with the strikes performed and taking a decisive blow at Libyan infrastructures (not human beings)[1052]. In particular, it should be stressed, the U.S. response did not allege that targeting a person directly would not fall within U.S. policy. It rather stated that it was the U.S. understanding that an action of the sort would not be in compliance with the law. In so doing, the U.S. expressed a clear stance that it perceived as legally binding a *jus in bello* prohibition to undertake an operation whose final aim would be to deprive of his or her life a pre-selected person.

1050 Robert A. Rowlette Jr., *Assassination is Justifiable Under the Law of Armed Conflict*, *supra*, p. 8; Stephen J. Berg, *The Operational Impact of the U.S. Assassination Ban*, *supra*, p. 3; Patricial Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 640.

1051 Department of State Bulletin, *U.S. Exercises Right of Self Defense Against Libyan Terrorism*, Washington, 15 June 1986.

1052 Veron A. Walters, *Letter of the U.S. Permanent Representative to the United Nations*, 15 April 1986.

Some authors have noticed that, whereas the one expressed above was the official U.S. position, "critics alleged that, in fact, at least one objective had been to kill Qaddafi"[1053]. However, the very justification of the act not in terms supporting the lawfulness of the targeting but based on the ground that the attack was not aimed at killing Qaddafi reinforces the argument that the U.S. believed Qaddafi could not legitimately be targeted and killed in that context.

Under this perspective, the evaluation expressed by former CIA Director Robert Inman that assassination is a "cowardly approach to cowardly acts"[1054] falls perfectly in place as does the assertion that "a free society will tolerate killing civilians in bombing raids but not government-sanctioned murder"[1055].

This understanding was made if possible even clearer just a few years later, during the Gulf-War. In fact, when in 1990 Kuwait was invaded by Iraqi forces, some suggested that the easiest way to solve the crisis would be to directly target Saddam Hussein, the then head of State of Iraq: "an overt attack against the person of Saddam Hussein, carried out by uniformed members of the opposing armed forces would have been entirely permissible. […] There being no dispute concerning the legality of using force, there can likewise be no dispute that Saddam Hussein, as commander of the Iraqi armed forces, was as legitimate a target as was Admiral Yamamoto"[1056]. As a matter of fact, numerous attacks were directed at Saddam Hussein's headquarters and command centres.

In relation to military attacks at Saddam Hussein's headquarters, U.S. General H. Norman Schwartzkopf rejected in the strongest terms allegations that the U.S. was trying to kill Iraq's president Saddam Hussein. In his words, "that's not the way how we fight anyway. We don't go out and kill one person"[1057]. Even more significantly, when the then U.S. Air Force Chief of Staff, General Michael Dugan, suggested to single out Saddam Hussein, attack and kill him directly, not only such option was wholeheartedly discarded[1058] but he was immediately fired[1059]. Accordingly, then U.S. Secretary of Defence Richard Cheney expressed a view very similar to that advanced by General H. Norman Schwartzkopf: "I'm not sure anybody would lose a lot of sleep over a situation in which he (Hussein) happened to be in a facility – if, in fact, it were a command center – and it was struck. But the notion that we go after

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1053 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 56.

1054 Shapiro, *Assassination: Is It a Real Option?*, in *Newsweek*, 29 April 1986, p. 21.

1055 *Ibidem.*

1056 Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 51.

1057 Jonathan Schell, *Heads of State Lie in the Cross Hairs*, in *Newsday*, 4 July 1993, p. 33.

1058 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 284.

1059 Alvin W. Keller Jr., *Targeting the Head of State During the Gulf Conflict, A Legal Analysis*, Newport, 1992, p. 1; George J. Church, *Saddam in the Cross Hairs*, in *Time*, 8 October 1990, p.29.

him individually or try to target him in some fashion is something we simply don't do"[1060].

In connection with this incident, General Shwartzkopf further stated that the US did not "have a policy of trying and kill any particular individual"[1061]. Taking steps from this statement, some authors have argued that "the issue was really about policy, not law"[1062]. Actually, some scholars had suggested a similar conclusion already in 1992, proposing that targeting foreign leaders was avoided "as a matter of comity"[1063].

Contrary to this reading of such events, however, are further episodes confirming this tendency. Thus, also when coming closer to the new century, U.S. practice in this regard did not change, as did not change the *opinio juris* underlying it. When confronted with the possibility to target and kill suspected terrorists who were allegedly involved in the bombings of U.S. embassies in Kenya and Tanzania, the Clinton administration rejected any such plan, making public its understanding that the U.S. could target terrorist infrastructures, but not terrorists directly[1064]. It has been reported that "of all the words you just can't say in the modern White House […] none is more taboo than assassination"[1065].

In fact, after the II World War the CIA commissioned a secret study on assassination (estimated date of publication 31 December 1953) which has been declassified pursuant to the U.S. Freedom of Information Act on 15 May 1997[1066]. This study defined assassination in terms very similar to those nowadays used to define targeted killings: assassination "is here used to describe the planned killing of a person who is not under the legal jurisdiction of the killer, who is not physically in the hands of the killer, who has been selected by a resistance organization for death"[1067]. In another passage of this report, it is farther stressed that "The essential point of assassination is the death of the subject"[1068]. Following this description of the relevant conduct, the study firmly states: "It should be assumed that it will never

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1060 Jonathan Schell, *Heads of State Lie in the Cross Hairs*, in *Newsday*, 4 July 1993, p. 33.

1061 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 346.

1062 *Ibidem*, p. 346.

1063 Chris A. Anderson, *Assassination, lawful homicide, and the butcher of Baghdad*, in *Hamline Journal of Public Law & Policy*, 1992, p. 303.

1064 Robert A. Rowlette Jr., *Assassination is Justifiable Under the Law of Armed Conflict*, 25 October 2001, p. 8.

1065 Stephanopoulos, *Why we should kill Saddam*, p. 34.

1066 CIA, *A Study Study of Assassination*, 31 December 1953 (estimated).

1067 CIA, *A Study Study of Assassination*, *supra*, p. 6.

1068 CIA, *A Study Study of Assassination*, *supra*, p. 8.

be ordered or authorized by any U.S. Headquarters […] No assassination instructions should ever be written or recorded"[1069].

At the end of the 1980s a Law Professor at the University of Illinois expressed the view that "It is the longstanding position of the United States Government that assassination of anyone - let alone a head of state or head of government (e.g., Muammar el-Qaddafi) - is a violation of the laws and customs of warfare and therefore an international crime"[1070].

In fact, again at the end of the 1990s, when the U.S. launched a raid in Afghanistan whose final aim was allegedly the killing of Osama Bin Laden due to his involvement in terrorist attacks against U.S. interests, the U.S. Chairman of the Joint Chiefs of Staff General Henry H. Shelton was eager to make clear that they "were not going directly after Osama bin Laden"[1071], even though they had indeed characterized the raid as a measure of self-defence in accordance with Art. 51 of the UN Charter[1072].

More recently, in this regard, a former CIA director has declared: "Back in 1999 and 2000 I was the Chief of Station in Islamabad […] we had Afghan tribals who were shadowing Bin Laden, they were telling us in any given day where he was, what town he was in and we had […] lethal authority and yet, if one of them had had the opportunity to shoot Bin Laden with a pistol, we would have had to tell him *no, you must not*, because that would have been assassination. We were asking them instead to try and arrest him. Had he resisted arrest, they would have been able to use violence in their own defense […] we could not engage in activities at that time whose intent was to produce the death of Bin Laden […] Now, clearly, we have come a long way since then. And activities which before 9/11 we would have said were assassination, now we are simply exercising as our sovereign right of self-defence"[1073].

1069 CIA, *A Study Study of Assassination*, *supra*, p. 6.

1070 Francis A. Boyle, *What's Still Wrong With Political Assassination*, in *New York Times*, 27 January 1989, available at http://www.nytimes.com/1989/02/09/opinion/l-what-s-still-wrong-with-political-assassination-law-of-the-land-899289.html.

1071 Washington Times, *Cohen Says Strike Targeted bin Laden*, 14 October 1998, p. 13.

1072 Note however that this characterization rapidly changed within the U.S. administration. It has indeed been reported that only a few months later the then U.S. Defense Secretary William Cohen disclosed to U.S. troops in Saudi Arabia that it was indeed the very aim of the U.S. strike to "hit" Osama Bin Laden. To this end see Mark V. Vlasic, *Assassination and Targeted Killing, A Historical and Post-Bin Laden Legal Analysis*, *supra*, p. 311.

1073 Robert Grenier, *Remarks at Rules of Engagement: the Legal, Ethical and Moral Challenges of the Long War*, in Center for the Study of the Drone and Carnegie Council for Ethics in International Affairs, *Rules of Engagement: the Legal, Ethical and Moral Challenges of the Long War*, 21 February 2014, *Podcast available at* www.carnegiecouncil.org.

c) Practice Post WW II: Other States

Notably, besides U.S. practice and expressed *opinio juris* with regard to the (lack of) possibility and lawfulness of targeting selected enemies directly, other states actually undertook several targeted killings since the end of World War II. Nonetheless, for a rather long time-frame – ranging up to the start of the new century really – they maintained a public stance similar to that of the U.S.

Israel actually endorsed a policy of targeted killing since the very initial phases of its history[1074]. In fact it has indeed been reported that Israel continued to target for death pre-selected individuals in third countries since it acquired its independence[1075]. Such policy had a sudden pick after the well-known terrorist attacks at the 1972 Munich Olympics[1076], when Israel started haunting those allegedly responsible for the massacre. In what was named *Operation "Wrath of God"*, Israeli secret agents tracked 13 persons allegedly belonging to Black September and to the Palestine Liberation Organization (the Palestinian groups suspected of having orchestrated the massacre) and, in the lapse of one year, killed all of them wherever they were found, including a waiter of Moroccan origins who met his death in Norway despite being surely uninvolved in the 1972 massacre[1077]. *Operation "Wrath of God"* continued then for over 20 years.

In addition to the reported operation, Israel has since then started to deploy lethal force against its perceived "enemies" in a systematic fashion, both within and outside the occupied territories[1078]. In the mid-1980s, Israel made several attempts at the life of PLO's leader Yasser Arafat with air attacks, sniper fire and booby-trapped cars[1079]. A relatively well-known episode of legally-debated targeted killing is that which saw the death of Khalil al-Wazir, otherwise known as Abu Jihad. The person in question was a military strategist of the Palestine Liberation Organization, suspected of having orchestrated several terrorist attacks against Israel and then residing with his family in Tunis, where the P.L.O. was based. On 16 April 1988, in

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1074 Steven R. David, *Fatal Choices: Israel's Policy of Targeted Killing*, in Efraim Inbar, *Democracies and Small Wars*, London, 2003, pp. 139-141.

1075 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 27.

1076 Nilanjana Bhowmick, *Terror at the Olympics: Munich, 1972*, in *Time*, 5 August 2013, available at http://time.com/24489/munich-massacre-1972-olympics-photos/; Wills Robinson, *Revealed: How Palestinian Terrorists Tortured Israeli Hostages before 1972 Munich Olympic Massacre*, in *The Daily Mail*, 1 December 2015, available at http://www.dailymail.co.uk/news/article-3341784/New-horrifying-details-emerge-1972-Munich-Olympic-massacre-including-one-athlete-castrated-hostages-watched.html.

1077 Alexander B. Calahan, *Countering Terrorism: The Israeli Response to the 1972 Munich Olympic Massacre and the Development of Independent Covert Action Teams*, 1995, pp. 15 - 35.

1078 Steven R. David, *Fatal Choices: Israel's Policy of Targeted Killing*, in *Democracies and Small Wars*, *supra*, pp. 139-141.

1079 *Ibidem*.

a joint effort by the Mossad secret service and the Sayeret Matkal, nine Israeli agents, at first apparently disguised as civilians but wearing uniforms at the moment of the raid, entered his house in Tunis and killed him in front of his family[1080]. Most notably, Israel has flatly rejected any involvement in the killing of Abu Jihad for over 20 years[1081], giving permission to release details pertaining to the operation only in 2012[1082].

During the so called *First Intifada*[1083], Israel kept on targeting pre-selected individuals both inside the occupied territories and in third countries' territories. One more case of this sort was the killing in Malta of Fathi Shikaki, a prominent member of the Islamic Jihad[1084]. Similarly, on 16 February 1992 Israel undertook a cross-border action deploying pre-meditated lethal force in Lebanon at the detriment of Sheik Abbas Musawi, killing the leader of the pro-Iranian Party of God, considered as an anti-Israel terrorist organization, through helicopter fire[1085].

One of the best assessments of Israeli practice during the *First Intifada* was advanced by the then U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, who expanded on the activities of Israeli authorities in the following terms: "Members of the Israeli Defence Forces, border guards and undercover units of the security forces were said to be responsible for a large number of extrajudicial, summary or arbitrary executions of Palestinians and other Arabs in the Occupied Territories. Allegedly, lethal force has been used in situations in which it was neither necessary nor proportionate. […] With regard to the operation of undercover forces, it was reported to the Special Rapporteur that their task was to

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1080 New York Times, *P.L.O. Accuses Israel in Killing of Senior Arafat Deputy in Tunis*, 17 April 1988; Washington Post, *High Backing Seen for Assassination*, 21 April 1988; BBC News, *Abu Jihad Killing: Israeli Censor Releases Commando's Account*, 1 November 2012. This episode is also reported in Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, p. 299, who, however, argues: "The Security Council denounced the Israeli action. Yet, the resolution made no mention of assassination".

1081 Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, *supra*, p. 330.

1082 BBC News, *Abu Jihad Killing: Israeli Censor Releases Commando's Account*, 1 November 2012.

1083 By the name of First Intifada is known the Palestinian uprising against Israel's occupation of Gaza and the West Bank, taking place from 1987 to 1991. On this topic see, *inter alia*, Katherine Wingate, *The Intifadas*, New York, 2004; Yashar Keramati, *Twenty Years in the Making: The Palestinian Intifada of 1987*, in *Nebula, a Journal of Multidisciplinary Scholarship*, San Francisco, 2007, pp. 107 -122*;* and Kamel Abu Jaber, *The Palestinians: People of the Olive Tree*, Amman, 1995.

1084 Matt Frankel, *The ABCs of HVT: Key Lessons from High Value Targeting Campaigns Against Insurgent Terrorists, Studies in Conflict and Terrorism*, Washignton, 2011, p. 22.

1085 Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, in *Hofstra Law Review*, 1991, p. 322.

work among the Palestinian population to identify those defined as 'activists' and to assassinate them"[1086].

Again, in January 1996 Israel killed in Gaza Yahya Ayyash, "the Ingeneer", a renowned bomb maker belonging to Hamas, with a booby-trapped mobile phone[1087]. In 1997, Israel conducted a covert operation to poison the chief of Hamas's political bureau in Amman, Khaled Meshal, being however discovered by Jordanian authorities and consequently forced to provide the victim with an antidote[1088].

Whereas, as the few episodes thus recounted clearly show, Israel has steadily maintained over time a policy of pre-selecting individuals allegedly affiliated to terrorist organizations, haunting them down and depriving them of their lives, such State has consistently rejected before the international community any allegation of direct involvement in targeted killings until very recently. Mirroring such approach, when inquired upon Israel's stance on policies of targeted killings in the 1990s, Israeli officials categorically stated that "the [Israeli Defense Force] wholeheartedly rejects this accusation. There is no policy and there never will be a policy or a reality of wilful killing of suspects […] the principle of the sanctity of life is a fundamental principle of the [Israeli Defense Force]"[1089].

In fact, Israel itself has for a long time avoided to disclose or even mention interpretations that would consider the targeting and killing of enemies as legal and viable options, be it during wartime or in times of peace. Interviewed about the feasibility of targeting Saddam Hussain in a press conference held back in 1993 together with the head of the Israeli air force, the then Israeli Prime Minister Rabin stated: "No doubt we would like to see the disappearance of Saddam Hussein as the tyrant and the dictator of Iraq. But this is not our business. This is one of our hopes, but there is nothing we can do about it"[1090].

d) Inerlocutory Analysis on State Practice before the Turn of the Century

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[1086] Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1993 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1993/46, 23 December 1992, para. 379. For further references to the Special Rapporteur's approach to targeted killings before the dawn of the new century see *infra*, Ch. IV, para. 2, sub-para. 2.2(c).

[1087] Steven R. David, *Fatal Choices: Israel's Policy of Targeted Killing*, in *Democracies and Small Wars*, *supra*, p. 141.

[1088] *Ibidem*. See also, accordingly, Matt Frankel, *The ABCs of HVT: Key Lessons from High Value Targeting Campaigns Against Insurgent Terrorists, Studies in Conflict and Terrorism*, *supra*, p. 22.

[1089] B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, *Activity of the Undercover Units in the Occupied Territories*, Jerusalem, 1992. See, accordingly, *Alston Report*, *supra*, para. 13.

[1090] abcNEWS, *Israel's Secret Plan to Kill Saddam*, available at www.abcnews.go.com.

It has been suggested that the decision to target specific individuals with lethal force is not unprecedented. One of the most common examples reported in this connection is the US targeting of Mexican bandits in a border "war" with Mexico[1091]. Inferring from, *inter alia*, such experience, it has therefore been held that "subjecting individual combatants to lethal force has been a permitted and lawful instrument of waging war"[1092]. Nonetheless, one thing is to report that something has been done before, whereas one very different thing is to assess that such conduct has been lawfully maintained. Moreover, the structure of international law has much evolved since 1916 and it is not sure that what was lawful then is still lawful now. Finally, it is certainly true that the use of lethal force in war is not *per se* outlawed. What is however problematic with targeted killings is that in such practice lethality is not a mere outcome of the use of force but rather the final aim of the action. It is this feature that should be contrasted with those limitations that, even during wartimes, may restrict the lawful means and method of warfare.

As it emerges from the episodes reported above, even the most excruciating challenges posed to the integrity of the system of international law during a conflict such as World War two could not overcome once and for all the deep reticence with which States have considered practices whose final aim is to target for death a pre-selected individual. Admittedly, plans in this regard were formulated and sometimes even executed. All of them, however, remained in a shadow area between permissibility and unlawfulness. What is sure, is that not even the occurrence of World War two and the revolution that such conflict represented for fighting strategy were actually able to strike a final blow at the longstanding prohibition of assassination. In particular, even in the framework of the plans theorized and those conducted to target individuals directly, no official position was assumed to the end that those plan would have been in conformity with the dictates of relevant international law norms.

This became all the more apparent with the stance assumed by States following the end of World War two and maintained in the following armed conflicts. Thus, the State that is currently at the forefront of war by targeted killing, namely the U.S., has for long maintained the view that the geography of conflicts do impose territorial restrictions to the scope of application of the laws of armed conflict or that, in any case, it would not be possible to use lethal force against pre-selected individuals outside a war zone. Pursuant to this understanding, until the dawn of the

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[1091] See to this end, inter alia, William C. Banks, *Are Targeted Killings by Drones Outside Traditional Battlefields Legal?* in Peter. L. Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law and Policy*, Cambridge, 2015, p. 130 and William C. Banks and Peter Raven-Hansen, *Targeted Killing and Assassination: The US Legal Framework*, *supra*, p. 688.

[1092] William C. Banks, *Are Targeted Killings by Drones Outside Traditional Battlefields Legal?*, *supra*, p. 130.

new century (and, officially, for a few years afterwards) the U.S. has constantly criticized Israeli actions aimed at killing members of Hamas or the Hezbollah in the West Bank[1093]. It is for this same reason that the U.S. refrained from killing Osama Bin Laden in 1998, when it had the occasion to do so[1094].

2.2. The Approach of the International Community to Targeted Killings before the Turn of the Century

a) The Position of the UN Security Council

The centrality of assassination as a prohibition to target and kill pre-selected individuals with premeditation under certain circumstances even though the targeted persons maintain a nexus with an ongoing armed conflict starkly emerges from a UN Security Council Resolution dating back to 1988. It is submitted here that such a Resolution mirrored the international community's granitic understanding that: a) even though a person is a *de facto* member of a terrorist organization; b) even when such terrorist organization actually has an organized structure and conducts armed activities of the quality and quantity that may be sufficient to qualify it as an organized armed group; c) even when such terrorist organization/armed group is involved in an ongoing armed conflict with a State, in no case a person may be haunted down and killed with premeditation with a plan whose final aim is to deprive that person of his life, at the very least not when that person is not directly involved in hostile acts at the time of targeting and, especially, not when such a person is far removed from the battlefield. It is also submitted that, as it will be shown in the next paragraphs, this understanding has remained largely unchallenged until the first decade of the new century.

In this sense, following the Israeli orchestrated killing of Abu Jihad, the United Nations Security Council, in an unprecedented fashion, qualified the episode as an "assassination" proper. In particular, with Resolution 611/1988, adopted by 14 votes to none (US abstaining), the Security Council "noted with concern that the aggression perpetrated on 16 April 1988 in the locality of Sidi Bou Said has caused loss of human life, particularly the assassination of Mr. Khalil al-Wazir" and "condemned vigorously the aggression"[1095].

[1093] Mary Ellen O'Connell, *Interview with Ken Dilanian*, in *Los Angeles Times*, available at http://articles.latimes.com/2012/oct/09/nation/la-na-drone-legal-20121009.

[1094] See *supra*, Ch. IV, para. 2, sub-para. 2.1(b).

[1095] UN Security Council, *Res. 611/1988*, 22 April 1988.

Notably, during the works that led to the deliberation U.S.' Representative Okun, whilst motivating U.S.'s abstention from the vote with wider considerations, did qualify the killing under discussion as a "political assassination"[1096].

It has been elaborated that "had the Abu Jibad affair occurred in the context of warfare without the issues of sovereignty and territoriality, the Israeli action may have been acceptable, for the commando team was in uniform at the time of the assault"[1097]. However, provided that belligerent occupation shows indeed the existence of a state of war under international law, what is mostly relevant here is not so much the existence of a state of war or the existence of a nexus between those involved in the targeted killing (perpetrators and victims) with such conflict, but the fact that the killing occurred miles away from the theatre of hostilities and it was specifically aimed at depriving the target of his life. Also noteworthy, in fact, is that, according to the accounts that led the UN Security Council to adopt the above-reported resolution, those who conducted the operation were uniformed personnel. Therefore, the episode could not be properly defined either as a treacherous killing nor as a "peacetime" killing proper. What this episode entails is that killings of this sort simply cannot be performed because they are far away from the frontlines and underpin the quotidian life of persons others than those targeted as well as that of the victims that may be terrorist, may be combatant or fighters, but are surely not involved directly in hostilities when killed in this fashion.

It is hardly surprising that only in 2012, when practices of targeted killing have been widely adopted by states other than Israel, the latter fully recognized its involvement in the targeted killing of Abu Jihad[1098]. Letting the retributive nature of the operation re-surface, the hit-man literally stated "Abu Jihad was involved in horrible acts against civilians. He was a dead man walking. I shot him without hesitation"[1099].

b) The International Court of Justice

The International Court of Justice never had occasion to consider in depth practices of targeted killing either within or outside the framework of hostilities. What it did have occasion to do, however, was to take cognisance of *Contras*' activities in Nicaragua.

1096 UN Security Council, *1988 UN SCOR, 43rd Session*, UN Doc. S/PV.2810.

1097 Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law, supra*, p. 307.

1098 The Guardian, *Israel Acknowledges Killing Palestinian Deputy in 1988 Raid*, 1 November 2012, available at www.theguardian.com.

1099 *Ibidem.*

In this connection, the ICJ expressed the consideration that the Pamphlet provided by the U.S. to the *Contras* actually encouraged practices contrary to international humanitarian law, thereby including "assassinations". It seems relevant to point out that the ICJ used this exact wording since, if it were only referring to civilians or otherwise protected persons, it would have used a vocabulary proper to war time murder, not instead to assassination, which implies a *quid pluris*. Notably, in this connection, the manual advised: "it is possible to neutralize carefully selected and planned targets", adding "if possible, professional criminals will be hired to carry out specific selective jobs".

Most of the recounted examples in the ICJ's decision at hand actually confirm first of all the existence and continuous significance of certain limitations to the use of lethal force reported in the previous chapter even during war times. Perhaps even more significantly, those examples are expressly tied to a general prohibition of assassination that, according to the Court, is therefore not trumped by the existence of an armed conflict.

c) *The Work of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*

The international monitoring body that has had occasion to work at closest contact with issues related to kill-lists, death squads, targeted–killings and other practices of the sort is with no doubt the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.

Whereas reference to practice has till now taken only into account well-known episodes of assassination (or else, alleged assassination) bearing nexus with armed conflicts, it is important to notice that practices of war-time targeted killing have been proliferating and employed in a diffuse and widespread manner in many states around the globe, particularly in contexts of non-international armed conflicts. It is exactly in this connection that the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has had occasion, over the years, to collect information regarding thousands of pre-meditated killings of pre-selected individuals, conducted in the most diverse manners and with the most diverse techniques.

It is submitted here that a brief survey of the work conducted by the subsequent holders of this special procedure mandate proves crucial to see current practices of wartime targeted killings in perspective. First, because it provides a scale against which it is possible to contrast current trends and policies dimension. Moreover, because it offers the insight and view of subsequent Special Rapporteurs on the issue. Finally, because from these reports it is possible to gather States' *opinio juris* on the lawfulness or lack thereof of practices of targeted killings in times of armed conflict, helping in discerning which ones should be regarded as

assassinations and which ones should be instead be qualified as permissible targeted killings.

It emerges from the first report authored by the then UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions Amos Wako and addressed to the late UN Commission on Human Rights, that the "deliberate killings of targeted individuals" were at the time either justified by States as armed confrontations ("encounters") or flatly denied by them, rather than vindicated as killings compatible with the laws of armed conflict and international humanitarian law, even when occurring in the general framework of non-international armed conflicts. In other cases, according to the Special Rapporteur, governments tended to justify the systematic killing of "specific categories of persons" qualifying those targeted as traitors, insurgents, communists, or as persons cooperating with the enemies[1100]. The Special Rapporteur's reference to violations of the laws and customs of war were admittedly not focused on episodes of assassination or targeted killing, but to massacres and depopulation[1101]. However, further considerations contained in the report testify the Special Rapporteur's aversion for practices of targeted killing: in particular, albeit not defining them as instances of assassination, the Special Rapporteur unequivocally condemned the killing of peasants, teachers and other intellectuals as well as members of opposition groups suspected by those targeting them of involvement with terrorist or *guerrilla* groups[1102]. With specific reference to the situation in South Africa and bordering countries where South-African agents operated at the time, the Special Rapporteur indeed made a finding of assassinations, without however specifying which conducts he deemed to fall within such categorization[1103]. In this context, the Special Rapporteur also pointed to the existence of a "death list" elaborated by the South-African government, naming supposed SWAPO (South-West African People's Organization) supporters and providing a Special Task Force of the police to kill them, both within South-African territory and cross-border, in Namibian refugee camps. He unequivocally condemned the existence of this list as much as the practice of targeting those therein named for death[1104].

In the strongest of terms, then, the Special Rapporteur condemned as summary or arbitrary executions the targeted killing of persons "who are perceived to be the leaders of groups opposed to government or just critics of the

1100 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1983 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1983/16, 31 January 1983, paras. 91 and 96.

1101 *Ibidem.*, para. 103.

1102 *Ibidem.*, paras. 103, 107, 117 and 118.

1103 *Ibidem.*, para. 200. The Special Rapporteur seems to use in this case the term assassination as a synonym of extra-judicial execution of pre-selected individuals.

1104 *Ibidem.*, paras. 181-184.

government"[1105]. Similarly, the Special Rapporteur condemned as extrajudicial executions the targeted killing of *campesinos* suspected of affiliation with the FARC in Colombia[1106] as well as the operations performed by "death squads" in Guatemala[1107].

In his following report, the Special Rapporteur Amos Wako returned to the question of lethal operations aimed at pre-selected individuals in countries affected by internal armed conflicts. In this connection, the Special Rapporteur underlined the involvement of "death squads" in the large number of killings perpetrated at the detriment of persons suspected of being guerrilla fighters[1108]. He moreover labelled as "assassinations" the killings of perceived opponents of the regimes by those same death squads[1109]. He further noted that in some instances perceived opponents were "assassinated even outside the territories of the countries concerned"[1110].

The Special Rapporteur also had the occasion to take notice with concern of a rather diffuse practice among states to hire assassins in order to target and kill suspected opposition to the ruling governments or regimes[1111].

"Assassination" of political opponents was at the centre of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions's work also in 1986, when he received allegations that Honduras had pursued and killed trade-union leaders for political motives[1112]. Perhaps more significantly for the present purposes, the Special Rapporteur referred to assassination also in the context of internal armed conflicts. Thus, he reported that in Guatemala persons suspected of opposing the government ware "assassinated" by "death squads", be them civilians suspected of supporting opposition groups, or people killed by the guerrilla due to suspicion of their cooperation with the government[1113]. The targeted, extrajudicial killing of non-combatants suspected of opposing the ruling government was also condemned in relation to the situation in Chad[1114].

1105 *Ibidem.*, paras. 219 and 220.

1106 *Ibidem.*, para. 140.

1107 *Ibidem.*, paras. 148 and 151.

1108 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1984 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1984/29, 21 February 1984, para. 87.

1109 *Ibidem.*, paras. 90, 93, 96 and 109.

1110 *Ibidem.*, paras. 100, 104 and 105.

1111 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1985 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1985/29, 12 February 1985, para. 72.

1112 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1986 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1986/21, 7 February 1986, para. 72.

1113 *Ibidem.*, paras. 151, 152, 157 and 174.

1114 *Ibidem.*, para. 68.

In 1987, the Special Rapporteur again condemned the extrajudicial killings of trade unionists, workers and students labelled by the government of El Salvador as terrorists at the hands of death squads mandated by military officers to haunt them down and kill them[1115].

In his report of 1988, the Special Rapporteur reported "assassinations" and "assassination attempts" conducted, respectively, by Libyan and Iraqi authorities against people living outside those countries' territories allegedly and known by the countries' authorities for their opposition to the ruling regimes. In neither one of these cases was a conflict ongoing within the territory of the relevant state when the report was issued by the Special Rapporteur. As a consequence, the conducts he labelled as assassination were peacetime extra-judicial executions of political opponents (or attempted so)[1116].

The Special Rapporteur made reference to an alleged pattern of target and kill operations by Yemeni security forces in 1988, demanding clarifications in relation to approximately 250 "assassinations", mainly of members of the National Opposition Front, allegedly perpetrated by agents of the security services[1117]. With reference to Colombia, the Special Rapporteur noted that members of security forces, including the police and the army intelligence units, as well as paramilitary groups had killed exorbitant numbers of persons in the previous year. In this connection, he expressed concern that most people who had fallen victims of these killings were trade-union leaders, activists, members of political parties, farm workers, human rights lawyers, judges and journalists[1118]. Similar concerns were expressed in relation to the killings of individuals suspected of collaboration with guerrilla groups perpetrated by Salvadorian "death squads"[1119]. As extrajudicial killing were also unequivocally considered the deprivation of lives of Peruvian villagers who had been suspected by the security forces of supporting the guerrilla of Sendero Luminoso[1120]. A very similar if not identical pattern concerned the Special Rapporteur in relation to the Philippines, where vigilante groups going by the name of Integrated Civilian Home Defence Forces had targeted and killed numerous individuals believed to be affiliated

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1115 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1987 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1987/20, 22 January 1987, paras. 94-98.

1116 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1988 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1988/22, 19 January 1988, paras. 115, 118 and 125.

1117 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1989 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1989/25, 6 February 1989, paras. 287-289.

1118 *Ibidem.*, para. 60.

1119 *Ibidem.*, para. 93.

1120 *Ibidem.*, para. 213.

to the New People's Army, acting with governmental support[1121]. Again, deployment of lethal force by state agents in the framework of counter-insurgency situations was observed by the Special Rapporteur in relation to Burma, where the army targeted and killed persons suspected of having ties with opposition groups[1122].

In 1990, the Special Rapporteur observed once more a pattern of "assassinations" of persons believed to have ties with insurgent groups in Colombia. According to the information received by the Special Rapporteur, such persons were targeted by paramilitary groups and members of State security forces. All the episodes described in the report reveal that the majority of those killed were individually targeted by their perpetrators[1123]. The Special Rapporteur also noticed the persistence of extrajudicial executions allegedly performed by various Salvadorian paramilitary groups and death squads acting with the State's connivance or complicity. As in the previous case, the episodes recounted in the Special Rapporteur's account show that most of those killed were selectively targeted by paramilitary groups[1124]. With regard to the situation in the Philippines, the Special Rapporteur received "concerning allegations that the life of 25 persons whose names reportedly appeared on two so-called hit lists were in jeopardy". According to the report, the practice of compiling hit lists had already been experimented in the country, causing numerous deaths pursuant to targeted killings defined by the special rapporteur as summary and arbitrary executions. The Special Rapporteur also underlined that most of those thus killed were targeted due to their alleged sympathies for the New Peoples' Army and that some of them were deprived of their lives in the areas where they lived[1125].

With regard to Israel, the Special Rapporteur noted that some "persons had been killed by IDF [Israeli Defence Force] troops during house-to-house searches" and that, in this connection, "few of such cases of death had been adequately investigated"[1126]. In his final assessment, the Special Rapporteur made clear that the existence of "death lists carrying the names of prospective targets of assassination" was an element of concern due to its contrariety to international law[1127].

1121 *Ibidem.*, paras. 220-222.

1122 *Ibidem.*, paras. 53-55.

1123 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1990 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1990/22, 23 January 1990, paras. 114-132.

1124 *Ibidem.*, paras. 151-156.

1125 *Ibidem.*, paras. 334-337. For a list of names of persons killed and the description of the circumstances leading to their death see Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1990 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1990/22, 23 January 1990, paras. 338-341.

1126 *Ibidem.*, para. 268.

1127 *Ibidem.*, para. 452.

A wave of extrajudicial killings defined as "political assassinations" by the Special Rapporteur characterized the conduct of State authorities in Colombia also in the following year. Victims were generally members of opposition parties as well as union members, peasants and indigenous leaders killed in regions where guerrilla groups were active[1128]. Episodes of assassination were also registered by the Special Rapporteur in the context of the internal Peruvian armed conflict, where both the State's armed forces and the armed opposition group named Sendero Luminoso were considered responsible for extrajudicial executions. In this regard, many of the episodes described by the Special Rapporteur involved intentional use of lethal force intentionally directed at individuals singled out as suspected members or co-operators of guerrilla groups[1129]. In general, the Special Rapporteur confirmed the continued practice of targeting and killing suspected members of guerrilla and rebel forces in the context of internal armed conflicts, considering them with concern and often explicitly defining them as extrajudicial executions[1130].

With specific regard to Turkey, the Special Rapporteur gave account of the several allegations received concerning the conspicuous number of killings of suspected members of the Turkish guerrilla executed by the State's security forces[1131]. In this context, the Special Rapporteur further defined as extrajudicial executions the killing of persons labelled as terrorists by Turkish authorities[1132]. In Israel, following the outburst of the first Intifada, the Special Rapporteur expressed concern, *inter alia*, at the practice of members of the Israel Defence Force to conduct house-to-house searches and killings as well as killings following suspects-pursuit[1133]. As some of the examples reported in the report show, some of such killing properly fall within the notion of targeted killing of suspected or alleged terrorists or *guerrilla* fighters[1134].

1128 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1991 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1991/36, 4 February 1991, paras. 109-117.

1129 *Ibidem.*, paras. 362-364.

1130 *Ibidem.*, paras. 79 (in relation to Sudan), 218 – 221 (in relation to Indonesia, including persons executed in East Timor), 375 (in relation to Peru), 393-398 (in relation to the Philippines), 432 (in relation to Senegal), 434, 435 and 438 (in relation to Somalia), 473 (in relation to Sri Lanka), 566 (in relation to Zaire).

1131 *Ibidem.*, para. 501.

1132 *Ibidem.*

1133 *Ibidem.*, para. 292.

1134 *Ibidem.*, para. 295, let. (e) and (k), respectively describing the killing of We'al al-Haj Hassan, wanted by Israel since the very first phases of the uprising and killed by Israel troops while he was crossing the border with Jordan and the killing of Basel Hamarsheh, killed by a headshot after being wanted by Israel for nearly two years.

Most of these findings have been confirmed in the following years. Thus, in his 1992 report the Special Rapporteur pointed out that he had received "many allegations concerning summary and arbitrary executions during armed conflicts" and stressed that, in considering and acting on such cases. he took into account both norms of international human rights law and those stemming from the law of war regime[1135]. The Special Rapporteur further clarified that "executions occurring during armed conflict, internal disturbances, or states of emergency", "suppression of members of the political opposition groups, including the activities of death squads" were one of the main situations in which summary or arbitrary deprivation of life occurs[1136]. In higher detail, the report recounted episodes of "hired assassins" being paid by drug traffickers with the acquiescence of the Colombian military in order to kill pre-selected FARC members[1137], instances of "death squads" being deployed by the government of Guatemala to perform "assassinations and disappearances"[1138], of plans aimed at the "assassination" of Humberto Ortega, then military leader of the Sandinista National Liberation Front in Nicaragua[1139], of arbitrary killings of persons suspected of sympathizing for or participating in the activities of armed opposition groups in Ethiopia and a campaign "directed against all those alleged to support [a] separatist movement" within that country[1140], of "mass extrajudicial killing of individuals suspected of having taken part in the uprising" perpetrated by the Iraqi military forces[1141], of arbitrary executions of peasants suspected by the Peruvian military of cooperating with Sendero Luminoso[1142].

In 1993 the Special Rapporteur expanded on the activities of Israeli authorities in the following terms: "Members of the Israeli Defence Forces, border guards and undercover units of the security forces were said to be responsible for a large number of extrajudicial, summary or arbitrary executions of Palestinians and other Arabs in the Occupied Territories. Allegedly, lethal force has been used in situations in which it was neither necessary nor proportionate. […] With regard to the operation of undercover forces, it was reported to the Special Rapporteur that their task was to work among the Palestinian population to identify those defined as 'activists' and to assassinate them"[1143]. In the same year, the Special Rapporteur gave

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1135 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1992 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1992/30, 31 January 1992, para. 28.

1136 *Ibidem.*, para. 617.

1137 *Ibidem.*, para. 129.

1138 *Ibidem.*, para. 222.

1139 *Ibidem.*, para. 388.

1140 *Ibidem.*, para. 178.

1141 *Ibidem.*, para. 316.

1142 *Ibidem.*, para. 450.

1143 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1993 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1993/46, 23 December 1992, para. 379.

account of continued targeted killing of persons suspected of having links with armed opposition groups in El Salvador[1144], of extrajudicial, summary or arbitrary executions of persons suspected of sympathizing or of being part of Sendero Luminoso in Peru[1145], of executions of persons suspected of being members of the PKK in Turkey also taking the form of targeted killings[1146], of targeted arbitrary killings perpetrated by Colombian death squads acting in coordination or with the connivance of State authorities in the framework of counter-insurgency operations, at the detriment of civilians located in rural areas where guerrilla groups operate[1147].

The following year the Special Rapporteur revealed a similar pattern in Colombia, where "members of the armed forces, the police and paramilitary groups cooperating with them were reported to be responsible for extrajudicial, summary or arbitrary executions. Very often, the victims of such killings were said to be civilians who were perceived by the security forces as potential guerrilla collaborators"[1148]. Still in such context, the Special Rapporteur labelled as assassinations the killings of persons suspected of being members of guerrilla groups, further expressing particular concern for lists of suspects wanted by state authorities[1149]. The same has been ascertained by the Special Rapporteur in relation to Turkey, where members of the PKK or persons alleged to be involved in the PKK were targeted for killings in the framework of the internal armed conflict between Turkey and the Kurdish Worker's Party in the south-eastern part of the country[1150]. The Special Rapporteur qualified such killing as extrajudicial, summary or arbitrary executions and expressed concern at allegations of "security raids carried out by soldiers in cooperation with special teams and village guards"[1151]. Similarly, in the context of the Israeli-Palestinian confrontations the Special Rapporteur noticed that "An upsurge in alleged extrajudicial killings of Palestinian civilians by Israeli forces, including special undercover units, has been reported since the deportation to southern Lebanon of more than 400 alleged supporters of the Islamic Resistance Movement (Hamas) and Islamic Jihad in December 1992. Since then, more than 100 Palestinians were allegedly killed by Israeli security forces. At least 70 of these killings were said to have taken place in the Gaza Strip"[1152].

1144 *Ibidem.*, para. 241.
1145 *Ibidem.*, para. 463.
1146 *Ibidem.*, paras. 582 and 606.
1147 *Ibidem.*, para. 189.
1148 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1994 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1994/7, 7 December 1993, paras. 221 and 222.
1149 *Ibidem.*, para. 228.
1150 *Ibidem.*, para. 594.
1151 *Ibidem.*, para. 596.
1152 *Ibidem.*, para. 382.

The following year, once more, the activities of paramilitary groups targeting and killing persons suspected of belonging to the FARC in Colombia raised the Special Rapporteur's concerns[1153]. The same is true in relation to violations of the right to life in the Arab territories. In this connection the Special Rapporteur reported a new wave of extrajudicial, summary or arbitrary executions, including many deprivations of life caused by Israeli Defence Force snipers' shots[1154]. In particular, the Special Rapporteur took issue with Israeli policy of targeting for death pre-selected individuals believed to belong to hostile armed groups as well as with such State's alleged shoot-to-kill policy. As far as the targeted killing policy is concerned, the Special Rapporteur reported that "Six Fatah members […] were allegedly killed by Israeli undercover units in an operation allegedly aimed at their elimination. According to the reports received, no attempts were made to arrest the men"[1155]. He qualified such practice as one of extrajudicial killing and asked Israel for an explanation to that end. As for Israel's shoot-to-kill policy, which appeared to "continue unabated" regardless of the ongoing negotiations for a peace settlement, the Special Rapporteur expressed "deep concern", suggesting that such practice proved "the existence of a pattern of abuse of force"[1156]. In this regard, he urged "the Government to conduct exhaustive and impartial investigations into all alleged violations of the right to life, with a view to identifying those responsible and punishing them, and to grant adequate compensation to the victims"[1157].

Again, in the context of Colombia the Special Rapporteur described as extrajudicial killings the targeted deprivations of life of indigenous leaders, members of political parties and peasants described by the Colombian authorities as guerrilla leaders dead in encounters with the army[1158].

In his 1997 Report the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions introduced a section appositely dedicated to "Violations of the right to life and terrorism"[1159]. After expressing "his repugnance at terrorist acts", the Special Rapporteur condemned targeting practices, i.e. the premeditated intentional killing of individually selected persons, in the strongest of terms. In this regard, he stated: "in some countries, the Government's reaction to terrorist groups has resulted

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1153 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1995 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1995/61, 14 December 1994, paras. 100-103.

1154 *Ibidem.*, paras. 190-192.

1155 *Ibidem.*, para. 192, let. (c).

1156 *Ibidem.*, para. 194.

1157 *Ibidem.*

1158 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1996 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1996/4, 26 January 1996, para. 131.

1159 *Ibidem.*, paras. 68-70.

in counter-insurgency strategies aimed at targeting those suspected of being members, collaborators or sympathizers of those groups. In this context, the Special Rapporteur wishes to emphasize once more that the right to life is absolute and must not be derogated from, even under the most difficult circumstances. Governments must respect the right to life of all persons, including members of armed groups, even when they demonstrate total disregard for the lives of others"[1160]. Most notably, the Special Rapporteur's assessment concerned not only general suspected terrorists but even "members of armed groups". In his addendum to the said report, the Special Rapporteur tackled some of this practices directly. He condemned the targeted killing of people suspected of cooperating with "the National Army of Democratic Kampuchea" in Cambodia[1161]; he expressed concern for people belonging to opposition groups being treated as military targets in Colombia[1162]; he stressed that, if substantiated, allegations of targeted operations jointly conducted by the Iraqi army and the Kurdish Democratic Party against armed groups in the north of the country would amount to blatant violations of the right to life of those killed[1163]; he reported of an urgent appeal he had sent in relation to a failed "assassination attempt" at former Rwandan Minister of Interior Seth Sendashonga when members of the Rwandan Patriotic Army tried to kill him[1164]; he expressed his regrets for the "assassination" of Theodore Miriung, the Premier of the Bougainville Transitional Government, on 12 October 1996 in Papua New Guinea, during the peace process between the Government and the BRA[1165].

The same logic underlies the following reports issued by the Special Rapporteur. In 1998, he reiterated that "he notes with concern that in some countries Governments have adopted counter-insurgency strategies aimed at targeting those suspected of being members, collaborators or sympathizers of those groups, leading to further violations of the right to life. In this context, the Special Rapporteur emphasizes once more that the right to life is absolute and must be respected even under the most difficult circumstances"[1166]. In 1999, the new Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Ms. Asma Jahangir assumed a

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1160 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1997 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1997/60, 23 December 1996, para. 69.

1161 *Ibidem.*, para. 92.

1162 *Ibidem.*, para. 116.

1163 *Ibidem.*, para. 268.

1164 *Ibidem.*, para. 292.

1165 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum to the 1997 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1997/60/Add.1, 23 December 1996, para. 380.

1166 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1998 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1998/68, 23 December 1997, para. 74.

stance similar to that characterizing her predecessor's reports on targeting persons suspected of being involved with armed opposition groups. In particular, she stressed that "in some countries Governments have adopted counter-insurgency strategies, often involving excessive and indiscriminate use of force, aimed at targeting those suspected of being members, collaborators or sympathizers of those groups, leading to further violations of the right to life"[1167]. In so doing, she expressly recalled the UN Human Rights Committee's General Comment No. 6 on the Right to Life, stressing that the "supreme right to life" may not be derogated from even in times of public emergency threatening the life of the nation. She thus concluded that " Governments engaged in action against armed groups must ensure that its own forces act in accordance with relevant international standards when carrying out their duties"[1168].

In the addendum to such report, the Special Rapporteur again made reference to practices of targeted killing, most notably in Turkey and Colombia. In relation to Colombia, the Special Rapporteur made reference to urgent appeals she had previously transmitted to the government, including an appeal concerning the activities of paramilitary troops that stormed villages looking for indigenous community leaders with the intent to haunt them down and kill them, due to their alleged support to the guerrilla[1169]. As for Turkey, the Special Rapporteur reported the replies received by the government in relation to the targeted killing of alleged PKK members. Notably, in this connection Turkey rejected any responsibility on factual grounds, rather than alleging any legal justification to target and kill alleged members of an armed groups[1170].

Whereas in her 2000 Report the Special Rapporteur do not replicate the sections dedicated to the targeted killing of suspected terrorists and members of armed groups in the 1997, 1998 and 1999 reports, she did express deep concern "over the continuing violence which has resulted in a growing number of extrajudicial killings in Colombia", underlying that "it is a cause for great concern that the civilian population, including the large IDP population, appear to have been deliberately targeted in the ongoing conflict"[1171]. It is indeed with reference to a pattern of extrajudicial killing in Colombia that, in her Addendum to the Report, the Special Rapporteur drove attention to the phenomenon of lists compiled with names

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1167 Asma Jahangir, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1999 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1999/39, 6 January 1999, para. 48.

1168 *Ibidem*.

1169 Asma Jahangir, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum to the 1999 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1999/39/Add.1, 6 January 1999, paras. 59 and 60.

1170 *Ibidem.*, para. 242.

1171 Asma Jahangir, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *2000 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/2000/3, 25 January 2000, para. 77.

of persons targeted for killing[1172]. In particular, the Special Rapporteur underlined that most of those named on the lists were peasants or indigenous leaders suspected by Colombian authorities of being members of the FARC. In general, those persons were haunted down and killed by paramilitary groups allegedly acting with the complicity or connivance of the State[1173]. It was furthermore reported that also in other States, such as in Nepal, "Civilians suspected of being supporters of the armed movement having been deliberately targeted and extrajudicially executed"[1174].

Other reports authored by the Special Rapporteur, especially some country-specific reports, actually tackled the issue of targeted killings during wartime and are therefore worth exploring. At the beginning of the 1990s, Israeli authorities rejected any allegation that Israel Defence Forces operated under a shoot-to-kill policy, stating that "According to standing army orders and guidelines, using live ammunition would be allowed (a) in a life-threatening situation; and (b) during suspect arrest procedures, when several 'preconditions for the use of firearms prevail'. Firing live ammunition, under any circumstances, was to be used only as 'a last resort with the intent to capture the suspect alive and not to kill him'"[1175]. Contrary to this assessment, it was however reported that Israel had been deploying undercover units composed by IDF troops, border guards and Shin Beth operatives tasked to "assassinate" Palestinians suspected of supporting the then ongoing uprising[1176]. Most notably, Israeli authorities never challenged their reported involvement in the alleged "assassination" of suspected Palestinian terrorists from a legal standpoint. They never did, in other words, alleged that such killings would not amount to assassination or any other form of extrajudicial killing because, for instance, those persons were to be considered legitimate targets. To the contrary, they replied on factual grounds. Thus, the Chief of General Staff Gen. Ehud Barak discarded accusations that Israeli undercover units had been deployed to target and kill Palestinian suspects[1177]. All in all, the Special Committee concluded as follows: "A preoccupying development already brought to the attention, of the Special Committee is the increasing use of "undercover" units to infiltrate the population and carry out "death squad" killings. During the fourth year of the uprising, between 8 December 1990 and 7 December 1991, 34 Palestinians are reported to have been killed by undercover units. During the first four months of the fifth year of the

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1172 Asma Jahangir, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum to the 2000 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/2000/3/Add.1, 2 February 2000, paras. 128-140.

1173 *Ibidem.*

1174 *Ibidem.*, para. 335.

1175 Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, *1992 Report to the General Assembly*, UN Doc. A/47/509, 21 October 1992, para. 42.

1176 *Ibidem.*, para. 84.

1177 *Ibidem.*, para. 71.

uprising, between 8 December 1991 and 8 April 1992, 20 Palestinians were killed by such units"[1178].

Also in the following years the Special Committee defined the premeditated and deliberate killing of pre-selected individuals performed by Israeli undercover units as extrajudicial killings[1179]. So much so that the Special Committee recommended the Israeli government "with regard to a better protection of the right to life and physical integrity" to "establish rules of engagement for its security forces that are clear and fully respect human rights standards, and apply open-fire regulations strictly in conformity with the principles of necessity and proportionality; exercise utmost restraint in responding to outbreaks of violence and fully investigate all incidents of shooting; put an immediate end to the activities of undercover units and, in particular, to extrajudicial and summary executions perpetrated by such units"[1180].

Similarly, in a joint report concerning the situation of human rights in Colombia the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments have registered and condemned in peremptory terms the intentional, premeditated killing of pre-selected individuals in the context of an internal conflict. In particular, the Special Rapporteur has characterized as "assassinations" the killing of trade union leaders deemed to be part of guerrilla groups by Colombian authorities[1181] and that of persons previously abducted by the security forces and, once more, believed to be cooperating with the guerrilla[1182]. At the same time, the Special Rapporteurs underlined that civilians in that context often found themselves in the cross-hairs, noticing that members of the guerrillas were responsible for the "assassination" of persons accused of being informers of the security forces[1183]. The Special Rapporteurs also revealed the existence of a plan resting with the command of the armed forces and going with the name "coup de grace", aimed at targeting and killing the leadership of opposition groups perceived

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1178 *Ibidem.*, para. 799.

1179 Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, *1995 Report to the General Assembly*, UN Doc. A/50/463, 22 September 1995, para. 744.

1180 *Ibidem.*, para. 768, Recommendation (i). Most notably, this recommendation has been reiterated *verbatim* in following years. Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, *1997 Report to the General Assembly*, A/52/131/Add.2, 14 November 1997, para. 641, Recommendation (i).

1181 Sir Nigel Rodley, UN Special Rapporteur Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Bacre Waly Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, *Joint Report, Visit by the Special Rapporteurs to the Republic of Colombia*, UN Doc. E/CN.4/1995/111, 16 January 1995, para. 44.

1182 *Ibidem.*, para. 44.

1183 *Ibidem.*, para. 73.

or else deemed as members of *guerrilla* forces[1184]. In this regard, they underlined that this plan included the compilation of a list of persons to be haunted down and deprived of their lives and characterized such killings as "assassinations"[1185]. They reported that victims of such extrajudicial killings and assassinations continued to be, in the majority of cases, persons suspected of having ties with or being members of the guerrilla: "Areas of armed conflict continue to be the scenario of large-scale human rights violations and abuses by members of the security forces, paramilitary or "private justice" groups often said to cooperate with them, and the armed insurgent groups.[…] In these areas, the armed forces allegedly continue to apply a counterinsurgency strategy based on the concept of "national security", whereby everybody who is known or suspected to be linked with the guerrillas is regarded as an internal enemy. According to the information received, in the areas labelled as "zonas rojas" (red zones), where the insurgents are active and armed confrontations take place, the security forces view virtually all civilians as collaborators of the subversion, an allegation which was denied by the members of the armed forces met by the Special Rapporteurs"[1186]. In this connection, the Special Rapporteurs also reported that "Cooperation between the drug traffickers and the military allegedly comprises protection of the installations used for the processing of cocaine and joint operations involving military and paramilitary groups, directed against guerrillas and their suspected supporters in areas of insurgent activities. It was also reported that no efforts have been made on the part of the military to disarm or dismantle private armed groups in the service of drug traffickers and/or landowners"[1187].

Finally, the report described the situation in Colombia as follows: "Colombian society is beset by criminality and violence. Over the past few years, this problem has not diminished, despite the numerous legislative reforms and initiatives described in this report. Each year, 28,000 to 30,000 murders are committed. The perpetrators are armed groups in the service of drug traffickers and private landowners; paramilitary organizations allegedly linked to the security forces; "death squads", sometimes including off-duty police, killing people suspected of criminality or otherwise considered as "disposable"; the armed forces and police themselves, who kill suspected guerrillas and civilians perceived as supporting them; guerrillas who kill members of the security forces, members of opposing factions, those who refuse to continue the armed insurgency or to continue to belong to an insurgent group and sometimes civilians; and ordinary criminals"[1188].

1184 *Ibidem.*, para. 46.
1185 *Ibidem.*
1186 *Ibidem.*, para. 24.
1187 *Ibidem.*, para. 72.
1188 *Ibidem.*, para. 103.

d) Interlocutory analysis: the Stance of the International Community before the Turn of the Century

From a survey of the Special Rapporteur's annual reports, it seems that "assassination" is generally used in a descriptive fashion rather than as a term of art. This impression seems evident when referring to the Special Rapporteur's account of "assassinations or massacres committed by revolutionary, counter-revolutionary or separatist movements, assassinations by elements of the police or governmental armed forces or militia which are not under effective governmental control and assassinations by private individuals or groups employed to defend the economic interests of large landowners, drug traffickers or others"[1189]. It appears that the term is interchangeably used to describe killings performed by State agents, insurgent groups, criminal networks and individuals. It also emerges that no specific requirements other than a selective use of lethal force are deemed relevant for the qualification of an act as an assassination or as a differentiated form of arbitrary or summary execution. For instance, there are no contextual references that would seem to point at different understandings of the notion of assassination during peacetime and in times of armed conflicts, either internal or non-international. Similarly, there is no hint as to which consequences are attached to the qualification of an episode as an assassination as opposed to arbitrary or summary execution. It would actually seem that the notions of assassination and arbitrary execution are used interchangeably when the latter refers to the killing of an individually selected person. Thus, the Special Rapporteur's language does not provide hints that would permit to refine the definition of assassination.

Nonetheless, a survey of these documents proves crucial insofar as it shows that in internal armed conflicts the pre-planned selective killing of persons suspected of involvement in the insurgents' activities has traditionally been understood as extrajudicial, arbitrary killing, with no further ado.

The only killing of insurgents not considered to violate the victim's right to life is thus the killing taking place during an armed confrontation. This holds true even in relation to persons that are undisputedly involved in armed activities, as shown, for instance, by the concerns expressed by the Special Rapporteur for the assassination plans orchestrated against Humberto Ortega in Nicaragua.

All in all, a survey of the various reports issued by the Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions shows that practices of targeted killings have often been deployed in the context of non-international armed conflicts. They have taken the most various forms, ranging from hiring assassins to deploying

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[1189] Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1992 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1992/30, 31 January 1992, para. 612.

paramilitary death squads, from compiling kill lists to sending out specific orders for taking out specific individuals. What emerges is that in all those cases these have been deemed as unlawful practices in and by themselves and as extrajudicial executions when actually leading to the death of the targeted persons. This assessment holds true regardless of the status of the person targeted. In many of the examples recounted by the various Special Rapporteurs the victims of targeted killings were actually well-known members of armed groups involved in armed conflicts. What they all had in common is that the operations depriving them of their lives were undertaken with the final aim to deprive them of their lives and, moreover, that in the moment when their killing actually occurred they were not actively engaged in hostilities.

What makes various reports so interesting to this end, furthermore, is the fact that targeting states never challenged the qualification of such acts as extrajudicial killings, rather preferring to deny any involvement in the relevant actions and rejecting the Special Rapporteurs' accounts on factual grounds.

Now, a general survey of the Special Rapporteurs' work shows that the term assassination has been used frequently but to cover the most diverse situations. Thus, admittedly, such term appears to have been resorted to in a descriptive rather than normative fashion, usually as a synonym of extrajudicial killing. Be that as it may, it is hereby submitted that what is mostly relevant in this regard is not how the label itself has been used in these instances but rather that the conduct underneath that label has been consistently deemed unlawful. Thus, every instance of premeditated, intentional killing of pre-selected individuals not taking direct active part to armed activities when targeted has systematically been qualified by successive special rapporteurs as extrajudicial executions, in open violation of international law.

3. TURN OF THE CENTURY, TURN OF LAW?

(1) State Practice Following the Turn of the Century; (1.a) First Episodes of Publicly Recognized Targeted Killing; (1.b) Contradictions and Grey Areas: U.S. Resorting to Targeted Killings while Blaming Israel for Maintaining the Same Conduct; (1.c) First Reactions from the International Community; (1.d) The Escalation of Targeted Killings; (2) Recent and Current Practice; (2.a) U.S.; (2.b) Israel; (2.c) UK; (2.d) Other States.

In order to identify whether or not current trends do have a normative transformative impact on the traditional prohibition of assassination reference should necessarily be made to State practice and *opinio juris* in this regard.

It is generally recognized that customary international law is generated by two components, that is an objective element integrated by the general practice of States (*diuturnitas*) coupled with a subjective element, to be identified in the belief that such practice is in compliance with and dictated by a legal obligation (*opinio juris*)[1190]. Indeed, the Statute of the International Court of Justice binds the ICJ to apply international custom "as evidence of a general practice accepted as law"[1191]. As well-known, the Court itself has found that, in order for customary norms of international law to be deemed into force, "not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.*, the existence of a subjective element is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough"[1192].

The necessary simultaneous presence of an objective and a subjective element as a condition of existence of custom is confirmed by the ongoing work of the

1190 Natalino Ronzitti, *Introduzione al diritto internazionale*, *supra*, pp. 154 and 155

1191 *Statute of the International Court of Justice*, *supra*, Art. 38.

1192 ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, para. 77. See also, to this end, ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, para. 185.

International Law Commission on the identification of customary international law[1193]. Indeed, without *diuturnitas* there could be no custom, understood as a general practice, whereas without *opinio juris* practice may very well be a mere habit, and henceforth there would be no legal obligation.

This assessment does not change with regard to customary norms of international humanitarian law and the laws of armed conflicts[1194].

However, as aptly pointed out by a distinguished author, "international custom presents a dynamic, yet rigid, process of norm creation"[1195]. From this perspective, the traditional view which understands custom as state practice compelled by the belief that the practice is imposed by law is characterized by an "unending circuity"[1196] insofar as a certain behavior assumed as a parameter for the genesis of a norm should itself be undertaken by States in the belief that it is imposed by that norm itself. Thus, it has been correctly stressed, whereas the traditional view may very well describe well-settled and crystallized norms of customary international law, it is not sufficient to explore the creation of new customary rules[1197]. It is not sufficient, in particular, in what has been described as a "process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character […] and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them"[1198].

These considerations particularly impinge upon the meaning of the subjective element identified by the traditional view endorsed in the ICJ's jurisprudence[1199]. In other words, there can be no law without a normative element, which is certainly

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1193 International Law Commission, *Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, UN Doc. A/CN.4/L.872, 30 May 2016,Draft Conclusions 2, 4 and 9.

1194 Paolo De Stefani and Federico Sperotto, *Introduzione al Diritto Internazionale Umanitario e Penale*, *supra*, p. 19.

1195 Jo Lynn Slama, *Opinio Juris in Customary International Law*, in *Oklahoma City University Law Review*, Oklahoma City, 1990, p. 604.

1196 *Ibidem*, p. 605. Judge Mouton of the ICJ expressed in his opinion on *The Continental Shelf* case the view that "[s]uch an uncritical assumption would be like accepting the beauty of a painting because the painter when making it had the conviction that it was beautiful".

1197 Tullio Scovazzi e Maurizio Arcari, *Corso di diritto internazionale, Vol. II*, Milano, 2015, p. 120. See accordingly Jo Lynn Slama, *Opinio Juris in Customary International Law*, *supra*, p. 605.

1198 McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, in *American Journal of International Law*, Washington, 1955, pp. 356 and 357.

1199 For a detailed, historical survey of the meaning attributed to *opinio juris* in different existing modern theories see Jo Lynn Slama, *Opinio Juris in Customary International Law*, *supra*, pp. 614 and ff.

geared around the subjective element accompanying a certain conduct. However, it has been argued, the traditional understanding of *opinio juris* is partly flawed since the belief that a certain behavior complies with a legal obligation is a consequence of the existence of a norm rather than one of its constitutive elements[1200]. This appears all the more true when dealing with the process of formation of customary international law or with norm-changing practice. Thus the question in fact remains as to what happens to practices that are undertaken in a normative vacuum, or even in contrast with established rules of international law, when they are indeed performed with the intention of generating a new normative phenomenon capable of filling the normative gap or overthrowing existing rules.

In this dynamic perspective, what matters the most is not that much whether a State maintains a certain behavior in the belief that such conduct is enjoined by a legal obligation but that when, undertaking a certain practice, a State does so with a normative intention, *i.e.* with the intention of generating a binding, general and abstract obligation which equally applies to all the members of the international community and does not end up to be a privilege exclusive to the acting State. Under this understanding, the subjective element is construed as an act of will rather than as an act of belief. The stark friction between the two has been sharply highlighted in the following terms: "The psychological element might either be: 1) the belief or conviction that something is law; 2) the will of the State that something be law. The *opinio* might be understood as pertaining to what the State knows or believes or it might be thought of as a *voluntas*, a conscious, law-creating will. […] They are not merely different, but mutually exclusive and defined by this exclusion"[1201].

Even when such a normative intention exists, then, it is crucial to assess whether or not States other than those advancing it actually agree with it and start behaving accordingly. This actually turns to the objective element of a custom in formation. Indeed, "practice as regularities of behavior (*usus*) constitutes the material element of the prospective norm"[1202].

As well known, the objective element of State practice includes the conduct undertaken by States in the exercise any of its powers, including its executive,

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1200 Tullio Scovazzi e Maurizio Arcari, *Corso di diritto internazionale*, *Vol. II*, *supra*, p. 120.

1201 Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge, 2005, pp. 417–418.

1202 Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in Ronald St John Macdonald, Douglas M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague, 1983, p. 548; GJH van Hoof, *Rethinking the Sources of International Law*, Deventer, 1983, p. 86; Gennady M. Danilenko, *The Theory of International Customary Law*, in *German Yearbook of International Law*, Munich, 1988, p. 31; Herman Meijers, *How is International Law Made? The Stages of Growth of International Law and the Use of its Customary Rules*, in *Netherlands Yearbook of International Law 1978*, The Hague, 1979, p. 13.

legislative, judicial or other functions[1203]. In particular, practice may include physical as well as verbal phenomena[1204]. Notably, conduct in connection with treaties squarely falls within State practice[1205]. In particular, it is of topical importance for the matters hereby under examination that treaty provisions may very well be understood as forms of evidence of *opinio juris*[1206]. In this regard, it has been noted, "a rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule" codified an existing rule of customary international law, has led to the crystallization of customary international law, has given rise to a general practice that is accepted as law, thus generating a new rule of customary international law[1207].

The crucial point thus turns to how much state practice is needed for the formation of a customary norm[1208]. To this end it has been maintained that the relevant practice should be integrated by "concordant and recurring action of numerous States in the domain of international relations, […] and the failure of other States to challenge that conception at the time"[1209]. In line with this assessment, the International Law Commission has found that "the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent"[1210]. Absent consistency, the practice of a certain State should be given reduced weight[1211].

Since, at the current stage, only a few States around the globe have either the interest or the capabilities of resorting to targeted killing techniques, of great importance to this end is the role covered by acquiescence for the formation of general rules of customary international law. In this regard, it should be noted that neither protest or acquiescence are determinative but they may indeed be of great significance insofar as they may show "whether a given practice is being pursued as a matter of right or merely as a matter of convenience may"[1212]. Accordingly, the

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1203 International Law Commission, *Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, *supra*, Draft Conclusion 5.

1204 *Ibidem, Draft Conclusion 6.*

1205 *Ibidem.*, Draft Conclusion 6, para. II.

1206 *Ibidem.*, Draft Conclusion 10, para. II.

1207 *Ibidem.*, Draft Conclusion 11.

1208 Nils Petersen, *The Role of Consent and Uncertainty in the Formation of Customary International Law*, Bonn, 2011, p. 1.

1209 Manley o. Hudson, *The Permanent Court of International Justice, 1920-1942*, New York, 1943, p. 609.

1210 International Law Commission, *Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, *supra*, Draft Conclusion 8.

1211 International Law Commission, *Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, *supra*, Draft Conclusion 7, para. II.

1212 I. C. MacGibbon, *Customary International Law and Acquiescence*, in British Yearbook of International Law, Oxford, 1957, p. 118. The mentioned author rightly goes on to specify: "Those

International Law Commission has stressed of late that "[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that Sates were in a position to react and the circumstances called for some reaction"[1213].

Therefore, when States start to maintain a certain, unprecedented behavior, two things should be first of all verified: a) first, whether or not the practice indeed fits the parameters of existing legal obligations, including the belief that such practice is consistent with international norms; b) whether the advanced understanding and the objective practice are actually shared by other states.

When the existent legal parameters on a certain issue are not clear or seem to run contrary to the undertaken practice, then, it should be verified whether the practice itself is coupled with a normative intention, that is the expression of a will that a certain interpretation of existing rules, or new rules at all, may develop in the direction taken by the repeated behavior.

It is with this in mind that the following paragraphs will try to identify the existence of a normative intention accompanying targeted killing policies, in order to understand whether they may indeed represent the seed of a new trend of international law towards their legitimization.

3.1. State Practice Following the Turn of the Century

What emerged with the turn of the century was a U-turn in the approach showed by many states to policies of targeted killing. This turn of perspective was motivated first of all by some States' willingness to deploy tools allegedly more effective in countering asymmetric and so defined "terrorist" threats. This new attitude was made possible, in practice, by major technological developments that granted States the possibility to target and kill individuals directly even in remote areas and mountain regions where ground troops could not engage in combat operations with likely chances of success. It was justified with many legal arguments raging from the possibility to engage in an armed conflict in self-defence against

parts of conflicting claims and practices in respect of a particular matter which are common to all of the claimant States and have encountered no protests are, it is submitted, the acceptable *residuum* of the practice or claim which is apt to attain the status of custom; by contrast, protests maintained against certain parts of the claim suffice to prevent those objectionable features from achieving legal sanction". To this end see *Ibidem*, p. 119. See accordingly International Law Commission, *Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, *supra*, Draft Conclusion 6: "Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction".

[1213] International Law Commission, *Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, *supra*, Draft Conclusion 10, para. III.

non-state actors and being involved with them in a non-international armed conflict taking place in several States' territories to the lawfulness of wartime techniques leaving no chances of survival to those made object of attack, whenever and wherever the attack could take place.

With the beginning of the new century Israel has changed its policy towards targeted killing. First of all, it has been reported that it scaled farther up its targeted killing program[1214]. Moreover, whereas until the end of the 1990s the plots designed to target and kill persons allegedly belonging to Hamas, the Hezbollah or other terrorist groups were in principle maintained secret and responsibility to this end was continuously denied[1215], in more recent years Israel has advocated for a shift in the applicable paradigm in its "war on terror".

Thus, whereas it maintained a decade-long practice of targeted killings, as a matter of principle and public policy, in the past Israeli armed forces were only allowed to use force against suspected terrorists in so called ticking bomb scenarios or else when their lives were directly threatened. In more recent years, instead, this policy has been withdrawn, leaving space to an official approval of targeted killing operations, allegedly conducted under the justification of self-defence[1216]. Thus, shortly after the turn of the century, for the first time, "Israel undertook a policy of liquidating Palestinian militants engaged in terrorist activity" and it did so publicly endorsing its actions[1217].

Shortly afterwards, the U.S. followed suit in Israel's advocacy for an enhanced scope of targeted deprivations of lives of pre-selected individuals, as the Bush administration started at first to express public approval of Israel's choice to select and kill individuals perceived as terrorists, then to endorse a targeted killing policy itself.

Thus, already in 2002 Dick Cheney declared: "If you've got an organization that has plotted or is plotting some kind of suicide bomber attack, for example, and they have evidence of who it is and where they're located, I think there's some justification in their trying to protect themselves by preempting"[1218]. Furthermore, in

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1214 Chris Toensing and Ian Urbina, *Israel, the US and "Targeted Killings"*, in *Middle East Research and Information Project*, 17 February 2003, available at http://merip.org/mero/mero021703.

1215 See *supra*, Ch. IV, para. 2

1216 Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, *supra*, p. 327.

1217 Michael L. Gross, *Assassination: Killing in the Shadow of Self-Defense*, *supra*, p. 101.

1218 Chris Toensing and Ian Urbina, *Israel, the US and "Targeted Killings"*, *supra*.

that very same year the first publicly acknowledged U.S. pre-meditated use of lethal force against a selected individual took place[1219].

The fact that the public endorsement of targeted killing policies by the U.S. represented a major evolution in such country's understanding of international law is well mirrored in the words of a former CIA operative who, in connection to the reported occurrence, declared: "It means the rules of engagement have changed […] that would be the first time that they have started doing this kind of thing"[1220].

In fact, other commentators noted the U-turn in U.S. state practice on this issue: "Until the Cheney/Rumsfeld embrace of secret war by assassination, the United States did not follow Israel's adoption of terror to fight terror, which had evolved from the shadows of Israeli policy to an outright avowal of legality in 2000 (after years of disavowal)"[1221].

a) First episodes of Publicly Recognized Targeted Killing

After all, following the terrorist attacks of 9/11, many in the US have argued for the abolition of the internal Executive Order banning assassination[1222]. President George W. Bush himself shortly after those tragic events opened a global man-haunt declaring publicly that Osama Bin-Laden was "wanted dead or alive"[1223]. Besides recalling a pure wild-west rhetoric previously avoided due to its excessive closeness to, if not identity with, outlawry[1224], the use of one such expression contributed to make clear that previous reticence towards policies aiming at going after persons specifically targeted was no longer a concern for the U.S.

It did not come as a surprise, then, that in 2002 the U.S. started deploying combat drones outside zones of active hostilities, targeting a suspected terrorist traveling in a car with other passengers in the month of November and thus killing

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1219 On this drone strike see, *inter alia*, Walter Pincus, *U.S. Strike Kills Six in Al Qaeda*, in *Washington Post*, 5 November 2002; Greg Miller and Josh Meyer, *CIA Missile in Yemen Kills 6 Terror Suspects*, Los Angeles Times, 5 November 2002, available at articles.latimes.com; and John Yoo, *Assassination or Targeted Killings After 9/11*, *supra*, p. 58.

1220 Marjorie Cohn, *A Frightening New Way of War*, in Marjorie Cohn, *Drones and Targeted Killing, Legal Moral and Geopolitical Issues*, Northampton, 2015, p. 16.

1221 Richard Falk, *Why Drones Are More Dangerous Than Nuclear Weapons*, in Marjorie Cohn, *Drones and Targeted Killing, Legal Moral and Geopolitical Issues*, Northampton, 2015, p. 41.

1222 Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, *supra*, 2003, p. 1.

1223 Charles Babington, *Dead or Alive: Bush Unveils Wild West Rhetoric*, in *Washington Post*, 17 September 2001, available at http://www.washingtonpost.com/ac2/wpdyn?pagename=article&node=&contentId=A43265-2001Sep17.

1224 To this end see *supra*, Ch. III, para. 4, sub-para. 4.3.

all those inside the vehicle[1225]. The target of such strike was Qaed Salim Sinan al-Harethi, an alleged senior Al-Qaeda leader, suspected of direct involvement in previous attacks against the USS Cole and other acts of violence directed by Al-Qaeda. His killing represented the first use of an Unmanned Aerial Vehicle (or Drone) for targeting purposes outside a recognized zone of active hostilities[1226].

b) Contradictions and Grey Areas: U.S. Resorting to Targeted Killing while Blaming Israel for Maintaining the Same Conduct

The shift in the U.S. position was however more gradual than it could seem at first glance. Confirming the epochal change in its purported understanding of its international obligations with regard to targeted killing, in fact, the newly asserted U.S. position took a certain period of time to get settled, being all but granitic in the first years of deployment of Unmanned Aerial Vehicles for targeting purposes outside active hostilities. For a certain period of time, in fact, the U.S. administration sent out contradictory messages about its stance on intentional deprivations of lives of pre-selected individuals, also when an armed conflict could be considered as ongoing.

Thus, most notably, even after proceeding in the reported fashion in regards of al-Harethi, the U.S. State Department expressed the view that they had "made repeatedly clear that we oppose targeted killings" in relation to the Israeli killing of Salah Shehade[1227]. By the same token, appearing on CNN one day after Israel assassinated two Hamas members (and also killed two young boys) with an anti-tank missile on 31 July 2002, Secretary of State Colin Powell said: "We have a consistent

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1225 *Al-Aulaqi v. Obama, Complaint*, 30 August 2010, para. 14.

1226 William C. Banks, *Are Targeted Killings by Drones Outside Traditional Battlefields Legal? supra*, p. 130. For a detailed report of the strike that killed Al-Harethi see *inter alia*, CNN, *Sources: U.S. Kills Cole Suspect*, 5 November 2002, available at http://edition.cnn.com/2002/WORLD/meast/11/04/yemen.blast/.

1227 Chris Toensing and Ian Urbina, *Israel, the US and "Targeted Killings", supra*. In particular, in July 2002, the U.S. highly criticized the Israeli bombing of the building where Shehadeh was located both because, as it made clear, it opposed such practices of "liquidation" of suspected terrorists and because, in any event, the building hit by the one-ton bomb delivered by the Israeli Defence Force was crowded with other civilians, including Shehadeh's wife and daughter, other members of his family living in the neighboring apartment, and several other people. At the end of the day, it was reported that the explosion killed 15 civilians, in addition to Shehadeh, and injured 176 others. This episode was also at the centre of legal proceedings that took place in Spain where the victims' relatives brought a complaint pursuant to alleged universal titles of jurisdiction. For a detailed and thorough description of the incident see therefore Javier Fernandez Estrada, *Appeal to the Spanish Supreme Court*, 21 September 2009. On these and other proceedings see *infra*, Ch. IV, para. 5.

view that this kind of response [to Palestinian attacks] is too aggressive and it just serves to increase the level of tension and violence in the region"[1228].

Accordingly, the shift towards an allegation of permissibility of targeted killings took place gradually. Exception made for episodes like the one just reported, U.S. criticism towards Israeli operations of the kind regularly decreased while its own involvement in similar counter-terror operations progressively increased. Describing this inversely proportional trends, one former senior White House official admitted plainly to the *New York Times* that "criticism [of Israel] diminished as the administration sought to move aggressively against al-Qaeda."[1229]

Consequently, at first, and then for several years, the U.S. drone program has not been officially acknowledged[1230]. Whether this choice was one of mere policy – *i.e.* the belief that a secret program may be more effective than a publicly advertised one – or it was due to the fear connected with the lack of a strong legal theory able to back the practice of drone strikes – *i.e*. the possibility of criticism by the international community coupled with the possible *prima facie* categorization of such strikes as assassinations – is a matter of speculation. Nonetheless, the fact remains that until these very last years the U.S. had consistently refrained from admitting the existence of a program of targeted killings through drone strikes and had proved even more unwilling to reveal the legal grounds that may have proven legitimacy to it. Then, gradually, the practice has grown in consistency and width and so has done, in a parallel fashion, both the acknowledgement by U.S. public authorities and interpretations arguing for the legal lawfulness and moral legitimacy of the drone program[1231]. Notably, however, even the U.S. has avoided up until now to establish a thorough legal theory of drone strikes[1232], and the various legal memos published or leaked to the press have proven to be only sparse pieces of a jigsaw whose exact frame and picture remain highly unforeseeable.

c) First Reactions from the International Community

1228 Chris Toensing and Ian Urbina, *Israel, the US and "Targeted Killings"*, in *Middle East Research and Information Project*, *supra*.

1229 *Ibidem*.

1230 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, European Council on Foreign Relations Doc. ECFR/84, 2013, p. 4.

1231 See accordingly Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, p. 4. On the issue of legality, morality, efficacy and legitimacy in counterterrorism see, *inter alia*, Steven J. Barela, *International Law, New Diplomacy and Counterterrorism, An Interdisciplinary Study of Legitimacy*, New York, 2014.

1232 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, p. 5.

What remains undeniable is that ever since the first reported episodes of U.S.-sponsored targeted killings outside of active combat zones, such practice has been on the rise.

At first, such practice has been analysed with the old lenses through which the international community has scrutinized practices leading to the intentional and pre-meditated deprivation of lives of people removed from actual battlefield for the entire duration of the second half of the XXth century, that is, such deeds were condemned as extrajudicial executions without any further qualms. Accordingly, in relation to the first publicly known selected killing occurred in Yemen, the then United Nations Special Rapporteur on Extrajudicial Killings later stated that the strike constituted "a clear case of extrajudicial killing" and set an "alarming precedent"[1233]. In relation to the newly enacted U.S. practice also European States voiced their discomfort, expressing it not only in terms of "comity" nor of "policy" but as a matter of believed lack of compliance with international law: by this token, for instance, in 2002 the Swedish Foreign Minister Anna Lindh qualified the killing of Ali Qaed Sinan al-Harithi, a suspected al-Qaeda affiliate terminated by a US drone strike in Yemen, as a summary execution in open violation of human rights law[1234].

In very similar terms international human rights bodies as well as States kept on condemning Israeli policy of targeted killings. Thus, for instance, the UN Human Rights Committee expressed its concern with this policy stating: "The Committee is concerned by what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6. […] Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted"[1235]. Admittedly, this latest assessment may be read as a preference for capture over killing operations, thus leaving intact the possibility for the State to resort to targeted killings wherever capture is not feasible. Nonetheless, it has been noticed, in its recommendations related to the report at hand the Committee "refers to use of deadly force against a person suspected of being in the process of committing acts of terror", thus seemingly endorsing a law enforcement standard that would permit to resort to force only in cases of absolute necessity, when no other solution would permit to prevent an imminent attack threatening the life of those persons that

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1233 Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *2003 Report to the UN Human Rights Commission*, U.N. Doc. E/CN.4/2003/3, 13 January 2003, para. 38.

1234 Brian Whitaker and Oliver Burkeman, *Killing probes the frontiers of robotics and legality*, The Guardian, 6 November 2002, available at http://www.guardian.co.uk/world/2002/nov/06/usa.alqaida.

1235 UN Human Rights Committee, *Concluding Observations on Israel*, CCPR/CO/78/ISR, 21 August 2003.

the State has a duty to protect and otherwise arresting the perpetrator whenever the attack may be otherwise stopped[1236].

Similarly, whereas most European States individually and the European Union as a whole have so far failed to take a decisive position towards U.S. Drone Strikes and targeted killing operations[1237], in 2004 the European Council strongly condemned the targeted killing of Hamas leader Sheikh Ahmed Yassin, orchestrated and perpetrated by Israeli forces. In such occasion, the operation was defined as an "assassination" and an "extra-judicial killing" and the European Council underlined that actions of this kind are not only "contrary to international law, they undermine the concept of the rule of law, which is a key element in the fight against terrorism"[1238]. Yet, the justification adduced by Israel for the killing of Yassin did not much differ from those usually adopted by the US when referring to its policy of drone strikes against suspected terrorists[1239].

d) The Escalation of Targeted Killings

When, in 2003, the U.S. doubled its war effort moving against Iraq[1240], its strategy to identify and kill top Al-Qaeda leaders was applied in identical terms to Iraqi officials: not only in this regard the U.S. issued a list of those most wanted, it even created the famous 55 cards-deck featuring the leaders of the Iraqi regime. Such deck of cards was distributed to coalition soldiers, officially to facilitate recognition in case of contact, passing on the message that those thereby enlisted were to be pursued and brought back, dead or alive[1241].

In so doing, the U.S. actually translated the already mentioned wild-west rhetoric bordering outlawry from Osama Bin Laden to a set of 52 wanted Iraqi officials. Such operation has been described in the following terms: "One of the first, and among the most memorable, weapons of the US propaganda war in Iraq was the infamous deck of cards identifying the fifty-two top "wanted" Iraqis […] The cards

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1236 David Kretzmer, *Targeted Killing of Suspected Terrorists. Extra-Judicial Executions or Legitimate Means of Defence?*, *supra*, p. 180.

1237 On current position of European States towards targeted killings see *infra*, Ch. IV, para. 4.

1238 European Council, *Council Conclusions on Assassination of Sheikh Ahmed Yassin*, 22 March 2004, available at http://europa.eu/rapid/press-release_PRES-04-80_en.htm.

1239 On the legal grounds advanced by States systematically resorting to targeted killings in order to uphold the lawfulness of their operations see *infra*, Ch. IV, para. 4.

1240 In general on the 2003 U.S.-Iraqi conflict see Debra A. Miller, *The War Against Iraq*, Patna, 2004. For a legal analysis of such conflict see, *inter alia*, Raul A. Pedrozo, *The War in Iraq: A Legal Analysis*, in *International Law Studies*, Newport, 2010.

1241 See to this end CNN, *U.S. Issues Most Wanted List*, 11 April 2003, available at http://edition.cnn.com/2003/WORLD/meast/04/11/sprj.irq.wanted.cards/.

made clear that assassination was now a key component of US war strategy"[1242]. In this framework, it has been underlined that the option brought in with the Iraqi identification card-deck was not merely a re-make of the novelty established with George W. Bush' "dead or alive" parlance, but could rather be characterized as a new attempt at the pursuit of the so called "Salvador option": "the Pentagon is intensively debating an option that dates back to a still-secret strategy in El Salvador in the early 1980s. Then, faced with a losing war against Salvadoran rebels, the US government funded or supported "nationalist" forces that allegedly included so called death squads directed to hunt down and kill rebel leaders and sympathizers […] Following that model, one Pentagon proposal would send Special Forces teams to advise, support and possibly train Iraqi squads, […] to target Sunni insurgents and their sympathizers, even across the border into Syria, according to military insiders familiar with the discussion"[1243]. This parallelism appears of the greatest interest for the current research, given that it is hardly possible to imagine that something relegated to secrecy due to its apparent unlawfulness in the 1980s could now become open policy in alleged compliance with international law, unless we accept that international law standards themselves have in the meantime radically change so as to permit to deliberately kill individuals even in situations where it was not allowed in the past. Namely, compiling lists of individuals who allegedly pose a certain threat to the attacking State and then targeting them for death as soon as the opportunity presents itself during an armed conflict[1244].

It is exactly keeping in mind the possibility that these practices may have actually led to a more permissive international law framework, bringing about a significant – if not revolutionary – change in perspective, that we shall therefore consider the steady evolution of targeting practices since the first recounted episodes dating back to the beginning of the century.

Since "the United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict"[1245], it seems useful to make already now a brief reference to the existing relationship between such technology and targeted killing in current U.S. counter-terrorism policies. At first drone strikes were undertaken secretly and the practice was not backed by any legal theory concerning its compatibility with international law, at least, not any such theory has ever been made public. One could argue, *a posteriori*, that such a practice squarely fell within

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1242 Phyllis Bennis, *Drones and Assassination in the US's Permanent War*, *supra*, p. 54.

1243 John Barry and Michael Hirsh, *The Salvador Option*, in *Newsweek*, 7 January 2007.

1244 Michael L. Gross, *Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?*, *supra*, p. 324.

1245 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilston Center*, 30 April 2012, available at https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

the legal maxim "whatever is not prohibited is allowed". Since drones do not much differ from any other military weapon system and targeted killing were performed in the framework of a war (the global war on terror) then no justification was to be adduced. The real novelty about drones, however, is not the technology itself but the way it has been used, *i.e.* their vast deployment in the struggle against transnational terrorism[1246]. A consistent part of such struggle, and that which has notoriously brought the most attention on drones and their use, is the policy of targeted killing systematically followed in the last years by some western States. As a confirmation of the dramatic growth undergone in parallel by drone technology and targeted killing it may be useful to recall the words of Michael Waltz, special forces commander in Afghanistan, who stated that "In 2005 drones were a rare commodity, particularly in Afghanistan […] It was not until 2009 and 2010 that we had enough assets to use drones for what we call 'pattern of life' operations"[1247], meaning to watch certain areas with no interruption until deciding to launch an operation aimed at capturing insurgents or, more simply, a lethal strike.

It is worrisome, however, to evaluate the impact that such an advanced technological capability may have on combatants' perception, on their decision-making and, ultimately, on the conduct of hostilities in general. Let us take for instance the account of the following episode occurred in Afghanistan given by a commander of US special forces deployed there. According to him, special forces spent hours trying to arrange for a lethal strike (be it by drone or by a small commando unit) following the prayers of a local civilian who felt (rightfully, most probably) his tribe threatened by alleged Haqqani fighters and thus turned to the US special forces for protection stating "Don't come capture them. Come kill them. Because if you capture them, they'll eventually be released and come back after us"[1248]. This gives account of an episode where a drone would have been deployed to target and kill some alleged Haqqani fighters on the basis of a prayer advanced by a local civilian to what has been defined by some analysts as the "predator transformative impact"[1249] did not however take place in western policies until the turn of the century and, in particular, not until after the terrorist attacks of September 11, 2001. It is indeed only following such occurrence, in the midst of U.S. armed reaction versus Afghanistan, that drones employed till then exclusively as a surveillance tools were weaponized and started being used as a platform to launch precise killings (as well as non-targeted attacks).

1246 Megan Braun, *Predator Effect, A Phenomenon Unique to the War on Terror*, in Peter L. Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law, and Policy*, Cambridge, 2015, p. 254.

1247 Michael Waltz, *Bring on the Magic, Using Drones in Afghanistan*, in Peter L. Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law, and Policy*, Cambridge, 2015, p. 209.

1248 *Ibidem*, p. 211.

1249 Megan Braun, *Predator Effect, A Phenomenon Unique to the War on Terror*, *supra*, p. 255.

3.2. Recent and Current Practice

Starting with the beginning of the new century the deployment of armed drones in targeted killing operations has exponentially increased. On the one hand, Israel has begun making use of drones in the context of the *Al-Aqsa Intifada*. As seen above, then, the U.S. has largely resorted to unmanned aerial vehicles first in connection with its alleged ongoing non-international armed conflict with Al-Qaeda and its so called "associated forces", both within and outside Afghanistan; it has furthermore used drones as means to inflict death upon pre-selected individuals in the framework of its armed activities in Iraq from 2003 until 2011, and then again in both Iraq and Syria in armed confrontations against Da'esh. In all these cases, the primary and arguably most important use of armed drones is to be associated with such technology's unparalleled abilities to conduct targeted killings. In this regard, it should be underlined, not only have targeted killing policies flourished among those states that are at the forefront of armed drones development; in recent years, those policies have even been conducted in a systematic fashion[1250].

It is submitted here that this systematic dimension takes up in this context a twofold meaning: systematic, on the one hand, insofar as this seems to be nowadays the default warring technique every time a new threat steps up (decades-long fights in the occupied territories for Israel, Al-Qaeda and associated forces first, Iraq then, and now Da'esh for the U.S.); systematic also, and perhaps most significantly, in relation to the way targeted killing policies are currently conducting, that is as large scale programs aiming at the physical elimination of every enemy target if considered any single operation in its nuclear dimension, at the physical elimination of every enemy at all if considered from a broader perspective that considers the sum of those single operations.

A more detailed report of the practices of those countries currently involved in this kind of operations may perhaps help refining this considerations.

a) U.S.

The targeted killing programme began under the Bush administration but was vastly expanded and accelerated by the Obama administration[1251]. As a distinguished

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[1250] Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, EU Doc. EXPO/B/DROI/2012/12, 2013, p. 30.

[1251] See accordingly Megan Braun, *Predator Effect, A Phenomenon Unique to the War on Terror*, *supra*, pp. 253 – 275 and Ateqah Khaki and Hannah Mercuris, *Why Targeted Killing is Unlawful and Dangerous*, in *American Civil Liberties Unions*, New York, 13 June 2012.

author put it, "The targeted killing programme began as part of a broader campaign to "find, fix, and finish" members of the terrorist network responsible for the attacks of September 11, a covert global manhunt operated both by the CIA and US Special Forces"[1252]. Legal standards, however, are necessarily to be taken into account when a clandestine policy becomes public, as the "war of the drones" were bound to become due to the ever increasing reliance of the United States on such technology in the framework of counter-terrorism strategies.

Statistical studies show that after 2009[1253] the U.S. deployment of Unmanned Aerial Vehicles used for targeted killings have exponentially grown[1254]. A report published by the British Broadcasting Corporation (BBC) shows that in a little more than one year from the beginning of 2009 to mid-2010 drone attacks in Pakistan have been three times those conducted between 2008 and 2009[1255]. A research conducted by the New America Foundation shows that US targeted attacks conducted in Pakistan in the first days of 2010 only were twice as many as those conducted between 2004 and 2007[1256]. Monitoring developments in the following years, the trend has not changed: according to the data collected by the Bureau of Investigative Journalism[1257], the number of drone attacks has consistently kept on growing, in line

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1252 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, p. 4.

1253 Notably, Barack Obama became president of the U.S. at the end of January 2009. The rise in drone strikes is linked by many to a change of strategy in U.S. counterterrorism policy following the beginning of his mandate. To this end see, *inter alia*, William C. Banks, *Are Targeted Killings by Drones Outside Traditional Battlefields Legal? supra*, p. 129.

1254 See, accordingly, David Turns, *Droning On: Some International Humanitarian Law Aspects of the Use of Unmanned Aerial Vehicles in Contemporary Armed Conflicts*, in Caroline Harvey, James Summers and Nigel D. White, *Contemporary Challenges to the Laws of War*, Cambridge, 2014, p. 193.

1255 BBC News, *Mapping US Drone and Islamic Militant Attacks in Pakistan*, 22 July 2010, available at http://www.bbc.co.uk/news/world-south-asia-10648909?print=true.

1256 Peter Bergen and Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010*, in *New America Foundation* 24 February 2010, available at http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf and Peter Bergen and Katherine Tiedemann, *There Were More Drone Strikes – And Far Fewer Civilians Killed*, in *Foreign Policy*, 21 December 2010, ,available at http://www.foreignpolicy.com/articles/2010/12/21/the_hidden_war?page=0,5.

1257 The Bureau of Investigative Journalism, *Obama 2013 Pakistan Drone Strikes*, 3 January 2013, available at www.thebureauinvestigates.com, *Obama 2014 Pakistan Drone Strikes*, 11 June 2014, available at www.thebureauinvestigates.com, *Obama 2015 Pakistan Drone Strikes*, 5 January 2015, available at www.thebureauinvestigates.com, and *Obama 2016 Pakistan Drone Strikes*, 11 January 2016, available at www.thebureauinvestigates.com. Peter Bergen and Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010*, *supra*. Note that these studies are hereby quoted as reinforcing each other's findings only in relation to the rising number of targeted attacks conducted pursuant to unmanned aerial vehicles by the U.S. over the last years. They do not necessarily agree, instead, on the number of casualties reported or on the account of the killed civilian/combatant ratio.

with the reported rise started in 2009. Such studies have been corroborated by other reliable sources monitoring the trend[1258].

Currently, "US MQ-1 Predator and MQ-9 Reaper drone planes carry out countless sorties over Pakistan, regularly patrolling over the Federally Administered Tribal Areas of Pakistan"[1259]. This perception is so much so that teams of US Special Forces backed by armed drones have been described as today's "bands of stealthy warriors […] committing acts of assassination" in the middle-east[1260]. Allegations of the kind are reinforced by data showing that the actual victims of targeted strikes are most of the times not involved with terror networks or armed groups at all. Thus, studies based on classified intelligence reports show that 265 out of 482 individuals killed in Pakistan in a 12-month period up to September 2011 were simply as Afghan, Pakistani, and unknown "extremists" rather than being high ranking Al-Qaeda operatives[1261]. Moreover, "it has been widely reported that in both Pakistan and Yemen the US has at times carried out "signature strikes" or "Terrorist Attack Disruption Strikes" in which groups are targeted based not on knowledge of their identity but on a pattern of behaviour that complies with a set of indicators for militant activity. It is widely thought that these attacks have accounted for many of the civilian casualties caused by drone strikes"[1262].

More than being linked to targeted killings, the fast and dramatic rise in the use of unmanned aerial vehicles is directly caused by their suitability to conduct pre-planned deprivations of life of pre-selected individuals. The escalation in the deployment of Unmanned Aerial Vehicles as caused by the need to render more and more effective a policy of targeted killings has been noticed in the following terms: "the pace of drone strikes has quickened dramatically in the early years of the Obama administration […] central to this process was the role of targeted killings as a key element of counterterrorism and counterinsurgency campaigns against Al-Qaeda, the Taliban and Associated groups"[1263].

1258 Amitai Etzioni, *The Great Drone Debate*, in *Military Review*, Fort Leavenworth, 30 April 2013; Jimmy Page, *US May Expand Drone Attacks in Pakistan*, in *Fox News*, 22 September 2009, available at http://www.foxnews.com/politics/2009/09/22/expand-drone-attacks-pakistan.html and Rafia Zakaria, *President Obama: The Drones Don't Work, They Just Make It Worse*, in *Al Jazeera*, 26 March 2013.

1259 Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan – The Legal and Socio-Political Aspects*, *supra*, p. 32.

1260 Phyllis Bennis, *Drones and Assassination in the US's Permanent War*, *supra*, p. 51.

1261 Jonathan S. Landay, *Obama's drone war kills 'others', not just al Qaeda leaders*, in *McClatchy Newspapers*, 9 April 2013, available at http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html.

1262 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, p. 6.

1263 William C. Banks, *Are Targeted Killings by Drones Outside Traditional Battlefields Legal? supra*, p. 129.

Targeted killings carried out through drone technology are not limited to Pakistan of course, but have occurred also in other regions such as Somalia, Yemen[1264] and, in general, in the horn of Africa[1265]. It is reported that targeted killings through drone technology are currently conducted in more than 12 countries[1266]. Consequently, the perception, for many authors, is that "Obama has extended his battlefield beyond Iraq and Afghanistan to Pakistan, Yemen, Somalia, and Libya, even though the United States is not at war with those countries"[1267]. As a matter of fact, the U.S. has suggested that, due to the existence of an armed conflict between the US and Al-Qaeda, the U.S. itself is also simultaneously engaged in an armed conflict with all of the latter's associated forces, thereby including al-Shabaab in Somalia, Al-Qaeda in the Arabian Peninsula (AQAP) in Yemen, Al-Qaeda in the Islamic Maghreb (AQIM) in North and West Africa – basically all the transnational area covered by the Maghreb region, whose borders are not even defined – Boko Haram in Nigeria[1268]. All in all, the Obama administration is said to have approved more targeted killings than any other modern president[1269].

1264 To this end see Intelligence, Surveillance, Reconnaissance Task Force, *ISR Support to Small Footprint CT Operations - Somalia/Yemen*, 2013, in general and, in particular, pp. 4, 12, 16 and 35; Christopher Swift, *The Boundaries of War? Assessing the Impact of Drone Strikes in Yemen*, in Peter L. Bergen and Daniel Rothenberg, *Drone Wars: Transforming Conflict, Law and Policy*, Cambridge, 2015, p.71. On the deployment of drone technology for targeted killings in Somalia and Yemen see also, *inter alia*, The Guardian, *Drones by Country: Who Has All the UAVs?*, 3 August 2012, available at http://www.theguardian.com/news/datablog/2012/aug/03/drone-stocks-by-country; Marina Fang, *Nearly 90 Percent Of People Killed In Recent Drone Strikes Were Not The Target - U.S. Drone Strikes Have Killed Scores Of Civilians In Afghanistan, Pakistan, Yemen and Somalia*, in *The Huffington Post*, 20 October 2015, available at http://www.huffingtonpost.com/entry/civilian-deaths-drone-strikes_us_561fafe2e4b028dd7ea6c4ff; On the impact of U.S. targeted killing in Yemen see, *inter alia*, Human Rights Watch, *Between a Drone and Al-Qaeda, The Civilian Cost of US Targeted Killing in Yemen*, New York, October 2013 and Open Society Justice Initiative, *Death By Drone, Civilian Harm Caused by U.S. Targeted Killings in Yemen*, New York, 2015.

1265 Frank Gardner, *US Military Steps Up Operations in The Horn of Africa*, in *BBC News*, 7 February 2014, available at http://www.bbc.com/news/world-africa-26078149, reporting US strikes directed at killing members of al-Shabab and al-Qaeda.

1266 Scott Shane, *Secret Assault on Terrorism Widens on Two Continents*, in *The New York Times*, 14 August 2010. To this end see also Pardiss Kebriaei, *Al-Aulaqi v. Obama: Targeted Killing Goes to Court*, in Marjorie Cohn, *Drones and Targeted Killing: Legal, Moral and Geopolitical Issues*, Northampton, 2015, p.196, stating: "[a]dministration officials have claimed or suggested AUMF authority to target so-called associated groups in at least half a dozen countries so far".

1267 Marjorie Cohn, *A Frightening New Way of War*, *supra*, p. 14 and Craig Whitlock, *Drone base in Niger Gives U.S. a Strategic Foothold in West Africa*, in *Washington Post*, 21 May 2013, available at www.washingtonpost.com.

1268 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, *supra*. For an accurate study of facts and figures related to targeted killings conducted by the U.S. through drone technology in these last years see in particular Jane Mayer, *The Predator War*, in Marjorie Cohn, *Drones and Targeted Killing, Legal Moral and Geopolitical Issues*, Northampton, 2015, pp. 63-76.

1269 David Rohde, *The Obama Doctrine - How the president's drone war is backfiring*, in *Foreign Policy*, 27 February 2012, available at http://foreignpolicy.com/2012/02/27/the-obama-doctrine/.

It is pursuant to this reasoning that in the last years the U.S. has been establishing drone bases in several African countries[1270] and, as of late, has started deploying unmanned aerial vehicles for purposes of targeted killings in Syria[1271] and Libya[1272] as well. Recently, also the UK has started to deploy unmanned aerial vehicles to perform targeted killings in Syria[1273]. This understanding would indeed bring to a kind of unprecedented, global drone warfare[1274].

Some commentators have argued that this practice is actually an advancement in both combatants and civilian protection since the review process necessary to designate a person for a targeted killing "goes far beyond any process given to any target in any war in American history"[1275].

Once the policy of targeted killing through drone strikes has become public, U.S. officials have not hesitated standing by it, also in the heat of public pressure. One of the most controversial issues related to targeted killing in the U.S. being the possibility for the U.S. administration to select for deprivation of life a U.S. citizen, the then-Director of National Intelligence Dennis Blair publicly averred in 2010 that the United States takes "direct action" against suspected terrorists and that "if we think that direct action will involve killing an American, we get specific permission to do that". A similar stance was later on assumed by Deputy National Security Advisor John Brennan, who also backed in his theory the potentially unlimited geographical reach of U.S. policy: "If an American person or citizen is in Yemen or in Pakistan or in Somalia or another place, and they are trying to carry out attacks against U.S. interests, they will also face the full brunt of a U.S. response"[1276].

1270 Craig Whitlock, *U.S. plans to add drone base in West Africa*, in *Washington Post*, 28 January 2013 available at https://www.washingtonpost.com/world/national-security/us-plans-to-add-drone-base-in-west-africa/2013/01/28/ce312c24-6994-11e2-aba3-d72352683b69_story.html.

1271 Owen Bowcott, *Mohammed Emwazi: Debate Over Legal Basis of Targeted Killings Remains Confused*, in *The Guardian*, 13 November 2015, available at http://www.theguardian.com/uk-news/2015/nov/13/mohammed-emwazi-legal-basis-killings-confused-cameron.

1272 Bill Chappell, *U.S. Airstrike Targets ISIS Operative in Libya, Reportedly Killing At Least 40*, in *Npr*, 19 February 2016, available at http://www.npr.org/sections/thetwo-way/2016/02/19/467327157/u-s-airstrike-reportedly-kills-at-least-40-targeting-isis-operative-in-libya; Al Jazeera, *ISIL Training Camp in Libya Targeted By US*, available at http://www.aljazeera.com/news/2016/02/deaths-reported-raids-isil-camp-libya-160219131122223.html.

1273 On UK use of drones in Syria see also Reprieve, *UK Drone Strikes in Syria - Reprieve Comment*, 7 September 2015, available at http://www.reprieve.org.uk/press/uk-drone-strikes-in-syria-reprieve-comment/.

1274 David Cortright, *The Scary Prospect of a Global Drone Warfare*, in *CNN*, 19 October 2011.

1275 Jack Goldsmith, *Fire When Ready*, in *Foreign Policy*, 19 March 2012, available at http://foreignpolicy.com/articles/2012/03/19/fire_when_ready.

1276 *Al-Aulaqi v. Obama, Complaint*, 30 August 2010, para. 15. In higher detail on the official U.S. *opinio juris* on the issue of targeted killing see *infra*, Ch. IV, para. 4, sub-para. 4.1.

A good example of how the U.S. led targeted killing program operates is given by the plan that led to the killing of Anwar Al-Aulaqi. In particular, this episode shows how the program does take the form of a man-hunt whose only possible end is the death of the person targeted. In connection with the Al-Aulaqi episode, for instance, the U.S. made around a dozen attempts at his life before succeeding in its intention and finally "obliterate" him[1277].

b) Israel

The Israeli targeted killing policy has had an equivalently high impact on Israel's confrontation with Hamas and the Hezbollah and it has acquired a geographical reach comparable to that of the US' policy. Israeli activities in this field have actually pre-dated the US use of such method to contrast real or perceived terror networks by the US. Already at the beginning of the new century, it was reported that in the context of the *al-Aqsa Intifada*[1278] alone Israel has deprived of their lives approximately 130 persons targeted for death[1279].

Israel is perhaps the state that has been relying on air targeted strikes for the longest period of time and with the highest consistency. In fact, Israel has adopted a policy of targeted killing of Palestinian militants in the West Bank and in Gaza[1280]. Such policy has been publicly recognized since the very beginning of the new century.

The policy of selecting specific individuals suspected of being active members of terrorist groups and killing them consequently has been a matter for public disclosure in Israel since the attempts at Hussein Abayat, killed in Beit Shaour (a village located in the West Bank) by an helicopter belonging to the IDF[1281]. Soon after the killing of Hussein Abayat, the Israeli government has successfully targeted

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1277 United States District Court for the District of Columbia, *Al-Aulaqi v. Obama*, Judgment of 7 December 2010, p. 7.

1278 See *supra*, Ch. I, para. 1.

1279 Orna Ben-Naftali and Keren R. Michaeli, *Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings*, in *Journal of International Criminal Justice*, Oxford, 2003, p. 369.

1280 Richard Murphy and John Radsan, *Due Process and Targeted Killing of Terrorists*, *supra*, p. 407.

1281 David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, *supra*, p. 172. On the publicly declared policy of targeted killing by Israel see also Chris Toensing and Ian Urbina, *Israel, the US and "Targeted Killings"*, *supra*. On the targeted killing of Hussein Abayat see B'Tselem The Israeli Information Centre for Human Rights in the Occupied Territories, *Israel's Assassination Policy: Extra-judicial Executions*, January 2001, available at http://www.btselem.org/Download/Extrajudicial_Killings_Eng.doc.

Palestinian imam and founder of Hamas, Ahmed Sheik Yassin[1282], killed on 22 March 2004 by a missile launched by an Israeli Defence Force helicopter immediately after finishing his morning prayers[1283], and Abdel Aziz Rantisi, one of Hamas' leaders, deprived of his life as well by an helicopter missile strike[1284]. The ones reported are but three examples of a campaign that has seen Israel systematically targeting for death during the *Al-Aqsa Intifada*[1285] dozens of Palestinians suspected of having some degree of involvement with Hamas[1286].

What actually marked a severe difference between this policy and the targeted killing performed more or less secretly by Israeli agents before the *Al-Aqsa Intifada*, besides the frequency with which pre-meditated lethal force has been used, is that this time Israel officially came out of secrecy and went public, standing by its choice to target its real or perceived "enemies" directly. On 14 February 2001 the Israeli Deputy Minister of Defence thus expressed the State's stance on targeted killing: "we will continue our policy of liquidating those who plan or carry out attacks, and not one can give us lessons in morality because we have unfortunately one hundred years of fighting terrorism"[1287].

Following suit to this declaration, it has been reported that Israel has resorted without rest to targeted killings during *Operation cast lead* between 2008 and

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1282 Matt Frankel, *The ABCs of HVT: Key Lessons from High Value Targeting Campaigns Against Insurgent Terrorists*, *supra*, p. 22.

1283 UN Human Rights Commission, *La Commission Adopte Une Resolution Condamnant Les Violations Dans Le Territoires Palestinien et L'Assassinat du Cheikh Yassine*, UN Doc. DH/G/330, 24 March 2004 and League of Arab States, *Urgent Announcement by the Arab League Council on the Permanent Representatives Level*, 22 March 2004, available at https://web.archive.org/web/20040627110741/http://domino.un.org/UNISPAL.NSF/eed216406b50bf6485256ce10072f637/029fa086fb91031885256e680074212a!OpenDocument. On the description of Yassin's Death see also Al Jazeera, *The Life and Deah of Shaikh Yasin*, 25 March 2004, available at https://web.archive.org/web/20070816132853/http://english.aljazeera.net/English/archive/archive?ArchiveId=2639.

1284 On this episode see *inter alia* CNN, *Hamas Leader Killed in Israeli Airstrike*, 18 April 2004, available at http://edition.cnn.com/2004/WORLD/meast/04/17/mideast.violence/.

1285 Also known as the Second Intifada, the *Al-Aqsa Intifada* has been the most violent armed confrontation between Israel and Palestinian liberation groups since the 1967 war. It started in September 2000 following the visit of Ariel Sharon to the Temple Mount, perceived by many Palestinians as a provocative gesture.

1286 According to empirical studies during the period 2000 - 2004 Israel has conducted about 159 targeted killing attempts, out of which 135 were successful. To this end see Asaf Zussman and Noam Zussman, *Assassinations: Evaluating the Effectiveness of an Israeli Counterterrorism Policy Using Stock Market Data*, in *Journal of Economic Perspectives*, 2006, p. 196. On this issue see also Chris Toensing and Ian Urbina, *Israel, the US and "Targeted Killings"*, *supra*.

1287 Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, 21 February, 2001, available at http://web.amnesty.org/library/index/engMDE150052001!Open.

2009[1288]. Israel's practice to this end is the one that has faced the harshest criticism from the international community. At the same time, like the practice of Colombia, it includes more than a few well-known killings that undoubtedly amount to a violation of international law norms, regardless of the legal regime(s) one were to assume would apply to these episodes.

c) U.K.

Until very few years ago in the UK the debate concerning targeted killings was mainly focused on domestic law enforcement operations[1289]. In less than a decade this assessment has radically changed. Following indiscretions at first and, later, the disclosure of documents later related to UK's complicity into US targeted strikes conducted in the framework of counter-terrorism operations in third countries[1290] the debate significantly shifted, acquiring a character much more similar to that describing the legal discourse over targeted killing policies in the US and Israel.

After the UK directly resorted to targeted drone strikes against members of Da'esh in Syria in August 2015, the Joint Committee on Human Rights of the UK's parliament launched an inquiry into the UK's policy on the use of drones for targeted killing[1291].

Similar to what previously happened in the U.S., also the UK's government has not set out a clear policy for targeted killing before starting to resort to lethal measures against pre-identified individuals outside zones of active hostilities. The inquiry's scope is to clarify the UK's policy overt targeted killing, the decision making process and the accountability for unlawful acts perpetrating pursuant to the targeted killing policy[1292].

1288 Matt Frankel, *The ABCs of HVT: Key Lessons from High Value Targeting Campaigns Against Insurgent Terrorists*, *supra*, p. 22.

1289 Nils Melzer, *Targeted Killing in International Law*, *supra*, pp. 22 and 23.

1290 Der Spiegel, *Obama's List: A Dubious History of Targeted Killings in Afghanistan*, 28 December 2014, available at http://www.spiegel.de/international/world/secret-docs-reveal-dubious-details-of-targeted-killings-in-afghanistan-a-1010358.html#ref=plista.

1291 The inquiry was launched at the end of October 2015. To this end see the webpage of the Joint Committee on Human Rights, available at: http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/uk-drone-policy-15-16/. As to the results of the enquiry, see in higher detail *infra*, Ch. IV, para. 4, sub-para. 4.4.

1292 Dapo Akande, *UK Parliamentary Inquiry into UK Policy on the Use of Drones for Targeted Killing*, 23 December 2015, available at http://www.ejiltalk.org/uk-parliamentary-inquiry-into-uk-policy-on-the-use-of-drones-for-targeted-killing/.

The UK government's response to the parliamentary inquiry has taken the form of a brief legal-memo setting out the following standards. First, terrorist attacks, either individually considered or series of them, may rise to the level of an armed attack triggering a state's right of self-defence pursuant to Art. 51 UN Charter[1293]; given that, the UK may act against Da'esh in anticipatory self-defence when there exists a an imminent threat of armed attack, exercising its inherent right of self-defence in compliance with Art. 51 UN Charter and in full respect of customary requirements of proportionality and necessity[1294]; in this context, the use of intentional lethal force represents in any case a last resort, only feasible when it would be otherwise impossible to detain the targeted person or else to disrupt and prevent the attack[1295]; even in this further restricted context, UK's action will strictly abide by parameters of necessity and proportionality[1296];

It has recently emerged that the UK Government has been maintaining a covert "kill list" since at least October 2001. Named targets for hit and death are located in several countries, including especially Pakistan, Afghanistan and Yemen, besides Iraq and Syria. Some of the enlisted persons have been targeted and killed in US-UK joint operations. The list allegedly includes supposed militants as well as people involved in drug trafficking and other activities considered to be "collateral" to terrorism[1297]. In particular, an investigation conducted by the NGO Reprieve and Vice has disclosed that UK military personnel do bear a crucial role in the conduction of the U.S. drone program in Yemen: their involvement ranged from triangulating intelligence and participating in joint operational meeting with US and Yemeni forces to taking direct part in drone "hits"[1298].

Notably however, the UK has consistently denied any involvement in targeted killing operations conducted with drone technology[1299] until evidence came out in the last months that could not be rebutted.

1293 UK Government, *Memorandum to the JCHR*, p. 2, available at file:///D:/UNI/PHD%20THESIS/003%20-%20CHAPTER%20III/Written%20evidence%20submitted%20to%20UK%20Gvt.'s%20inquiry/UK%20GVT's%20MEMO%20-%20Reply%20to%20the%20Committee.pdf.

1294 *Ibidem*, p. 2.

1295 *Ibidem*, p. 1.

1296 *Ibidem.*

1297 Reprieve, *Britain's Kill List*, 10 April 2016, London, pp. 5-7.

1298 Reprieve, *Britain's Kill List*, 10 April 2016, London, pp. 32-36. To this end see also Vice News, *Exclusive: How the UK Secretly Helped Direct Lethal US Drone Strikes in Yemen*, 7 April 2016, available at https://news.vice.com/article/exclusive-how-the-uk-secretly-helped-direct-lethal-us-drone-strikes-in-yemen and Reprieve's newsletter, *Britain's Kill List: Government Must Come Clean*, London, 10 April 2016.

1299 Reprieve, *UK Plays Critical Role in Yemen Drone War-Reports*, 7 April 2016, available at http://www.reprieve.org.uk/press/uk-plays-critical-role-in-yemen-drone-war-reports/ and Vice News,

Still in July 2014, indeed, answering to queries related to UK involvement in targeted killing operations taking place in Yemen the assessment was that "Drone strikes against terrorist targets in Yemen are a matter for the Yemeni and US Governments. We expect all concerned to act in accordance with international law and take all feasible precautions to avoid civilian casualties when conducting operations". Confirming the secrecy of the UK's involvement in targeted killing by drone strikes, the chief of UK Parliamentary Group on Drones has underlined that "The involvement of the British state is something that the government ought to make plain to parliament"[1300]. The extent to which UK agents were deeply scrupulous in maintaining a low profile and therefore willing to be undetected in their operational role in this framework may be well understood with reference to the words of former Commander of Yemen's Central Security Forces Yahya Saleh. According to him, the British trained Yemen's security forces in the identification of targets for drone strikes but they did so making sure that their involvement would not become public: "They stipulated that we couldn't take their photos, or mention their names; even when we were honoring the American trainers the British avoided having their names mentioned"[1301]. Perhaps even more significantly, an agent of the Foreign and Commonwelth Office has declared: "We have previously provided counter-terrorism capacity building support to the Yemeni Security Services to increase their ability to disrupt, detain, and prosecute suspected terrorists in line with Yemeni rule of law and international human rights standards. Following the closure of the embassy in Sanaa in February 2015 we suspended this activity. We continue to work with regional and international partners to tackle the threat posed by terrorist organizations including AQAP and Daesh-Yemen [...] and to build regional capacity on counter terrorism"[1302]. The most noteworthy part of such declaration is that it portraits UK's counterterrorist activities in Yemen as limited to support functions for the disruption, detention and prosecution of suspected terrorists, "in line with Yemeni rule of law". This necessarily entails that any activity not encroached upon these parameters, and notably among them, executions of suspected terrorists without previous fair trial, would fall foul of any legality.

d) Other States

Exclusive: How the UK Secretly Helped Direct Lethal US Drone Strikes in Yemen, *supra*, underlying that for a long time the identification of human targets for drone strikes have been "characterized as a unilateral policy of the United States" by official UK sources.

1300 Vice News, *Exclusive: How the UK Secretly Helped Direct Lethal US Drone Strikes in Yemen*, 7 April 2016, *supra*.

1301 *Ibidem*.

1302 *Ibidem*.

In its struggle against the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), the Colombian government has constantly targeted directly leaders of the opposing belligerents. Such strategy covers also the paramilitary operations that led to the death of the FARC's leader Raul Reyes in March 2008[1303]. Most notably, however, the tactics followed by Colombia in its struggle to target FARC's "high value members" have been overtly in breach of the laws of armed conflict more often than not. Thus, for instance, it is well known that the government offered rewards for the killing of Ivan Rios, a prominent member of the FARC's secretariat[1304]. The killing of Raul Reyes itself may be classified under the heading of assassination, provided that the government kept on its payroll a paramilitary group whose qualification under the laws of war remains utterly controversial specifically sending it to accomplish the specific aim of killing Reyes.

Also Russia is renowned for its resort to targeted killing. In 1996, in its struggle in Chechnya, for instance, Russia killed Chechen leader Dzhokar Dudayev targeting him with laser-guided missiles. After that, Russia extensively resorted to techniques of targeted killing, launching on 1 February 2000 *Operation Wolf Hunt*, a campaign aimed at killing top Chechen fighters in the town of Grozny[1305]. In 2004 Chechen leader Yanderbeyev was killed in Qatar by a bomb by two Russian men reportedly sent for the mission by the Russian government[1306].

1303 Matt Frankel, *The ABCs of HVT: Key Lessons from High Value Targeting Campaigns Against Insurgent Terrorists*, *supra*, p. 21.

1304 *Ibidem*.

1305 John Russell, *Chechnya - Russia's War on Terror*, London, 2007, p. 63; Michael Bhatia, *Terrorism and the Politics of Naming*, Abingdon, 2008, p. 102; and Olga Oliker, *Russia's Chechen Wars 1994 - 2000, Lessons From Urban Combat*, Santa Monica, 2001, p. 73.

1306 David Ignatius, *In Qatar, Standing Up to Putin*, in *Washington Post*, 16 March 2006.

4. DETECTING A NORMATIVE INTENTION

(1) U.S. Legal Theory Supporting the Lawfulness of Targeted Killing; (1.a) Context and Nature of the Conflict; (1.b) Parties to the Conflict; (1.c) Pigeonholing Targeted Lethal Attacks in the Applicable Legal Framework; (1.d) Objectives of Targeted Attacks: Who May Be Targeted?; (1.e) Objectives of Targeted Attacks: When May Targetable Persons Be Attacked with Lethal Force?; (1.f) Objectives of Targeted Attacks: How Can a Targetable Person Be Attacked with Lethal Force?; (2) Israel; (3) European States' Position; (4) *Sui Generis*: U.K.

Following the reported evolutions in the practice of States which bear targeting capabilities and are currently involved in non-international armed conflicts with organized armed groups, the question that remains unanswered is, essentially, whether this is an instance of states wanting to "invent new laws to justify new practices"[1307]. In order to provide an adequate answer to this question, reference to practice alone cannot be deemed sufficient. What actually acquires the utmost relevance from a legal perspective is the existence of a legal theory supporting practice. In other terms, if States are indeed trying to invent new laws to justify new practices, what they should be doing is to show a normative intention, *i.e.* to suggest a new general legal framework, applicable to all those that are involved in armed conflicts (States and non-state actors alike), capable of leading to the formation of a new, more permissive norm of customary international law. It is submitted here that, as will be shown in the present paragraph, States resorting to targeted killing have so far failed to undertake this effort, or at the very least that they have done so with little success. First of all, because most of the justifications they adduce are actually grounded in the currently existing framework of international law. Second, because in any event the evolutive interpretation so far advanced in relation to specific sectors of the laws of war have generally been rejected by the international community.

4.1. U.S. Legal Theory Supporting the Lawfulness of Targeted Killing

In response to the lawsuits addressed to the United States directly or, in any case, to key members of its administration by actual or potential victims of targeted killings, the U.S. has never replied in the merits, confining its reasoning to non-

[1307] Christof Heyns, UN Special Rapporteur on Summary or Arbitrary Executions Chirstof Heynes, statement reproduced in Owen Bowcott, *Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur*, in *The Guardian*, 21 June 2012, available at www.theguardian.com.

justiciability clauses and avoidance doctrines[1308]. Therefore, little opinion juris can be inferred from those cases and the majority of details related to the U.S. policy of targeted strikes should be gathered from public disclosures coming from U.S. public officials.

As mentioned above, the U.S. drone program for targeted killing has not been officially acknowledged for several years[1309]. Whether this choice was one of mere policy – *i.e.* the belief that a secret program may be more effective than a publicly advertised one – or it was due to the fear connected with the lack of a strong legal theory able to back the practice of drone strikes – *i.e.* the possibility of criticism by the international community coupled with the possible *prima facie* categorization of such strikes as assassinations – is a matter of speculation. Nonetheless, the fact remains that until these very last years the U.S. had consistently refrained from admitting the existence of a program of targeted killings through drone strikes and had proved even more unwilling to reveal the legal grounds that may have granted its legitimacy. Then, gradually, the practice has grown in consistency and width and so did, in a parallel fashion, its acknowledgment by U.S. public authorities and the corresponding emergence of interpretations arguing for the legal lawfulness and moral legitimacy of the drone program[1310]. Notably, however, even the U.S. has avoided up until now to establish a thorough legal theory of drone strikes[1311], and the various legal memos published or leaked to the press have proven to be only sparse pieces of a jigsaw whose exact frame and picture remain highly unforeseeable.

It is believed that the new U.S. policy of targeted killing is rooted in a secret memorandum issued by the Bush administration on 17 September 2001 by which the U.S. President authorized CIA agents to use lethal force in covert operations against suspected members of Al-Qaeda around the world. In this connection former US president George W. Bush wrote "We are at war [...] there can be no bureaucratic impediments to success. All the rules have changed"[1312].

At first, targeted strikes were allegedly justified on the basis that they were part of a global war on terror[1313].

1308 See *infra*, Ch. IV, para. 5.

1309 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra supra*, p. 4.

1310 See accordingly *Ibidem*, p. 4. On the issue of legality, morality, efficacy and legitimacy in counterterrorism see, *inter alia*, Steven J. Barela, *International Law, New Diplomacy and Counterterrorism, An Interdisciplinary Study of Legitimacy*, *supra*.

1311 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, p. 5.

1312 Megan Braun, Predator Effect, *A phenomenon Unique to the War on Terror*, *supra*, p. 253.

1313 To this end see, for instance, *Condoleezza Rice's declaration concerning the targeted killing of Qaed Salim Sinan al-Harethi* on *Fox News Sunday*, 10 November 2002, available at http://www.foxnews.com/story/2002/11/11/transcript-condoleezza-rice-on-fox-news-sunday.html.

In spite of the Bush administration common jargon concerning the US's "war on terrorism", the US Congress never approved of such a war and was really precise in tying the authorization to the use of force to actions directed against those responsible for the 9/11 terrorist attacks, *i.e.* Al-Qaeda and the Taliban[1314].

Whereas the global war on terror rhetoric has been later on rejected by following U.S. administrations, the understanding has remained that any active member of AQ is an enemy combatant who can be targeted at any time[1315]. By this token, a former legal adviser to the US Army Special Forces once clarified the US legal position towards targeting and killing members of Al-Qaeda in the following terms: "We can kill them when they are eating, we can kill them when they are sleeping. They are enemy combatants, and as long as they are not surrendering, we can kill them"[1316].

The friction between the willingness to display a restricted understanding of the U.S. power to resort to lethal force on the one hand, and the actual intention to target and kill its perceived "enemies" on the other, is well mirrored in somehow contradictory views expressed by U.S. officials. Thus, for instance, in an interview released to the CNN, Obama himself has asserted that targeted killing shall be restrained to situations where such operations are authorized under U.S. law, where the targeted individual poses a serious threat to the U.S. and especially, where "we can't capture the individual before they move forward on some sort of operational plot against the United States"[1317]. However, statements coming from other U.S. officials resemble more than vaguely the proposition of a global battlefield[1318].

As a matter of fact, that is how other states around the world have perceived and continue to perceive the allegation that the U.S. is involved in an armed conflict with Al-Qaeda. To this end, for instance, the UK Joint Parliamentary Committee on the Use of Drones for Targeted Killing has stated that "The United States has caused controversy in the years since 9/11 by arguing that it is involved in a single, global non-international armed conflict with Al Qaida", so much so that it had maintained this position regardless of the constant criticism of the global battlefield concept

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1314 Jennifer Daskal and Sephen I. Vladeck, *After the AUMF*, in *Harvard National Security Journal*, Harvard, 2014, pp. 115 and 120 - 122.

1315 Doyle McManus, *The Other Drone Question, Are We Creating More Enemies Than We Are Killing?*, in *Los Angeles Times*, 10 February 2013, available at http://articles.latimes.com/2013/feb/10/opinion/la-oe-mcmanus-drones-20130210.

1316 Adam Entous, *Special Report: How the White House Learned to Love the Drone*, in *Reuters*, 18 May 2010.

1317 The Bureau Of Investigative Journalism, *Obama's Five Rules for Covert Drone Strikes*, 6 September 2012, available at https://www.thebureauinvestigates.com/2012/09/06/obamas-five-rules-for-covert-drone-strikes/.

1318 Marjorie Cohn, *A Frightening New Way of War*, *supra*, p. 16.

expressed by the ICRC so as to justify lethal targeted strikes in Yemen, Somalia and Pakistan[1319].

After all, most recently, referring to the U.S. involvement in the fight against Da'esh, U.S. president Obama himself has expressed the view that it is the U.S.'s intention to "degrade and ultimately destroy" Da'esh[1320] and that, in order to do so, "we will go after ISIS wherever it appears, the same way that we went after al-Qaida wherever they appeared"[1321].

It thus appears that the U.S. is trying to put some distance between its current position and the highly criticized notion of a global war on terror, while at the same time asserting a right to resort to lethal targeted strikes against suspected members of Al-Qaeda, the Taliban and associated forces as well as, of now, members of Da'esh. What actually makes a difference, is that the theory backing drone strikes right now does envisage some limitations to such right. Thus the question is, which are the main tenets of the current U.S. position to justify targeted killing. In order to try and answer this question, one must first of all assess which legal framework the U.S. deems applicable to targeting operations, on which basis such paradigm is the one finding application in the relevant circumstances and which consequences are triggered by such application.

a) Context and Nature of the Conflict

The U.S. Government has first asserted to be engaged in a "war against terrorism" as a legitimate reaction in self-defence in response to the 9/11 terrorist attacks that took place on U.S. soil[1322]. As per its initial claim, "the war on terror" saw as opposing parties the U.S. and their "friends"[1323] on one side and any "terrorist group of global reach" or "terrorism" as a whole on the other[1324]. The immediate consequence of such stance was that, according to the US, the law of armed conflict paradigm should govern the alleged "war on terrorism". What appeared peculiar since the very beginning in this position is that, allegedly, the "war on terror" could

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1319 UK Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing*, London, 10 May 2016, para 3.50.

1320 Barack Obama, President of the United States of America, *Statement by the President on ISIL* , 10 September 2014, available at http://www.whitehouse.gov/the-press-office/2014/09/10/remarkspresident-barack-obama-address-nation.

1321 Barack Obama, President of the United States of America, *Address at the US-Asean Summit*, 17 February 2016.

1322 To this end see, inter alia, Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 262.

1323 George W. Bush, former president of the United States of America, *White House press statement: Statement by the President in Address to the Nation*, 11 September 2001.

1324 *Ibidem*. See also to this end US Government, *National Security Strategy*, Washington, 1 February 2015, p. 5.

not fit either within the parameters of an international armed conflict nor in those of a non-international one. Taking steps from this consideration, the US held that international law, including the laws of armed conflict, could not bind its conduct of hostilities[1325].

The theory was wholesale flawed. It in fact argued that armed conflicts of international and non-international character would not constitute a continuum but would leave uncovered some areas where a third hybrid concept – that of international conflicts between a State and a non-state actor – which would be left for lawlessness as it would not be governed by either human rights law or international humanitarian law[1326]. Such conflict, it has been suggested, would constitute a third type of conflict which has been characterized as transnational or extra-state in character[1327].

The U.S. Supreme Court itself flatly rejected the US Government argument when, in *Hamdan v. Rumsfeld*, it held that the conflict with Al-Qaeda was to be qualified as a non-international armed conflict and, as such, was governed by the rules applicable to this kind of hostilities[1328].

Besides the position assumed by the U.S. Supreme Court, the U.S. assumption has been first rejected by legal scholars dealing with the matter[1329], then overturned by the current U.S. administration.

At the same time, also the idea advanced by the U.S. Supreme Court in *Hamdan v. Rumsfeld* has been highly criticized. Indeed, it has been held that qualifying an alleged conflict with a terrorist organization not located on a precise territory as a non-international armed conflict is wrong from the perspective of international law: in particular, it has been noticed, "the idea that a NIAC can be global in nature is oxymoronic: an armed conflict can be a NIAC or it can be global, but it cannot be both"[1330].

1325 US Department of Justice, *Memorandun: Application of Treaties*, Washington, 9 January 2002, pp. 12 and 39 and US Department of Justice, *Memorandum: Re, Application of Treaties and Laws to al Qaeda and the Taliban Detainees*, Washington, 22 January 2002, p. 81.

1326 To this end see, inter alia, Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 262.

1327 See, in particular, Geoffrey S.. Corn and E. Talbot Jensen, *Transnational Armed Conflict: A Principled Approach to the Regulation of Counter-Terror Combat Operations,* in *Israel Law Review*, Cambridge, 2009, p. 46.

1328 US Supreme Court, *Hamdan v. Rumsfeld*, *supra*, p. 72.

1329 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge, 2014, p. 27; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford, 2012, p. 229; Jean-Philippe Lavoyer, *International Humanitarian Law and Terrorism*, in Liesbeth Lijnzaad, Johanna van Sambeek and Bahia Tahzib-Lie, *Making the Voice of Humanity Heard*, Leiden, 2004, p. 269; Nils Melzer, *Targeted Killing in International Law*, *supra*, pp. 266 – 268.

1330 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, p. 27.

As it currently stands, the U.S. justification for the use of targeted lethal attacks against pre-selected individuals is grounded in the assumption that the U.S. is "a nation at war"[1331], currently involved in an armed conflict against Al-Qaeda, the Taliban and "associated forces", particularly in the tribal regions of Afghanistan and Pakistan[1332].

Such armed conflict represents the U.S. reaction to the terrorist attacks of 9/11, in compliance with its inherent right of self-defence[1333], and is characterized by the U.S. administration as a Non-International Armed Conflict[1334].

b) Parties to the Conflict

The U.S. is openly involved in an armed conflict against two (more or less) well-identified organized armed groups: Al-Qaeda and the Taliban. Next to them, however, the U.S. administration has consistently made reference to other not better identified "associated forces": indeed, US President Barack Obama has established since the very beginning of his mandate that "the United States will use all available tools of national power to protect the American people from the terrorist threat posed by al-Qa'ida and its associated forces"[1335].

It has been reported that the term "associated forces" first appeared in a Department of Justice Habeas Brief dating 13 March 2009, which argued that the President has authority to detain those who "substantially support" Al Qaeda or the Taliban and "associated forces"[1336].

Currently, the U.S. considers that "Al-Qaida and its associated forces still have the intent to attack the United States"[1337]. After all, the first ever released (*rectius*, leaked to the press) piece of information on the U.S. targeted practices, the

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1331 Eric Holder, *Attorney General's Speech at Northwestern University Law School*, *supra*.

1332 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, *supra*.

1333 Eric Holder, *Attorney General's Speech at Northwestern University Law School*, *supra*.

1334 Harold H. Koh, *Statement before the Senate Foreign Relations Committee Regarding Authorization for Use of Military Force After Iraq and Afghanistan*, 21 May 2014.

1335 The White House Offiice of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, Washington. 23 May 2013, p. 1.

1336 Marty Lederman and Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War*, in *Lawfare*, 31 December 2011, available at http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-ii.".

1337 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, *supra*.

so called *Department of Justice White Paper*, plainly declared that its purpose was to establish a legal framework governing the use of lethal force by U.S. authorities "in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force"[1338]. As it immediately appears, the most problematic issue in this connection is the determination of what may be qualified as Al-Qaeda's "associated forces". Depending on this conclusion, in fact, the range of people subjected to direct attack according to U.S. standards may significantly change.

In recent War Powers Reports to Congress, for example, the Administration has correctly taken pains to specify that "[t]he U.S. military has taken direct action in Somalia against members of al-Qa'ida, including those who are also members of al-Shabaab, who are engaged in efforts to carry out terrorist attacks against the United States and our interests"[1339]. By so saying, the Administration has made clear that it has acted against particular individuals because they themselves are part of or co-belligerents with Al Qaeda, not because the U.S. is at war with all of Al Shabaab.

Accordingly, U.S. officials have suggested that in Somalia Al-Qaeda merges with Al-Shabaab; in Yemen Al-Qaeda in the Arabian Peninsula (AQAP) continues to be Al-Qaeda most active affiliate, "we therefore continue to support the government of Yemen in its efforts against AQAP"; in north and west Africa Al-Qaeda in the Islamic Maghreb (AQIM), affiliated to Al-Qaeda, is involved in a process of destabilization of regional governments and kidnaps western citizens; in Nigeria Boko Haram emerged as a group "aligned with Al-Qaeda's violent agenda and is increasingly looking to attack Western interests in Nigeria"[1340].

Since this explanatory list is admittedly not thorough and it does not prove sufficient to clear the fog surrounding the notion of associated forces, it seems useful to make reference to the theory backing the selection of the aforementioned armed groups as Al-Qaeda's affiliates. In this regard, it appears that the U.S. has applied a notion of co-belligerency traditionally reserved to inter-state relationships to armed groups and individuals alleged to be Al-Qaeda's "associated forces" [1341]. The notion

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[1338] Department of Justice, *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* (*White Paper*), 8 November 2011, p. 1.

[1339] Barack Obama, President of the United States of America, *Letter from President Barack Obama to Speaker of the House, Presidential Letter - 2012 War Powers Resolution 6-Month Report*, 15 June 2012, available at http://www.whitehouse.gov/the-press- office/2012/06/15/presidential-letter-2012-war-powers-resolution-6- monthreport.

[1340] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilston Center*, *supra*.

[1341] Jennifer Daskal and Sephen I. Vladeck, *After the AUMF*, *supra*, p. 123.

of "associated forces" has been defined by the U.S. as embracing organized armed groups which are co-belligerents with Al-Qaeda in the hostilities against the U.S. or coalition forces, thus including "those (1) organized armed groups that have entered the fight alongside Al Qaeda; and (2) are a co-belligerent with Al Qaeda in those hostilities against the United States and its coalition partners"[1342]. The characterization of organized armed groups fighting alongside Al-Qaeda as the terrorist organization's co-belligerent associated forces has been accepted by US courts[1343].

Regardless of the suggested definition, however, it remains highly problematic to identify in practice which armed groups the US considers to be at war with[1344]. In part, because the U.S. constantly refuses to disclose a complete list of the so called "associated forces"[1345] under the pretext that doing so would afford credibility to such groups with the risk that others will join them. In part because next to the locution "associated forces" some persons within the US administration have started to make reference to Al-Qaeda's "affiliates", which make the issue even more obscure[1346]. In fact, it has been reported that, pursuant to this understanding, "the CIA killed people who only were suspected, associated with, or who probably belonged to militant groups"[1347].

c) Pigeonholing Targeted Lethal Attacks in the Applicable Legal Frameworks

Pursuant to the existence of an ongoing armed conflict with Al-Qaeda, the Taliban and "associated forces", the U.S. "would not hesitate to use military force against terrorists who pose a direct threat to America" [1348]. In fact, U.S. officials argue that, if they had actionable intelligence about high-value terrorist targets, including in Pakistan, they would "act to protect the American people"[1349]. In this context, according to U.S. officials, "U.S. targeting practices, including lethal

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1342 Jeh Charles Johnson, *The Conflict Against Al Qaeda and its Affiliates: How Will It* End?, Speech Before the Oxford Union, 30 November 2012, available at http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-theoxford-union/.

1343 Jack Goldsmith, Ryan Goodman and Steve Vladeck, *Six Questions Congress Should Ask the Administration About its ISIL AUMF*, in *Just Security*, 20 February 2015, available at https://www.justsecurity.org/20232/six-questions-congress-isil-aumf/.

1344 To this end see, *inter alia*, Cora Currier, *Who are We at War With? That's Classified*, in *Propublica*, 26 July 2013, available at http://www.propublica.org/article/who-are-we-at-war-with-thatsclassified.

1345 Jack Goldsmith, *DOD's Weak Rationale For Keeping Enemy Identities Secret*, in *Lawfare*, July 26, 2013, http://www.lawfareblog.com/2013/07/dodsweak-rationale-for-keeping-enemy-identities-secret/.

1346 Jennifer Daskal and Sephen I. Vladeck, *After the AUMF*, *supra*, p. 124.

1347 Marjorie Cohn, *A Frightening New Way of War*, *supra*, p. 18.

1348 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilston Center*, *supra*.

1349 *Ibidem*.

operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war"[1350].

Such targeting practices should therefore be evaluated against the backdrop of the international laws of armed conflict. In this connection, various U.S. officials public addresses have recalled the four cardinal principles of international humanitarian law, namely necessity, distinction, proportionality and humanity[1351]. By this token, the U.S. administration has clarified that members of Al-Qaeda are considered as legitimate military targets, that the U.S. has authority to target them with lethal force, that in doing so it respects thte principles of distinction and proportionality and that targeted strikes are actually the best method ever existed to abide by these principles of the laws of war.

In this spirit, the U.S. administration has rejected the idea that targeting a particular leader of a countering belligerent party would in and by itself constitute a breach of the laws of war. In particular, U.S. officials have suggested that "individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law"[1352]. In order to reinforce such theory, the U.S. administration has made reference to past episodes of targeted strikes, especially relying on the Yaamoto precedent to justify its current practice[1353].

d) Objectives of Targeted Attacks: Who May be Targeted?

Having assessed the abstract compatibility of targeted killing with the laws of war, it becomes of the utmost importance to understand who can be lawfully targeted. This is all the more problematic because the persons the U.S. currently aims at targeting and killing are not members of a State's armed forces who may be recognized based on their status; they are persons belonging to non-state armed groups, which generally bear no cognizable signs or emblems and refrain from carrying arms openly so as to distinguish themselves from the population at large not involved in armed activities. Such contextual reality poses factual as well as legal problems. First of all, from a strictly legal point of view, there are ongoing debates as to the characterization of those fighting for an armed group as "members" that can be

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1350 Harold H. Koh, *The Obama Administration and International Law, Speech at the American Society for International Law*, 25 March 2010. See, accordingly, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilston Center of 30 April 2012*, *supra*.

1351 *Ibidem*. See also Eric Holder, *Attorney General's Letter to the United States Senate Committee on the Judiciary*, Washington, 22 May 2013.

1352 *Ibidem*.

1353 *Ibidem*. See accordingly, Eric Holder, *Attorney General's Speech at Northwestern University Law School*, *supra*.

object of attack pursuant to a status-based model or as mere civilians directly participating in hostilities who can only be targeted for so long as they take part in hostilities[1354]. Regardless of the legal theory of choice, then, a factual assessment remains in any case troublesome, since it remains unclear under which conditions a person should be considered to fit within the legal parameters established for recognizing him as a person who may be directly attacked. Strictly linked with this consideration is the question of the evidence deemed necessary to come to a final assessment.

In this regard, the view of the U.S. administration is that targeted lethal force may be deployed against any person involved in the conflict inasmuch as involved to some extent in the activities of Al-Qaida, the Talibans and associated forces. Stressing that the exigency to target persons for death stems from imminent threats of attack against the U.S., the latter's administration has pointed out that international law "does not require the United States to have clear evidence" that an attack will actually be performed since, "by its nature […] the threat posed by Al-Qaeda and its associated forces demands a broader concept of imminence [which] must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damages to civilians, and the likelihood of heading off future disastrous attacks on Americans"[1355].

While repeatedly stressing that its operations abide by the principles of proportionality and distinction[1356], however, the U.S. has not outlined how it determines who is a lawful target for the deployment of deadly force. This becomes all the more troublesome due to repeated reports alleging that the U.S. considers all military aged males located in zones of hostilities or in the proximity of terrorist facilities as targetable individuals[1357].

The risks of abuse patently inherent to any practice consisting of compiling lists of names corresponding to persons who are to be killed has led many to ask for more transparency over drone strikes and, especially, over the methodology followed

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1354 On this and other concerns related to membership in armed groups, civilian direct participation to hostilities and continuous combat function see *infra*, Ch. V, para. 2.

1355 Department of Justice, *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* (hereinafter, *White Paper*), 8 November 2011, p. 7.

1356 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilston Center*, *supra*.

1357 Jo Becker and Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will, supra*.

by the U.S. administration in naming names for its so called kill-lists[1358]. Furthermore, in this connection, serious concerns related to possible violations of the victims' due process rights have been raised. With regard to due process, the US position is that guarantees related to such principle should not hinder lethal operations. According to this view, due process guarantees should be balanced against national security necessities[1359]. The practical rationale identified by the U.S. administration to uphold this conclusion is that "the realities of combat render certain uses of force necessary and appropriate […] and due process analysis need not blink at those realities" [1360]. In fact, it has been further underlined in response to critics alleging that the use of lethal force against specific individuals fails to provide adequate process to the victims, that "a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force"[1361].

e) Objectives of Targeted Attacks: Where May Targetable Persons Be Attacked with Lethal Force?

Strictly related to the question concerning the identification of targets is a further point, that of the geographical boundaries, if any such boundary exists, restricting the targeting states' right to kill pre-selected individuals allegedly linked to the armed conflict.

In this connection, the first feature that peculiarly connotes current U.S. practice is that, in general terms, the U.S. maintains that persons eligible for targeting may be attacked with lethal force also when they are located outside areas of active hostilities[1362]. In this regard, personnel from the U.S. administration has expressly declared that "terrorists" may be targeted and killed "beyond hot battlefields like Afghanistan […]Attorney General Holder, Harold Koh, and Jeh Johnson have all addressed this question at length […] There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the

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1358 Stimson Centre, *Grading Progress in U.S. Drone Policy*, Washington, 2016. See also, *inter alia*, *Transparency in the Drone Wars*, in The New York Times, 19 March 2016 and Trevor Timm, *Obama Claims He Wants More Transparecy. But He's Said That Before*, in *The Guardian*, 4 November 2015.

1359 *Department of Justice White Paper*, *supra*, pp. 5 and 6.

1360 *Ibidem*, p. 6. In line with this assessment see also Eric Holder, *Attorney General's Letter to the United States Senate Committee on the Judiciary*, *supra*.

1361 Harold H. Koh, *The Obama Administration and International Law, Speech at the American Society for International Law*, *supra*.

1362 The White House Office of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, supra, p. 2.

country involved consents or is unable or unwilling to take action against the threat"[1363].

It further emerges from the various speeches given and documents released to this end by the U.S. administration that even in such zones extending beyond traditional battlefields, the suspected nexus between the targeted person and the organization allegedly involved in an armed conflict with the U.S. itself justifies the application of the laws of armed conflict: "any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities"[1364]. In fact, in replying to the Senate Committee on the number of U.S. Citizens killed abroad by the U.S. Attorney General Eric Holder qualified the general framework of the relevant actions as "counterterrorism operations outside of areas of active hostilities"[1365].

This position has already been clarified and settled also in U.S. jurisprudence, not with reference to targeting practices but in more general terms to the geographical scope of the U.S. war against Al-Qaeda and associated forces. Thus, in *Bensayah v. Obama* the D.C. District Court averred that an individual turned over to the United States in Bosnia could be detained if the government demonstrates he was part of alQa'ida[1366] and it similarly concluded in *al-Adahi v. Obama*, finding authority under domestic legislation to apprehend and detain persons arrested by Pakistani authorities and then transferred to U.S. custody[1367].

The assessment that the laws of war also apply to situations outside traditional battlefields is therefore what justifies, according to the U.S. understanding, the targeting and killing of named persons.

In spite of what would seem *prima facie* as an understanding that permits the targeting state to conduct premeditated lethal operations whenever and wherever it wants, the U.S. has stressed that this is not the case. In this regard, it has underlined that this theoretical global battlefield in fact knows of some restrictions, not related to the selected targets but to the states on whose territory the targets are located. Thus, while asserting that the U.S. legal authority to resort to lethal force is not geographically limited to battlefields in Afghanistan because the war is conducted with a stateless enemy, the U.S. has recognized the existence of restrictions related to

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1363 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilston Center*, *supra*.

1364 *Department of Justice White Paper*, *supra*, p. 3.

1365 Eric Holder, *Attorney General's Letter to the United States Senate Committee on the Judiciary*, *supra*.

1366 District Court for the District of Columbia, *Bensayah v. Obama,* Judgment of 28 June 2010.

1367 District Court for the District of Columbia, *al-Adahi v. Obama,* Judgment of 13 July 2010.

other States' sovereign rights. In this connection, it has coined an "unwilling or unable test"[1368], pursuant to which U.S. perceived enemies may only be targetable when they are on the territory of a State which is unwilling or unable to apprehend them, kill them or otherwise neutralize the threat they pose for U.S. interests[1369]. According to the U.S., "this 'unable or unwilling' standard is […] an important application of the requirement that a State, when relying on self-defense for its use of force in another State's territory, may resort to force only if it is necessary to do so […] The unable or unwilling standard is not a license to wage war globally or to disregard the borders and territorial integrity of other States. Indeed, this legal standard does not dispense with the importance of respecting the sovereignty of other States. To the contrary, applying the standard ensures that the sovereignty of other States is respected. Specifically, applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using its territory as a base for attacks and related operations against other States"[1370].

f) Objectives of Targeted Attacks: How Can Targetable Persons Be Attacked with Lethal Force?

The final points commonly addressed by the various public reports provided by the U.S. administration relate to the aims, reasons and methods justifying targeting strikes.

As to their aims and reasons, the *2013 Policy Standards and Procedures* have clarified that premeditated, intentional and deliberate lethal force against pre-selected targets "will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect"[1371]. Also U.S. president Barack Obama has stressed that targeted killing are not to be understood as a punishment: "America does not take strikes to punish individuals; we act against terrorists who pose a continuing and

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1368 Eric Holder, *Attorney General's Speech at Northwestern University Law School*, *supra*.

1369 *Department of Justice White Paper*, *supra*, pp. 2 and 5. See, accordingly, Brian Egan, *State Department Legal Adviser's Speech at the American Society of International Law*, Washington, 4 April 2016: "It is with respect to this 'where' question that international law requires that States must either determine that they have the relevant government's consent or, if they must rely on self-defese to use force against a non-State actor on another State's territory, determine that the territorial State is 'unable or unwilling' to address the threat posed by the non-State actor on its territory".

1370 Brian Egan, *State Department Legal Adviser's Speech at the American Society of International Law*, *supra*.

1371 The White House Offiice of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, *supra*, p. 1.

imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat"[1372]. According to an understanding of targeting strikes as measures completely unlinked to retribution for past actions, the U.S. administration has gone through great pains to consistently underline that the criteria to be followed in order to conduct a lawful targeted killing are: a) there ought to be a legal basis for using lethal force; b) such force may only be used against persons that pose a continuing imminent threat to US persons; c) when force is used there must be "near certainty" about the presence of the targeted terrorist, and about the fact that non-combatants will not be affected by the attack, capture shall not be a feasible option, the territorial State where force is used shall be either unwilling or unable to "effectively address the threat to US persons" and no other reasonable alternatives are available to tackle the threat posed by the target; d) finally, the use of force must comply with relevant rules of international law and cannot violate other States' sovereignty[1373]. Stressing the need to target and kill only persons who pose an ongoing imminent threat, the administration thus clarified that lethal force is not deployed in connection with past conducts but only as a measure related to the dangers posed by the targets within the context of the ongoing armed conflict between the U.S. and the non-state actors involved.

The list of parameters to be abided by further introduces to the question of the methods deemed allowable by the U.S. in deploying targeted lethal force. In this connection, the administration has stressed that any military operation involving targeted strikes would be premised upon respect for the four fundamental principles of the laws of war, namely necessity, distinction, proportionality and humanity, without further specifying how[1374]. It also took into account, that the laws of war compel states to abide by much more norms than those that can be directly traced back to its four founding principles, making reference to the prohibition of treachery and perfidy. By reference to the killing of Admiral Yamamoto during World War II, then, the U.S. administration has asserted that targeted strikes do in fact comply with the applicable laws of war and excluded that they could amount to assassination. Thus, the U.S. administration has argued that: "Some have called such operations 'assassinations'. They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. […] the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful"[1375].

1372 Barak Obama, *Remarks by the President at the National Defense University*, 23 May 2013.

1373 The White House Office of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, *supra*, p. 2; Harold H. Koh, *Statement before the Senate Foreign Relations Committee Regarding Authorization for Use of Military Force After Iraq and Afghanistan*, *supra*.

1374 *Department of Justice White Paper*, *supra*, p. 8.

1375 Eric Holder, *Attorney General's Speech at Northwestern University Law School*, *supra*.

Even when all the above-mentioned conditions are met, then, the U.S. position remains that, as a matter of policy, capture is preferable to deprivation of life. Thus, the US *Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* explicitly set forth as a key element for U.S. counterterrorism operations overseas the preference for capture over lethal force. However, such document makes it clear that, in the U.S. administration's understanding, this choice is a matter of policy and not of perceived legal restraint to the use of force[1376]. Accordingly, the declared rationale for such policy is that a captured terrorist proves more useful in gathering information and intelligence than a dead one. In addition, the policy seems to lean towards a least harmful means approach insofar as it points out that "[l]ethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively"[1377]. This stance has been constantly reiterated by U.S. officials[1378] who have however somehow re-expanded the lawfulness of operations whose only aim is to eliminate the targeted person by stating: "capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant"[1379].

In sum, the U.S. position is that lethal force in a foreign country is allowed against a "senior operational leader of Al-Qaeda or its associated forces […] who is actively engaged in planning to kill Americans" when: a) the US government has determined that the targeted person poses an imminent threat of violent attack against the U.S.; b) capture is not feasible; c) the operation is consistent with laws of war principles[1380].

1376 The White House Office of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, *supra*, p. 1: " The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect". See accordingly John O. Brennan, *The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilston Center*, *supra*, suggesting that "It is our preference to capture suspected terrorists whenever and wherever feasible. For one reason, this allows us to gather valuable intelligence that we might not be able to obtain any other way".

1377 The White House Offiice of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, *supra*, pp. 1 and 2.

1378 John O. Brennan, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, *Speech at the Woodrow Wilston Center*, *supra*; Eric Holder, *Attorney General's Letter to the United States Senate Committee on the Judiciary, supra*; and Eric Holder, *Attorney General's Speech at Northwestern University Law School*, *supra*.

1379 *Department of Justice White Paper*, *supra*, p. 8.

1380 Eric Holder, *Attorney General's Letter to the United States Senate Committee on the Judiciary*, *supra*.

4.2. Israel

The Israeli Government has openly endorsed a policy of targeted killing since the beginning of the new millennium[1381]. According to the Israeli administration, Israel is involved in an armed conflict. As a consequence, the State may lawfully attack the adverse party's combatants. Targeted killings of suspected terrorists would fall within this framework and, as such, could not be reprehended[1382]. The position of Israel on targeted killing policies is mirrored in the words of the Deputy Minister of Defence Ephraim Sneh, who declared that it is allowable to "hit all those who are involved in terrorist operations, attacks or preparations for attacks, and the fact of having a position within the Palestinian Authority confers no immunity on anyone"[1383]. According to one such assessment, then, also persons involved in political activities and only remotely connected (if at all) with terrorist attacks may be lawfully targeted.

A high ranking official of the Israeli security forces declared to the Israeli Parliament Foreign Affais and Defence Committee that "the liquidation of wanted persons is proving itself useful [...] This activity paralyzes and frightens entire villages and as a result there are areas where people are afraid to carry out hostile activities"[1384]. If this were the real legal reasoning underlying such practice, however, the retributive character of the killings would be self-evident, making it troublesome under both the law enforcement and the law of war paradigms.

A few years later, in response to the UN Human Rights Committee's inquiry into the matter, Israel's delegate somehow restricted the scope of the targeted killing formally considered to be allowable in the context of counterterrorism operations. First, he reported that Israel only targeted persons directly involved in hostile acts[1385]. This excluded from the pool of targetable persons both political leaders and alleged terrorists not immediately involved in hostile acts. The Israeli delegate also conceded that it would be preferable to capture rather than to kill those suspected of involvement in terrorist attacks, but he maintained that such an option would not be feasible in territories where the Israeli Government had no control. In spite of such assessment, he reported that the instruction given to Israeli forces was

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1381 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 29.

1382 Amnesty International, I*srael and the Occupied Territories, State Assassinations and Other Unlawful Killings*, London, 2001, p. 4.

1383 *Ibidem*, p. 11.

1384 B'Tselem, *Israel's Assassination Policy: Extrajudicial Executions*, 2001.

1385 Israeli Government, *Statement to the UN Human Rights Committee*, 25 July 2003, UN Doc. CCPR/C/SR.2118, para. 40.

to respect a least harmful means approach, *i.e.* deploying lethal force only in presence of an urgent military necessity when less impacting methods could not have been pursued[1386].

The Israeli policy of targeted killing does not appear to have been limited over time. All to the contrary, according to Netanyahu, in the context of Israeli's operations in 2014, Israel considered as legitimate targets for killing all members of Hamas, including civilian components of the organization[1387]. Thus, Israel targeted persons that it considered "symbols of the Hamas government" as well as political members of Palestinian parties in Gaza[1388].

Israel's primary argument, common to all the reported positions slightly changed over time, remains that any person engaged in hostilities, be he a civilian or a combatant, can be a legitimate target[1389]. Moreover, Israel has advanced the argument that "a combatant may be an illegal combatant, and a civilian may be a combatant"[1390].

In the context of 2006 Israeli operations against the Hezbollah in Lebanon, the Israeli government understood a conflict to exist between the State of Israel and the Hezbollah as an independent and autonomous armed group, not instead between Israel and Lebanon itself[1391]. At the same time, the government of Lebanon rejected any involvement in the actions of the Hezbollah[1392]. Israel's reaction in predicated self-defence, was therefore a reaction against the activities of a non-state actor. The confrontation has been variously characterized as an international as well as a non-international armed conflict. The UN Commission of Inquiry and Israel itself have qualified the conflict as an international one. However, it has been suggested that a different characterization of the conflict is possible and could actually be more

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1386 *Ibidem.*

1387 Ray Lewis, *Netanyahu: All Hamas Members Legitimate Targets for Israeli Attacks*, in *Al Jazeera*, 20 August 2014, available at http://america.aljazeera.com/articles/2014/8/20/israel-hamas-assassination.html.

1388 Susan Power and Nada Kiswanson van Hooydonk, *Devide and Conquer, A Legal Analysis of Israel's 2014 Military Offensive Against the Gaza Strip*, Ramallah, 2015, p. 30.

1389 Kathleen A. Cavanaugh, *Rewriting the Law: The Case of Israel and The Occupied Territories*, in David Wippman and Matthew Evangelista, *New Wars, New Laws?Applying the Laws of War in 21st Century Conflicts*, New York, 2005, p. 250.

1390 *State Attorney's Office, Supplemental Statement*, in *The Pubblic Committee Against Torture in Israel v. Israel*, 1999, para. 152.

1391 Israeli government, *Cabinet Communique*, 16 July 2006.

1392 Permanent Mission of Lebanon to the United Nations, *Letter to the Secretary-General*, UN Doc. A/60/938, 13 July 2006 and *Letter to the President of the UN Security Council*, UN Doc. S/2006/518, 13 July 2006.

appropriate to identify it as one of a non international nature[1393]. Be it as it may, what would really make a difference in these different characterizations is that under the laws of non-international armed conflict Hezbollah could not have combatant status since such a status does not exist in this kind of conflicts. This consideration, in turns, would reflect on the permissibility of targeting operations directed at Hezbollahs. During the conflict, Hezbollah fighters were not considered as civilians but they were sometimes labelled as combatants, other times as simple fighters[1394].

4.3. European States' Position

After the introduction of drone technology and the subsequent enhanced scope of the U.S. targeted killing policy, following the latter's acquired public dimension through its overt recognition and official endorsement by the U.S. administration, European States have had hesitant reactions, both individually considered as well as in the framework of regional organizations.

Up until now the European Union has been largely passive in its response to drone warfare, accurately avoiding to react to the ever increasing resort to drone strikes by the United States[1395]. In fact, it has been noticed, "EU member states have not yet tried to formulate a common position on the use of lethal force outside battlefield conditions"[1396]. Such indecision in taking a clear stance on the matter, it has been argued, is mainly due to a reluctance to openly accuse the U.S. of patently breaking well-established norms of international law, also in consideration of the ties linking in a more or less direct way some European States to the U.S. in terms of intelligence[1397]. Be that as it may, at the dawn of drone warfare, European states remained largely disengaged from activities that would even remotely compare to those undertaken with ever increasing frequency by the U.S.

Besides remaining severed in the actual use of drone technology and, in particular, in the use of such technology for targeted killing, European states at first accurately avoided to take a clear stance on the use of such unmanned aerial vehicles

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1393 To this end see Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors, supra*, pp. 251-254.

1394 *Ibidem*, pp. 251-254.

1395 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, pp. 1 and 2.

1396 *Ibidem*, p. 7.

1397 *Ibidem*, p. 2.

made by their counterparts[1398]. Arguably, their silence in the matter may be interpreted as implicit consent and approval of U.S. use of drones for targeting purposes. This could perhaps find further confirmation in that the absence of a clear stance on the matter by European States and, in particular, by the European Union as a whole, lasted until very recently.

However, when in 2014 the European Parliament called for a clarification on the European Union common position on armed drones, it did so expressing "grave concern over the use of armed drones outside the international legal framework", further urging "the EU to develop an appropriate policy response at both European and global level which upholds human rights and international humanitarian law"[1399]. These concerns actually matched those already expressed within the framework of another European international organization around a year before: in April 2013 the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs had taken an alarmed position with regard to the rising use of armed drones for strikes in counterterrorism operations and pointed out with apprehension that more and more European states were developing or acquiring combat drones[1400].

What has been suggested in this regard is that "The EU should base its position on the idea that lethal force should only be used outside theatres of conventional military operations against individuals posing a serious and imminent threat to innocent life"[1401]. In particular, some authors have argued, "the default European assumption would be that the threat of terrorism should be confronted within a law enforcement framework", which would not absolutely prohibit the deliberate killing of individuals, but would set an extremely high threshold for its use[1402]. In apparent accordance with this suggestion, three EU member states have agreed that "European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way"[1403].

1398 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, The Hague, 2015, Executive Summary.

1399 Parliament of the European Union, *Joint Motion for a Resolution on the Use of Armed Drones*, EU Doc. 2014/2567 (RSP), 27 February 2014, available at http://www.europarl.europa.eu/oeil/popups/summary.do?id=1340215&t=e&l=en).

1400 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, *supra*, pp. 56 and 57.

1401 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, p. 1.

1402 *Ibidem*, p. 8.

1403 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, *supra*, Executive Summary.

Albeit rather clear at first glance, this stance leaves however some doubts even with regard to what has been purported as the core common ground of European States on this issue. Such consideration is due to the fact that the expression "zones of conventional hostilities" is not a term of art and may be thwarted through interpretation so as to expand its scope rather indefinitely, as it has already occurred in the American discourse related to drone strikes. This perplexity seems moreover to find immediate confirmation in the following reference to what would appear to be a least harmful means approach: once more, saying that outside zones of conventional hostilities premeditated lethal force may be used against pre-selected individuals when there is no other course of action to prevent an imminent threat to life may certainly be interpreted in conformity with that absolute necessity standard required by international human rights law. However, some have been arguing that it should be considered that no other course of action is possible when there is no other window of opportunity to actually apprehend the source of the threat, and therefore that basically any targeted killing through drone technology should be justified.

Partly in line with such assessment, moreover, in response to a survey conducted in order to assess whether or not it is possible to detect a common European position on this issue, three EU Member States (all those that replied to the survey in this regard) underlined that the States' public silence on the issue of drones did not necessarily entail their acquiescence to U.S. practices[1404].

As a matter of fact, some among European states have voiced reluctance in accepting the U.S.-proposed model of targeted killing, when not condemning it directly. Notably, in 2002 the Swedish Foreign Minister Anna Lindh qualified the killing of Ali Qaed Sinan al-Harithi, a suspected al-Qaeda affiliate terminated by a US drone strike in Yemen, as a summary execution in open violation of human rights law[1405]. Even though her assessment remains rather isolated, given that other European political leaders have never expressed an opinion on the issue and that the EU has not adopted any official stance on the legality of targeted killings in general and drone strikes in particular[1406], her position finds some support. Actually, other European political leaders and lawmakers, Danish in particular, have more recently raised similar concerns and have gone even further than their Swedish counterpart

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1404 *Ibidem*. In particular, the response by Czech Republic reads: "No. In our opinion silence cannot be interpreted as implicit consent as to how drones are currently being employed" (to this end see the quoted survey, p. 17).

1405 Brian Whitaker and Oliver Burkeman, *Killing Probes the Frontiers of Robotics and Legality*, in *The Guardian*, 6 November 2002, available at http://www.guardian.co.uk/world/2002/nov/06/usa.alqaida.

1406 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, p. 2.

had done, expressly labelling some of U.S.'s targeted killings as assassination[1407]. In this regard, it has been pointed out that again in 2012 several Danish lawmakers expressed concerns about the U.S. use of drones in Somalia, Pakistan and Yemen, and defined the US strategy as one of "targeted assassination" which runs contrary to international law[1408].

In line with the reported assessment, when in 2011 it was alleged that a Danish double-agent had passed to the U.S. pieces of intel that the latter later used to locate and kill Anwar Al-Aulaqi in Yemen[1409], the Danish intelligence agency excluded any involvement of its agents clarifying, in particular, that "the PET does not participate in or support operations where the objective is to kill civilians. The PET did therefore not contribute to the military operation that led to the killing of al-Awlaki in Yemen"[1410]. In so doing, albeit without handing out a precise formulation of its approach to policies of targeted killing, the Danish intelligence service made it clear that it considered Anwar Al-Aulaqi to be a civilian and that, regardless of any other circumstance, it excluded the possibility to ever design a plan whose final aim is the deprivation of life of a pre-selected civilian.

Moreover, whereas it is true that, in general terms, European States and the European Union as a whole have so far failed to take a decisive position towards US Drone Strikes and targeted killing operations, in 2004 the European Council strongly condemned the targeted killing of Hamas leader Sheikh Ahmed Yassin[1411], orchestrated and perpetrated by Israeli forces. In such occasion, the operation was defined an "assassination" and an "extra-judicial killing" and the European Council underlined that actions of this kind are not only "contrary to international law, they

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1407 Copenhagen Post, *Political Leaders Call Obama Assassin for Use of Drones*, 25 July 2012, available at http://cphpost.dk/news14/international-news14/political-leaders-call-obama-assassin-for-use-of-drones.html.

1408 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, *supra*, p. 18: "In the Copenhagen Post, Rasmus Helveg Petersen (the former Danish Social Liberal Party's foreign policy spokesperson, and current Minister of Climate and Energy) stated: 'It's terrible. The United States has no right to carry out these types of executions of suspected political adversaries. It contravenes international law'. Soren Pind, former Minister of Integration, Refugees and Immigrants and current MP and Foreign Affairs Spokesperson of the Liberal opposition party, made the comparison of drone attacks to 'assassinations' and stated that what Obama and his administration were doing 'violates the principles of the Western world'. Additionally, those from the Red-Green Alliance party vowed to voice their concern with the Danish Parliament's foreign policy committee".

1409 On the legal proceedings before the U.S. judiciary to try and stop the targeted killing of Anwar Al-Aulaqi and those aimed at obtaining reparation after his death see *infra*, Ch. IV, para. 5.

1410 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, *supra*, p. 19. See also O. Borg, *The Double Agent Who Infiltrated Al Qaeda*, in *Newsweek*, 10 February 2013, http://www.newsweek.com/double-agent-who---infiltrated-al-qaeda-63259)

1411 In higher detail on the killing of Sheikh Ahmed Yassin see *supra*, Ch. IV, para. 3, sub-para. 3.1(c).

undermine the concept of the rule of law, which is a key element in the fight against terrorism"[1412]. Yet, the justification adduced by Israel for the killing of Yassin did not much differ from those usually adopted by the U.S. when arguing for the lawfulness of its policy of drone strikes against suspected terrorists.

Nonetheless, the practice of deploying armed drones on traditional battlefield as well as in areas afar from combat operations is in rapid evolution and with it, arguably, the legal stance of the countries that are more and more inclined to support such practice. Thus, just a few years ago a scholar exploring the lawfulness of targeted killings performed with armed drones could write "While European countries have not taken public positions, Germany, Austria, and some Nordic countries are among those that have tended to be more direct in their criticism of US policy in private meetings, while France and the UK probably have greater sympathy with the US. Other EU member states that do not face a serious threat from international terrorism or deploy military forces in overseas operations against non-state groups may not have felt any need to consider their views on these issues at all"[1413].

Such an assessment may not be as accurate now as it was back in 2013. An evolutionary trend may perhaps be exemplified with reference to Germany's stance. Whereas in 2013 the German Defence Minister strongly condemned the use of armed drones outside zones of active hostilities, qualifying drone killings taking place in such context as extrajudicial executions[1414], it has been reported that the current understanding of the German Armed Forces Chairman is that "all future conflicts […] will be fought with drones, and therefore the time is right to purchase and develop armed drone technology in Germany"[1415]. By the same token, German newspapers have reported in the last years that Germany had already been greatly involved in drone warfare, at least insofar as drone operations in Afghanistan were concerned, both in terms of intel gathering and sharing with the U.S. and in relation to Germa basis used to launch drones operating in the mid-east[1416].

In spite of the evidence thus emerged, however, the German government declared in an answer to a parliamentary question: "Below the threshold of armed

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1412 European Council, *Council Conclusions on Assassination of Sheikh Ahmed Yassin*, 22 March 2004, available at http://europa.eu/rapid/press-release_PRES-04-80_en.htm.

1413 Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, *supra*, p. 7.

1414 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, *supra*, p. 23.

1415 *Ibidem*, p. 23.

1416 Der Spiegel, *A War Waged from German Soil: US Ramstein Base Key in Drone Attacks*, 22 April 2015, available at http://www.spiegel.de/international/germany/ramstein-base-in-germany-a-key-center-in-us-drone-war-a-1029279.html.

conflict, the international and constitutional basic conditions for the use of armed drones are the same as for any other armed system"[1417].

In fact, what does remain consistent over time is the lack of a clear stance on targeted killing in general and drone strikes in particular by European States, considered as each individual State as well as a whole within the framework of the European Union. Such lack of a shared position does not only cover the issue of targeted killings in general, but is actually rooted in different views concerning very specific facets characterizing this practice. Thus, it appears that no agreement can be detected on geographical boundaries of non-international armed conflicts as some European States actually consider oxymoronic the possibility that such a kind of conflict could possibly have no geographical limitation whereas others actually uphold the opposite conclusion[1418]. Similarly, with fundamental repercussions on the delimitation of the pool of targetable individuals, there would seem to be no agreement as to the existence of a customary notion of continuous combat function as suggested by the ICRC[1419].

One of the very few issues some European States seem to agree upon is that "self-defense against an autonomous NSA [Non-state actor] is possible", or at least that it is possible to act in self-defence against a State to which non-state actors' behaviours may be attributed inasmuch as such a state is not willing or able to stop the actions of the non-state actor triggering the third states' right to self-defence[1420].

Most European states also seem to agree that resort to lethal force against preselected individuals is in principle not lawful outside zones of active hostilities. Thus, some went on record stating that "Targeting people outside of an armed conflict is not authorized by international law. The legality of a killing outside the context of armed conflict is governed by human rights standards, especially those concerning the use of lethal force. Under IHRL, and under the domestic law of most states, targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be lawful" and further stressed that, as a consequence of this understanding, "[a]n actor located in a non-belligerent state, who directly participates in hostilities and he/she is in a continuous combat function falls under the non-belligerent state's jurisdiction. Based on the law of this state, he/she shall be detained"[1421]. In a somewhat more drastic fashion, other states wholly

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1417 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, *supra*, p. 25.

1418 *Ibidem*, p. 54.

1419 *Ibidem*, p. 54. Thus, for instance, in response to this survey the Netherlands expressed the view that "the continuous combat function test outlined by the ICRC's Direct Participation in Hostilities study reflects customary international law" whereas other states disagreed with such assumption.

1420 *Ibidem*, p. 53.

1421 *Ibidem*, response by The Netherlands, pp. 33, 36 and 48.

rejected the idea that outside of armed conflict could even be appropriate to speak about targetable persons: "It is not appropriate to use a word targetable in relation to situations outside of armed conflicts"[1422].

Regardless of this assessment, however, most of the European states accepting to participate to a survey concerning these issues stated that they would consider permissible to take action in self-defence within the territory of "unwilling or unable states" [1423]. While it is true that some of them pointed out that the individuation of "unwilling or unable states" should rest with the UN Security Council, the test thus recalled is actually one that, under certain circumstances, would *de facto* contradict and trump the assessment that non international armed conflicts are inherently limited from a geographical point of view and that military armed force may not be used outside areas of active hostilities.

One more point emerging from the survey should actually be underlined: "Four EU Member States were of the opinion that there is no obligation to capture rather than kill in IHL (unless the person in question is *hors de combat*, see the third anonymous respondent), although capture may be the preferred (policy) option. One EU Member State (second anonymous respondent) was less clear, but argued that "killing the target is to be avoided in all cases except when such a behavior poses a real threat to life"[1424].

Perhaps moving in the opposite direction, at least in relation to some of these points, it has been noticed in an expert meeting organized by the Council of Europe that extensive interpretation of existing rules of international law is extremely problematic inasmuch as it entails an overextension of the battlespaces and it blurs the traditional boundaries of the principles of distinction an proportionality. It further emerged in such context that the U.S. position assumed on the use of unmanned aerial vehicles for targeting purposes should not be shared by the Council of Europe, considering the extremely broad interpretation given by U.S. president Barack Obama and his administration to the notion of imminence, that the U.S. understands as "encompassing considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks […] it would allow attacks on individuals as a deterrent on or punishment of those that had engaged in prior attacks, but were not in the process of carrying out renewed attacks. All other signatures would fail either the proportionality or the necessity test outlined in IHL"[1425]. A belief was further expressed that "the creation of a 'kill-list' would be contrary to obligations under the

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1422 *Ibidem*, response from the Czech Republic, p. 14.
1423 *Ibidem*, pp. 48 and 50.
1424 *Ibidem*, p. 54.
1425 *Ibidem*, pp. 56 and 57.

ECHR in times of peace, but it was context specific within armed conflict what the obligations might be"[1426].

The Parliamentary Assembly of the Council of Europe unanimously adopted in 2015 a resolution related to this matter. It first of all observed that "several member States and States enjoying observer status with the Council of Europe or the Parliamentary Assembly have used combat drones as weapons of war or for carrying out targeted killings of people suspected of belonging to terrorist groups in a number of countries, including Afghanistan, Pakistan, Somalia and Yemen […] have shared intelligence with States using combat drones for targeted killings, thus assisting them in carrying out drone attack"[1427].

The assembly then went on to stress that "under international humanitarian law, which applies in situations of armed conflict, only combatants are legitimate targets. In addition, the use of lethal force must be militarily necessary and proportionate and reasonable precautions must be taken to prevent mistakes and minimise harm to civilians". It however immediately added: "under international human rights law, which generally applies in peacetime, but whose application has permeated also into situations of armed conflict, an intentional killing by State agents is only legal if it is required to protect human life and there are no other means, such as capture or non-lethal incapacitation, of preventing that threat to human life" [1428]. It further Stressed that "in order to justify a wider use of targeted killings, the concept of 'non-international armed conflict' has been extended by some countries so as to include numerous regions across the world as 'battlespaces' of the 'global war on terror'. This threatens to blur the line between armed conflict and law enforcement, to the detriment of the protection of human rights" and, in this connection, it recommended member states to "avoid broadening the concept of 'non-international armed conflict' by continuing to respect established criteria, including the requisite degree of organisation of non-State groups and a certain degree of intensity and localisation of violence"[1429].

4.4. *Sui Generis*: UK

Recent evolutions in the field actually make the UK stick out among other European States and therefore its position deserves a particular, autonomous analysis

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1426 *Ibidem*, 2015, p. 57.

1427 Council of Europe, Parliamentary Assembly, *Drones and targeted killings: the need to uphold human rights and international law*, Resolution No. 2051, 2015, paras. 2 and 3.

1428 *Ibidem*, paras. 6.2 and 6.3.

1429 *Ibidem*, paras. 6.5 and 8.3.

in this connection. The UK is in fact the only EU Member State that currently has armed drones[1430] and uses them for targeting practices.

In a letter addressed to the Security Council on 8 September 2015 the UK has explicitly tackled the issue of targeted killings. In such occasion, the UK presented a precision air strike it had conducted on 21 August 2015 killing a person allegedly "known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom" as a necessary and proportionate exercise of its inherent right of self-defence. At the same time, it held that the strike was conducted within the framework of an ongoing armed conflict against Da'esh in Syria that sees the UK directly involved by reason of its engagement in the collective self-defence of Iraq[1431].

As concise as it may be, the recalled letter issued by the UK's permanent representative to the UN provides various relevant indications in itself as well as if compared with the broader context of UK's responses on its position on targeted killings. First, it is apparent from the letter itself that the UK, in a rather contradictory fashion, starts alleging that the drone strike represents itself an exercise of its own right of self-defence as a measure of *jus ad bellum* only to go on and picture it as a measure of lawful action under *jus in bello* criteria, due to its ongoing involvement in the collective self-defence of Iraq. This discrepancy in the legal rationale underlying the position of the UK has been observed by relevant actors in this field, that underlined its discrepancies with previously reported justification for targeted killing policies[1432]. Indeed, when addressing the British parliament on the targeted killing of Reyaad Khan, the Prime Minister stated in rather unequivocal terms that "the strike was not part of coalition military action against ISIL in Syria; it was a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home"[1433].

Second, when focusing on the argument concerning UK's own self-defence pretences, it is apparent that the strike is being characterized as a preventative measure. In this connection, the alleged right to conduct such operation according to

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1430 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, *supra*, p. 42.

1431 Matthew Rycroft, *Letter From the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, UN Doc. S/2015/688, 8 September 2015, paras. 2 and 3.

1432 Reprieve, *UK Drones Letter To UN Casts Doubt on Prime Minister's Claims to Parliament*, 10 September 2015: "The British Government has told the UN Security Council (UNSC) that the campaign against ISIS in Iraq provides legal justification for UK drone strikes in Syria – a claim which is different to that of pure UK 'self-defence' provided by David Cameron to MPs earlier this week".

1433 David Cameron, *Prime Minister's Address to the British Parliament*, London, 7 September 2015.

the UK's position remains confined by well-established parameters of proportionality, imminence and necessity governing the use of armed force in self-defence. Three main issues remain however extremely problematic in this connection. For starters, it seems rather difficult to uphold that a single action programmed and directed by one individual could ever rise to the level of an armed attack that would *per se* justify a reaction in self-defence as per Art. 51 UN Charter. Moreover, whereas the traditional criteria of necessity, proportionality, and imminence are recalled, it seems impossible to assess the existence of the first two in the case at hand since the UK government did not provide any explanation as to the factual circumstances against which they should be confronted. As for the last of the enucleated parameters, it should be noticed that imminence does not only pose problems from a factual viewpoint but, most significantly, it raises questions from an intimately legal perspective, particularly considering the fact that imminence is not defined in the letter under scrutiny. Finally, even if the alleged target's imminent actions had been actually sufficient to warrant a reaction in self-defence, such response should have been compatible with applicable *jus in bello* and applicable human rights standards. Were it otherwise, law enforcement parameters alone should apply and, in such context, self-defence would require a much higher threshold in order to be invoked as a justification that would render a killing non-arbitrary. The silence of the letter in this connection let the interpreter infer that the UK's position is that targeted strikes do not pose any sort of legal challenge under the laws of war or human rights parameters applicable in an armed conflict scenarios. However, such a delicate area should definitely not be left to interpreters' conjectures, all the less in consideration of the profound legal doubts that raise in this connection under both legal paradigms.

This latest point is actually the only one that, in the letter issued by the UK's representative to the UN, is common to both legal justifications adduced. Indeed, the strike should in any case comply with the laws applicable to armed conflicts also when considering it as a military operation conducted in the broader framework of the ongoing collective self-defence of Iraq. Also in this connection it seems possible to detect a few juridical points of interest within the letter at hand. First of all, it is relevant that the UK regards itself as engaged in an armed conflict with Da'esh, a non-state entity that should therefore be characterized as an organized armed group. Such conflict is evidently *de facto* transnational as it crosses the Iraqi - Syrian border. It is completely unclear however whether, from a legal standpoint, the UK regards it as an international armed conflict or as a non-international armed conflict that spilled-over into the territory of a bordering State. What remains obscure, moreover, partly as a consequence of this latest consideration, is whether the UK regards Syria as one of the battlefields where such conflict is conducted or else if it considers that pursuant to this allegedly ongoing armed conflict against Da'esh it regards itself allowed to conduct strikes wherever and whenever it deems appropriate insofar as the targeted person is identified as an ISIL member.

In this regard, the Prime Minister's speech to the British Parliament seems to be more clear. In that occasion, in fact, the UK Prime Minister stated that any direct threat to "the British people" should be stopped, even by deployment of lethal force, "whether the threat is emanating from Libya, from Syria or from anywhere else"[1434]. Nonetheless, it should be recalled that in such address the British Prime Minister had actually established that the legal basis for targeted killing is the State's right of self-defence. Thus, when pointing out that such strategy could be deployed everywhere on the territory of third countries, he was referring to targeted strikes as a means of self-defence rather than as a method of warfare compatible with further *jus in bello* parameters.

A final, crucial point for the assessment of the legality of any targeted killing of suspected terrorists relates to the issue of membership. UK's letter to the Security Council is clear in stating that it stroke "an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom was travelling". It does not clarify whether such target was regarded himself as a Da'esh member, even though from the tenure of the letter this seems the most likely solution. In the absence of any reference to the point, however, it is not possible to assess on which basis the UK regards possible to establish membership status. As a consequence, it is impossible to know who can allegedly be targeted, when and where.

The confusion risen by the UK Government's contradictory accounts is acknowledged by the report of the UK Joint Committee on Human Rights[1435]: according to the Joint committee, after the Prime Minister's statement it was assumed that that the new UK policy would consist of targeted strikes against suspected terrorists abroad as a measure of preventive self-defence, even on the territories of States where the UK is not engaged in armed hostilities. However, as the Joint Committee recognizes, this sufficiently clear proposition has been disrupted by the UK's letter to the UN Security Council as well as by a further letter addressed by the Government to Leigh Day & Co. In both cases in fact, clarifies the Joint Committee, the Government has stated that its strikes in Syria have been conducted in the framework of an armed conflict. Precisely, the armed conflict referred to is the one taking place in Iraq which, according to the UK Government, has spilled over into Syria[1436].

After the UK directly resorted to targeted drone strikes against members of Da'esh in Syria in August 2015, the Joint Committee on Human Rights of the UK's

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1434 *Ibidem*.

1435 UK Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing*, *supra*, para. 2.8.

1436 *Ibidem*, para. 2.11.

parliament launched an inquiry into the UK's policy on the use of drones for targeted killing[1437]. Similar to what previously happened in the US, also the UK's government has not set out a clear policy for targeted killing before starting to resort to lethal measures against pre-identified individuals outside zones of active hostilities. The inquiry's scope was to clarify the UK's policy over targeted killing, the decision making process and the accountability for unlawful acts perpetrating pursuant to the targeted killing policy[1438]. The UK government's response to the parliamentary inquiry has taken the form of a brief legal-memo setting out the following standards.

First, terrorist attacks, either individually considered or series of them, may rise to the level of an armed attack triggering a state's right of self-defence pursuant to Art. 51 UN Charter[1439]; given that the UK may act against Da'esh in anticipatory self-defence when an imminent threat of armed attack exists, it is allowed to exercise its inherent right of self-defence in compliance with Art. 51 UN Charter and in full respect of customary requirements of proportionality and necessity[1440]; in this context, the use of intentional lethal force represents in any case a last resort, only feasible when it would be otherwise impossible to detain the targeted person or else to disrupt and prevent the attack[1441]; even in this further restricted context, UK's action will strictly abide by parameters of necessity and proportionality[1442];

On 10 May 2016, the Joint Committee on Human Rights has published its report on the UK's policy for the use of unmanned aircrafts for targeted killing[1443].

The report makes clear that, when Reyaad Khan was targeted and killed in Syria in 2015, the UK government was authorized under UK law to use military force against Da'esh in Iraq whereas any possible resort to force in Syria fell short of parliamentary authorization[1444]. This first remark is of the outmost importance since

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1437 The inquiry was launched at the end of October 2015 is currently open and ongoing. To this end see the webpage of the Joint Committee on Human Rights, available at: http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/uk-drone-policy-15-16/.

1438 Dapo Akande, *UK Parliamentary Inquiry into UK Policy on the Use of Drones for Targeted Killing*, in *EJILTalk!*, 23 December 2015, available at http://www.ejiltalk.org/uk-parliamentary-inquiry-into-uk-policy-on-the-use-of-drones-for-targeted-killing/.

1439 UK Government, *Memorandum to the JCHR*, *supra*, p. 2.

1440 *Ibidem*, p. 2.

1441 *Ibidem*, p. 1.

1442 *Ibidem.*

1443 UK Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing*, *supra*.

1444 *Ibidem*, para. 1.2. The authorization to use military force in Syria was provided to the UK Government by the House of Commons only on 2 December 2015. Before the issuance of such authorization, the UK performed in joint UK-US operations two more targeted strikes against UK nationals in Syria killing Junaid Hussain and Mohammed Emwazi on 24 August and 12 November 2015 respectively.

it clarifies that, under UK legal parameters, at the time the relevant targeted killing was performed the UK was not engaged in an armed conflict over Syrian territory. They could have thus resorted to military measures on the territory of Syria only if such actions were part of the ongoing hostilities against Da'esh in Iraq, eventually spilled over into the territory of the neighbouring State. Absent standing authority to use armed force in Syria provided by Parliament, under UK law such measure could have been only considered as: a) a measure of self-defence providing a new justification for the use of force in a new, different context; b) a measure of extraterritorial law enforcement. This consideration therefore provides a first factual background for a legal analysis under international law.

Recalling the oral statement released on 7 September 2015 by the Prime Minister to the House of Commons on Refugees and Counter-terrorism, the Joint Committee has further clarified that, according to the Government, such action had been motivated by the necessity to disrupt a terrorist threat to the UK which could not have otherwise be dealt with due to the inability of the territorial State to do so[1445]. In particular, the Prime Minister had hold that Khan was at the centre of a net to conduct coordinated and multiple armed attacks to the UK, thereby triggering the State's inherent right of self-defence. In that occasion, the Prime Minister admitted that the operation leading to Khan's death was the first of its kind for the UK and described it as a "new departure".

Such new departure, in the Committee's words, concerns a governmental policy "to use drones for targeted killing outside of armed conflict […] The UK had previously used armed drones to deliver lethal strikes, but only in areas such as Iraq and Afghanistan where the UK was already clearly involved in an armed conflict […] our inquiry has established that it is the Government's policy to use lethal force abroad, even *outside of armed conflict*, against individuals suspected of planning an imminent terrorist attack against the UK, when there is no other way of preventing the attack"[1446].

The new position assumed by the UK Government would represent an epochal change in the UK's policy were it to be considered that the strikes carried out afar from hot battlefield are mere measures of law enforcement. Thus, it has been noted that "it amounts to a sea-change in the UK's legal position, and indeed aligns it with several US legal positions in the 'war on terror' which, hitherto, no European state has formally embraced"[1447].

1445 *Ibidem*, paras. 1.3-1.6.

1446 *Ibidem*, paras. 1.7 and 2.2.

1447 Nehal Bhuta, *On Preventive Killing*, in *EJIL:Talk!*, 17 September 2015, http://www.ejiltalk.org/on-preventive-killing/.

The Joint Committee has observed that Da'esh poses a very serious threat of terrorist attack in the UK and that it is the duty of every State to take the measures necessary to ensure the right to life of those within their jurisdiction[1448]. It is this new scenario that, according to the Joint Committee, has led to a blurring of lines between peace and war, warranting a reaction that is different from traditional, domestic counterterrorism models[1449].

In relation to the use of lethal force in third countries outside the context of armed hostilities, the UK Secretary of State for Defence has averred before the Joint Committee that the UK considers itself allowed to resort to such measure even outside the framework of an ongoing armed conflict[1450]. As per the examples and the description he made, however, this assessment seems to do away with any consideration related to the characterization of terrorist groups as organized armed groups or to the assessment of the target's membership with a given group who is involved in an armed conflict against the UK in a different part of the globe. In fact, the Secretary of State for Defence referred in general terms to imminent threats to the lives of British citizens with no other way to repel such threats rather than lethal force (i.e. there is an absolute necessity to use lethal force). Considering these conditions as the relevant parameters for the use of lethal force suggests that the source of the threat has no real relevance in the assessment over the lawfulness of an envisaged targeted strike. Therefore, under this reading, the source of the menace could be a person belonging to a terrorist group as well as any other individual who, jointly with others or autonomously, threaten the life of British citizens.

In connection with the position expressed by the Secretary of State for Defence, taking into account the previous official statements of the Government on this issue, the Joint Committee concluded that "it is clear that the Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes"[1451].

In relation to the laws of war, armed conflicts, and the existing ratio between the former and the latter, the Joint Committee has first of all clarified its position regarding the scope of application of the laws of war. Thus, it has stated that such legal paradigm "applies where there is an armed conflict"[1452]. It also clarified that there can only be two kinds of conflicts, namely international and non-international ones. The Committee went on to assess that 1) a non-international armed conflict can

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1448 UK Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing*, *supra*, para. 1.20.

1449 *Ibidem*, para. 1.28.

1450 *Ibidem*, para. 2.32.

1451 *Ibidem*, para. 2.39.

1452 *Ibidem*, para. 3.45.

take place across state boundaries; 2) the conflict in such case remains non-international in nature because reference is due to the nature of the parties involved rather than to the geographical location of the armed confrontations; 3) since Da'esh is a non-state armed group, despite its flawed claims to statehood, the UK is involved in a non-international armed conflict with such entity; 4) the theatre of such conflict extends over the territories of Iraq and Syria, and therefore the laws of war applies in both States[1453].

Coming to the question of the admissibility of pre-meditated lethal force against pre-selected individuals, according to the Joint Committee, it should be considered that: 1) the law of war "permits targeted killing in an armed conflict, provided that certain principles are complied with" [1454]; 2) such principles, in particular, are the principles of distinction, proportionality and precaution[1455]. Most notably, in this assessment the Committee did not take into account the principle of military necessity.

The Committee stressed that the laws of armed conflict are not the only applicable legal regime, as human rights law remains in place also in such context. However, it has underlined, the substantive protections granted under the latter paradigm are to be interpreted in light of international humanitarian law, as this latter body set forth "more precise requirements". Therefore, compliance with the laws of war would be sufficient to satisfy all requirements connected to the respect to the right to life imposed by human rights law[1456].

Dissociating the UK's position from that of the US administration in relation to the alleged existence of a global battlefield where terrorists can be targeted at any time and in any place they are found, the Joint Committee has ascertained that the British government does not consider to be engaged with Da'esh wherever its members may be located but rather that its conflict is geographically limited to the territories of Iraq and Syria. As the Committee has recognized, nonetheless, according to the UK government, this geographical limitation to the notion of armed conflict would not prevent it from using lethal force abroad outside of armed conflict, in compliance with the laws of war, when responding to an imminent threat to the UK or to UK's interests. This, in turns, implies that a) armed conflict have a geographical limitation; b) the laws of armed conflict apply beyond such a geographical scope; c) kinetic operations aimed at killing an enemy fighter may be undertaken, outside the geographical limitations of the armed conflict, proven that they comply with the laws of armed conflict and are meant to repel an imminent

1453 *Ibidem*, paras. 3.45 and 3.46.
1454 *Ibidem*, para. 3.47.
1455 *Ibidem*, para. 3.47.
1456 *Ibidem*, para. 3.48.

threat. As the Committee has noticed, "The effect of that assertion is that the UK Government's policy ends up in the same place as the US policy, despite disavowing the wide American view"[1457]. In this connection, the Joint Committee has expressed the opinion that "the Secretary of State's position that the Law of War applies to the use of lethal force abroad outside of armed conflict, and that compliance with the Law of War satisfies any obligations which apply under human rights law, is based on a misunderstanding of the legal frameworks that apply outside of armed conflict. In an armed conflict, it is correct to say that compliance with the Law of War is likely to meet the State's human rights law obligations, because in situations of armed conflict those obligations are interpreted in the light of humanitarian law. Outside of armed conflict, however, the conventional view, up to now, has been that the Law of War, by definition, does not apply" [1458].

This consideration is all the more relevant in connection with the UK's involvement in US-led drone strikes outside traditional theatres of armed conflict. The Joint Committee has recognized that UK bases were used by the US to perform the attack to the training camp in Libya that on 19 February 2016 has led to the death of over 40 Da'esh fighters. The attack had actually targeted and finally successfully killed Noureddine Chouchane, a Tunisian national suspected of involvement in terrorist attacks in Tunisia[1459].

According to the Joint Committee the British government position is that outside active theatres of battle the laws of war stop applying and, as a consequence, the only applicable legal framework remains human rights law[1460].

4.5. Interim Conclusions

This paragraph has shown that since the beginning of the new century an ever-increasing resort to practices of targeted killing within as well as outside cognizable theaters of hostilities has no longer been shrouded in secrecy, being publicly endorsed by States resorting to such technique.

To be sure, such States are not many at the current stage: besides the U.S. and Israel, no other State has maintained such practice in a consistent fashion even though, admittedly, some other States have indeed resorted to targeted killing techniques on sporadic basis. These factual data alone show that there is at present no "concordant and recurring" practice. It would therefore be impossible to conclude

[1457] *Ibidem*, para. 3.54.
[1458] *Ibidem*, para. 3.55.
[1459] *Ibidem*, para. 3.81.
[1460] *Ibidem*, para. 3.85.

that the model proposed by States most widely resorting to targeted killing techniques has actually been endorsed by the remainder of the international community.

These considerations, in and by themselves, are not however conclusive as to a possible, ongoing paradigm shift: indeed, most states do not have any need to resort to targeted killing techniques because, at present, they are not involved in armed conflicts. Others, albeit involved in such conflicts, may decide not to adopt such practices as a matter of policy.

In the absence of positive practice, what becomes determinative in order to assess the existence of the seeds of a paradigm shift towards a legitimation of these operations is therefore an assessment of the legal theory purportedly supporting the legitimacy of the proposed model.

As abundantly shown in the course of this paragraph, the U.S. position may be summarized in the following terms. As to the context and nature of the conflict, while the "global battlefield" rhetoric has been formally abandoned, the current administration continue to pursue the idea that it has authority to go after individuals it one-sidedly identifies as unlawful enemy combatants wherever and whenever they are. Allegedly, the U.S. is involved in an armed conflict with Al-Qaeda and its "associated forces". Importantly, the notion of "associated forces" has never been clarified. Analogously, these forces as well as Al-Qaeda itself are often described as "transnational networks", which makes it rather obscure to assess on which basis they may be considered as organized armed groups for the purpose of the law of armed conflicts. As of late, the U.S. also considers itself involved in an armed conflict with Da'esh. It is not clear whether or not the "associated forces" paradigm is a notion uniquely operative for Al-Qaeda or it also applies to Da'esh. Be that as it may, the administration considers that the laws of armed conflict are the only applicable legal regime, to the complete exclusion of human rights law, both because of an alleged in-applicability of human rights standards extraterritorially and pursuant to a strict adherence to the *lex specialis* principle. In this framework, the administration has stated that any person who is "a member" or is "affiliated with" Al-Qaeda (does the same hold true for Da'esh?) may be targeted. Again, no parameters are outlined to establish either membership or affiliation. Such persons, in the U.S.' view lose their immunity from military attack once and for all after their very first act of participation in hostilities. They may be targeted not only while engaged in hostilities, and also when they are located far away from any battlefield or theater of hostilities, insofar as the State where they are is either "unwilling" or "unable" to "neutralize" them. Again, the parameters of unwillingness and incapability have not been clarified by the U.S. administration. The latter has however pointed out that targeted strikes are not retributive in nature and may only be addressed at persons who pose a "continuous imminent threat" to U.S. interests and that, as a matter of policy, they the U.S. gives capture precedence over killing.

This theory has not been endorsed by European States, that have largely been silent on the matter. The European Union, as a whole, has not adopted a common position. On the other hand, single States have inconsistently reacted to the U.S. advanced model. Notably, however, there have been more than a few condemnations of targeted killing operations. Thus, Swedish and Danish representatives have defined targeted killings outside situational fighting as assassinations. Faced with criticism for their alleged involvement in U.S. led targeted killings the Danish secret services have publicly stated that they considered Anwar Al-Aulaqi a civilian that could not be targeted when he was killed. In 2013, then, Germany has defined targeted killing outside theaters of hostilities as extrajudicial killings. The Council of Europe, on its part, has vehemently condemned the killing of Sheik Ahmed Yassin. A survey conducted to this end finally shows that most European states share the view that the laws of armed conflict should not be considered to apply outside zones of active hostilities. In particular, there is some consensus on the fact that the regions where international humanitarian law applies should be identified through reference to intensity and protraction of armed violence as well as to the degree of organization of the groups involved in order to avoid an over-extension of the notion of non-international armed conflicts.

The United Kingdom has become as of late the exception to this position, following its involvement in targeted killing of Da'esh members in Syria. For what matters the most for the present study, the stance assumed by the UK is that: it is possible to be involved in a cross-border armed conflict with non-state actors; the exact geographical limitations to the authority to conduct targeted strikes remains unclear as the stance assumed by different stake-holders diverge on this issue. In any case, the UK endorses a least harmful means approach. Whereas the Government has alleged that it should be possible to use targeted lethal force in the absence of an imminent threat also outside battlefield situations, an appointed parliamentary committee has rejected this option.

As it appears, at this stage neither the U.K. position nor that of other European States seems to endorse the model proposed by the U.S. and Israel, which therefore, for the moment, stand alone. To the contrary, some European states seem to be overtly antagonizing such interpretation.

5. ACCESS TO JUSTICE AND NATIONAL JURISPRUDENCE

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(1) Access to Justice and the Stance of the Judiciaries; (1.a) Anwar Al-Aulaqi - Case of Al-Aulaqi v. Obama; (1.b) Case of Al-Aulaqi and Others v. Panetta and Others; (1.c) Case of Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs; (1.d) Noor Khan v. Pakistan - Noor Khan before the Pakistani Judicial System (1.e) Karim Khan - Karim Khan v. The Inspector General of ICT Police; (1.f) Faisal bin Ali Jaber; (1.g) Faisal bin Ali Jaber v. Germany; (1.h) Faisal bin Ali Jaber v. The United States and Others; (1.i) Barakeh - Barakeh v. Prime Minister and Minister of Defence; (1.j)The Public Committee Against Torture in Israel The Public Committee Against Torture in Israel v. Israel.

It has been correctly pointed out that "Judges in democratic States assume different roles. They may variously serve as a legitimating agent of the State; avoid exercising jurisdiction for extra-legal considerations; defer to other branches of the government; enforce the law in line with the rule of law ideal; or develop the law and introduce forms of ethical judgment that go beyond positive application of the law"[1461]. The way targeted killings have been addressed by various national judiciaries around the world proves a valuable test for such assertion, actually confirming it insofar as it displays the various approaches undertaken by the different national judicial bodies asked to express their judgments in this subject matter.

Before getting into a detailed analysis of targeted killing-related judicial decisions issued until now[1462], a few premises are in order. First of all, as apparent from the above, at this stage any analysis of jurisprudence in this field is necessarily confined to pronouncements of national judicial bodies. This is because no international court has ever had any chance of issuing a decision on episodes of targeted killing properly so called. Second, the decisions that will come under scrutiny are both sparse in geographical terms as they are in quantity, especially taking into account the existing ratio between the number of judicial proceedings stemming from episodes of targeted killing and the number of targeted killing

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[1461] Sharon Weill, *Reducing the Security Gap through National Courts: Targeted Killings as a Case Study*, in *Journal of Conflict and Security Law*, Oxford, 2015, p. 49.

[1462] The reported proceedings will be thoroughly analyzed but, due to the specific focus of the present research, which deals with assassination and not with targeted killing in general, both the reported passages and the analysis conducted will primarily emphasize the impact of the national judicial decisions under scrutiny on the law of targeting during armed conflicts.

actually performed by States in these last years. This is mainly due to a set of two very practical reasons: at the current stage, States resorting to a widespread and systematic use of targeted killing are relatively few, as relatively few (even though ever-increasing)[1463] are those States on whose territory this kind of operations are generally conducted. Not so many are therefore the national judicial systems currently in the position to have jurisdiction over the matter and, consequently, issue judgments on the ensuing incidents. Moreover, victims of targeted killing rarely find themselves in an excellent position for the purpose of bringing lawsuits, considering a multitude of factors, spanning from poor economic conditions and geographical hurdles, to limited knowledge of their rights and perplexity as to the benefits of any judicial proceeding. These are all factors that highly contribute to discourage the initiation of judicial proceedings either before domestic courts or before the judicial system of the states allegedly responsible for the killing.

An analysis of domestic case laws, however, proves fundamental in this field. First of all because, absent any international jurisprudence on the point, these judgments are the only judicial scrutiny available to commentators in order to prove their theory on a practical level. Secondly, because an in-depth scrutiny may prove crucial for a survey of common trends and subsequent identification of the emergence of a legal argument (possibly leading to the genesis of a new *opinio juris*) on the subject[1464]. Moreover, even in the absence of any such common trends, judicial review may reflect national positions and understanding of the current status of international law which could be very helpful to bring the analysis of the phenomenon a step further. Finally, because a particular attention to the rule of law is the very trigger of the present research and no other body is better placed than national courts to honour such principle.

Admittedly, however, courts involved in these matters may face a non-negligible number of obstacles, especially when they are tasked with the judgement of issues traditionally abandoned to the discretion of executive powers. Military operations and any other action purported by the executive to be even remotely connected with military activities squarely fall within the matters of this sort. It is submitted here that the ambit of subjects deemed as non-justiciable within many domestic legal systems sometimes limits domestic jurisdictions, actually preventing them from issuing their judgment on the merits of the cases under their scrutiny. Some other times, however, the impression rises that domestic courts actually take

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1463 See *supra*, Ch. IV, para. 3.

1464 Notably, judicial decisions are acts of State organs capable of integrating State practice as well as *opinio juris*. See to this end International Law Commission, *Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, UN Doc. A/CN.4/L.872, 30 May 2016, Draft Conclusion 5.

advantage of so called "avoidance doctrines"[1465] so as to evade any involvement in decisions that would touch upon highly sensitive disputes in a way related to political choices made by other powers of the State. Be it as it may, it is undeniable that forced or tendentious resort to non-justiciability clauses and avoidance doctrines represent by and large the primary cause of the unbridled lack of judicial scrutiny over the merits of targeted killing-related complaints. On the lack of judgments in the merits is indeed premised the lack of judicial enforcement of the law, which irremediably leaves victims of abuses outside of the protection of the law and with no further venues of relief.

5.1. Access to Justice and the Stance of the Judiciaries

In this section various attitudes assumed by domestic judicial systems towards these subjects will be scrutinized. This will serve a twofold purpose: first of all, it will aim at exploring which stances various courts of different countries assume towards current developments in the use of premeditated lethal force against pre-selected individuals. In so doing, it will try to highlight their consideration of issues related to the existence of conflicts with transnational non-state armed groups, to the characterization of such conflicts as international or non-international, to the possibility to target individuals for death within and outside the context of hostilities (including the identification of the applicable legal regimes, their scopes and interactions), to the particular rules applicable and, possibly, violated by targeted killing practices. Secondly, it will provide a general overview of the judicial venues actually available (or, more commonly, as we will see, unavailable) to targeted persons and their relatives. This point bears particular relevance provided that, as it will be shown, some of the courts best suited to make a difference in this field have actually refrained from taking a decision in the merits of the plaintiffs' claims relying on those avoidance doctrines recalled above. Being this the case, it is submitted here that the consistent refusal to afford reliable judicial – if we may, procedural – guarantees bears substantial repercussions, at the very least insofar as refusing to deliver judgments in this matter often results in materially placing a person outside the protection of the law, making him or her an outlaw, in open violation of substantive norms of both international human rights law and international humanitarian law.

In order to undertake this general judicial review it is believed that the clearest approach to the matter may be one that relies on a case-by-case victim-centred analysis. The following will therefore aim at bringing light on the selected

[1465] Sharon Weill, *Reducing the Security Gap through National Courts: Targeted Killings as a Case Study*, *supra*, p. 52.

judicial proceedings not proceeding by country but by victim[1466]. A general comparative assessment will be offered throughout the analysis that follows as well as, chiefly, in the conclusion of this paragraph.

a) Anwar Al-Aulaqi - Case of Al-Aulaqi v. Obama

On 30 August 2010, following media indiscretions that the name of U.S. citizen Anwar Al-Aulaqi had been placed at the top of a secret CIA "kill-list"[1467], Nasser Al-Aulaqi, Anwar's Father, represented by the Center for Constitutional Rights and the American Civil Liberties Union, brought a lawsuit challenging the government's decision to target Anwar Al-Aulaqi for killing[1468]. In particular, the complainant sought a declaration "that the Constitution and international law prohibit the government from carrying out targeted killings outside of armed conflict except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury" and an injunction "prohibiting the targeted killing of U.S. citizen Anwar Al-Aulaqi outside this narrow context"[1469].The lawsuit argued that Al-Aulaqi was located outside the framework of any active hostility, considered that the geographic dimension of the armed conflict between the U.S. and Al-Qaeda was restricted to regions characterized by intense and protracted armed violence, conditions which were absent in Yemen at the relevant time. Henceforth, according to the plaintiff, international humanitarian law could have not found application in Yemen and any operation of targeted killing envisaged to take place in such State would have been, by that reason only, automatically unlawful. Alternatively, the plaintiff argued that, in any case, Al-Qaeda in the Arabian Peninsula (AQAB) had no sufficient affiliation to be regarded as an association whose members may have been object of attack under the Authorization for the Use of Military Force (AUMF)[1470]: since Al-Aulaqi was alleged to be a member of AQAB, and not of Al-Qaeda directly, under this reading he could not have been targeted and killed as his supposed affiliation to AQAB would not deprive him of his civilian status and of the related

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1466 As will become apparent to the reader during this chapter, some victims have brought complaints and lawsuits before the domestic courts of different countries, so that it results more effective, in the author's views, to treat each victim separately, rather than undertaking a country-specific general analysis.

1467 *Al-Aulaqi v. Obama, Complaint*, 30 August 2010, paras. 18-20.

1468 See accordingly, Pardiss Kebriaei, *Al-Aulaqi v. Obama: Targeted Killing Goes to Court*, *supra*, p.196.

1469 *Al-Aulaqi v. Obama, Complaint*, *supra*, para. 6.

1470 United States Congress, *Authorization for the Use of Military Force*, Washington, 14 September 2001, authorizing the use of military armed force against those responsible for the 9/11 attacks and providing the President of the United States the authority to resort to all "necessary and appropriate force" against them.

attack-exemption[1471]. In both cases, the plaintiff argued, "the placement of Al-Aulaqi on the government's kill lists amounted to a standing authorization to use lethal force against him and was fundamentally inconsistent with those requirements [*i.e.* requirements of Constitutional and International Human Rights Law]"[1472]. Consequently, a standing order that Anwar Al-Aulaqi was to be killed infringed upon the latter's constitutional rights as well as upon his internationally recognized human rights, affecting his right against excessive use of force by public authorities, his right not to be arbitrarily deprived of his life, and his right to due process of law[1473].

The defendant's motion to dismiss argued instead that judicial review would breach fundamental principles at the roots of separation of powers[1474], further arguing that the plaintiff lacked standing and that its complaint would in any case require the Court to assess a non-justiciable political question[1475].

On 7 December 2010 the United States District Court for the District of Columbia, granting the Government's *Motion*, dismissed the plaintiff's lawsuit on jurisdictional grounds[1476]: the District Court averred that the plaintiff had no standing and that there could be no judicial review of the executive power's decision to target Al-Aulaqi due to the political question doctrine[1477].

At the outset, the Court stressed the "unique and extraordinary" nature of the case related to the "fundamental questions of separation of powers involving the proper role of the courts in our constitutional structure"[1478]. The Court itself further recognized that the plaintiff's claim rose a number of vital legal questions[1479]. Nonetheless, it made clear from the very beginning of its legal analysis that "unfortunately [...] no matter how interesting and no matter how important this case may be […] we cannot address it unless we have jurisdiction"[1480].

Albeit never really entering into the merits of the plaintiff's claim, in more than one *obiter dictum* the Court's decision shows that it indeed glimpsed at the

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1471 *Al-Aulaqi v. Obama, Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss*.

1472 *Al-Aulaqi v. Obama, Complaint*, *supra*, para. 3. Pardiss Kebriaei, *Al-Aulaqi v. Obama: Targeted Killing Goes to Court*, *supra*, p.196.

1473 *Al-Aulaqi v. Obama, Complaint*, *supra*, paras. 27-30.

1474 *Al-Aulaqi v. Obama, Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss*.

1475 *Al-Aulaqi v. Obama, Defendants' Motion to Dismiss*, 25 August 2010, p. 1.

1476 United States District Court for the District of Columbia, *Al-Aulaqi v. Obama*, Judgment of Judgment of 7 December 2010.

1477 On the political question doctrine see *infra*, in this same paragraph.

1478 United States District Court for the District of Columbia, *Al-Aulaqi v. Obama*, *supra*, p. 2.

1479 *Ibidem*, p. 2.

1480 *Ibidem*, p. 2.

substance of the complaint. First, in its reasoning on the plaintiff's standing the Court recalled the jurisprudence of *Hamdan v. Rumsfeld* qualifying the confrontation between the US and Al-Qaeda as an armed conflict[1481]. In yet another passage related to the plaintiff's standing it argues: "Anwar Al-Aulaqi would not be killed if he were to present himself in a peaceful manner and seek relief in U.S. courts, but he would expose himself to possible detention as an enemy combatant"[1482]. In this connection, the District Court has stressed that "all U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities"[1483] and, arguably, correctly so. Not so correctly, however, this principle was applied to the case at hand: in so doing, in fact, the Court showed that it did not attach any significance to the twelve previous (failed) attempts at Al-Aulaqi's life. In fact, the Court concluded that "given that an individual's actual incarceration is insufficient to show that he lacks access to the courts, the mere prospect of Anwar Al-Aulaqi's future incarceration fails to satisfy Whitmore's "inaccessibility" requirement"[1484], showing indifference towards the fact that Al-Aulaqi's hiding was essentially different from any incarceration, at least insofar as coming out of his secure location would have most probably entailed meeting his "dead end" in rather literal terms (as he in fact did not so long after the judgment under scrutiny was delivered). In line with its reasoning, therefore, the Court concluded on the point that the plaintiff lacked standing because he could not show that Al-Aulaqi was prevented access to judicial guarantees[1485].

The Court reached a similar assessment in relation to the plaintiff's argument that he would anyways have standing as a third party[1486]. In so doing, the Court averred that it was prevented from considering the merits of the constitutional complaints advanced by the plaintiff and therefore could not clarify any of the questions concerning the compatibility of targeted killing policies underlying the claims as to the Anwar Al-Aulaqi's rights to life, integrity and due process of law.

1481 *Ibidem*, p. 18.

1482 *Ibidem*, p. 43.

1483 *Ibidem*, pp. 18 and 19.

1484 *Ibidem*, p. 19.

1485 *Ibidem*, p. 28.

1486 *Ibidem*, p. 49: "Ultimately, plaintiff's belated argument in support of third party standing fares no better than his attempt to sue as his son's "next friend." Plaintiff cannot show that a parent suffers an injury in fact if his adult child is threatened with a future extrajudicial killing"[1486]. To this end, the Court particularly underlined that "Although a parent may sometimes serve as an effective advocate for the interests of his child, a parent may not be accorded third party standing where his interests are "potentially in conflict" with his child's". On the basis of, *inter alia*, these considerations, the Court concluded that "Because plaintiff can satisfy neither the requirements of third party standing […] nor the requirements of "next friend" standing […], all three of plaintiff's constitutional claims must be dismissed due to lack of standing".

Since the plaintiff brought his last argument under the Alien Tort Statute, the Court was finally also asked to address whether "the policy of targeted killings violates treaty and customary international law"[1487]. The Court, however, dismissed this claim as it did with the ones previously rejected, stating that the plaintiff had failed to show either that he suffered a legally cognizable tort in relation to his son's future and eventual targeted killing, nor that the US had waived sovereign immunity for an Alien Tort Statute claim[1488]. For the purpose of the current study the analysis conducted by the Court in this connection is definitely relevant. The Alien Tort Statute as currently interpreted in US jurisprudence (and by the District Court for the District of Columbia itself) provides the possibility to bring claims related to violations of the law of nations that "rest on a norm of international character accepted by the civilized world" and are "sufficiently definite to support a cause of action"[1489]. Whereas the court conceded that "U.S. courts have recognized a customary international law norm against past state-sponsored extrajudicial killings as the basis for an ATS claim", it immediately underlined that "plaintiff cites no case in which a court has ever recognized a "customary international law norm" against a threatened future extrajudicial killing, nor does he cite a single case in which an alien has ever been permitted to recover under the ATS for the extrajudicial killing of his U.S. citizen child" [1490]. The Court focused its attention on the nature of the threat of targeted killing, which it esteemed to be projected into the future, and averred that "there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing - as opposed to the commission of a past state-sponsored extrajudicial killing - constitutes a tort in violation of the "law of nations"[1491]. In so doing, it endorsed a particularly restrictive interpretation of the existing norm of international law against extrajudicial executions. First of all, because it did not consider whether or not under international law an attempt to break a norm may in and by itself constitute a breach of such norm. Additionally, because it did not consider that the prohibition of extrajudicial killing does not stand in a vacuum but rather stems from the general norm granting the right to life, a norm that is now generally accepted as entailing both a positive and a negative dimension and that does in itself forbid States from keeping conducts which could jeopardize the right to life of all those who can be defined as rights-bearers *vis-à-vis* such states[1492].

Moreover, with its assessment as to the plaintiff's failure to citing previous case law related to the recognition of a norm of international law of customary nature against the threat of future extrajudicial killings, the Court itself showed that it did

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1487 *Al-Aulaqi v. Obama, Complaint*, *supra*, para. 29.

1488 United States District Court for the District of Columbia, *Al-Aulaqi v. Obama*, *supra*, p. 50.

1489 *Ibidem*, p. 50.

1490 *Ibidem*, pp. 51 and 52.

1491 *Ibidem*, p. 52.

1492 To this end see *supra*, Ch. II, paras. 4 and 5.

not fully take into account the novelty of the subject matter, which was the very reason for the lack of judicial precedents supporting the plaintiff's complaint. This point is as crucial as it was brutal for the plaintiff's claim: the very lack of any judicial precedent could suffice to assess in the merit that no such a thing as standing orders to kill a pre-selected individual existed until very recently as it has always been – rightly – assumed that such practice would in and by itself violate well-established international law parameters related to the right to life. At the time of the delivery of the judgment under scrutiny here, the U.S. itself maintained its policy in this regard fully shreded in secrecy.

Thus, the fact that "no court has ever found that the threat of a future extrajudicial killing is a recognized tort, much less one that violates the present-day law of nations"[1493] has no bearing in assessing how well established a rule of customary international law the prohibition of extrajudicial killing (effectively performed or attempted so) is. The further conclusion that "plaintiff cannot point to a single case recognizing such a claim"[1494] could perhaps lead to the conclusion endorsed by the Court that "his ATS claim cannot possibly be held to violate a 'norm of customary international law so well defined as to support the creation of a federal remedy'" [1495]. However, it may very well (and perhaps more appropriately) be construed to mean the exact opposite, that is since a rule forbidding extrajudicial executions is so well established under international law a practice of standing orders to kill pre-selected persons has never before been implemented by any State in the international community. Henceforth, the utter absence of judicial precedent is inherently interlinked to and caused by an equally significant absence of practice, proving exactly the point that the Court tried to discredit with the assessment under question.

The Court also stressed that Al-Aulaqi's lawsuit should be deemed as a lawsuit against the U.S. itself since his claims were addressed against the U.S. President, the Secretary of Defense and the CIA Director. In this connection, it stressed that the U.S. cannot "be sued without its consent", which is a "prerequisite for jurisdiction"[1496] and concluded that "here, plaintiff also asks this Court to interject itself into a 'sensitive' foreign affairs matter, by issuing discretionary relief that would prohibit military and intelligence activities against an alleged enemy abroad […] The Supreme Court has repeatedly acknowledged the separation-of-powers concerns posed by any judicial attempt to 'enjoin the President in performance of his official duties.' […] it [would] be extraordinary for this Court to order declaratory and injunctive relief against the President's top military and

1493 United States District Court for the District of Columbia, *Al-Aulaqi v. Obama*, *supra*, p. 54.
1494 *Ibidem*, p. 54.
1495 *Ibidem*, p. 54.
1496 *Ibidem*, p. 59.

intelligence advisors, with respect to military action abroad that the President himself is alleged to have authorized. Given that there is no clear waiver of sovereign immunity permitting such 'extraordinary relief' and that '[t]he Alien Tort Statute has never been held to cover suits against the United States or United States Government officials', this Court declines to exercise its equitable discretion to grant such relief here"[1497].

Coming finally to the political question doctrine the Court stressed that "The political question doctrine is essentially a function of the separation of powers". Testing the plaintiff's claim against a six-pronged test framed in order to assess the justiciability of the matter brought to its attention[1498], the Court argued that "an examination of the specific areas in which courts have invoked the political question doctrine reveals that national security, military matters and foreign relations are 'quintessential sources of political questions.' […] Courts are thus institutionally ill-equipped 'to assess the nature of battlefield decisions,' […] or to 'define the standard for the government's use of covert operations in conjunction with political turmoil in another country' […] These types of decisions involve 'delicate, complex' policy judgments with 'large elements of prophecy,' and 'are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility'"[1499].

By this token, the Court was able to conclude: "Judicial resolution of the "particular questions" posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar Al-Aulaqi's alleged terrorist activity renders him a "concrete, specific, and imminent threat to life or physical safety," see Compl., Prayer for Relief (c); and (4) whether there are "means short of lethal force" that the United States could "reasonably" employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests. […] Viewed through these prisms, it

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1497 *Ibidem*, pp. 62-64.

1498 Six factors were taken into account by the Supreme Court for the identification of non-justiciable matter falling within the scope of the political question doctrine: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question". To this end see United States District Court for the District of Columbia, *Al-Aulaqi v. Obama, supra*, pp. 65-66.

1499 United States District Court for the District of Columbia, *Al-Aulaqi v. Obama, supra*, pp. 65-66.

becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.”[1500].

Then, quoting from judicial precedent set by the D.C. District Court in a case involving the bombing a Sudanese pharmaceutical plant mistakenly thought to be a terrorist base under the control of Osama Bin Laden, the Court stressed: “"[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target […] this Court cannot possibly determine whether the government's alleged use of lethal force against Anwar Al-Aulaqi would be "justified or well-founded." […] "[i]t is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action." […] Moreover, any post hoc judicial assessment as to the propriety of the Executive's decision to employ military force abroad "would be anathema to […] separation of powers" principles. […] The mere fact that the "foreign target" of military action in this case is an individual -- rather than alleged enemy property -- does not distinguish plaintiff's claims from those raised in El-Shifa for purposes of the political question doctrine”[1501]. Tracing a distinction with habeas corpus petitions, the Court also stressed, “While the Suspension Clause reflects a ‘textually demonstrable commitment’ of habeas corpus claims to the Judiciary, […] there is no ‘constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target’” [1502]. Analogously, the Court traced a difference between the case at hand and previous cases adjudicated by the judiciary in relation to unlawful seizure of property, averring: “[o]nce the court characterized the case as a land dispute between the plaintiffs and the U.S. government, it had little difficulty concluding that ‘adjudication of the defendants' constitutional authority to occupy and use the plaintiffs' property’ did not require ‘expertise beyond the capacity of the Judiciary’”[1503].

Quite surprisingly, the conclusion reached by the Court is that where a judicial decision would matter the most (literal life-or-death situation) then courts have no powers whatsoever. Perhaps more astonishingly, the Court avers that the decision whether or not to deprive a person of his fundamental right to life (inherent, supreme and presupposed to all other rights) is political in nature. In this case, the Court alleges, an "unquestioning adherence to a political decision by the

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1500 *Ibidem*, pp. 67-69.
1501 *Ibidem*, pp. 70 - 72.
1502 *Ibidem*, p. 75.
1503 *Ibidem*, pp. 76 and 77.

Executive"[1504] is required: "To be sure, this Court recognizes the somewhat unsettling nature of its conclusion – that there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas is 'constitutionally committed to the political branches' and judicially unreviewable. But this case squarely presents such a circumstance" [1505].

In so doing, the Court actually came to the conclusion that every single time the executive alleges the existence of a certain matter's more or less close nexus with an armed conflict, then it has *carte blanche* to decide how to proceed, even if this means proceeding completely outside the boundaries of the law.

b) Case of Al-Aulaqi and Others v. Panetta and Others

Anwar Al-Aulaqi was finally killed in a U.S. drone strike carried out the morning of 30 September 2011 while he was travelling with another person, Samir Khan, in the province of al-Jawf, Yemen. At least other two people, besides Anwar Al-Aulaqi and Samir Khan were killed[1506].

On 18 July 2012, after Anwar Al-Aulaqi was deprived of his life, and a second drone strike killed Abdulrahman Al-Aulaqi[1507], the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR), representing the victims' relatives, filed a lawsuit against the US Secretary of Defense Leon C. Panetta, the Commander of the Special Operations Command William H. McRaven, the Commander of the Joint Special Operations Command Joseph Votel and the Director of the CIA David H. Petraeus. The lawsuit challenged the constitutionality as well as the lawfulness under international law of targeting of U.S. citizens outside zones of active hostilities[1508]. In particular, the complaint was based on the premises that the U.S. was not at war with or in Yemen at the time the relevant targeted killing occurred[1509] and thus alleged that, outside the frame of hostilities, "both the United States Constitution and international human rights law prohibit the use of lethal force

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1504 *Ibidem*, p. 77.

1505 *Ibidem*, p. 78.

1506 On the factual circumstances surrounding the killing of Anwar Al-Aulaqi see *inter alia* Jennifer Griffin, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, in *Fox News*, 30 September 2011 and Dominic Rushe, Chris McGreal and Others, *Anwar Al-Awlaki's Death: US Keeps Role Under Wraps to Manage Yemen Fallout*, in *The Guardian*, 30 September 2011.

1507 *Al-Aulaqi and Others v. Panetta and Others, Complaint*, 18 July 2012.

1508 United States District Court for the District of Columbia, *Al-Aulaqi v. Panetta*, Judgment of 4 April 2014.

1509 Al-Aulaqi and Others v. Panetta and Others, Complaint, *supra*, para. 4.

unless, at the time it is applied, lethal force is a last resort to protect against a concrete, specific, and imminent threat of death or serious physical injury"[1510].

The lawsuit further alleged that "[e]ven in the context of an armed conflict, the law of war cabins the government's authority to use lethal force and prohibits killing civilians who are not directly participating in hostilities"[1511]. The lawsuit also argued that the killing of Anwar Al-Aulaqi, Samir Khan and Abdulrahman Al-Aulaqi amounted to an execution without due process of law and further argued that, in any case, the US government were to be found responsible for the death of civilian bystanders.

Also in this case, the defendants filed a motion to dismiss "because this Court lacks subject matter jurisdiction"[1512]. The defendants maintained in particular that, exercising its inherent right to self-defense, the US has been engaged in an armed conflict with Al-Qaeda and associated forces since 2001, that Anwar Al-Aulaqi was the leader of Al-Qaeda in the Arabian Peninsula (AQAP), and that AQAP is either an integral part of Al-Qaeda or, at least, one of its "associated forces"[1513]. For what matters the most here, the defendants held that the plaintiffs' demand of a judgment on the conduct of the Executive for actions allegedly committed in the framework of an armed conflict fully authorised under U.S. law represents the "quintessential source of non-justiciable political questions"[1514]. In addition, they evoked a qualified immunity defense[1515]. In this connection, the defendants discredited the plaintiffs' claim that the victims' fourth[1516] and fifth[1517] amendments rights were violated since

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1510 *Ibidem*, para. 4.

1511 *Ibidem*, para. 4.

1512 *Al-Aulaqi and Others v. Panetta and Others, Defendant's Motion to Dismiss*, 14 December 2012.

1513 *Ibidem*, pp. 13-15.

1514 *Ibidem*, 14 December 2012, pp. 13, 15 and 18: henceforth, the defendants argued, "This Court should dismiss the complaint on four independent grounds. First, Plaintiffs have failed to demonstrate they have the capacity to sue. Second, their claims raise quintessential political questions, and therefore this Court lacks jurisdiction to consider them. Third, under governing precedent, special factors counsel against inferring a damages remedy in this novel context. And fourth, Defendants are entitled to qualified immunity because Plaintiffs have failed to allege the violation of any clearly established constitutional right".

1515 *Ibidem*, 14 December 2012, p. 41: "government officials performing discretionary functions are protected by qualified immunity and cannot be liable unless their actions violate clearly established statutory or constitutional rights of which a reasonable person would have known".

1516 *U.S. Constitution*, Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". For the purpose of this analysis, it should be underlined that Fourth Amendment claims are relevant insofar as excessive force is used in unreasonable seizure, i.e. when an organ of the State has unduly restrained a person's liberty.

1517 *U.S. Constitution*, Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the

such protections would not find application "in the context of the conduct of armed conflict abroad", maintaining that the victims' deaths were provoked by "alleged missile strikes at designated targets from RPAs circling above Yemen in the context of an ongoing armed conflict"[1518], adding that "[l]egal precedent provides almost no guidance on whether and to what extent the Fifth Amendment applies extraterritorially in the battlefield context presented" and quoting previous domestic case law indicating that "in the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront"[1519]. To this end, the defendants have underlined that "in any event, under any reasonable construction of procedural due process and on the facts alleged, Anwar Al-Aulaqi's claim fails. The Supreme Court has recognized that procedural due process rights may be diminished in a battlefield situation"[1520].

On 4 April 2014 the US District Court for the District of Columbia issued its judgment on the case, granting the government's motion and thus dismissing the lawsuit.

The Court considered that "Anwar Al-Aulaqi was a key leader in AQAP who had been, and continued to be, involved in recruiting, training, and preparing terrorists for attacks on U.S. targets"[1521] and it took judicial notice of his involvement in the so called Christmas Day terrorist attack as well as of Al-Aulaqi's pledge that he would never surrender in his "jihad against America"[1522].

Contrary to what it had hold in the *Al-Aulaqi v. Obama* judgment, the Court in principle excluded the applicability to the case of the political question doctrine. It held: "The powers granted to the Executive and Congress to wage war and provide for national security does not give them *carte blanche* to deprive a U.S. citizen of his life without due process and without any judicial review […] The Bill of Rights was passed to protect individuals from an over-reaching government, and this Court cannot refuse to provide an independent legal analysis […] Because Plaintiffs here pointedly allege that Defendants, U.S. officials, intentionally targeted and killed U.S.

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land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". For the purpose of this analysis, it should be underlined that Fifth Amendment protections secure individuals against arbitrary exercises of public power without proper due process.

1518 *Al-Aulaqi and Others v. Panetta and Others, Defendant's Motion to Dismiss, supra*, pp. 45 and 46.

1519 *Ibidem*, pp. 52 and 53.

1520 *Ibidem*, p. 55.

1521 United States District Court for the District of Columbia, *Al-Aulaqi and Others v. Panetta and Others*, *supra*, p. 6.

1522 *Ibidem*, p. 17.

citizens abroad without due process, the Court finds that this case is justiciable and that it has subject matter jurisdiction"[1523]. Notably, the Court acknowledged that this decision on the political question doctrine diverged from the judgment issued in *Al-Aulaqi v. Obama*, but it justified such difference on the basis of the different claims underlying the two proceedings. According to the Court, whereas *Al-Aulaqi v. Obama* was geared around fifth amendment protections involving issues of separation of powers and judicial competence to review military decisions, *Al-Aulaqi and Others v. Panetta and Others* posed a different question, namely, whether the considerations that had formed the object of the previous lawsuit could prevent the plaintiffs from seeking remedy against individual officials[1524].

Turning its focus to constitutional rights and due process, the Court first averred that no excessive use of force related to unreasonable seizure in violation of fourth amendment rights could be advanced as, in the case at hand, there had been no seizure at all[1525].

After clarifying that fifth amendment protections (both substantive and procedural in nature) secure individuals against arbitrary exercise of public power without proper due process[1526] and pointing out that "No court has ever examined the precise nature of the substantive due process rights of an enemy, who also is a U.S. citizen, killed by a drone", it took the stance that 'the Complaint states a "plausible" procedural and substantive due process claim on behalf of Anwar Al-Aulaqi[1527]".

However, the Court came to the conclusion that U.S. law does not provide any available remedy for such a claim[1528] since a number of special factors hinder its justiciability. According to the Court's reasoning, "special factors—including separation of powers, national security, and the risk of interfering with military decisions—preclude the extension of a *Bivens* remedy [*i.e.* claims against individual federal officials] to such cases […] [T]he insistence […] with which the Constitution confers authority over the Army, Navy, and militia upon political branches […] counsels hesitation in our creation of damages remedies in this field"[1529].

The Court further noticed: "Anwar Al-Aulaqi was an active and exceedingly dangerous enemy of the United States, irrespective of his distance, location, and citizenship. […] Anwar Al-Aulaqi was able to persuade, direct, and wage war against the United States from his location in Yemen, *i.e.*, without being present on an

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1523 *Ibidem*, pp. 20 and 21.
1524 *Ibidem*, p. 21.
1525 *Ibidem*, p. 24.
1526 *Ibidem*, p. 25.
1527 *Ibidem*, pp. 25 - 27.
1528 *Ibidem*, p. 27.
1529 *Ibidem*, pp. 28-32.

official battlefield or in a 'hot' war zone. Defendants, top military and intelligence officials, acted against Anwar Al-Aulaqi, a notorious AQAP leader, as authorized by the AUMF […] Permitting Plaintiffs to pursue a *Bivens* remedy under the circumstances of this case would impermissibly draw the Court into "the heart of executive and military planning and deliberation, […] as the suit would require the Court to examine national security policy and the military chain of command as well as operational combat decisions regarding the designation of targets and how best to counter threats to the United States […] Plaintiffs' Complaint also raises questions regarding foreign policy"[1530].

In so doing the Court never got to examine the merits of the lawsuit: while rejecting the application of the political question doctrine *tout-court*, what the Court did was however very similar in its substance to the application of an avoidance doctrine also in *Al-Aulaqi v. Panetta*. The Court's reasoning actually even runs counter to the rationale underlying *Al-Aulaqi v. Obama* pursuant to which the political question doctrine barred in that case any possible consideration of the lawsuit in its merits because, it held, the role of the judiciary is to conduct "post hoc determinations", stressing that courts "are certainly not accustomed to assessing claims like those raised by plaintiff here, which seek to prevent future U.S. military action in the name of national security against specifically contemplated targets"[1531]. In *Al-Aulaqi and others v. Panetta and others*, in fact, the Court invoked "hesitation" to apply remedies based upon individual damages for conducts falling within the constitutional mandate of the Navy, the Army or militia. Such decision stands regardless of all the considerations the Court itself had previously conducted on the importance of the substantive rights allegedly breached. At the same time, the Court disregarded the assessment reached in *Al-Aulaqi v. Obama* on the post *hoc* role of the judiciary. The Court trumped the fundamental rights of those affected, considering them *de facto* unfit to be justiciable. Thus the real face of the argument excluding the applicability of the political question doctrine to the case at hand resurfaces: such doctrine does not *strictu sensu* apply to the current case not because it is deemed incompatible with the claim of extrajudicial executions due to the nature of the right allegedly violated but simply because it is not meant to be used in damage claims. For this kind of complaints, the same *ratio* that permeates the *Al-Aulaqi v. Obama* judgment under the shape of political question doctrine takes up a new profile, that of "hesitation in our creation of damages remedies"[1532]. At the end of the day, read

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1530 *Ibidem*, pp. 32-36.

1531 United States District Court for the District of Columbia, *Al-Aulaqi v. Obama, supra*, p. 75.

1532 For an opposite commentary to this judgment see however Sharon Weill, *Reducing the Security Gap through National Courts: Targeted Killings as a Case Study*, *supra*, pp. 56 and 57, coming to the conclusion that "this case may represent a significant step towards greater judicial oversight over US executive actions in regards to targeted killings […] the door is now open for US courts to review similar cases, which could ultimately result in the courts being more assertive on the merits in the future". It is submitted here that, whereas the argument advanced by such analysis is undoubtedly

jointly, the two decisions make clear that there are no judicial venues to either prevent an extrajudicial killing to take place *ex ante* (*Al-Aulaqi v. Obama*) nor to seek for a remedy *post facto* (*Al-Aulaqi and others v. Panetta and Others*).

c) Case of Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs

Malik Daud Khan, a Pakistani tribal leader, was killed by a drone strike on 17 March 2011 when he was presiding over a jirga, a traditional meeting used in Pakistani tribal culture as a means of dispute resolution. Over 40 people were taking part to the jirga when the unmanned aerial vehicle discharged four missiles. Most of them were killed by the strike. Following the strike evidence showed that US drone strikes in Pakistan were actively supported by the GCHQ, *i.e.* the British intelligence agency. In particular, the GCHQ had previously shared information and intelligence with the US. Late Malik Daud Khan's son, Noor Khan took legal action against the UK government for its alleged complicity in the US targeted killing programme.

Before the judicial system of the United Kingdom, Noor Khan has filed a petition in the High Court against the Foreign and Commonwealth Office demanding clarification of UK involvement in the US operation in drone strikes conducted in Pakistan claiming that such cooperation could entail UK complicity in acts of murder, war crimes and crimes against humanity[1533]. In particular, Noor Khan alleged that the GCHQ had provided and continued to provide locational intelligence to U.S. operators, helping them to conduct targeted killings through drone strikes in Pakistan. Noor Khan therefore sought to impugn the UK's Secretary of State alleged decision to cooperate with U.S. authorities, suggesting that the GCHQ cooperation in drone strikes would make any UK agent involved secondary party to murder or, at the very least, of conduct ancillary to war crimes and crimes against humanity[1534]. As the Court itself put it "It is plain, from the nature of the claims, that the purpose of the proceedings in England and in Pakistan [making reference to the proceedings started by Noor Khan for the same incident before the Peshawar High Court] is to persuade a court to do what it can to stop further strikes by drones operated by the United States"[1535].

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sound, the conclusions it leads to cannot be shared. In fact, cautioning hesitation when at stake is a judicial decision upon an allegedly arbitrary deprivation of life is, in the view of this author, tantamount to refusing to apply the law as it leaves a potential victim without any remedy whatsoever. This assessment does not of course intend to restate domestic US legal parameters but under international law there can be no “hesitation” hampering the victims’ access to effective remedies and judicial reviews.

1533 Hight Court of Justice, *Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs*, 21 December 2012.

1534 *Ibidem*, paras. 2 and 3.

1535 *Ibidem*, para. 13.

Opposing Noor Khan's requests, the Secretary of State argued instead that the Court could not take cognisance of the case since this would imply an adjudication over third sovereign States' conducts, that the claimant merely sought a declaration as to the lawfulness of future conducts under UK criminal law and that it is not the judiciary's role to provide advisory opinions, and that the case would be barred in any case on procedural grounds[1536].

The Court clarified that it "would not even consider, let alone resolve, the question of the legality of United States' drone strikes" due to considerations over sovereigns' jurisdictional immunity under international law[1537]. Even admitting that issues of international law were to be taken into consideration only insofar as they would permit to reach a conclusion under UK criminal law, then, the Court held, "the courts will not give advisory opinion as to whether the proposed conducts is lawful, save where it would serve a cogent public or private interest"[1538].

The Court went on to rebut the claimant's argument that, "absent any prospect of criminal prosecution, a declaration is the only way the legality of passing information used for the location of drone strikes may be monitored"[1539]. In this regard, the Court held that "GCHQ activities are [...] subject to the scrutiny of the Intelligence and Security Committee [...] and of the Intelligence Services and Interception Commissioners, whose remit is to hold the Security Services and those responsible for intelligence accountable" and, consequently, "it is not correct to assert that a declaration is the only means of testing the lawfulness of the activities of GCHQ"[1540].

Moreover, after noticing that the claim concerned actions of UK agents only as accessories to third State's personnel and pointing out that it could not issue a judgment over the conduct of other States' organs, the Court suggested that it would be "curious that a defendant can be guilty of the offence of murder and subject to a mandatory life sentence when the principal is not guilty of any offence at all. I do not propose to resolve the difficulty. […] it would be quite wrong to make a declaration in an area of law so fraught with difficulty that no prosecution under these provisions, a prosecution with requires the Attorney-General's fiat […], has as yet been brought"[1541].

1536 *Ibidem*, para. 4.
1537 *Ibidem*, para. 14.
1538 *Ibidem*, paras. 29.
1539 *Ibidem*, para. 47.
1540 *Ibidem*, para. 48.
1541 *Ibidem*, paras. 53 and 54.

Finally, coming to the "fundamental objection" to the grant of a declaration sought by the claimants, the Court stated: "[the declaration] involves, and would be regarded 'around the world' […] as 'an exorbitant arrogation of adjudicative power' in relation to the legality and acceptability of the acts of another sovereign power. [...] any consideration as to whether a GCHQ employee is guilty of a crime would be regarded by those who were said to have been encouraged or assisted as an accusation against them of criminal activity and, in the instant case, an accusation of murder. [...] Even if the argument focussed on the status of the attacks in North Waziristan […] for the purposes of considering whether the United Kingdom employee might have a defence of combatant immunity, it would give the impression that this court was presuming to judge the activities of the United States"[1542].

As accurately summarised by the Court of Appeal which later on had occasion to consider the case[1543], "The Divisional Court [...] decided to adjudicate on the Secretary of State's threshold objections to the claim which were that the court should refuse permission on the principal ground that the issues raised were non-justiciable and/or that it would be a wrong exercise of discretion to grant relief which would necessarily entail a condemnation of the activities of the United States"[1544].

Unsatisfied with the decision issued by the Divisional Court on 21 December 2012, Noor Kahn filed for appeal, claiming that a UK national taking part to drone strikes by means of passing locational intelligence to US military forces or CIA agents may be guilty of murder under UK domestic law. The claimant also argued that a defence of combatant immunity would not apply in this case since: "CIA officials are not members of the US armed forces and GCHQ officials are not members of the UK's armed forces. They cannot, therefore, be combatants. Secondly, it has never been suggested that there is an armed conflict with Pakistan. In so far as it is suggested that there is an armed conflict with Al-Qaeda taking place in Afghanistan and elsewhere, that is wrong because (a) Al-Qaeda is not a sufficiently coherent grouping to be capable of being a party to an armed conflict; and (b) the acts of violence with which Al-Qaeda is associated are too sporadic to reach the threshold of violence required to establish the existence of an armed conflict. Thirdly, if there is an armed conflict in Pakistan between the US and those who are targeted by the drone strikes, it is of a non-international nature"[1545].

While accepting that "it is certainly not clear that the defence of combatant immunity would be available to a UK national", the Court of Appeal did not find it

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1542 *Ibidem*, para. 55.

1543 See *infra*.

1544 Court of Appeal, *Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs*, Judgment of 21 January 2014, para. 8.

1545 *Ibidem*, paras. 14 and 17.

"necessary to examine these arguments further" since, as the claimant had put it, "this claim concerns the lawfulness of the policy and not the guilt of individual officials in particular cases" [1546].

The question thus revolved around the justiciability of a claim concerning UK's involvement in a foreign policy of targeted killing as well as the limits of the judiciary's discretion into such matters. To this end, the Court first clarified that it would "not decide whether the drone strikes committed by US officials are lawful", recalling and agreeing with the Divisional Court judgment[1547]. Noting that the claimant did not seek a decision which would judge upon the conduct of a third sovereign, the Court thus summarized the logics underlying the claim for relief: "He seeks relief on the basis that the acts of the CIA officials, if committed by UK nationals, would be unlawful in English law. The assumption that the operation of drone bombs by US nationals is treated as if executed by UK nationals is a necessary link in a chain of reasoning which comprises (i) a finding that the act of the principal who operates the bombs is murder in English law; (ii) a GCHQ employee who encourages or assists such an act is liable as a secondary party to murder under sections 44 to 46 of the 2007 Act; and (iii) the Secretary of State's practice and policy of providing locational guidance is unlawful"[1548]. Expounding on the said reasoning, the Appellate Court entirely recalled the arguments previously averred by the divisional court, namely that adjudicating on the matter would give the impression that the Court was actually judging activities of the U.S., underlying that answering an hypothetical question of whether a U.K. national who kills a person in a drone strike in Pakistan is guilty of murder would be in reality tantamount to make an assessment of U.S. conducts which "would inevitably be understood […] by the US as a condemnation of the US"[1549]. The Court therefore refused permission to appeal in relation to the claimant's primary case[1550].

The claimant's secondary case rested on the argument that, even admitting that the *corpus juris* applicable to the drone strikes relevant for the claims is international humanitarian law and not ordinary domestic criminal law, drone strikes in Pakistan are carried out in violation of international humanitarian law since those targeted are not directly participating in hostilities and therefore GCHQ officers may be guilty of crimes against humanity and or war crimes[1551].

1546 *Ibidem*, paras. 19 and 20.
1547 *Ibidem*, para. 25.
1548 *Ibidem*, para. 32.
1549 *Ibidem* 4, paras. 33 and 36-38.
1550 *Ibidem*, para. 44.
1551 *Ibidem*, para. 47.

The Court noticed in this regard that "the secondary claim in this case founders on the same rock as the primary claim. The claimant is inviting the court to make a finding condemning the person who makes the drone strike as guilty of committing a crime against humanity and/or a war crime" and thus concluded: "For these reasons, I would not grant permission to appeal"[1552].

d) Noor Khan v. Pakistan - Noor Khan before the Pakistani Judicial System.

Notably, for the same drone strike that killed his father, Noor Khan initiated litigation before the Pakistani judiciary[1553]. In its lawsuit the plaintiff asked, *inter alia*, that the respondent be ordered to "assert its State sovereignty and convey [...] that no further drone strikes would be tolerated", to "protect the right to life of its citizens and use force if need be to stop extrajudicial killings with drones", to "provide redress for the criminal offences committed [...] in drone operations [...] by directing the relevant authorities that criminal charges be registered against those responsible", "to immediately contact the Security Council of the United Nations for violation of Pakistan's territorial sovereignty [...] and demand the adoption of a resolution condemning drone strikes and requiring the US to stop the strikes in Pakistan"[1554].

On 11 April 2013, the Peshawar High Court declared that the US drone programme in North West Pakistan had originated war crimes and it simultaneously ordered the Pakistani Government to take action aimed at halting it. First of all, the Peshawar High Court defined the US position on "enemy combatants" allegedly absconding in the North Waziristan region and, in general, in other Pakistani regions bordering Afghanistan, as a "self framed opinion"[1555]. The Court found the US drone strike policy in Pakistan contrary to international law by making reference to both the UN Charter and *jus ad bellum* issues on the one hand and to the laws of armed conflicts on the other[1556]. With reference to this last point, in particular, after pointing out that in principle "According to Article 3 and Article 52 (1) & (2) of the Additional Protocol, targeted killing is only lawful when the target is a 'combatant' or 'fighter' or, in the case of a civilian, only for such time as the person 'directly participates in hostilities'", the Court stressed that "It is never permissible for killing to be the sole objective of an operation as is the case in these U.S drone strikes"[1557].

1552 *Ibidem*, paras. 50 and 52.
1553 Peshawar High Court, *Noor Khan v. Pakistan*, Judgment of 11 April 2013.
1554 *Ibidem*, para. 1.
1555 *Ibidem*, para. 5.
1556 *Ibidem*, paras. 8-11.
1557 *Ibidem*, para. 11.

Whereas this passage alone would suffice to highlight how much targeted killings may have in common with assassination, the latter being the rule of the laws of armed conflict prohibiting attacks whose only purpose is to kill the enemy, the judgment of the Peshawar High Court went on to point out: "The forming of an opinion by the CIA that these strikes target groups of men, who are militants having links with terrorist groups, is based on figment of imagination and till date no tangible, reliable & convincing proof has been furnished to that effect by the U.S Authorities including CIA[1558].

In so doing, the Court actually added to the analysis of targeted killing policies another factor which may be of crucial importance. The whole point of direct participation in hostilities, one might say, is to have a near-certainty standard that a person may be object of attack (which, it is worth underlying, remains an entirely different concept from being object of deliberate and pre-meditated killing). As soon as we depart from such standard, be it through reference to membership, affiliation or continuous combat function, attacks may be directed at persons on the basis of collected intelligence and information which is however only examined by the executive powers. Leaving any judicial scrutiny out of the loop for this kind of decisions means that we actually allow the executive *carte blanche* to target whomever it deems appropriate. From the victims' perspective, this equates to deprive them of any chance of challenging the executive's decision that may lead to their death. It is from this viewpoint that the Court stresses that every human being's inherent right to life "shall be protected by law [and] no one shall be arbitrarily deprived of his life", adding that "drone strikes in Pakistan is [sic] blatant breach of absolute right to life"[1559].

In view of these considerations, concerned for the protection of the Pakistani fundamental rights - among which, first and foremost, their right to life - the Peshawar High Court went so far as to invoke Pakistan's right of self-defence under international law and consequently order Pakistani authorities to prevent drone strikes on Pakistan, if need be by using force against the drones[1560]. In line with the reasoning it followed, the Peshawar High Court finally concluded that a) Drone strikes conducted by the US in North Waziristan are unlawful under international law, are in blatant violation of international human rights norms and amount to war crimes; b) those strikes simultaneously represent a violation of Pakistan's sovereignty; c) due to the casualties caused, the said drone strikes are crimes under Pakistani law and US authorities, including the CIA agents involved, are considered responsible; d) the US government is bound to compensate all Pakistani victims of drone strikes; e) the Pakistani Government shall ensure that no more drone strikes

1558 *Ibidem*, para. 12.
1559 *Ibidem*, para. 13.
1560 *Ibidem*, para. 17.

would take place over Pakistani territory, either by diplomacy or by force in compliance with Pakistan's right of self-defence; f) the Pakistani Government shall take the matter before the UN Security Council and the UN General Assembly; g) the Pakistani Government shall lodge a request with the UN Security Council to constitute an independent war crime tribunal mandated to investigate into drone strikes in Pakistan[1561].

Among the measures that the Court ordered to the Pakistani government was, notably, that of bringing the matter to the attention of the UN Security Council. As an extreme solution, were the drone strikes to continue in spite of its sentence and in spite of future efforts on part of the Government, the High Court recommended that the Unmanned Aerial Vehicles be shot down. Moreover, the Peshawar High Court averred that the US Government is under an obligation to compensate all the victims' family members[1562].

The case at hand represents the first proceeding concerning drone strikes ever examined in the merits[1563]. It makes clear that a crucial part of reparation is criminal prosecution of those responsible for international crimes and gross human rights violations[1564].

The Court came to the conclusion that Drone strikes are unlawful under Pakistani and International Law clarifying in particular that "It is never permissible for killing to be the sole objective of an operation as is the case in these U.S. drone strikes".

e) Karim Khan - Karim Khan v. The Inspector General of ICT Police:

On 31 December 2009 Kareem Khan's son Zahinullah Khan and his brother Asif Iqbal Khan were killed in a CIA drone strike in North Waziristan, a region of Pakistan bordering Afghanistan. Kareem Khan denounced the episode to the local authorities. The Pakistani police, however, refused to register a first information report (*i.e.*, they refused to take formal notice of Kareem Khan denounce, without which no criminal investigation can be officially triggered), alleging that opening an

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1561 *Ibidem*, para. 22.

1562 On this episode and the ensuing judicial proceeding see the website of Reprieve, the Non-Governmental Organization representing the victim. Updated information on the case is available at http://www.reprieve.org.uk/case-study/noor-khan/.

1563 Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan – The Legal and Socio-Political Aspects*, *supra*, p. 211.

1564 See, accordingly, Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan – The Legal and Socio-Political Aspects*, *supra*, p. 212.

investigation against former CIA chief of staff would ultimately deteriorate the relationship between Pakistan and the US. Thus, Kareem Khan sought an injunction from the judiciary, lodging a petition with the judicial system asking it to order the opening on an investigation into the case[1565]. Nonetheless, in December 2013 the Islamabad Justice of Peace dismissed his application on jurisdictional grounds[1566]. Consequently, Kareem Khan appealed such decision before the Islamabad High Court. On 5 June 2014 the Islamabad High Court ordered the Pakistani police to open a criminal investigation against Jonathan Banks, former CIA Islamabad Station Chief, and against John A. Rizzo, a former CIA lawyer[1567]. The investigation, on charges of murder, conspiracy to kill, waging war against Pakistan and offences under the provisions of Terrorism Act 1997 should have concerned the two CIA operatives' respective involvements in the drone strike that led to the deaths of Kareem Khan's son and brother[1568]. At first, the Islamabad High Court's order of 5 June 2014 went wholly unimplemented by Pakistani authorities. Thus, the Police Secretariat was summoned by a bench of the Islamabad High Court in October 2014[1569]. Following such development, on 7 April 2015 the Islamabad High Court issued a new order to open a criminal investigation[1570]. Consequently, on 29 April 2015 the Islamabad Police has registered First Information Report No. 91/2015 and launched an official investigation. Such a decision represents a landmark as for the first time in this field official authorities moved to hold individual CIA members accountable[1571].

f) Faisal bin Ali Jaber

1565 *Kareem Khan v. Station House Officer, Secretariat Police Station, Islamabad and Others, Written Arguments on Behalf of the Petitioner*.

1566 The News International, *IHC Orders FIR Against Ex-CIA Station Chief*, 8 April 2015, available at http://www.thenews.com.pk/print/11872-ihc-orders-fir-against-ex-cia-station-chief.

1567 Foundation for Fundamental Rights, *Press Release: Islamabad High Court Orders Registration of Criminal Case Against the CIA Station Chief*, 5 June 2014, available at http://www.rightsadvocacy.org/press.html.

1568 On this episode and the ensuing judicial proceeding see the website of Reprieve, the Non-Governmental Organization representing the victim. Updated information on the case is available at http://www.reprieve.org.uk/case-study/kareem-khan/.

1569 Rizwan Shehzad, *2009 Drone Strike: Court Directs Police to Register Case Against ex-CIA Station Chief*, in *The Express Tribune*, 26 April 2016, available at http://tribune.com.pk/story/865815/2009-drone-strike-court-directs-police-to-register-case-against-ex-cia-station-chief/.

1570 Mirza Shahzad Akbar and Umer Gilani, *Fire From the Blue Sky, Drone Attack Victims from Pakistan, their Voice and their Struggle*, in *International Journal on Human Rights*, 2015, p. 126.

1571 Reprieve, *Criminal Investigation Launched by Pakistan Police Into Former CIA Station Chief's Role in Drone Strikes*, 30 April 2015, available at http://www.reprieve.org.uk/press/criminal-investigation-launched-by-pakistan-police-into-former-cia-station-chiefs-role-in-drone-strike/.

On 29 August 2012, on the second day of a family wedding celebration the victims were attending, a US drone strike killed Faisal bin Ali Jaber's brother in law, named Salem, and his nephew, called Waleed. When the missile struck they were outside a mosque in Khashamir, a small village in the Hadhramaut Governorate, Yemen. The former was an anti-Al-Qaeda imam, the latter was a police officer. Consequently, neither one or the other were the likely targets of the strike that killed them[1572].

Faisal travelled to Washington DC with NGO Reprieve's representatives, meeting members of the Congress and members of the National Security Council. The US never admitted responsibility but in July 2014 Faisal's relatives were offered 100,000 US dollars as compensation during a meeting with the Yemeni National Security Bureau. The Yemeni Government officially acknowledged that the US was responsible for the drone strike that had killed Salem and Waleed, clarifying that such an outcome was "a mistake". No official investigation has ever been opened on this drone strike. No apologies were ever issued to the victims' family.

g) Faisal bin Ali Jaber v. Germany

In October 2014 Faisal took this case before the German administrative justice system arguing that Germany was responsible of aiding and abetting his relatives' killing and demanding Germany to halt its collaboration with the U.S.: the allegation was grounded on the fact that Germany had indeed allowed the U.S. to use its military basis to facilitate drone strikes in Yemen, including the one that killed Salem and Waleed. According to the complaint, allowing the U.S. to use German airbases (in this case Ramstein) to conduct targeted killings would violate the German constitution. The Administrative Court of Cologne ruled against Faisal's allegations in May 2015. In June 2015 the German Federal Prosecutor's office has launched a "monitoring process" aimed at investigating possible violations of international law related to Germany's involvement in drone strikes abroad[1573].

h) Faisal bin Ali Jaber v. The United States and Others

1572 Reprieve, *Faisal bin Ali Jaber*, available at http://www.reprieve.org.uk/case-study/faisal-bin-ali-jaber-2/. See accordingly, *Jaber and Jaber v. The United States and Others, Complaint*, 7 June 2015, paras. 1 and 8.

1573 On this episode and the ensuing judicial proceeding see the website of Reprieve, the Non-Governmental Organization representing the victim. Updated information on the case is available at http://www.reprieve.org.uk/case-study/faisal-bin-ali-jaber-2/.

In June 2015 Faisal bin Ali Jaber sued the Obama administration[1574] before the US judiciary. The plaintiffs argued that the two victims of the strike were not the likely targets of the drone attacks, which had therefore killed two innocent civilians; that, in any case, the US was not at war with Yemen nor was the Yemeni government involved in an armed conflict with Al-Qaeda when the strike took place; that AQAP cannot be understood as a force affiliated to Al-Qaeda or as a part of Al-Qaeda since it did not even exist when the 2001 terrorist attacks on US soil took place; that therefore the only applicable legal regime at the time of the strike was international human rights law, and not instead the laws of armed conflict; that therefore any eventual consent given by Yemeni authorities was invalid as the lives of those killed were not theirs to give[1575]. The plaintiffs additionally argued that, were the laws of war to apply to the killing at hand, they would anyways be violated, not only by reason of breach of principles of distinction and proportionality[1576] but also referring to a least harmful means paradigm: "even if the three men were affiliated with al Qaeda or some other renegade terrorist group, and by that or other behavior had rendered themselves outlaws and the legitimate object of military action, the circumstances clearly permitted their arrest rather than extrajudicial killing"[1577].

The US District Court for the District of Columbia dismissed the cases a few months later, in October 2015, on grounds of the "political question doctrine"[1578]: according to the Court, the use of military force abroad falls within the discretionary powers of the Executive branch and falls therefore foul of any judicial review. Coming to this conclusion, the Court confirmed the U.S. District Court for the District of Columbia's jurisprudence establishing that military actions (or actions that are not military at all but are defined as such by the Executive) are unreviewable.

To this end, the Court wondered "what conceivable basis would the Court have for delineating the point at which the three young men presented an "imminent" threat to the U.S., such that it could confidently second-guess the Executive? When would their capture have been 'feasible'—when there was a 51% chance that the operation would succeed, without any risk of harm to U.S. or Yemeni forces? Or a 75% chance that the operation would succeed, with a 50% risk of harm to U.S. or Yemeni forces? Should the Court assume that the local Yemeni forces were trustworthy allies, or should it factor in some risk that they might have colluded with

1574 *Jaber and Jaber v. The United States and Others, Complaint*, 7 June 2015.
1575 *Ibidem*, paras. 97-103.
1576 *Ibidem*, paras. 105-110.
1577 *Ibidem*, 7 June 2015, paras. 112.
1578 District Court for the District of Columbia, *Jaber and Jaber v. The United States and Others*, Judgment of 22 February 2016.

the young men? And how could these odds even be calculated by the Court in the first place?" [1579].

Instead of concluding that all those questions are of such a delicate nature to deserve unbridled judicial scrutiny, the Court came to the opposite view that "these are precisely the type of "complex policy questions" that courts are ill-equipped to answer"[1580]. In analogy to what it had already done in its "Al-Aulaqi" jurisprudence, the Court showed to consider evaluations concerning possible violations of the fundamental right to life as a matter of politics rather than a legal issue[1581], thus in fact making clear the complete withdrawal of the judiciary from any assessment over any possible abuse whatsoever conducted by the executive. Stressing its most profound conviction that the matter at hand presented no "purely legal issues", the Court in fact made clear that it did not consider the protection of the fundamental right to life as a matter of law but as something that should be confined to the realm of politics. The greatest confirmation of this understanding comes from the sentence itself, which, challenging the plaintiffs' allegation that the political question doctrine would allow for the most heinous war crimes, reads: "to the extent that these hypothetical war crimes do result from a deliberate policy decision of the Executive, the courts' inability to review that decision "underlies our entire constitutional system."'"[1582].

It established, consequently, that victims of such actions cannot have access to any means useful for the enforcement of their fundamental rights. The Court, glimpsing at the merits, also noted that the judicial system is ill-equipped to verify the lawfulness of drone strikes on the basis that a judge is not in the proper position to establish whether or not the target of an attack does indeed pose an imminent threat to the US and whether or not the target's capture may be feasible. It has been rightly pointed out, in this connection, that "the ruling would indicate that even the most heinous war crimes by the U.S. government are beyond the reach of the U.S. Courts"[1583]. Following such an outcome before the District Court, Faisal bin Ali Jaber filed an appeal in his federal lawsuit against the Obama Administration before the Washington DC Appeals Court, seeking the truth on the killings of his brother in law and his nephew, besides demanding an apology from the US government.

1579 *Ibidem*.

1580 *Ibidem*.

1581 *Ibidem*: "Plaintiffs argue that determining whether "the Executive violated laws of war, the TVPA, and ATS present the sort of `purely legal issues' over which this Court unquestionably has jurisdiction." (Pls.' Opp'n Br. at 28.) The Court disagrees that this case presents any "purely legal issues".

1582 *Ibidem*.

1583 Reprieve, *Yemeni Drone Victim Appeals to US Court Amid Fresh Obama Administration Denials on Drone Deaths*, 21 April 2016.

i) Barakeh - Barakeh v. Prime Minister and Minister of Defence

Arab Israeli member of the Parliament, Mr. Mohammed Barakeh appealed to the Supreme Court of Israel (sitting as a High Court of Justice)[1584] seeking to stop the government's policy of targeted killing. The Court refused to subject Israeli policy to judicial review, declaring the matter non-justiciable. In an extremely brief judgment the Court stated "It seems to us that the announcement given on behalf of the Respondents supplied an exhaustive response to the Applicant's claim. The choice of means of warfare, used by the Respondents to pre-empt [sic] murderous terrorist attacks, is not the kind of issue the Court would see fit to intervene in. This is the case a fortiori when the appeal lacks a firm factual foundation and seeks a sweeping redress"[1585]. Through the characterization of the government's policy of targeted killing as a "means of warfare" the Court thus avoided to enter into the merits of the appeal submitted by Mr. Barakeh[1586], basically declaring this matter out of reach for judicial review. However

j) The Public Committee Against Torture in Israel -The Public Committee Against Torture in Israel v. Israel.

In 2002 The Public Committee Against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment lodged with the Supreme Court of Israel (sitting as the High Court of Justice) a petition arguing that Israel's policy of targeted killing is illegal and contrary to international law as well as to basic principles of humanity, thus asking the court to declare the unlawfulness of targeted killing policy and arguing[1587].

Contrary to the practice of many other national courts, the Supreme Court of Israel this time did not refrain from issuing a decision tackling the merits of the case submitted to its judgment. It instead flatly rejected the applicability of any avoidance doctrine to the case of targeted killings[1588]. The Court made clear that institutional

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1584 Pursuant to *Israeli Basic Law* the Supreme Court of Israel may operate in the capacity of a high court of justice when dealing with matters that evade the jurisdiction of any other court and yet require to grant relief. To this end see Israeli Basic Law, Art. 15, para. c.

1585 Supreme Court of Israel, *Barakeh v. Prime Minister and Minister of Defence*, judgment of 29 January 2002 (translation from Orna Ben-Naftali and Keren R. Michaeli, *Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings*, *supra*, p. 369.

1586 Orna Ben-Naftali and Keren R. Michaeli, *Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings*, *supra*, p. 369.

1587 Supreme Court of Israel, *The Public Committee Against Torture in Israel v. Israel*, Judgment of 13 December 2006, paras. 3 and 60.

1588 *Ibidem*, paras. 48-54.

non-justiciability (*i.e.* a principle dictating that some matters are not decided by legal standards in Court) could not find application in relation to targeted killing because: a) "recognition of it might prevent the examination of impingement upon human rights […] The petition before us is intended to determine the permissible and the forbidden in combat which might harm the most basic right of a human being – the right to life. The doctrine of institutional non-justiciability cannot prevent the examination of that question"[1589]; b) "When the character of the disputed question is political or military, it is appropriate to prevent adjudication. However, […] The questions disputed in the petition before us are not questions of policy. Nor are they military questions. The question is whether or not to employ a policy of preventative strikes which cause the deaths of terrorists […] The question is […] legal"[1590]; c) "the types of questions examined by this Court have also been decided by international courts […] Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?" [1591]; d) "the law dealing with preventative acts on the part of the army which cause the deaths of terrorists and of innocent bystanders requires *ex post* examination of the conduct of the army […]. That examination must – thus determines customary international law – be of an objective character. In order to intensify that character, and ensure a maximum of that required objectivity, it is best to expose that examination to judicial review"[1592].

According to the Israeli Supreme Court, a continuous situation of armed conflict between Israel and terrorist organizations active in the Gaza strip, in Judea and in Samaria has existed since the first intifada. Such armed conflicts should be regarded as international in character since the law of belligerent occupation belongs to the legal regime governing international armed conflict[1593]. The court underlined this concept confirming that, under its understanding, "the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict"[1594]. In such context, the Court specified, humanitarian law is the *lex specialis* and, where there is a gap in such law, it should be integrated with human rights law parameters[1595], pointing out however that, whereas human rights are protected by the law of armed conflict, in times of hostilities they are not granted in their full scope[1596].

1589 *Ibidem*, para. 50.
1590 *Ibidem*, para. 51.
1591 *Ibidem*, para. 53.
1592 *Ibidem*, para. 54.
1593 *Ibidem*, paras. 16 and 18.
1594 *Ibidem*, para. 21.
1595 *Ibidem*, para. 18.
1596 *Ibidem*, para. 22.

Thus, exploring the armed conflict paradigm and making a clear reference to conducts traditionally understood as falling within the notion of wartime assassination, the Court further noted that, whereas in general terms combatants are legitimate targets for military attack not every act of combat against them is permissible, and not every military means is permissible. Thus, for example, they can be shot and killed. However, 'treacherous killing' and 'perfidy' are forbidden"[1597]. It then went on to clarify that no combatant is beyond the protection of the law: "Needless to say, unlawful combatants are not beyond the law. They are not 'outlaws'. God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law […] It is manifest in the fact that civilians who are unlawful combatants are legitimate targets for attack, and thus surely do not enjoy the rights of civilians who are not unlawful combatants, provided that they are taking a direct part in the hostilities at such time"[1598].

While stressing that Israel is not party to *AP I* to the *1949 Geneva Conventions*, the Court conceded that Art. 51, para. 3 enlisted in such conventional instrument had acquired customary status and, consequently, it held that civilians who directly participate in hostilities lose their immunity for so long as their participation in active hostilities takes place[1599].

After setting out the parameters permitting to define civilians' direct participation in hostilities[1600] and expressing its believe that a least harmful means approach should be adopted when resorting to force against them[1601], the Court concluded that targeted killings in times of international armed conflicts are neither inherently lawful nor intrinsically unlawful. In this regard it first of all held that civilians enjoy full immunity from direct attacks; that such protection, however, does not cover civilians who take direct part in hostilities for the time of their involvement; that as far as civilians directly participating in hostilities are concerned a least harmful means approach shall be maintained, resorting to lethal force only as a last resort when no other means to neutralize the threat is available[1602]. In line with these findings, the Court averred that in its fight against terrorism the State must abide by rules of international law which are based upon a balance between human rights and states' interests, whereby none of such consideration can receive full

1597 *Ibidem*, para. 23.
1598 *Ibidem*, paras. 25 and 26.
1599 *Ibidem*, para. 30.
1600 *Ibidem*, paras. 30 to 40.
1601 *Ibidem*, para. 40.
1602 *Ibidem*, para. 60.

protection. It underlined that ends do not justify the means and that States must, even in times of armed conflict, act in accordance with the law[1603].

Importantly, the Court's judgment referred to targeted lethal strikes conducted in the occupied territories: it indeed indicated more than once that the strikes concerned by the judgment are those conducted "in the area of Judea, Samaria, and the Gaza strip"[1604].

5.2. Interim Conclusions

The present paragraph has provided a thorough account of the main domestic judicial proceedings dealing with the use of pre-meditated lethal force against pre-selected individuals in times of armed conflict (or alleged armed conflict). It has done so with a twofold aim. On the one hand, in order to detect in judicial precedents possible restatements of existing *opinio juris* on this matter. On the other, with a view to consider these judicial decisions themselves as relevant data of both practice and *opinio juris* potentially capable of leading to an advancement of the law in this field.

As this paragraph has copiously shown, most of the judicial proceedings launched before national jurisdictions have met with insurmountable procedural obstacles that have prevented considerations of the merit underlying the victims' complaints. As shown in the analysis of the relevant sentences, these decisions are anyways relevant for two reasons: first, in order to conclude for a dismissal on procedural grounds, they often need first of all to adscertain whether the nature of the debated matter is indeed outside the scope of their jurisdiction. Accordingly, U.S. jurisprudence in this field shows the judiciary's adherence to the government's stance that the U.S. is involved in an armed conflict with Al-Qaeda and that acts of hostilities may indeed be waged by locations outside hot theaters of hostilities[1605]. Second, procedural decisions may have an impact on the lawfulness of substantive rights: as the Al-Aulaqi cases show with singular clarity, as things currently stand a victim of drone strikes cannot either obtain an injunctive order "freezing" his position as a named target on a hit list before being killed, nor a post-hoc adjudication (on his behalf) of the legitimacy of the strike that has caused his death. This procedural reality brings the substantive matter os state-sanctioned death perilously close to what has been defined *antes* as outlawry, all the more so in

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1603 *Ibidem*, para. 61-63.

1604 *Ibidem*, paras. 1, 4, 16-20, 24, 40, 41, 47, 50-52, 55-57, 61.

1605 To this end see *supra*, *Case of Anwar Al-Aulaqi v. Obama*, *Case of Anwar Al-Aulaqi and Others v. Panetta and Others*, *Case of Jaber and Jaber v. The United States and Others*.

consideration of the "wanted dead or alive" jargon and the actual state practice in this field.

As for those decisions that have tackled the question of the lawfulness of targeted strikes in the merits, then, this paragraph has shown that two judiciaries in particular have come to notable conclusions in this field.

First, the Pakistani judicial system has folly rejected the lawfulness of drone targeted strikes in Pakistan, stressing in particular that also in times of armed conflict "it is never permissible for killing to be the sole objective of an operation" and defining as assassinations targeted killings performed outside theaters of hostilities. Notably, the Pakistani judicial system has invoked to this end both arguments of *jus ad bellum* and *jus in bello* and has come to order criminal proceedings against foreign personnel involved in drone strikes in Pakistan and has strongly condemned the actions of the U.S., even invoking for Pakistan a right of self-defence against foreign states resorting to targeted killing operations on its territory[1606].

Second, the Israeli Supreme Court has issued what is surely the most well-known and perhaps leading sentence on targeted killings so far. The content of such sentence has been thoroughly examined in this paragraph and there is no need to tackle it once more in detail. However, it is crucial to highlight in this conclusion that the stance adopted by the Supreme Court of Israel is in stark contradiction to the practice of the government of Israel. The Supreme Court in fact averred that ambiguous or lacking international humanitarian law should be integrated with human rights law standards, it stressed that civilians lose their immunity from attack only for so long as they take a direct part to hostilities, it endorsed a least harmful means approach and concluded that targeted killings may not be performed in any event if not as a last resort, in order to prevent a threat, when no other to neutralize it is available. In so doing, the Israeli judiciary fully endorsed a mixed model stemming from a thorough integration of international human rights and international humanitarian law.

[1606] To this end see *Case of Noor Khan v. Pakistan* and C*ase of Karim Khan v. The Inspector General of ICT Police.*

6. REACTIONS FROM THE INTERNATIONAL COMMUNITY

(1) Territorial States' Reactions; (2) The Work of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Targeted Killing after the Turn of the Century; (2.a) Analysis of Relevant Reports; (2.b) Reports Especially Devoted to Targeted Killings and the Results of the UN "Probe" into Drone Strikes.

6.1. Territorial State's Reactions

a) Pakistan

Former Pakistani Prime Ministers Yusuf Raza Gilani and Raja Pervaiz Ashraf have often officially condemned drone strikes due to their contrariety to Pakistan's sovereignty and to their impact on Pakistani people, alleging in particular that drone strikes fuel radicalization and militarism[1607]. Such a public reaction has however been criticized by some, alleging that Pakistan had indeed provided its consent to the U.S. "under the table"[1608], in spite of Gilani's categorical denial that such a secret agreement may exist[1609]. Be that as it may, the Pakistani Government has over the time sent official *notes verbales* to the US Embassy in Pakistan condemning drone attacks and demanding the U.S. to halt them and has passed legislation to render null and void *ex tunc* any alleged secret agreement with the U.S[1610]. In 2013, Pakistan's President Zardari expressly defined drone strikes as "counterproductive" at a meeting with a delegation of the US Senate Foreign Relations Committee, stating that they

[1607] Simon Hooper, *Pakistan: US Must Halt Drone Attacks*, in *CNN News*, 29 January 2009, available at http://edition.cnn.com/2009/WORLD/asiapcf/01/28/davos.pakistan.pm/index.html?eref=onion; Sumera Khan, *Controversial US Campaigns: PM Calls for Alternatives to Drone War*, in *The Express Tribune*, 7 December 2012; Irfan Ghauri, *Gilani, Kayani Condemn Drone Attack*, in *The Express Tribune*, 18 March 2011.

[1608] Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, in *New York Times*, 6 April 2013, and Tom Coghlan, Zahid Hussain and Jeremy Page, *Secrecy and Denial as Pakistan Lets CIA Use Airbase to Strike Militants*, in *Times Online*, 17 February 2009, available at http://www.thetimes.co.uk/tto/news/world/asia/article2609732.ece.

[1609] John Hudson, *Pakistan Denies New York Times Report on Drones*, in *Foreign Policy News*, 5 March 2013, available at http://foreignpolicy.com/2013/03/05/pakistan-denies-new-york-times-report-on-drones/. Former Prime Minister Gilani declared to the press: "I want to put on record that we do not have any agreement between the Government of the United States and the Government of Pakistan". To this end see Simon Hooper, *Pakistan: US Must Halt Drone Attacks*, in *CNN News*, *supra*.

[1610] Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan – The Legal and Socio-Political Aspects*, *supra*, p. 34.

damage the popularity of the territorial State's government as well as that of the State actually resorting to such armed force[1611].

In line with this assessment, it has been observed that "as regards Pakistan, there is strong evidence to suggest that between June 2004 and June 2008 remotely piloted aircraft strikes in the Federally Administered Tribal Areas were conducted with the active consent and approval of senior members of the Pakistani military and intelligence service, and with at least the acquiescence and, in some instances, the active approval of senior government figures. On 12 April 2012, however, both houses of the parliament unanimously adopted guidelines for revised terms of engagement with the United States, NATO and ISAF and general foreign policy. In a resolution, the parliament, among other things, called for an immediate cessation of drone attacks inside the territorial borders of Pakistan [...]Since the elections in Pakistan in May 2013, the Special Rapporteur has been informed by the new Administration that it adopts the same position as its predecessor, namely that drone strikes on its territory are counterproductive, contrary to international law, a violation of Pakistani sovereignty and territorial integrity, and should cease immediately"[1612].

Be that as it may, arguably, Pakistan has never given consent to the targeting operations taking place within its territory[1613]. Pakistan is indeed a parliamentary democracy. Legislatures at both the national and provincial level have officially condemned drone strikes on Pakistani soil. Various subsequent executives have taken the exact same stance[1614]. The judiciary has even more vehemently criticized the U.S. policy of targeted killings in the areas bordering Afghanistan[1615].

It has been noticed that no regulation or other relevant instrument of domestic law has ever been approved to the effect that drone strikes are or may be authorized in Pakistan, especially not in the Federally Administered Tribal Areas (FATA), where targeted killing operations have been conducted by the U.S[1616]. On the contrary, provincial assemblies have issued resolutions that openly and

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1611 Dawn News, *Drone Attacks Are Counterproductive, Says Zardari*, 21 February 2013, available at http://www.dawn.com/news/787686/drone-attacks-are-counter-productive-says-zardari.

1612 *Emmerson Report*, *supra*, paras. 53 and 54.

1613 *Ibidem*. Indeed, on the relationship between consent (denied) and secret agreements see, *inter alia*, Sikander Ahmed Shah, I*nternational Law and Drone Strikes in Pakistan, The Legal and Socio-political Aspects*, *supra*, pp. 99 - 102.

1614 Accordingly, inter alia, Sikander Ahmed Shah, I*nternational Law and Drone Strikes in Pakistan, The Legal and Socio-political Aspects*, *supra*, p. 89.

1615 See *supra*, Ch. IV, para. 5.

1616 Sikander Ahmed Shah, I*nternational Law and Drone Strikes in Pakistan, The Legal and Socio-political Aspects*, *supra*, p 95.

uncontrovertibly condemn drone strikes[1617]. The national Parliament, at the same time, has condemned drone strikes more than ones, repeatedly demanding their cessation. The executive has reportedly done the same, writing *notes verbales* to this end to U.S. authorities on a regular basis[1618].

This is confirmed by the first accounts of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in the first report in which he took note of the increasing trend of U.S. targeted killing by drone strikes in Pakistan. In so doing, he reported the letter he had sent to the government of the U.S. in relation to three incidents of air strikes conducted in Pakistan with the aim of targeting and killing pre-selected individuals, concerning the same episodes already referred to the government of Pakistan. On these cases, the Special Rapporteur did not receive replies from the U.S[1619]. In this connection, the Special Rapporteur noted that "The Government of Pakistan is reported to have lodged a diplomatic protest over the incident on 14 January 2006. Pakistan's Prime Minister, Mr. Shaukat Aziz, reportedly stated publicly that such attacks are not acceptable to Pakistan"[1620].

Remarkably, the Peshawar High Court has defined the stance taken by the US in terms of targeted killing as a "self framed opinion"[1621], it has stressed that "the President of Pakistan, the Parliament through unanimous resolution, the Prime Minister & his Cabinet and Military Leadership have openly condemned these attacks and have lodged soft protests with the US Authorities through its Ambassador in Pakistan"[1622].

The issue of consent is not excessively relevant for the present *in se*. It matters for this study insofar as its existence would consolidate an alleged *opinjo juris* considering targeted killings lawful practices even when conducted outside the theater of hostilities against person not directly engaged in hostile acts when so killed. As it emerges, the practice of the executive, the judiciary and the parliament in Pakistan undoubtedly shows that Pakistan does not support this view. As for alleged "under-the-table" arrangements between secret services and militaries, it is clear that such an *opinio juris* cannot certainly be detected in secret agreements, as

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1617 Abdur Rauf, *Assembly, Day 2: House Passes Joint Resolution against Drone Attacks*, in *The Express Tribune*, August 2010, available at http://tribune.com.pk/story/427576/assembly-day-2-house-passes-joint-resolution-against-drone-attacks/.

1618 Owen Bowcott, *US Drone Strikes in Pakistan Carried Out without Government's Consent*, in *The Guardian*, March 2013, available at https://www.theguardian.com/world/2013/mar/15/us-drone-strikes-pakistan.

1619 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2007, Addendum*, UN Doc. A/HRC/4/20/Add.1, 12 March 2007, p. 359.

1620 *Ibidem*, p. 360.

1621 Peshawar High Court, *Noor Khan v. Pakistan*, *supra*, paras. 4 and 5.

1622 *Ibidem*, para. 6.

they are by definition unknown to the public. Even when they do come to surface, then, it seems hard (where not absolutely absurd) to characterize them as documents capable of fostering a normative change, since their secrecy in the first place makes them devoid of any significance in terms of expressing a normative intention. This, indeed, would more likely hint at the opposite conclusion.

b) Yemen

The situation of Yemen seems to be partly different from that of Pakistan.

In 2012, before the UN General Assembly, Yemeni president Abd Rabbuh Mansur Hadi urged the international community to increase support for Yemen in its internal fight against AQAP[1623]. To be sure on the significance of such request, only a few days later Hadi endorsed covert US operations and acknowledged that the US was operating drones in Yemen in cooperation with the Yemeni Air Force: both of them were targeting "terrorists"[1624]. In line with this assessment, it has been reported as early as 2012 that the US was starting a cooperation with Yemeni authorities to target around two dozens alleged members of Al-Qaeda in Yemen[1625]. Thus, in the occasion of al-Harethi's targeted killing by US forces, the Yemeni government recognized that the operation had been coordinated between the US and the Yemeni government itself[1626], specifying that "it had made every effort to bring these accused persons to justice"[1627].

It therefore seems possible to state, in this connection, that Yemen have consistently offered its consent for U.S. exercise of premeditated lethal force against suspected targets on its own territory[1628]. Arguably, providing such consent also entails an approval as to the method used to attack the targets, including both the

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1623 Reuters, *Yemeni President Calls for More Support to Fight Al-Qaeda*, 26 September 2012.

1624 Christopher Swift, *The Boundaries of War? Assessing the Impact of Drone Strikes in Yemen*, *supra*, 2015, p.71.

1625 Eric Schmitt, *U.S. Teaming With New Yemen Government on Strategy to Combat Al Qaeda*, in *New York Times*, 27 February 2012.

1626 Un Human Rights Committee, *Summary Record of the 2283rd Meeting*, UN Doc. CCPR/C/SR.2283, 18 July 2005, para. 19.

1627 Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Janhangir, *Summary of Cases Transmitted to Governments and Replies Received, Addendum*, UN Doc. E/CN4/2004/7/Add.1, 24 March 2004, para. 612. Note that it has never been fully clarify whether or not Yemen had given prior valid consent to the US for use of military force on its territory, so that the inter-state dimension of this case remains at best ambiguous. To this end see, *inter alia*, Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, *supra*, p. 254.

1628 To this end see also *Emmerson Report*, *supra*, para. 52: "'The Government of Yemen has informed the Special Rapporteur that the United States routinely seeks prior consent, on a case-by-case basis, for lethal remotely piloted aircraft operations on its territory through recognized channels. Where consent is withheld, a strike will not go ahead".

platform (unmanned aerial vehicles) and the final aim of the operation (leaving the target no chance of survival).

c) Somalia

Drone strikes and targeted killing policies in general seem to be welcome by the Somali government. Interviewed about drone strikes shortly after the US had started to target suspected terrorists in the horn of Africa launching drones from an airbase in Djibouti, the Somali prime minister said: "We feel that really Djibouti is one of the top targets of al-Shabab in the region [...] These people are very dangerous, the al-Shabab and al-Qaeda elements. So whatever it takes [...] If we can contain them, ok, if we can get rid of them it's better [...] But we don't have to waste time in asking each and every time ourselves if we should use drones or not"[1629].

d) Third States' Practice

The fact that no consensus at all may be identified on these issues within the international community finds further confirmation in that some States, in particular Russia and Venezuela, qualified the 2011 bombings directed at killing Libyan dictator Col. Qaddafi as "assassination attempts"[1630]. Perhaps even more significantly in this regard is the fact that NATO authorities did not try to counter Russia and Venezuela's arguments in point of law but rather did so in point of fact. Indeed, their replies did not argue that Qaddafi was a legitimate military target involved in an active conflict and located on the battlefield, but rather focused on a full-out rejection of the underlying factual circumstances: in other words, they denied that they had attempted to kill Qaddafi at all. In particular, the NATO Mission Operational Commander, Lt. Gen. Charles Bouchard publicly stated: "[a]ll NATO's targets are military in nature and have been clearly linked to the Qaddafi regime's systematic attacks on the Libyan population and populated areas. We do not target individuals"[1631]. By the very same token, the White House underlined that it is "certainly not the policy of the coalition or this administration, to decapitate, if you will, or to effect regime change in Libya by force"[1632].

1629 Frank Gardner, *US Military Steps Up Operations in The Horn of Africa*, in *BBC News*, 7 February 2014, available at http://www.bbc.com/news/world-africa-26078149.

1630 Rommel J. Casis, *Predator Principles: Laws of Armed Conflict and Targeted Killings*, *supra*, pp. 346 and 347 and Mark V. Vlasic, *Assassination and Targeted Killing, A Historical and Post-Bin Laden Legal Analysis*, *supra*, p. 305.

1631 Farim and Fitzpatrick, *Qaddafi is Said to Survive NATO Airstrike that Kills Son*, in *The New York Times*, 30 April 2011, available at http://www.nytimes.com/2011/05/01/world/africa/Ollibya.html?_r=3.

1632 Simon Denyer, *Libya Accuses NATO of Trying to Assassinate Gaddafi in Tripoli Strike*, in *Washington* Post, 25 April 2011, available at http://www.washingtonPostcom/world/libya-accuses-nato-of-trying-toassassinate-gaddafi-in-tripoli-strike/2011/04/25/AFRNKEkEstory.html.

Thus for instance, in relation to the abovementioned NATO strikes allegedly directed at Col. Qaddafi in Libya[1633], the U.K. Chief of the Defense Staff General David Richards stated: "if he [Qaddafi] was in a command-and control center that was hit by NATO and he was killed, that would be within the rules"[1634].

6.2. The Work of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Targeted Killing after the Turn of the Century

The turn of perspective undertaken by some States with the dawn of the new century and progressively consolidating in the most recent years makes it particularly important to evaluate the reaction of international monitoring bodies. In the absence of international jurisprudence specifically dedicated to these themes, peculiar reference should be done to the work of the UN Special Rapporteur(s) on Extrajudicial, Summary or Arbitrary Executions as an actor placed in a particularly privileged as well as relevant position to take knowledge of targeted killing and to evaluate them against the backdrop of international law.

As will be shown in all the following reports, it seems possible to detect in the work of successive Rapporteurs taking office across or after the down of the century a trend towards a diminished use of the term assassination, which gradually started to be employed by the Special Rapporteur only in relation to the extrajudicial killing of journalists, human rights defenders and political figures neither involved in *guerrilla* activities nor suspected of any such involvement.

For instance, in his 2005 report the then Special Rapporteur Philip Alston actually endorses the use of the term "targeted assassination" but he resorted to such expression only to make reference to individuals alleged to have committed crimes or alleged to be terrorists (*i.e.*, prima facie, to civilians). This, in a way, amounts to a heightened protection, in line with a strict reading of the direct participation in hostilities paradigm. On the other hand, however, it mirrors an a-technical use of the term: in a way, such killings could amount to assassination insofar as they are targeted deprivations of life contrary to international humanitarian law. On the other, however, there is no trace of this understanding. It thus seems to be used in a descriptive rather than proscriptive fashion.

1633 See *supra*, in this same paragraph.

1634 John F. Burns, *British Commander Says Libya Fight Must Expand*, in *The New York* Times, 15 May 2011, available at http://www.nytimes.com/2011/05/16/world/africa/16ibya.html?scp = 1 &sq= &st= nyt.

In his addendum to the 2007 Annual Report, the Special Rapporteur pointed out in relation to a number of countries including Pakistan, Nepal, Ethiopia and Sudan the relevant principles of international humanitarian law applicable to internal armed conflict, clarifying that: "Insofar as these attacks were linked to your Government's armed conflict […] I would like to recall the applicable principles of international humanitarian law. This body of law requires parties to an armed conflict to distinguish at all times between combatants and civilians, and to direct attacks only against combatants (Rules 1 and 7 of the Customary Rules of International Humanitarian Law identified by the International Committee of the Red Cross); acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited (Rule 2); attacks by bombardment which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited (Rule 13); launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited (Rule 14)"[1635].

Notably, the Special Rapporteur never enlisted assassination among such limitations to the belligerent parties' ability to resort to lethal force. On the one hand, that would seem to exclude assassination from the set of limitations taken into consideration by the special rapporteur. On the other, however, he notably avoided reference to other well-established limitations to means and methods of warfare, letting the door open to interpretations that take into account the broader context in which the aforementioned rules have been recalled. So that it seems possible to conclude that the restrictions explicitly recalled by the Special Rapporteur are to be understood as an explanatory, open list of rules, expressly mentioned only insofar as these are the provisions mostly relevant for the contexts the Special Rapporteur was making reference to.

A thorough assessment of the work of the special rapporteur in these instances is therefore required in order to understand whether and to such extent the changed approach to targeting practices advanced by some States have impact in a parallel way the perception of assassination in the general framework of international law.

a) Analysis of Relevant Reports

[1635] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2007, Addendum*, UN Doc. A/HRC/4/20/Add.1, 12 March 2007, pp. 124 and 125, 248, 305 and 306.

The turn of the century did not see an immediate change in perception on part of the special rapporteur on extrajudicial killings. In her 2001 Report, Ms. Asma Jahanhir made reference to urgent appeals she had sent in 2000 on behalf of two activists who had been threatened by *Esquadrones de la Muerte* in Honduras and who she defined as victims of "assassination attempts"[1636]. She also continued denouncing the existence of death lists naming persons suspected of being collaborators or sympathizers with *guerrilla* forces in Colombia[1637]. In this connection, she maintained that persons enlisted in those rolls were victims of "executions", thus characterizing the selective targeting of suspected fighters as unlawful in and by itself[1638]. Notably, in this connection, the involved State never claimed that the denounced conduct may be considered lawful. It instead reportedly launched investigations, mandating the Unit on Crimes against Life and Security of Person to conduct them. In one circumstance, for instance, the investigation disclosed that "a group of heavily armed men had burst into the houses and chosen the victims from a list they had with them"[1639]. The involved State thus assumed such practice to be in violation of the victims' right to life and acted accordingly.

What mainly emerges from this report is the Special Rapporteur's concern over the selection of people deemed as military targets and consequently pursued and executed. Thus, still in relation to Colombia, "The Special Rapporteur drew the Government's attention to information received concerning the existence of a list allegedly distributed by a paramilitary group in the department of Santander giving the names of about 500 people, most of them human rights defenders, and accusing them of being collaborators or sympathisers with guerrilla forces and declaring them to be military targets"[1640].

With specific reference to the situation of Israel, the Report gives account of the Government's reply to the Special Rapporteur urgent appeal issued on 3 October 2000: "The Government reported that helicopters had been used in certain incidents as a means of accurate identification, in order to target only specific snipers and firing positions, thereby minimizing damage and injury"[1641]. Notably, as happened in previous years, Israel acknowledged only the targeted killing of persons directly involved in combat when attacked, whereas avoiding any mention to the selective use of force against suspected terrorists and fighters uninvolved in hostilities.

1636 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2001*, UN Doc. E/CN.4/2001/9/Add.1, 17 January 2001, para. 195.

1637 *Ibidem*, paras. 66, 68, 71 and 76.

1638 *Ibidem*, paras. 76, 99, 101.

1639 *Ibidem*, para. 139.

1640 *Ibidem*, para. 66.

1641 *Ibidem*, para. 262.

In her following report the Special Rapporteur for the first time explicitly pointed out that "the targeting and killing of civilians appear to have become part of military tactics in most of today's conflicts"[1642]. In this connection, she noticed that "Such incidents have been particularly common in situations of internal conflict and unrest, where the direct targeting of civilians has increasingly become part of the tactics employed by the parties involved. During the period under review, the Special Rapporteur sent urgent appeals to the Government of Colombia concerning threats and attacks by paramilitary forces against groups of internally displaced people[1643]. Moreover, she expressed concern for the situation in the Chechen Republic where Russia had been accused of perpetrating human rights violations "including deliberate and targeted extrajudicial executions of unarmed civilians"[1644].

In her *Addendum Report*, the Special Rapporteur reiterated her concern for the practice of extra-judicial killings of persons named in kill lists in Colombia, including the extrajudicial execution of suspected members of the FARC *guerrilla* by paramilitary death-squads[1645].

The increasing trend in the employment of targeted killing of suspected terrorists, fighters and members of organized armed groups was further noticed the following year by the Special Rapporteur, who particularly observed this phenomenon "in situations of internal conflict and unrest, where the direct targeting

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1642 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2002*, UN Doc. E/CN.4/2002/74, 9 January 2002, para. 90.

1643 *Ibidem*, para. 53.

1644 *Ibidem*, para. 70.

1645 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2002, Addendum*, UN Doc. E/CN.4/2002/74/Add.2, 8 May 2002, para. 73: "El 22 de octubre de 2001, la Relatora Especial trasmitió un llamamiento urgente en relación a las denuncias graves con respecto a posibles casos de masacres en los municipios de Jurado en el departamento del Chocó por lo cual varias familias habrían sido obligadas a desplazarse hacia la zona urbana del municipio. De acuerdo con las informaciones recibidas, el 6 de octubre de 2001 habría llegado a Jurado un grupo de paramilitares quien habría llevado hacia la playa a 14 indígenas de las comunidades de Santa Teresita y Buenavista, supuestamente para asesinarles. Sin embargo las religiosas misioneras se habrían opuesto a que se fueran. Los informes señalan que al mismo tiempo los paramilitares habrían llevado a la playa al comerciante del lugar el Sr. José del Transito pino, a quien habrían asesinado de tres disparos, para luego salir en dos embarcaciones. Además, los paramilitares, quienes tendrían listas de campesinos a quienes acusan de pertenecer a grupos insurgentes, habrían proferido amenazas contra los habitantes de Garrapatal, exigiéndoles de abandonar sus parcelas de tierra y sus casas. Según las informaciones recibidas, las autoridades civiles y militares del municipio no harían nada para prevenir estos hechos". To this end see also *Ibidem*, para. 94: "El 5 de enero de 2001 unos 15 hombres armados pertenecientes a un grupo paramilitar habrían realizado una incursión en las veredas de Mesetas, Chicó y Chiquinquirá en el municipio del Peñol, Antioquía. Los paramilitares habrían seleccionado, sobre la base de una lista, 13 campesinos a quienes posteriormente habrían ejecutado".

of civilians has increasingly become part of the tactics employed by the parties involved"[1646].

It is in this report that, for the first time, the Special Rapporteur had occasion to make reference to a targeted killing performed outside zones of active combat with drone technology. In this connection, she stated: "A truly disturbing development was the events in Yemen in November 2002. It is reported that six men were allegedly killed while travelling in a car on 3 November 2002 in Yemen by a missile launched by a United States-controlled Predator drone aircraft"[1647].

After providing a thorough account of the known facts of the incident, the Special Rapporteur indicated that the government of Yemen had replied: that one of the person was alleged to be a senior member of Al-Qaeda and all those targeted had been allegedly involved in the attacks at the vessel USS Cole and at a French tanker out of the port of Aden; that the strike was conducted with the approval of the territorial State; that the Yemeni government had already unsuccessfully attempted to apprehend the men killed; that had those targeted decided to come forward, they would have been granted a fair trial[1648]. On the basis of these information, the Special Rapporteur stated: "The Special Rapporteur is extremely concerned that should the information received be accurate, an alarming precedent might have been set for extrajudicial execution by consent of Government. The Special Rapporteur acknowledges that Governments have a responsibility to protect their citizens against the excesses of non-State actors or other authorities, but these actions must be taken in accordance with international human rights and humanitarian law. In the opinion of the Special Rapporteur, the attack in Yemen constitutes a clear case of extrajudicial killing"[1649].

She notably placed the incident under the heading "Deaths due to attacks or killings by security forces, paramilitary groups or private forces cooperating with or tolerated by the State, and violations of the right to life during armed conflict".

In the addendum to the report related to the communications sent to States and replied received, the Special Rapporteur once more took notice with concern of the widespread use of death lists naming people suspected of being members of *guerrilla* forces[1650]. In relation to the situation in Colombia, the Special Rapporteur

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1646 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2003*, UN Doc. E/CN.4/2003/3, 13 January 2003, para. 56.

1647 *Ibidem*, paras. 37 – 39.

1648 *Ibidem*.

1649 *Ibidem*, paras. 37 – 39.

1650 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2003, Addendum*, UN Doc. E/CN.4/2003/3/Add.1, 12 February 2003, para. 70: "Según las informaciones recibidas, el 6 de diciembre de 2001, la Corporación Sembrar en Bogotá habría

further noticed a pattern of executions or threated executions of persons suspected of involvement in the activities of non-organized armed groups[1651].

In the context of the internal armed conflict that took place in Nepal from 1996 and 2006, the Special Rapporteur noticed one episode of extrajudicial execution of a man suspected of being a mid-level officer of the Maoist insurgency: "According to the information received, Sonelal Mandal, a 42-year-old farmer from Mohanpur VDC-9, Shivanagar village, Sirha district, was reportedly killed on 2 August 2002 while walking with a friend, Arun Chaudhari, to Bhawnipur to buy supplies. On the way to Bhawnipur, three plain-clothes policemen reportedly approached Mr. Mandal, who reportedly ran away suspecting that they were members of the police. Six policemen were said to have been hiding further away and when he started running they reportedly opened fire, shooting him up to 12 times, including at close range. The police then allegedly forced two men from Bhawanipir, who were working in the field nearby, to carry the dead body up to the road and the police took it away on a private tractor. It is believed that the body was taken to Lahan police station. The body has reportedly not been handed over to the family for cremation. Mr. Mandal was allegedly suspected by the security forces of being an area commander of the Maoist insurgents, which was reportedly denied by locals from the village"[1652].

In her annual report for the year 2004, the Special Rapporteur introduced a section under the heading "Violations of the right to life during armed conflict contrary to international humanitarian law". In this framework, she noticed that

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recibido una carta con una lista de personas amenazadas de muerte, entre los cuales figuraban sus activistas Nelson Urrego, Blanca Valencia, Ludivia Giraldo, Sandra Herrera y Diana Herrera, acusados de haber colaborado supuestamente con la guerrilla".

1651 *Ibidem*, para. 84: "Estas amenazas podrían estar relacionadas con las actividades de Josédil Gutiérrez que trabajaba con el difunto Alberto Varela en el programa *Hablemos de política*, que desde hace un mes presentaba diferentes puntos de vista sobre los candidatos a la próxima elección de gobernador del departamento. Se informó de que otro periodista de la emisora, Luis Eduardo Alfonso, habría tenido que exiliarse de la ciudad el 30 de junio de 2002 tras la divulgación supuestamente por las AUC de una lista de 350 nombres de personas que podrían ser ejecutadas por las AUC, entre las cuales figuraría Luis Eduardo Alfonso". See also *Ibid.*, para. 91: "El 23 de agosto de 2002, la Relatora Especial mandó un llamamiento urgente al Gobierno de Colombia relativo a la situación de inseguridad y peligro en la que se encuentra la comunidad de desplazados forzosos de Tulda, departamento de Valle del Cauca. De acuerdo con las informaciones recibidas, el 13 y 14 de agosto de 2002, habría circulado por el municipio de Tulda una lista negra firmada por el Bloque Calima de las AUC. Se habrían colocado copias de la lista en lugares muy visibles del municipio, como comercios y apeaderos de autobús. La lista pedía una "limpieza social" y abogaba "por una Tulda sin parásitos". Se informa de que entre el14 y el 16 de agosto se habría dado muerte a ocho personas citadas en la lista. Estas amenazas habrían suscitado honda preocupación por la posibilidad de que se produjera en el municipio una incursión inminente de paramilitares supuestamente respaldados por el ejército. Aunque las autoridades locales habrían sido informadas de la situación, no habrían tomado hasta la fecha ninguna medida efectiva para proteger a la población civil".

1652 *Ibidem*, para. 389.

"According to the information received by the Special Rapporteur, civilians as well as clearly identified aid workers were allegedly targeted by Israeli Defence Forces either while taking shelter in their homes, or when trying to provide first medical aid to injured victims *hors de combat*"[1653]. In this context, the Special Rapporteur underlined that "all parties to an armed conflict […] must respect the rights of the civilian population in accordance with international humanitarian and human rights law. The Special Rapporteur also wishes to emphasize that the right to life of civilians and persons *hors de combat* allows for no derogation, even in time of public emergency or in the context of a fight against terrorism"[1654]. She further noted that in the context of internal armed conflicts "Furthermore, entire rural communities, composed of hundreds of individuals, are also reportedly at risk after death threats are issued against them by paramilitary groups which accuse them of collaborating with members of guerrilla groups"[1655].

In her conclusive remarks, she looked with apprehension at the increasing trend of targeting persons directly through aerial bombardment: "In the last 11 months she has noticed a trend where excessive use of force is being used by Governments on the justification of defending the "security" of the country. There are a number of reports of the use of aerial bombardments or "target shooting" by security forces"[1656]. In this connection, she stressed: "The Special Rapporteur has continued to receive alarming reports of civilians and persons *hors de combat* killed in situations of armed conflict and internal strife in various regions of the world. These violations of international humanitarian law are often due to attacks by security forces of the State, or by paramilitary groups, death squads or other private forces cooperating with or tolerated by the State"[1657]. These general concerns were explicitly reiterated by the Special Rapporteur with specific reference to the situation in Colombia "in cases in which paramilitary groups, reportedly tolerated or supported by the Government, continue to carry out large-scale extrajudicial killings of civilians. In most instances, the paramilitary group *Autodefensas Unidas de Colombia* is responsible for summarily executing ordinary citizens as well as political leaders, trade unionists or human rights defenders whom they accuse of collaborating with guerrilla movements"[1658].

The same pattern of use of lethal force by death squads at the detriment of people named on special lists as suspected members of the *guerrilla* was signaled

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1653 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2004*, UN Doc. E/CN.4/2004/7, 22 December 2003, para. 27.

1654 *Ibidem*, para. 29.

1655 *Ibidem*, para. 60.

1656 *Ibidem*, para. 89.

1657 *Ibidem*, para. 26.

1658 *Ibidem*, para. 31.

with alarm by the Special Rapporteur in her following reports. In these cases, the Special Rapporteur respectively "expressed her concern for the impunity related to these crimes" [1659], defined them as "murders" and "assassinations"[1660], and labelled lists of suspected fighters as "black lists", condemning this practice as unlawful[1661]. Notably, in one of the reported incidents the army, allegedly responsible for the killing of two peasants suspected to be *guerrilleros*, justified the killings on the basis that they took place during an encounter and the two had been therefore been killed during combat[1662]. It is revealing in this regard that the State never alleged any right to kill suspected FARC members outside combat situations.

In relation to the targeted drone strike that had killed six people in Yemen in 2002, the Special Rapporteur reported a further reply received by the Yemeni government[1663] that specified: the victims "were being sought by the judicial authorities on charges of involvement in terrorist activities"; the group they belonged to had allegedly planned new terrorist attacks "that would have adversely affected the international standing of Yemen, as well as its political and economic interests and external relations with other States"; every effort had been made by the government to apprehend them; "they would not be harmed if they had come forward voluntarily to stand trial"; Yemeni security forces were cooperating with the U.S. "with a view to tracking the movements and whereabouts of this alleged terrorist group"; the measure was in compliance and implementation of "Security Council resolution 1373 concerning the suppression of terrorism"; the targeted killing of those persons was "the only option capable of stopping this group and preventing it from carrying out its terrorist plans" [1664].

Mrs. Asma Jahanhir's successor, Mr. Philip Alston, tackled the issue of targeted killing of suspected terrorists and suspected members of organized armed groups since the very beginning of its mandate. In his first report, he in fact devoted

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1659 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2004, Addendum*, UN Doc. E/CN.4/2004/7/Add.1, 24 March 2004, para. 78.

1660 *Ibidem*, para. 81: "De acuerdo con las informaciones recibidas el 2 de julio de 2003, embarcaciones, presuntamente pertenecientes a grupos paramilitares, se habrían dirigido desde el municipio hasta la bahía de Buenaventura, a pesar de la fuerte militarización presente en dicha zona. De acuerdo con las informaciones, se presume que ese mismo grupo paramilitar habría sido el responsable del homicidio de cuatro personas en el barrio Dignidad de la ciudad de Buenaventura, ocurrido el 27 de junio de 2003; las personas asesinadas habrían sido acusadas de pertenecer a la guerrilla".

1661 *Ibidem*, paras. 83-85.

1662 *Ibidem*, para. 93: "El 29 de abril de 2003, en la vereda la Ruidosa Magdalena del municipio de Viotá departamento de Cundinamarca, una patrulla del ejército, al parecer perteneciente al batallón Colombia, habría asesinado a los campesinos Gonzalo Peña y José Gómez. En el mismo sentido se informó de que los cuerpos habrían sido trasladados a la inspección de San Gabriel, donde habrían sido presentados a la comunidad como guerrilleros dados de baja en combate".

1663 *Ibidem*, para. 611.

1664 *Ibidem*, para. 611.

an entire section to "executions occurring in the context of armed conflict"[1665]. In this connection, the Special Rapporteur has focused his attention on "the growing number of civilians and persons *hors de combat* killed in situations of armed conflict and internal strife" causing "a general lessening of the respect for clearly binding international norms"[1666]. In relation to this phenomenon, the Special Rapporteur first of all stressed that "Empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted" [1667]. Second, he underlined the need to "reject unequivocally the killing of all innocent civilians and non-combatants by no matter whom and in no matter what circumstances", including situations of belligerent occupation[1668]. He further expressed his discontent with the U.S. assumption that its alleged involvement in an armed conflict against Al-Qaeda would justify the targeted killing of people suspected of being Al-Qaeda members in Yemen, presupposing at the same time that the application of the armed conflict paradigm would deprive of any significance international human rights law[1669]. He instead maintained that human rights law, and the human right to life in particular continues to apply in situations of armed conflict, so that every arbitrary deprivation of life would in fact amount to a breach of the targeting state's international obligations[1670]. He thus asserted that "this [U.S.] proposition is not supported by general principles of international law. It is now well recognized that the protection offered by international human rights law and international humanitarian law are coextensive, and that both bodies apply simultaneously unless there is a conflict between them"[1671] and upheld that "the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are in fact complementary and not mutually exclusive"[1672].

The special rapporteur concluded, in relation to this matter, that "Proposals seeking to justify or rationalize the arbitrary execution or targeted assassination of individuals alleged to have committed crimes or to be linked to terrorism involve a fundamental undermining of international human rights law and should be condemned without reservation. The Commission should reject unequivocally the

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1665 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2005*, UN Doc. E/CN.4/2005/7, 22 December 2004, para. 43.

1666 *Ibidem*, para. 41.

1667 *Ibidem*, 22 December 2004, para. 41.

1668 *Ibidem*, 22 December 2004, para. 42.

1669 *Ibidem*, paras. 43 and 44.

1670 *Ibidem*, paras. 45-49.

1671 *Ibidem*, para. 50.

1672 *Ibidem*, para. 52.

intentional killing of all civilians and non-combatants, no matter by whom and no matter what the circumstances"[1673].

In a different section of the report, the Special Rapporteur also tackled the issue of death squads, giving for granted the unlawfulness of their actions and therefore stressing that States would be responsible of their wrongdoings, were they to be found directly implicated in the actions of those non-state actors: "The most important category of non-State actor within the context of this mandate are those groups which, although not government officials as such, nonetheless operate at the behest of the Government, or with its knowledge or acquiescence, and as a result are not subject to effective investigation, prosecution, or punishment. Paramilitary groups, militias, death squads, irregulars and other comparable groups are well known to the readers of the Special Rapporteur's reports. There is no legal complexity in relation to this group because insofar as the Government is directly implicated its legal responsibility is engaged"[1674].

In his addendum to this report, the Special Rapporteur made reference to episodes of violation of the right to life in times of armed conflict and, especially, to episodes of premeditated killings of pre-selected individuals. Thus, he made reference to the "Israeli helicopter strike in Gaza city" that had killed Sheikh Ahmed Yassin, to the "targeted missile strike" that had killed Abdel Aziz al-Rantisi on 17 April 2004 and to killing of Samer Jaser Arrar, "a 27-year-old 'wanted' member of Hamas"[1675]. When the State of Israel replied, it maintained that these actions were taken "in self-defence against terrorism and suicide-bombings, defending the right to life of every Israeli citizen" against "leaders who condone, conduct and implement these abhorrent policies"[1676].

As for death lists, the Special Rapporteur transmitted to Colombia a communication concerning inhabitants of the city of Barrancabermeja whose names appeared on "black lists" of paramilitary groups. In particular, he alleged that "Dicha 'lista negra', habría empezado a circular por la zona el mes de agosto de 2003, y contendría nombres de jóvenes de los barrios mencionados a quienes se acusaría de tener vínculos con la guerrilla"[1677]. In this connection, the State of Colombia did not even try to allege the compliance of such measure with its domestic and international

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1673 *Ibidem*, paras. 84 and 85.

1674 *Ibidem*, para. 69.

1675 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2005, Addendum*, UN Doc. E/CN.4/2005/7/Add.1, 17 March 2005, pp. 137 and 138. On this incidents see in higher detail *supra*, Ch. IV, para. 3, sub-para. 3.1.

1676 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2005, Addendum*, UN Doc. E/CN.4/2005/7/Add.1, *supra*, p. 138.

1677 *Ibidem*, para. 105.

law obligations, clarifying instead that investigations into the matter had been launched[1678].

In his following annual report, the Special Rapporteur introduced a section dedicated to "shoot-to-kill policies", noting that "In recent years there have been a number of high-profile pronouncements by officials, not infrequently at the most senior level of Government, that they have given orders for the police or the military to "shoot to kill", to "shoot on sight", or to use the "utmost force" in response to a particular challenge to law and order"[1679]. The Special Rapporteur underlined the challenges posed by these new sets of practice to well-established rules of international law, comparing shoot to kill policies to invocations of targeted killing and pointing out that both these kinds of rhetoric are "used to imply a new approach and to suggest that it is futile to operate inside the law in the face of terrorism"[1680]. Notably, at a semantic level, in this report the Special Rapporteur abandoned any reference to "assassination", shifting his language from targeted assassination to targeted killing.

In his first addendum to the 2006 annual report, the Special Rapporteur directly tackled the issue of Israeli targeted killings conducted in the area of the West Bank, asking the government of Israel to respond upon communications related to deaths caused by premeditated lethal attacks directed by the its security forces at the detriment of pre-selected Palestinian persons. In particular, in relation to "numerous reports" received by the special rapporteur "concerning the killing of suspected terrorists by the Israeli Defense Force"[1681]. According to the accounts, Israeli agents opened fire without any warning and without any threat being posed to them by those targeted at the moment of their shooting. In some of these instances, moreover, the Israeli agents involved in the operations were disguised in civilian clothes and travelled on civilian vehicles. The Special Rapporteur further stressed that "The victims of the killings described in the annex include both persons sought by the Israeli security forces because of a suspicion that they were engaged in terrorist acts and persons who would not appear to have been under such suspicion"[1682].

Some of the reported targeted killing resemble modalities of executions performed by death squads properly so called, with IDF Special Squads reaching

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1678 *Ibidem*, para. 106.

1679 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2006, UN Doc. E/CN.4/2006/53*, 8 March 2006, para. 44.

1680 *Ibidem*, para. 45.

1681 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2006, Addendum 1*, UN Doc. E/CN.4/2006/53/Add.1, 27 March 2006, p. 130.

1682 *Ibidem*, p. 130. For a detailed description of the episodes considered by the Special Rapporteur see *ibid.*, pp. 132-136.

their target on board undercover cars, disguised as civilians, with masks covering their faces, opening fire against the target and then immediately leaving the area[1683].

As for Israel stance, the report confirmed the trend towards a consolidation of the orientation adopted by this State since the turn of the century[1684]: official endorsement of the practice of targeting and killing suspected terrorists, declared intention to continue such killings, reference to the laws of armed conflict as the only applicable legal regime, qualification of the persons targeted as legitimate military targets, Israeli actions' compliance with the laws of war alleging, in particular, that legitimate methods of warfare are employed by Israel in carrying out these killings. Israel also maintained that even well-known terrorists would be legitimate targets only insofar as they are directly involved in a hostile act, only in the presence of an urgent military necessity and only when no less harmful means would be available to prevent the occurrence of such threat. It also clarified, however, that in areas where arrest would not be practically feasible or else would present some hurdles, such as in the Gaza strip, then arresting the target would not be an option and a targeted killing should be performed instead[1685].

In this connection, besides reiterating his "concern that empowering Governments to identify and kill 'known terrorists' places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative has been exhausted"[1686], the Special Rapporteur resorted to the wording "assassination attempt" in order to define the failed targeted killing of Majdi Mir'I, a suspected member of Hamas[1687]. In this report the Special Rapporteur also started making reference to U.S. led drone strikes in the territories at the Afghan-Pakistani border. Thus, he related about the killing of suspected Al-Quaeda operative Haitham al-Yemeni performed by a missile fired by a CIA-operated unmanned aerial vehicle. In particular, the Special Rapporteur reported that the situation that triggered the killing of al-Yemeni was the fear that he would otherwise go into hiding and he stressed that whereas the Government of Pakistan officially denied that any such incident ever occurred[1688] no response whatsoever was received by the U.S.[1689]. Also in this connection, the Special Rapporteur reiterated his stance that empowering

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1683 See for instance the killing of Fadi Fakhri Zakarna described by the Special Rapporteur in this same report at p. 134.

1684 *Israel's statement to the Human Rights Committee*, 25 July 2003, UN Doc. CCPR/C/SR.2118, para. 40.

1685 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2006, Addendum 1, supra*, pp. 130 and 131.

1686 *Ibidem*, p. 131.

1687 *Ibidem*, p. 135.

1688 *Ibidem*, p. 183.

1689 *Ibidem*, p. 264.

governments to identify and kill known terrorists places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are terrorists.

The Special Rapporteur also referred to targeted killings in other contexts. Thus, he pointed out the numerous reports of "assassinations allegedly committed by the LTTE since the entry into force in February 2002 of the Agreement on a Ceasefire Between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam" since the beginning of its mandate and expressed his awareness of "numerous LTTE cadres and supporters have themselves been victims of killings by other actors involved in the conflict", expressing concern over the unlawfulness of these episodes[1690]. In the context of the internal conflict in Nepal, the Special Rapporteur defined as executions the reported killing of 14 persons suspected to be Maoist insurgents by governmental forces following a raid on a village in the district of Makwanpur, on 5 February 2004[1691]. In this case, the executed persons were not apprehended by the governmental forces who instead killed all of them in their sleep. In its reply to the Special Rapporteur, the government of Nepal maintained that the operation stormed a maoist hideout, apparently assuming that those killed were legitimate military targets[1692].

Some of these issues were further taken into account in the Special Rapporteur's 2007 annual report. In this occasion, the Special Rapporteur first summarized the U.S. position on the matter of the applicable legal regime in the alleged "war on terror" in the following terms: "In essence, the United States position consists of four propositions: (a) the "war on terror" constitutes an armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law"[1693]. He then underlined that the U.S. stance in relation to targeted killings would lead to a complete auto-referential framework where every state could label any individual as an "enemy combatant" and allege that such individual was attacked in "appropriate circumstances"[1694]. He stressed that "this position would place all actions taken in the so-called "global war on terror" in a public accountability void, in which no international monitoring body would exercise public oversight" and pointed out in

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1690 *Ibidem*, p. 320.

1691 *Ibidem*, p. 161.

1692 *Ibidem*, p. 162.

1693 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2007*, UN Doc. A/HRC/4/20, 29 January 2007, para. 27.

1694 *Ibidem*, para. 27.

the strongest terms that "Creating such a vacuum would set back the development of the international human rights regime by several decades"[1695].

In his addendum to this report the Special Rapporteur in fact took issue with targeted killings conducted by the U.S. in Pakistan. In this regard, he made reference to a letter sent to the governments of Pakistan and the U.S. concerning three episodes of targeted killings by unmanned aerial vehicles that resulted in "the death of several civilians", expressing once more his concern for such episodes and reiterating that States cannot simply proceed to target "known terrorists" for death[1696].

Replying to the Special Rapporteur in relation to the targeted killing of Haitham al-Yemeni, the U.S. government made clear that it considered itself involved in a conflict with Al-Qaeda, that therefore the legal regime governing its actions would be the laws of armed conflict, that it conducted in such conflict legitimate military operations and that "Al-Qaeda operatives" were considered as legitimate military targets[1697]. The U.S. position in this regard is well summarized by the following section of its reply to the special rapporteur: "The law of armed conflict […] is the applicable law in armed conflict and governs the use of force against legitimate military targets. Accordingly, the law to be applied in the context of an armed conflict to determine whether an individual was arbitrarily deprived of his or her life is the law and customs of war. Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered *hors de combat*. Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances"[1698]. As it appears, this stance gives for granted that, once a person is identified as a legitimate military target, then that person may be selected and designated for death, which may be delivered at any time and everywhere the person is found. In line with such understanding, the U.S. made clear that "Al Qaeda terrorists who continue to plot attacks against the United States may be lawful subjects of armed attacks in appropriate circumstances", implying that Haitham al-Yemeni was targeted on these basis[1699].

In his following correspondence with the U.S., the Special Rapporteur stressed that human rights law and the laws of armed conflict are not mutually exclusive but rather complementary[1700] and noted that "the United States [n]ever

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1695 *Ibidem*, para. 18.

1696 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2007, Addendum*, UN Doc. A/HRC/4/20/Add.1, 12 March 2007, pp. 244 and 245.

1697 *Ibidem*, p. 344.

1698 *Ibidem*, p. 345.

1699 *Ibidem*, 12 March 2007, p. 346.

1700 *Ibidem*, pp. 347 and 348.

object[ed] to the inclusion of international humanitarian law instruments in the legal framework supporting the mandate [of the Special Rapporteur] until 2003, two decades after international humanitarian law was first applied under the mandate"[1701].

In this report the Special Rapporteur also had the occasion for the first time to take into account the increasing trend of U.S. targeted killing by drone strikes in Pakistan. In so doing, he reported the letter he had sent to the government of the U.S. in relation to three incidents of air strikes conducted in Pakistan with the aim of targeting and killing pre-selected individuals, concerning the same episodes already referred to the government of Pakistan. On these cases, the Special Rapporteur did not receive replies from the U.S[1702]. In this connection, the Special Rapporteur noted that "The Government of Pakistan is reported to have lodged a diplomatic protest over the incident on 14 January 2006. Pakistan's Prime Minister, Mr. Shaukat Aziz, reportedly stated publicly that such attacks are not acceptable to Pakistan"[1703]. Following reiteration of the already recalled considerations related to the Special Rapporteur's mandate, he once more concluded on the point: "we would express the concern […] that empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative has been exhausted"[1704].

Remarkably, in his correspondence with the government of Pakistan the Special Rapporteur made reference to repeated episodes of use of military force by governmental forces in the district of Dera Bugti, located in the Balochistan region. While acknowledging "the existence of armed tribal militias in Balochistan which carry out attacks against governmental forces and infrastructure" the special rapporteur went ahead to assume that "the situation in Dera Bugti district was a question of 'law and order' and did not constitute an armed conflict, as reportedly argued by your Excellency's Government"[1705]. In so doing, he therefore expressed the understanding that it is possible to have an internal armed conflict in one area of the country whereas maintaining the default law enforcement model on the remainder of the State's territory.

1701 *Ibidem*, p. 354.
1702 *Ibidem*, p. 359.
1703 *Ibidem*, p. 360.
1704 *Ibidem*, p. 360.
1705 *Ibidem*, p. 248.

Whereas the Special Rapporteur did not deal with the topic of conflict-related extrajudicial executions in his 2008 annual report[1706], in one of his addendum he did tackle the issue of "targeted assassination", resorting to this wording to define the pre-selected killings perpetrated by the Taliban at the detriment of civilians in Afghanistan[1707].

In 2009 as well the Special Rapporteur avoided any reference to targeting practices and war-time extrajudicial executions[1708]. In his addendum to this report, however, the Special Rapporteur expounded on limitations to targeted killing techniques in relation to the killing of Palestinians in the occupied territories by Israeli forces. In this connection, the Special Rapporteur made reference to customary rules governing the conduct of hostilities, focusing in particular on the "prohibition on directing attacks against the civilian population" and stressing that such protection is suspended only "for such time as they take a direct part in hostilities"[1709]. In his analysis, the Special Rapporteur expressly referred to the applicability of human rights law in times of armed conflict, in particular in relation to belligerent occupation, and endorsed a least harmful means approach. Accordingly, he made reference to the already recalled decision of the Israeli Supreme Court and stated: "the law must strictly control and limit the circumstances in which a person may be deprived of his life by [State] authorities. A civilian taking a direct part in hostilities may be the object an attack, for such time, only if no less harmful means, such as arrest, can be used. This has been the interpretation adopted by the Israeli Supreme Court *(The Public Committee against Torture in Israel et al. v. The Government of Israel et al*). […] Examining the right to life in the context of an anti-terrorist operation the European Court for Human Rights reached a similar conclusion, in the McCaan v. United Kingdom case of 1995"[1710]. This endorsement of the position reached by the Supreme Court of Israel is particularly noticeable in at least two regards. First of all because, as it expressly relates, it amounts to a full-out validation of a least harmful means approach, pursuant to which it is strictly unlawful to kill a fighter when he could be captured. It is of great significance, in addition, because it shows, albeit without pointing it out with the same clarity, that the targeted killing of a civilian suspected of taking an active part in hostilities is not in and by itself considered unlawful, even though it does require investigation. This is indeed confirmed by the further Special Rapporteur's consideration that in such cases the

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1706 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2008*, UN Doc. A/HRC/8/3, 2 May 2008.

1707 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2008, Addendum*, UN Doc. A/HRC/8/3/Add.6, 29 May 2008, paras. 21 and 28.

1708 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2009*, UN Doc. A/HRC/11/2, 27 May 2009.

1709 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2009, Addendum*, UN Doc. A/HRC/11/2/Add.1, 29 May 2009, pp. 244 and 245.

1710 *Ibidem*, p. 245.

State party bears an obligation to thoroughly investigate, especially into "the precision of the identification of the target and the circumstances of the attack"[1711].

Still in 2009, the Special Rapporteur undertook a visit to the U.S. and elaborated a report analyzing compliance of the State's conducts with the protection of fundamental rights falling within the scope of his mandate[1712]. In this framework, the Special Rapporteur took notice of the publicly acknowledged existence of a targeted killing program stressing that "[the Government] has been evasive about its grounds for targeting" and highlighting his discontent with the position apparently assumed by the U.S.: "I am disturbed by the broader implications of its positions. Briefly, those positions are that: (a) the Government's actions against al-Qaeda constitute a world-wide armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Human Rights Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law"[1713]. Recalling his correspondence with the Government of the United States as well as his discussion of this matter with the Council of Human Rights, the Special Rapporteur stressed that the consequences of allowing policies of targeted killing would lead to the following consequences: "(a) many of the worst human rights and humanitarian law violations in the world today would be removed from the purview of the Special Rapporteur and the Human Rights Council; (b) a State could target and kill any individual, anywhere in the world, whom it deemed to be an "enemy combatant" and it would not be accountable to the international community; (c) a State could unilaterally decide that a particular incident complied with international law - as interpreted solely by the State - and would not therefore be covered by the mandate; (d) it is widely agreed that international human rights and humanitarian law are complementary, not mutually exclusive[1714].

In his first annual report, Philip Alston's successor Christof Heyns did not dedicate specific attention to the issue of targeted killings[1715]. Although in his Addendum Report the Special Rapporteur reported an allegation letter regarding the targeted killing of Anwar Al-Aulaqi perpetrated by a U.S. drone strike in Yemen[1716],

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1711 *Ibidem*, p. 246.

1712 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2009, Addendum V*, UN Doc. A/HRC/11/2/Add.5, 28 May 2009.

1713 *Ibidem*, para. 71.

1714 In this connection see *UN Docs. A/HRC/4/20* and *A/HRC/4/20/Add.1*, *supra*.

1715 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2011*, UN Doc. A/HRC/17/28, 23 May 2011.

1716 See *supra*.

he did not receive any reply from the U.S. government[1717]. Significantly, in this report, the Special Rapporteur made use of the wording "assassination" only in relation to the targeted killing (or attempted targeted killing) of political leaders or other public figures in situations short of conflict[1718].

Christof Heyns dedicated his 2012 Annual Report to the protection of the right to life of journalists, provided the alarmingly high death rate of professionals of that category, whose voices have been silenced by both States and non-state actors[1719]. In one of the addenda to that report, however, the Special Rapporteur reported on the follow up to the recommendations issued to the U.S. by his predecessor. In this addendum, he dedicated a specific section to targeted killings. In this connection, after recalling that the U.S. had "continuously engaged in targeted killings on the territory of other States" including "Afghanistan, Iraq, Pakistan, Somalia and Yemen" the Special Rapporteur lamented that "to date, the Government has not provided an official and satisfactory response", making instead simple reference to Statements by the Department of State Legal Adviser[1720]. In this connection, the Special Rapporteur reaffirmed that "an advance decision, ruling out the possibility of offering or accepting an opportunity to surrender, renders such operations unlawful "[1721]. He again called for transparency and urged the U.S. to conduct an accurate assessment of civilian casualties[1722]. He further expressed concern "that the practice of targeted killing could set a dangerous precedent, in that any Government could, under the cover of counter-terrorism imperatives, decide to target and kill an individual on the territory of any State if it considers that said individual constitutes a threat"[1723].

In line with the previous considerations he therefore recommended the U.S. to "explicate the rules of international law it considers to cover targeted killings. It should specify the bases for decisions to kill rather than capture particular individuals, and whether the State in which the killing takes place has given consent. It should specify the procedural safeguards in place, if any, to ensure in advance of drone killings that they comply with international law, and the measures the Government takes after any such killing to ensure that its legal and factual analysis

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1717 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2011, Addendum*, UN Doc. A/HRC/17/28/Add.1, 27 May 2011, pp. 394-397.

1718 *Ibidem*, pp. 34-37, 43-44 and 352.

1719 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2012*, UN Doc. A/HRC/20/22, 10 April 2012.

1720 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2012, Third Addendum*, UN Doc. A/HRC/20/22/Add.3, 30 March 2012, para. 76.

1721 *Ibidem*, para. 77.

1722 *Ibidem*, paras. 79 and 81.

1723 *Ibidem*, para. 84.

was accurate and, if not, the remedial measures it would take"[1724]. These conclusions were further recalled by the Special Rapporteur in a subsequent addendum to his annual report, following a lack of response by the U.S. on allegations of targeted killing conducted in breach of international law norms[1725]. Similarly, in this report the Special Rapporteur expressed his discontent with a lack of response on part of Yemen in relation to targeted killing operations conducted by the U.S. with the local Government alleged consent[1726].

The Special Rapporteur devoted his following annual report to the issue of Lethal Autonomous Robotics[1727]. Whereas this kind of weapon systems does not integrate an element of targeted killings, insofar as such practices may very well be conducted with different methods and means, it is surely linked to them due to the final aim of lethal autonomous robotics that is to leave no chance of survival to their victims as well as by reason of their possible deployment against pre-selected individuals. In this regard, the Special Rapporteur stressed: "the increased precision and ability to strike anywhere in the world, even where no communication lines exist, suggests that LARs will be very attractive to those wishing to perform targeted killing. The breaches of State sovereignty – in addition to possible breaches of IHL and IHRL – often associated with targeted killing programmes risk making the world and the protection of life less secure"[1728]. He then established a parallelism between drones and lethal autonomous robotics in the following terms: "While it is desirable for States to reduce casualties in armed conflict, it becomes a question whether one can still talk about "war" – as opposed to one-sided killing – where one party carries no existential risk, and bears no cost beyond the economic. There is a qualitative difference between reducing the risk that armed conflict poses to those who participate in it, and the situation where one side is no longer a "participant" in armed conflict inasmuch as its combatants are not exposed to any danger. LARs seem to take problems that are present with drones and high-altitude airstrikes to their factual and legal extreme"[1729]. In so doing, on the one hand he touched upon one of the problematic issues risen by the deployment of drones (also relevant for targeted killings); on the other, however, he assumed that with drones, as opposed to lethal autonomous robotics, such troublesome characteristic is not so extreme as to warrant a specific moratorium. A further assessment of a certain relevance for targeting practices is that "Experts have noted that for counter-insurgency and unconventional warfare, in which combatants are often only identifiable through the

1724 *Ibidem*, Recommendation 24.

1725 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2012, Fourth Addendum*, UN Doc. A/HRC/20/22/Add.4, 18 June 2012, Para. 85.

1726 *Ibidem*, Para. 88.

1727 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2013*, UN Doc. A/HRC/23/47, 9 April 2013.

1728 *Ibidem*, para. 62.

1729 *Ibidem*, para. 60.

interpretation of conduct, the inability of LARs to interpret intentions and emotions will be a significant obstacle to compliance with the rule of distinction"[1730]. Ultimately, the Special Rapporteur stressed: "The regulation of the use of UCAVs is currently in a state of contestation, as is the legal regime pertaining to targeted killing in general, and the emergence of LARs is likely to make this situation even more uncertain"[1731].

In his report dedicated to the mission to Turkey he had undertaken the previous year, the Special Rapporteur noted "a number of cases where civilians were mistakenly identified as terrorists and killed in counter-terrorism operations" and therefore stressed "the need for counter-terrorism operations to develop a thorough method of identification of the alleged terrorists, so as to avoid mistakes and civilian harm"[1732]. In so doing, the Special Rapporteur apparently assumed that, under certain circumstances, targeted killings of suspected terrorists may be lawful: it would be otherwise inexplicable why he made reference to the need for the development of "a thorough method of identification". The Special Rapporteur further acknowledged "information from Government officials that the Turkish Armed Forces make efforts to apprehend alleged terrorist suspects without lethal force whenever possible. Attention was brought to a case earlier in December 2011 at Cudi Mountain in Sirnak province, where the armed forces were apparently successful in obtaining the surrender, without fatalities, of alleged members of the Kurdistan Workers' Party (PKK), operating in a seven-storey-high cave in the mountain. The Special Rapporteur encourages the authorities to apply such methods of non-fatal engagement and opportunity for surrender as much as possible in counter-terrorism operations"[1733].

In the subsequent addendum report, relating his observations on communications transmitted to States and their replies, the Special Rapporteur once more restricted the use of the wording "assassination" to episodes involving the premeditated killing of civilians having nothing to do with armed conflicts, especially making reference to human rights defenders or journalists[1734]. In this addendum the Special Rapporteur avoided any reference to targeted killing, kill lists, or in general any other such killing conducted in the framework of an armed conflict.

1730 *Ibidem*, para. 68.

1731 *Ibidem*, para. 98. By the same token see also para. 110.

1732 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2013, Second Addendum*, UN Doc. A/HRC/23/47/Add.2, 18 March 2013, para. 21.

1733 *Ibidem*, para. 27.

1734 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2013, Fifth Addendum*, UN Doc. A/HRC/23/47/Add.5, 27 May 2013, paras. 41, 78, 81 and 98.

In the following year, the Special Rapporteurs focused once more his attention on drone technology and autonomous weapons systems, devoting to these issues an entire section of his annual report. In this regard, after recounting the mandate's engagement on armed drones related concerns over the years and his more recent interest in the matter of lethal autonomous robotics, the Special Rapporteur identified the role of human beings as decision makers on the delivery of lethal force as the crucial difference existing between these technologies[1735]. With specific reference to the use of armed drones in times of armed conflict, the Special Rapporteur stressed that the lawfulness of operations conducted through such platforms is to be assessed on a case by case basis. He further pointed out that "Legal uncertainty in relation to the interpretation of important rules on the international use of force presents a clear danger to the international community. To leave such important rules open to interpretation by different sides may lead to the creation of unfavourable precedents where States have wide discretion to take life and there are few prospects of accountability. Such a situation undermines the protection of the right to life. It also undermines the rule of law, and the ability of the international community to maintain a solid foundation for international security"[1736].

The main focus of the 2015 Annual Report was the use of information and communication technologies to secure the right to life[1737]. No reference whatsoever was made in this report to arbitrary deprivation of life in the form of pre-meditated killing of pre-targeted individuals. The Special Raporteur dedicated the fourth Addendum to his Annual Report to the follow-up to the recommendations he had issues at Turkey. In this regard, the Special Rapporteur reiterated that counterterrorism operations must comply with international law, including the prohibition to target civilians directly, under any circumstance[1738].

b) Reports Especially Devoted to Targeted Killing and the Results of the UN "Probe" into Drone Strikes

Emphasizing the ever increasing attention dedicated to the rise of premeditated killing of pre-selected individuals, especially in the framework of the fight against international terrorism, a report entirely dedicated to the topic of

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1735 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2014*, UN Doc. A/HRC/26/36, 1 April 2014, para. 133.

1736 *Ibidem*, para. 137.

1737 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2015*, UN Doc. A/HRC/29/37, 24 April 2015.

1738 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2015, Fourth Addendum*, UN Doc. A/HRC/29/37/Add.4, 6 May 2015, para. 18.

targeted killing was authored by the Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, for the first time, in 2010. The then Special Rapporteur Philip Alston, in fact, conducted a specific study on the topic, attaching it as the VI addendum to his 2010 annual report[1739].

The Special Rapporteur accurately noticed that "In modern times, targeted killings by States have been very restricted or, to the extent that they are not, any *de facto* policy has been unofficial and usually denied, and both the justification and the killings themselves have been cloaked in secrecy. When responsibility for illegal targeted killings could be credibly assigned, such killings have been condemned by the international community – including by other States alleged to practice them"[1740].

Whereas tackling the issue of targeted killing in general, the Special Rapporteur also dedicated one section of his report to the specific issue of targeted killing in times of armed conflict.

In this context, the Special Rapporteur noted that both the laws of armed conflict and human rights law find application and he made reference to the well-known *lex specialis* principle as a relevant criterion for the regulation of the relationship between the two paradigms[1741]. What marks the most peculiar aspect of the assessment conducted by the Special Rapporteur in this regard is perhaps that, immediately following his reference to the *lex specialis* criterion he went on to state "To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law"[1742]. Now, notably, most of those who invoke the *lex specialis* principle with reference to the relationships between these two legal paradigms actually do so in order to derogate from human rights law restrictions in times of armed conflict. In this assessment instead, the Special Rapporteur applied the criterion *a contrario*, actually opening a door for the interpretation of the laws of armed conflict in light of human rights law rather than *vice versa*.

Nonetheless, in the following paragraph, he states: "Targeted killing is only lawful when the target is a 'combatant' or 'fighter' or, in the case of a civilian, only for such time as the person 'directly participates in hostilities'"[1743]. From this statement a few considerations on the Special Rapporteur's understanding may be

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1739 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2010*, UN Doc. A/HRC/14/24, 20 May 2010.

1740 *Alston Report*, *supra*, para. 11.

1741 *Ibidem*, para. 29.

1742 *Ibidem*, para. 29.

1743 *Ibidem*, para. 30.

drawn: a) targeted killings in times of armed conflict may be lawful under certain circumstances; b) people who may be lawfully pre-selected as targets for the use of pre-meditated lethal force may belong to three categories of persons, *i.e.* combatants, fighters and civilians directly participating in hostilities, meaning that the Special Rapporteur considers this latest category as one autonomous and additional to that of "fighters" (but see *infra* in this regard); c) civilians may lawfully be targeted only for so long as they are actually participating in hostilities; d) the Special Rapporteur does not take into consideration other specific norms belonging to the armed conflict paradigm, chiefly those related to the prohibition of assassination. Whereas this is surely true, it is also true that he nonetheless doesn't make reference to other well-known limitations to means and methods of warfare, and he certainly doesn't imply with that to consider that every targeted killing conducted in any fashion should therefore be considered lawful. Therefore, what may be concluded by this first reference to targeted killings in the context of armed conflict by the Special Rapporteur is that, considering that some of them might indeed be lawful, not all targeted killing amount in and by themselves to assassination, as otherwise the whole category would be outlawed at once.

More to the point in this regard, after stressing that the most problematic issue concerning targeted killing in times of armed conflict relates to the identification of who may be a lawful target[1744], the Special Rapporteur introduces a distinction between international and non-international armed conflicts. As for armed conflicts international in character, he suggests that "combatants may be targeted at any time and any place" maintaining however that this holds true only "subject to the other requirements of IHL" and avoiding any specification as to what other requirements should those be[1745]. As far as non-international armed conflicts are concerned then, first of all, the Special Rapporteur specifies that there is no such a thing as a combatant and stresses that States may only attack individuals who directly participate in hostilities, notion that, he clarifies, is however open to interpretation, provided that there is no international consensus on its exact meaning[1746]. Regarding this crucial notion, then, the Special Rapporteur gives account of three key controversies (concerning respectively the kind of conducts that amount to direct participation, the question of "membership" in an organized armed group and the duration of the participation) before passing on to a detailed analysis[1747].

Following such analysis, the Special Rapporteur also reports about the existence of an obligation to resort to least harmful means when circumstances permit to do so, explicitly endorsing a position that would understand the least

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1744 *Ibidem*, para. 57.
1745 *Ibidem*, para. 58.
1746 *Ibidem* para. 58.
1747 See in higher detail *infra*, Ch. V, para. 2.

harmful means approach to be binding in nature: "Although IHL does not expressly regulate the kind and degree of force that may be used against legitimate targets, it does envisage the use of less-than-lethal measures: in armed conflict, the 'right of belligerents to adopt means of injuring the enemy is not unlimited' and States must not inflict "harm greater that that unavoidable to achieve legitimate military objectives"[1748]. The rationale mirrored in this considerations is that the principle of military necessity, in its restrictive dimension, would impose an obligation on belligerent parties to capture rather than kill an enemy every time that apprehension is a viable option because resorting to lethal force instead would basically entail a harm greater than that strictly required to achieve the military purpose. Unravelling these considerations, the Special Rapporteur explicitly recalls the ICRC guidance and harmonize with it, further underlying that killing an adversary "where there manifestly is no necessity for the use of lethal force" would "defy basic notions of humanity"[1749]. Thus, the Special Rapporteur comes to the conclusion that "Less-than-lethal measures are especially appropriate when a State has control over the area in which a military operation is taking place, when "armed forces operate against selected individuals in situations comparable to peacetime policing", and in the context of non-international armed conflict, in which rules are less clear. In these situations, States should use graduated force and, where possible, capture rather than kill."[1750].

The Special Rapporteur concludes on wartime targeted killing with an analysis of the use of drones to conduct such lethal operations. After recalling differing views on the matter, he stresses that "a missile fired from a drone is no different from any other commonly used weapon"[1751] and goes on to stress that the real criticality highlighted by these weapons is that States "will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively" because unmanned aerial vehicles "make it easier to kill without risk to a State's forces"[1752].

Whereas the Report's conclusions seem to be inclined to a more permissive trend towards targeted killing insofar as States undertake every effort to verify the identity of the target and the target is a lawful one, this remains problematic at the very least in two regards. First, in allowing States to target persons that they have verified as lawful targets implies that they are given entitlement to conduct an assessment very similar to that over which solely courts of law should have competence. Second, this implies that, if the target is lawful, he in fact can be

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1748 *Alston Report*, *supra*, para. 75.
1749 *Ibidem*, para. 75.
1750 *Ibidem*, para. 77.
1751 *Ibidem*, para. 79.
1752 *Ibidem*, para. 80.

selectively aimed at and deprived of his life with pre-meditation, even when not directly engaged in conflict-related activities. This certainly cannot be the ultimate consequence of a report which, thoroughly considered, actually tend to limit rather than permit uses of premeditated lethal force against selected individuals in times of armed conflicts. Thus, these conclusions, read in the general framework of the report seem to actually hint at the possibility to resort to targeted strikes only insofar as these are conducted in areas where international humanitarian law is applicable, against legitimate targets who are taking part in hostilities and when no less harmful means may in any case be adopted.

Due to the sensitiveness of the subject matter and the systemic resort to targeted strikes with drone technologies by some states involved in the most notorious armed conflicts, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Mr. Ben Emmerson submitted to the United Nations General Assembly a report concerning the use of remotely piloted aircraft in counterterrorism operations[1753]. This document reported on the inquiry launched by the Special Rapporteur in January 2013 with regard to the use of armed drones "in extraterritorial counter-terrorism operations, including in the context of asymmetrical armed conflict"[1754].

Notably, the Special Rapporteur recalls a statement issued by the ICRC according to which "any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimise incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not"[1755]. This assessment surely is true. Even though such prescription is surely necessary, however, it is not sufficient. Another principle of the laws of war is that weapons which render death inevitable should not be used. In this sense, a State should comply with both rules while engaging in an attack.

In strict relation to human rights law and international humanitarian law related to limitations to the use of lethal force, after noticing that the U.S. has asserted a right to use targeted strikes outside areas of active hostilities, the Special Rapporteur pointed out that in such context "deadly force by the State is lawful only if strictly necessary and proportionate, if aimed at preventing an immediate threat to life and if there is no other means of preventing the threat from materializing"[1756].

1753 Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counter-Terrorism Operations*, UN Doc. A/68/389, 18 September 2013 (hereinafter *Emmerson Report 2013*).

1754 *Ibidem*, para. 20.

1755 *Ibidem*, para. 28, quoting ICRC, *The use of armed drones must comply with laws*, 10 May 2013, available at www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm.

1756 *Emmerson Report 2013*, *supra*, para. 60.

As for the interplays between human rights law and international humanitarian law, the Special Rapporteur expresses the view that what is an arbitrary deprivation of life in times of armed conflict falls to be determined by the applicable targeting rules of the laws of armed conflict and therefore stresses the importance to identify the existence of an armed conflict and its geographical boundaries[1757]. In this light, he focuses to the geographical scope of armed conflicts, noting that the U.S. does not appear to recognize any territorial limitation to the applicability of international humanitarian law[1758]. In this regard, the Special Rapporteur expresses the view that the classic test to the identification of an armed conflict, making reference to intensity and protraction of armed violence, is implicitly premised on a territorial dimension. He also points out that, were it otherwise, it would be lawful to resort to military force in areas free of hostilities, in contrast with the purpose and object of international humanitarian law; he maintains that even allowing for conflict spill-overs in third states' territories these threshold rules for territorial application of international humanitarian law should be met[1759]. Nonetheless, he reports the ICRC's view that there is no consensus on the issue and accordingly reports the view of scholars upholding the U.S. position that there is no settled opinio juris confirming the existence of a legal rule over the geographical dimension of armed conflicts[1760].

Coming to applicable targeting rules, the Special Rapporteur has related the stance assumed by the ICRC in its interpretative guidance that civilians who may be considered as members of an armed group due to their continuous combat function - to be deemed as "lasting integration into an armed group" - can be targeted for lethal operations at any time. In the absence of such continuous combat function, a person remains a civilian to all effects and, as such, loses immunity from attack only for such time as he is directly taking part in hostilities[1761]. According to the Special Rapporteur, then, " Lethal targeting directed at senior operational leaders of Al-Qaida and those who pose an imminent threat of violent attack would appear to satisfy the ICRC tests of continuous combat function and direct participation, respectively. There is, however, evidence to indicate that attacks have been launched against much lower-level operatives, including those who have harboured identified targets"[1762].

The second-prong of the so-called UN Probe into drone strikes is the twin report drafted more or less in the same period by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Christof Heyns. In his report, the

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1757 *Ibidem*, para. 61.
1758 *Ibidem*, para. 62.
1759 *Ibidem*, para. 63.
1760 *Ibidem*, paras. 64 and 65.
1761 *Ibidem*, paras. 69 and 70.
1762 *Ibidem*, para. 71.

Special Rapporteur observed at the outset that drones are mostly used in confrontations between State and non-state actors which may at best amount, in certain cases, to non-international armed conflicts[1763] and clarified that in this framework, the right to life is to be "interpreted in accordance with the rules of international humanitarian law"[1764]. However, often confrontations between States and non-state actors fails to meet the threshold requirement for the existence of a non-international armed conflict. When this is the case, international humanitarian law does not find application[1765].

Thus, the Special Rapporteur goes on to give account of the parameters for the existence of a non-international armed conflict. In this regard, in particular, he makes reference to the well-known *Tadic formula* referring to "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State", underlying that the two relevant criteria are the intensity of the fight and the organization of the parties involved. As for the organizational requirement, indicia of relevant organization are the existence of a command structure, of headquarters and of the group's ability to plan and perform military operations. The intensity should be protracted and meet a higher threshold than internal disturbances. Both these criteria are to be determined on case-by-case basis. Where any of these requirements is lacking, international humanitarian law does not find application[1766]. This latest affirmation, seems to indicate a geographic restriction to the use of drones as military weapons employed for targeted killing operations.

Replying to arguments suggesting that networks "affiliated" to an organized armed group involved in a non-international armed conflict may indeed be considered as co-belligerents of that group, the Special Rapporteur underlined that the concept of co-belligerency only applies to international armed conflicts, implying that a State sides with one of the parties involved. This idea cannot be transposed to organized armed groups by virtue of the inherent differences between the latter and sovereigns, in particular because it "opens the door for an expansion of targeting without clear limits"[1767]. As a consequence, "where the individuals targeted are not part of the same command and control structures as the organized armed group or are not part of a single military hierarchical structure, they ought not to be regarded as part of the same group, even if there are close ties between the groups"[1768]. In this regard, he particularly underlined that "Violence by various organized armed groups

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1763 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/68/382, 13 September 2013 (hereinafter Heyns Report 2013), para. 52.

1764 *Ibidem*, para. 53.

1765 *Ibidem*, para. 53.

1766 *Ibidem*, paras. 55-58.

1767 *Ibidem*, paras. 59-61.

1768 *Ibidem*, para. 62.

against the same State can amount to separate non-international armed conflicts, but only where the intensity of violence between each group and the State individually crosses the intensity threshold. Isolated drone strikes alone are unlikely to meet this threshold of violence intensity"[1769]. On this basis, he rejects the idea of the existence of a single transnational non-international armed conflict taking place in different States and territories and therefore allowing for the targeting of everybody having a nexus with an organized armed groups, regardless of where he is located[1770]. Accordingly, various terrorist groups labelled (or labelling themselves) as Al-Qaeda sometimes do not have a sufficient integration in the command structure of the core organization and do not even possess an autonomous integrated command structure that would permit to consider them as a party to an armed conflict. Accordingly, "Some situations may be classified as an international armed conflict, others a non-international armed conflict, while various acts of terrorism taking place in the world may be outside any armed conflict"[1771].

Shifting then his focus to the principle of distinction, the Special Rapporteur clarified that when international humanitarian law applies, the crucial question becomes who may be targeted, endorsing the view expressed by the ICRC in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities*[1772]: "civilians protected from direct attack in a non-international armed conflict are all those who are neither members of a State's armed forces nor members of organized armed groups". The latter are to be identified on the basis of their continuous combat function. An attack directed at a member of an armed group is in compliance with the principle of distinction, endorsing the view that organized armed groups may be considered as armed forces of a non-state actor. Individual civilians also lose immunity from attack on the basis of their direct participation in hostilities, to be defined in accordance to the interpretive guidance threefold test (threshold of harm, direct causation and belligerent nexus)[1773].

The Special Rapporteur also tackled the issue of so-called signature strikes, *i.e.* attacks conducted against unidentified targets on the basis of a pattern of behavior or their appearances and presence in a certain location. In this regard, he argued: "This is not a concept known to international humanitarian law and could lead to confusion. The legality of such strikes depends on what the signatures are. In some cases, people may be targeted without their identities being known, based on

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1769 *Ibidem*, para. 63.

1770 *Ibidem*, para. 64.

1771 *Ibidem*, paras. 65 and 66.

1772 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, Geneva, 2009 (hereinafter *ICRC Interpretive Guidance*).

1773 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra*, paras. 67-69.

insignia or conduct. The legal test remains whether there is sufficient evidence that a person is targetable under international humanitarian law, as described above, by virtue of having a continuous combat function or directly participating in hostilities, and if there is doubt States must refrain from targeting. Insofar as the term "signature strikes" refers to targeting without sufficient information to make the necessary determination, it is clearly unlawful"[1774]. The trouble with this assessment, it is submitted here, is that "doubts" pertain to the realm of the judiciary and this should be the function of direct participation in hostilities: absent direct engagement, a person cannot be targeted because in that case it would fall to the total discretionary power of the targeting party alone who may and who may not be considered as a person assuming a continuous combat function. In this regard, signature strikes are relatively more safe, when conducted in compliance with the laws of war, as they fall back into the realm of group activities, as warfare is: a Marching column of armed persons even in the absence of insignia or uniforms may disclose their direct participation to the ongoing hostilities. Of course, that should be accurately verified by the targeting party, also on the basis of information on the customs of the local population, so as to avoid gross mistakes as those done when attacking and killing dozens of people attending a wedding party. In a way, every strike in every war ever known has been a "signature strike", based on the insignia or uniforms of the other party. Thus, if genuinely conducted and performed following accurate precautions, signature strikes may indeed be in full compliance with international law.

Concluding on the alleged existence of a capture rather than kill obligation, the position of the Special Rapporteur is that "[i]t is too early to determine in which direction the controversy around this concept will be resolved. The issue will likely remain relevant in the context of modern anti-terrorism measures where individuals or small groups may be isolated in territory far away from the conflict zone, which may even be controlled by the State party or its allies. The ICRC approach has been applied in some recent State practice on drone attacks and at least one other State that uses drones has stated that, as a matter of policy, it will not use lethal force when it is feasible to capture a terror suspect"[1775].

[1774] *Ibidem*, para. 72.
[1775] *Ibidem*, paras. 78 and 79.

7. CONCLUSIONS

One of the main arguments adduced to discard an interpretation of assassination as a prohibition that goes beyond mere perfidious killing is that state practice does not mirror an understanding that killings by design are in and by themselves forbidden in the course of armed conflicts.

The exhaustive analysis of state practice undertaken in the present chapter shows that this is absolutely not the case: at the very least until the beginning of the new century, State practice in this regard was not settled. If anything, it indeed favored a thorough protection against assassination, certainly not limited to perfidious killings. This finds thorough confirmation not only in dated expressions of *opinio juris* and other objective data regarding State practice during the XX century, but also on statements released by state agents in these very last years that, comparing past and current practice, highlight profound differences, especially revealing that policies of targeted killing would have been perceived as utterly unlawful until just a little more than a decade ago, also in the context of armed conflicts[1776].

Admittedly, however, evolutions in the practice of war following the dawn of the new century have the potential to change the relevant normative landscape. It is in this vein that, as reported above, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has expressed concern that a targeted killing performed at the beginning of the 2000s may have set "an alarming precedent […] for extrajudicial execution by consent of Government" [1777]. Notably, as already underlined during the preceding analysis, this practice on part of some States may indeed modify the prevalent understanding of relevant rules of international humanitarian law, including assassination, but they also may very well be a blatant attempt to impose a privilege rather than to claim a right. As such, they may very well be no more than a crease abandonment of the rule of law. After all, it has been observed that the same states responsible for extensive targeted killing policies are also those that from one minute to the next overtly changed their attitude towards the monitoring functions exercised by UN bodies in order to exclude any control over their practices[1778].

1776 Rommel J. Casis, *Predator Principles: Laws of Armed Conflict and Targeted Killings*, *supra*, 2011, pp. 329 and 330: "While no government in the past would admit to assassinating its enemies, governments have now openly acknowledged that they use targeted killings "to curb insurgent or terrorist activities".

1777 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2003*, *supra*, paras. 37 – 39.

1778 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2007, Addendum*, *supra*, p. 354: "the United States [n]ever object[ed] to the inclusion of international humanitarian law instruments in the legal framework supporting the mandate [of the Special

The change in perspective arguably affecting the international community may well be exemplified by the different reactions towards the death of Osama Bin Laden on the one hand and Israeli targeted killing policies on the other.

Thus, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has repeatedly took issue with Israeli policy of targeting for death pre-selected individuals believed to belong to hostile armed groups as well as with such State's alleged shoot-to-kill policy[1779]. Accordingly, in relation to yet other states, the Rapporteur has consistently expressed deep concern at counter-insurgency strategies aimed at targeting individuals suspected of being members, collaborators or sympathizers of organized armed groups, detecting in targeted killings performed in this connection multiple violations of the right to life[1780]. The Special Rapporteur has further underlined that "executions occurring during armed conflict, internal disturbances, or states of emergency […] suppression of members of the political opposition groups, including the activities of death squads" were one of the main situations in which summary or arbitrary deprivation of life occurs[1781].

Notably, it is not only all the mandate holders of this rapporteurship that have endorsed this stance. As correctly pointed out in this regard, "the United States has in the past criticized Israel for engaging in the targeted killing of Palestinian militants" [1782]. As already reported, moreover, with its Resolution 611 the U.N. Security Council condemned Israel, for carrying out an "assassination", with regard to the 1988 killing of Abu Jihad by Israeli security agents. Notably, in this connection, the U.S. Ambassador to Israel Martin Indyk himself publicly stated on Israeli television the U.S. position regarding Israeli targeted killing of suspected terrorists back in 2001: 'The United States government is very clearly on the record as against targeted assassinations. They are extrajudicial killings, and we do not support that'"[1783]. Again, in reaction to the killing of Hamas's leader Ahmed Yassin, then British Prime

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Rapporteur] until 2003, two decades after international humanitarian law was first applied under the mandate".

1779 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1995 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1995/61, 14 December 1994, paras. 190-192.

1780 Bacre Waldy Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1998 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1998/68, 23 December 1997, para. 74. See accordingly Asma Jahangir, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1999 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1999/39, 6 January 1999, para. 48.

1781 Amos Wako, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *1992 Report to the UN Human Rights Commission*, UN Doc. E/CN.4/1992/30, 31 January 1992, para. 617.

1782 David Wippman, *Do New Wars Call for New Laws?* In David Wippman and Matthew Evangelista, *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, 2005, p. 5.

1783 Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, *supra*, p. 347. Accordingly, Joel Greenberg, *Israel Affirms Policy of Assassinating Militants*, in *New York Times*, 5 July 2001.

Minister Tony Blaire expressed the view that such targeted killings represented "a setback" and made clear that "there is no point in pretending otherwise" [1784]. Blair's official spokesperson had a reaction that underlines how much this kind of operation departed from any existing or even envisaged principle of international law, commenting "it goes without saying that the PM condemns today's killings […] We repeatedly made clear our opposition to Israel's use of targeted killings"[1785]. In relation to the very same episode, the U.K. Foreign Secretary Jack Straw further stated that "[a]ll of us understand Israel's need to defend itself against terrorism which affects it, within international law" but, he added, such need does not entitle Israel to perform "this kind of unlawful killing, which we all condemn […] It is unacceptable, unjust and very unlikely to achieve [Israel's] objectives"[1786]. Dozens instances of the like may be mentioned and have partly been reported in the previous paragraph, witnessing full-out aversion by the international community for the premeditated killing of individually selected persons when not directly engaged in hostilities or anyhow outside any cognizable battlefields.

Yet, when Osama Bin Laden was killed, the entire U.S. administration rejoiced and started with the well-known "justice has been done" rhetoric[1787]. Remarkably, it has been reported that, when confronted with this reality, a U.S. State Department spokesman "bobbed and weaved and tried to draw distinctions. But, privately, administration officials say the difference is really one of scale and frequency"[1788]. It is in fact in this vein that, when targeted killing operations first gained public attention, the press and other media expressed deep concern and established a parallelism between JSoc and Death Squads[1789].

It is submitted here that this sudden change in perspective is fundamentally insufficient to trigger a change in legal paradigms, also considering that, as shown in the course of this chapter, the international community does not seem to have endorsed the U.S. position until now and that territorial states on whose territories targeted killings are performed often oppose such practice not only in terms of *jus ad bellum* but also contesting their compatibility with the laws of armed conflict. As it has been rightly observed in this regard "[a]s a result, the framework of customary international law began its normative change to incorporate [targeted killing], until it encountered one of the biggest stressors in international law in over half a century- the 9/11 terrorist attacks. Subsequently, the post-9/11 global landscape has shaped

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1784 BBC, *Blarie Condemns Hamas's Chief Death*, available at http://news.bbc.co.uk/2/hi/uk_news/politics/3556753.stm.

1785 *Ibid.*

1786 *Ibid.*

1787 See *supra*, Ch. IV, paras. 3 and 4.

1788 Evan Thomas and Mark Hosenball, *The Opening Shot*, in *Newsweek*, 11 November 2002.

1789 Naomi Wolf, *JSoc: Obama's Secret Assassins*, in *The Guardian*, 3 February 2013, available at https://www.theguardian.com/commentisfree/2013/feb/03/jsoc-obama-secret-assassins.

the theoretical discussions surrounding targeted killing on two main fronts. First, by allowing a *de facto* blanket approval on pervasive targeted killings by nation states, international law has remained largely complicit. Second, by infusing a nebulous paradigm of 'the law of 9/11' legal justification for targeted killings has transmogrified into an unregulated space within international law"[1790].

It is indeed rather ironic that just a few months after so strongly condemning Israeli policies of targeted killing the U.S. engaged in the exact same activities[1791] and now try to infer from them a generalized *opinio juris* that does not actually yet seem to exist.

1790 Saby Ghoshray, *Targeted Killing in International Law: Searching for Rights in The Shadow of 9/11*, in *Indiana International and Comparative Law Review*, Indianapolis, 2014, pp. 358 and 359.

1791 Jum Serpless, *Targeted Killing in Modern Warfare*, in *Canberra Law Review*, Canberra, 2012, pp. 77 and 78: "Taken collectively, these and other instances, of which there are many, appear to demonstrate that the US has adopted a tactic similar to one the Israeli government has openly used to counter terrorist attacks since the outbreak of the al-Aqsa Intifada in September 2000. Israel, through its policy of targeted killing, has identified, located, and killed hundreds of alleged terrorists through various means […] There seems to be a changing perception of the legality of targeted killing".

CHAPTER V

Assassination where it Matters the Most: direct participation in hostilities, geographical considerations and least harmful means

1. INTRODUCTION

Following the thorough analysis of theory and practice relating to the use of lethal force against preselected individuals in situations of armed conflicts conducted in the previous sections of this study[1792], the present chapter should lead this work where the theorization of a prohibition of assassination could matter the most. This chapter will therefore tackle contentious issues crucial to current developments in the field of international humanitarian law: direct participation in hostilities, geography of the battlefield, and least harmful means approaches.

As will be shown, the discourse concerning the existence and scope of a prohibition of assassination under nowadays international law both benefits from the legal debates concerning these issues and dramatically impacts on them, bearing the potential for conclusively orienting the possible interpretation of these subjects towards the most protective solutions in terms of protections from pre-meditated lethal attacks against selected individuals.

It is in this view that, it is suggested, a human rights oriented interpretation of uncertain (or non-existing) rules of the laws of armed conflict often lends determinative support for the continued existence of a prohibition of assassination under international humanitarian law, leading to the same results that such a prohibition would *per se* entail and therefore confirming it.

Thus, in the context of direct participation in hostilities and related questions of membership in organized armed groups, following a thorough analysis of existing legal theories, existing treaty law provisions and relevant national and international jurisprudence, this paragraph will show that the premeditated lethal killing of a pre-selected individual may only escape the ban on assassination and therefore be compatible with currently existing international law if the deadly strike is performed when a person is directly engaged in acts of hostilities.

Analogously, in relation to the identification and delimitation of the battlefield is concerned, a traditional, restrictive understanding of the prohibition of assassination matches a human rights oriented interpretation of unsettled state practice and ambiguous rules of international humanitarian law, actually narrowing the authority to deliver killings by design to well-defined and restricted locations where hostilities take place.

Finally, it will be shown that the long-standing prohibition of assassination at once delivers a decisive blow in favor of a least harmful means approach to the kind

[1792] See *supra* Ch. II to IV.

and degree of force allowed in times of armed conflicts and finds further nourishment in such theory.

It should be underlined once more at the outset, in this regard, that the purpose of the present analysis, though crossing many other issues, is restricted to this exact topic: prohibition of assassination and existing limitations to the use of premeditated lethal force against individually designated persons. Its results, therefore, may perhaps be extended to different concerns but are geared around this precise focus.

2. READING DIRECT PARTICIPATION IN HOSTILITIES IN CONTEXT

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(1) Introduction: Defining Civilians and Combatants; (2) The Basic Criterion: Combatants; (3) Unlawful Combatancy; (4) Civilians' Direct Participation in Hostilities; (4.a) The Concept; (4.b) The ICRC Clarification Process; (4.c) Critiques to the Identification of the Constitutive Elements; (4.d) Critiques to the Temporal Scope of Direct Participation; (5) Continuous Combat Function and Membership in Organized Armed Groups; (5.a) The Guidance's take; (5.b) Membership Approaches and Criticism to the Continuous Combat Function Restriction; (5.c) Criticism to the Continuous Combat Function Approach: Restrictive View; (6) The Role of Assassination in the Direct Participation in Hostilities Debate.

2.1. Introduction: Defining Civilians and Combatants.

As highlighted in previous paragraphs[1793], the principle of distinction lies at the very core of international humanitarian law and comes from a lengthy evolution of ethics, law, and philosophy[1794]. Roughly defined, at the essence of the principle of distinction lays the need to protect against the dangers of war the lives and integrity of all those who do not take part in the fighting[1795]. Such principle thus prevents belligerents to direct their attacks at civilians, clerics, medical personnel and, in general, all those who stopped assuming an active role in the conduct of hostilities, such as sick, wounded and shipwrecked combatants, and also prisoners of war.

The negative definition of civilians provided by the relevant instruments of international humanitarian law[1796] imposes a wider reflection on the notions of combatants and fighters. In this connection, two norms among the laws of armed conflict codified in the *1949 Geneva Conventions* and their *Additional Protocols* are paramount.

1793 See *supra*, Ch. II, para. 3.

1794 *Ibidem.*

1795 Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan, The Legal and Socio-political Aspects, supra*, pp. 179-181.

1796 See *supra*, Ch., para.3.

Art. 4 (a), *GC III* and art. 43, *AP I*, indeed, describe who can become a prisoner of war[1797]. Since only combatants can acquire such a status, due reference shall be paid to such norms. In principle, persons who do not satisfy the criteria set forth by those provisions are to be considered civilians[1798]. However, as we will see *infra*, determining whether a person may or may not be made object of attack requires in practice additional considerations.

In particular, the ever increasing involvement of civilians in hostilities, as well as tendencies of *guerrilla* fighters and members of terrorist groups to camouflage and hide amongst the civilian population call for a carefully drawn distinction. Henceforth, crucial problems rise when groups of people take part in active fighting or in the preparatory phases of armed attacks without distinguishing themselves from the population.

2.2. The Basic Criterion: Combatants

Following the failure of the 1899 Hague Conference to find a proper solution to these questions[1799], the four *Geneva Conventions* of 1949 provided a first definition of combatants while tackling the issue of prisoner-of-war status.

Art. 4, III GC[1800] identifies who can become a prisoner of war and, henceforth, who qualifies for combatant status. According to this provision

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1797 Combatants who are entitled to prisoner-of-war status cannot be sanctioned for taking part in hostilities, are entitled to a set of rights and privileges established by the laws and customs of war and may only be tried and punished for war crimes and crimes against humanity that they may have perpetrated during hostilities.

1798 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, pp. 31 and 32. Note that, as specified *antes*, the principle of distinction applies in international as well as non-international armed conflicts alike. Nonetheless, AP II does not provide a precise definition of combatants, only distinguishing between those who are fighting and those who are not (or no longer) fighting. To this end see AP II, arts. 10 to 13.

1799 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, an Introduction to International Humanitarian Law*, *supra*, p. 86.

1800 *GC III*, art. 4: "A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their

combatants are first of all persons belonging to an armed force of a belligerent party, regardless of their exact function or mandate. This means that every member of an armed force is considered a combatant and enjoys no immunity from attack on the basis of his status only, medical and religious personnel being the only exceptions to this rule. Furthermore, art. 4, *GC III* makes clear that persons accompanying the armed forces without being their members such as journalists[1801] and civilians working for the army withhold their status. These persons, even though entitled to become prisoners of war according to art. 4, *GC III*, are not liable to be targeted[1802]. In agreement with such reading, the provision at issue makes clear that it shall in no way affect the status of medical personnel and chaplains as provided for in art. 33, *GC III*. Importantly, membership in regular State armed forces is to be formally assessed by reference to qualifications established under domestic legal systems.

Art. 4, para. 2 of *GC III* establishes four cumulative requirements that members of militias and volunteer corps (including organized resistance movements) other than regular armies must meet in order to be entitled to prisoner-of-war status in international armed conflicts: the first of them, namely being under the control of a responsible commander, responds to the function of avoiding individual wars or vengeances[1803]. The second and third conditions are aimed at ensuring the possibility to distinguish these forces from the civilian population and require that militias and volunteer corps bear a fixed emblem or distinctive sign and carry their arms openly. Finally, in order to be entitled to prisoner-of-war status, they need to abide by the laws of war.

In addition art. 4 (a) (6), *GC III* provides that inhabitants of a non-occupied territory who take part to a mass uprising (*levée en massé*) are to be qualified as combatants in so far as they carry arms openly and respect the laws and customs of war.

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operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. […] (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. […]".

1801 In detail, on the qualification of military reporters as civilians see Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, pp. 84-94.

1802 *GC III*, art. 4: "(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law".

1803 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 38.

As a matter of fact, most of the *guerrilla* groups nowadays involved in armed conflicts do not meet all these requirements[1804]. The striking difference of power and armaments with regular armies prompts resort to tactics and methods of warfare that find their very *raison d'être* in the non-compliance with those parameters. The prescriptions of art. 4, *GC III* therefore left irregular combatants "out in the cold"[1805].

The centrality of the principle of distinction for the laws of war, coupled with the ever blurring of dissimilarities between combatants and the civilian population, thus imposed to approach a more flexible solution. As a consequence, at the drafting stages of the 1977 Protocols Additional to the 1949 Geneva Conventions the pressing need to encourage *guerrilla* groups to abide by the laws of armed conflict while at the same time affording them with a higher protection led to a relaxation of the requirements of art. 4, *GC III*[1806].

Art. 43 (1), *AP I*[1807] thus extended the notion of armed forces so as to embrace also "all organized armed forces, groups and units belonging to a belligerent party", avoiding any reference to "armies" and rather shifting the focus of the notion to the requirements of organization, responsible command and internal disciplinary system. In so doing, the provision at issue does not strike any difference between "regular" and "irregular" armed forces. The outcome of this approach is that also "irregular" armed groups have to abide by the requirements of responsible command

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1804 No uniform and coherent notion of *guerrilla* fighters exists as the term is not juridical in nature. The expression is believed to embrace all irregular combatants that resort to *guerrilla* tactics, *i.e.*, combatants that fall short of the requirement established by art. 4, GC III, including members of armed forces. To this end see Frits Kalshoven, *Reflections on the Law of War, Collected Essays, supra*, pp. 467, 468, 473 and 474. In general on the notion of *guerrilla* see Richard Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs* in *28 British Yearbook of International Law*, Oxford, 1951.

1805 See accordingly, Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, an Introduction to International Humanitarian Law*, *supra*, p. 86.

1806 *Commentary on the APs*, *supra*, para. 1728: "this concern, laudable though it was, could no longer stand in the way of the realities of modern warfare in 1976. Since the Conference wished to take into account the various categories of combatants which had appeared in the most recent conflicts, it was therefore also necessary to establish procedures which were more likely to guarantee that this status would be granted them".

1807 *AP I*, art. 43: "1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict. 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict".

and internal disciplinary system enforcing compliance with the rules of international law applicable in armed conflicts[1808]. Notably, Art. 43, *AP I* spelled out an additional requisite condition that combatants are to meet in order to be considered as legitimate ones and that had previously been considered implied in art. 4, *GC III*: armed forces, groups and units have to "belong to a party" to the conflict[1809].

A systemic interpretation of the norms at hand in light of relevant state practice imposes to underline a further set of considerations. First and foremost, members of a group that is not involved in an international armed conflict, *i.e.* which does not side with one of the parties to an armed conflict international in nature, cannot fall within the notion of combatant designed under art. 4, para 2, *GC III*[1810]. Second, the requirement of being under the control of a responsible commander entails that members of a group do not qualify for combatancy, even when the group does belong to a party to the conflict, absent the existence of an organized structure[1811].

The requirement to belong to a party denotes the need for a given armed group to have some kind of legal or *de facto* relationship with one of the belligerents. As a consequence, organized armed groups that perform attacks against a party to an international armed conflict without belonging to another party are civilians under both *GC III* and *AP I*[1812].

Since art. 44, *AP I* establishes the conditions to be entitled to prisoner of war status, the joint reading of such provision with art. 43, *AP I* is crucial for the identification of a person as a combatant or as a civilian, insofar as these two provisions together outline the rights and obligations of combatants. Art. 43 (2), *AP I* clarifies that all those meeting the requirements of the preceding paragraph are combatants and hence they have the right to participate in hostilities. The right to be a prisoner of war envisaged by art. 44 (1), *AP I*[1813] directly derives from the

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1808 See accordingly, Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, an Introduction to International Humanitarian Law, supra*, p. 86. Note that before the adoption of AP I regular armed forces had always been presumed to satisfy these three requirements as well as all the others set forth by art. 4, GC III.

1809 Antonio Cassese, *International Law, supra*, p. 406.

1810 *Ibidem*, p. 406.

1811 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge, 2004, pp. 36 and 37. Note that in his analysis Dinstein also points out a third consideration, which however does not have consequences in relation to the rules of targeting as it refers exclusively to the recognition of prisoner of war status: according to the author prisoners of war cannot either hold the citizenship of the state that detains them or owe it any duty of allegiance. If this were the case, they would be immediately deprived of their prisoner of war status.

1812 *ICRC Interpretative Guidance*, pp. 23 and 24.

1813 *AP I*, art. 4 (1): "1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war".

qualification of a person as a combatant. The following paragraph of the very same provision makes clear that violations of the rules of international humanitarian law do not in and by themselves deprive a person falling within the abovementioned category of his right to be a combatant or, if captured, a prisoner of war[1814]. However, the drafters of *AP I* acknowledged that the reality of warfare knows of *guerrilla* tactics, especially employed by irregular combatants and therefore established an exception to this general rule: according to art. 44 (3)[1815], in fact, a combatant shall retain his status even though falling short of the criteria set forth in the preceding paragraphs when he still carries arms openly during military engagements and before the launching of an attack in which he takes part, at least for so long as he is visible to the enemy. The consequence for failing to carry arms openly is the forfeiture of the right to become a prisoner of war once captured[1816].

In a nutshell, the notion of combatant liable to attack in international armed conflicts thus embraces the following categories of persons:

i. members of regular armed forces (besides medical and religious personnel);
ii. militia and volunteer corps (including organized resistance movements) belonging to a party to the conflict (when they are under a responsible command, they bear a fixed, distinctive emblem, they carry arms openly and they conduct their operations in accordance with the laws and customs of war);
iii. adherents to a *levée en masse*: inhabitants of a non-occupied territory who spontaneously take up arms to resist the invaders (if they carry arms openly and respect the laws and customs of war);

1814 *AP I,* art. 44 (2): "2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4".

1815 *AP I*, art. 44 (3): "3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate […]."

1816 *AP I*, art. 4 (4): "4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed".

iv. all organized armed forces, groups and units belonging to a party to the conflict which, falling short of the requirements reported above, are however under a responsible command, when their members are subjected to an internal disciplinary system that enforces compliance with rules of international humanitarian law.

2.3. Unlawful Combatancy

Persons who do not meet the criteria reported above do not fall within the category of combatants. This implies that: a) they do not have a right to participate in hostilities; b) if apprehended, they are not entitled to prisoner-of-war status and therefore may be tried and punished for taking part to hostilities[1817]. Moreover, they may be prosecuted, tried and sanctioned for any conduct which amounts to a common crime under the national legislation of the country where the act was performed or, according to active and passive personality grounds for jurisdiction, under the legislation of the country that undertakes prosecution[1818].

Persons who do not fulfil those requirements, however, do not fall within a third, mixed class additional to the two sub-groups of combatants and civilians mentioned above[1819]. These two categories, indeed, are mutually exclusive[1820]. This, in turn, implies two consequences: a) whoever is not a combatant is a civilian; b) under the laws of war every person is entitled to protection, more or less wide as it may be depending on specific circumstances and provisions.

In disagreement with this approach, some have suggested the existence of a third category of persons who, allegedly, would not be entitled to any guarantee: according to such approach, people who do not meet the criteria for being considered legitimate combatants reported above on the one hand, while embracing arms and thus allegedly forfeiting their status as civilians on the other, would fall in between

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1817 As a matter of fact, there is no provision of international humanitarian law preventing a government from applying its domestic criminal legislation to rebels and insurgents, thus treating them as common criminals. Accordingly see, *inter alia*, Antonio Cassese, *International Law*, *supra*, p. 429; Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, *supra*, p. 889.

1818 Note that, under very exceptional circumstances, such persons may very well be tried also by third countries pursuant to the principle of universal jurisdiction.

1819 Antonio Cassese, *International Law*, *supra*, pp. 408 and 409.

1820 To this end see *ICRC Commentary*, *supra*, p. 52: "every person in enemy hands must have some status under international law: he is either a prisoner of war […], a civilian […] or a member of the medical personnel […]. There is no intermediate status; nobody in enemy hands can be outside the law". Accordingly, Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 143.

the two main categories and shall be classified as "unlawful combatants"[1821] or "unprivileged combatants"[1822] or, again, "illegal combatants"[1823].

In very simple terms, an "unlawful enemy combatant" is described as someone "not entitled to lawful combatant immunity"[1824]. The notion of "unlawful combatants" was coined in U.S. jurisprudence, in the *Ex parte Quirine* case[1825]. In these last years, persons suspected of belonging to Al-Qaeda have similarly been labelled by the U.S. administration as unlawful combatants[1826]. In the meanwhile, Israel has enacted a particular legislation concerning the detention of "unlawful combatants"[1827].

According to those supporting the existence of this hybrid category, "the distinction between lawful and unlawful combatants complements the fundamental distinction between combatants and civilians"[1828]. This notion purports the existence of a legal limbo in between provisions of international humanitarian law. Supporters of this interpretation hold that armed groups who do not wear a uniform or any other clearly distinctive sign in order to distinguish themselves from the civilian population, who avoid to carry arms openly exploiting the possibility of mixing up with civilians and do not respect the laws of armed conflicts while carrying out their operations fall short of the requirements set forth by art. 4, *GC III* and arts. 43 and

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1821 U.S. case law and practice have been heavily relying upon the notion of "unlawful enemy combatants". To this end see *infra.* For support to such concept in scholarly analysis see, *inter alia*, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra*, p. 31 and, in general, Yoram Dinstein, *Unlawful Combatancy*, in Michael N. Schmitt and Wolff Heintschel von Heinegg, *The Conduct of Hostilities in International Humanitarian Law, Volume II*, Abingdon, 2012, pp. 227-250.

1822 Richard R. Baxter, *So Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, *supra*, pp. 323-345. Note that, contrary to other authors' views and recent practice by some States, Baxter coined the term "unprivileged belligerent" but he maintained that such expression had a merely descriptive character, rather than a normative one. To this end see *Ibidem*, p. 340.

1823 Ingrid Detter, *The Law of War and Illegal Combatants*, in *The George Washington Law Review*, Washington, 2007, pp. 1050-1104.

1824 G. C. Harris, *Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant*, in *Loyola International and Comparative Law Review*, Los Angeles, 2003, p. 31.

1825 Supreme Court of the United States, *Ex parte Quirin and others*, Judgment of 31 July 1942, § 305: "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful". Notably, the decision in *Ex parte Quirin* was issued in 1942, well before the draft, adoption and enter in force of the 1949 Geneva Conventions.

1826 John C. Yoo, *The Status of Terrorists*, in *Virginia Journal of international Law*, Charlottesville, 2007, p. 217.

1827 Israel, *Internment of Unlawful Combatants Law*, 2002.

1828 Yoram Dinstein, *Unlawful Combatancy*, *supra*, p. 229.

44, *AP I*. As such, it is suggested, members of those armed groups could not be considered either as regular combatants or civilians. For some authors the identification of this third, hybrid group of persons as combatants without rights would *de facto* entail a higher protection for civilians[1829]. In fact, according to this approach, people who engage in sporadic acts of hostilities as well as people who assume a continuous combat function are but combatants disguised as civilians.

The consequences attached to the qualification of a person as an unlawful enemy combatant are twofold since, it is suggested, such person should neither enjoy the protection of the *Third Geneva Convention* nor that of the *Fourth Geneva Convention*[1830]. In other words, being considered neither as civilians nor as combatants, unlawful enemy combatants would not enjoy immunity from armed attack from the belligerents and, at the same time, they would not enjoy prisoner of war status, and may therefore be tried and sanctioned for the acts of hostility they have undertaken[1831].

The existence of a category of unlawful enemy combatants is to be rejected[1832]: international humanitarian law only contains two categories, that is, civilians and combatants[1833]; if an individual does not fall within the definition of a combatant he consequently is a civilian[1834].

Accordingly, the commentary to the IV GC states: "[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view"[1835]. Referring to this excerpt, the ICTY has underlined that "there is no gap between the Third and the Fourth Geneva Conventions"[1836].

1829 Theodor Meron, *Some Legal Aspects of Arab Terrorists' Claims to Privileged Combatancy,* in *Of Law and Men: Essays in Honor of Haim H. Cohn*, New York, 1971, pp. 225-241.

1830 Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings case*, in *International Review of the Red Cross*, Geneva, 2007, p. 386.

1831 Knut Dormann, *The Legal Situation of 'unlawful/unprivileged' combatants*, in Michael N. Schmitt and Wolff Heintschel von Heinegg, *The Conduct of Hostilities in International Humanitarian Law, Volume II*, Abingdon, 2012, p. 70.

1832 Stefanie Schmal, *Targeted Killings – A Challenge for International Law?*, in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter, *The Right to Life*, Leiden, 2010, p. 257.

1833 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 143.

1834 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 36.

1835 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Volume IV*, Geneva, 1958, p. 51.

The absurdity of the theorization of the category of "unlawful enemy combatants" has been correctly described in the following terms: "If the imposition of this new category is accepted, then the logical corollary would be that the TTP lies outside the framework of IHL – which means that the TTP is not bound by the rules of IHL either, in turn encouraging further transgressions […] the tactics used by the United States to challenge existing categories of IHL are also reflected in the TTP's strategy to evade the rules of IHL and break down the barriers between civilians and combatants"[1837].

The Israeli Supreme Court has endorsed the view that the notion of unlawful combatant may be retained only for descriptive purposes[1838], referring to those people who take parts in hostilities without having any right to do so. Thus, according to the Court: "needless to say, unlawful combatants are not beyond the law. They are not 'outlaws'. […] their human dignity as well is to be honoured; they as well enjoy and are entitled to protection"[1839].

In line with this assessment, commentators have pointed out: "international law does not make allowance for a *tertium genus* or third category, in addition to the dichotomy civilians/combatants"[1840]. Thus, persons not entitled to protection under the Third Geneva Convention must necessarily be protected under the Fourth Geneva Convention[1841]. Accordingly, as far as the legal status of unlawful combatants is concerned, persons falling within this descriptive category qualify as civilians taking direct part in hostilities. As such, they may be prosecuted for their hostile actions and they lose immunity from attack while engaged in acts of direct participation, but they do not fall within a hybrid category which loses protection from attack once and for all while at the same time having no entitlement to prisoner of war status.

1836 ICTY, *Prosecutor v. Delalic and others*, Trial Chamber Judgment, *supra*, para. 271. Note that in the following paragraph of this same Judgment the ICTY went on and made reference to the relevant provisions of AP I finding that: "this position is confirmed by article 50 of Additional Protocol I which regards as civilians all persons who are not combatants as defined in article 4(A) (1), (2), (3) and (6) of the Third Geneva Convention, and article 43 of the Protocol itself".

1837 Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan, The Legal and Socio-political Aspects, supra*, p. 183.

1838 Antonio Cassese, *International Law*, *supra*, p. 409; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 144.

1839 Supreme Court of Israel, *Targeted Killing Case*, *supra*, para. 25.

1840 Antonio Cassese, *International Law*, *supra*, p. 420.

1841 Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, *supra*, pp. 387 and 388. Accordingly, see also, *inter alia*, *ICRC Interpretative Guidance*, *supra*, pp. 20 and 21.

Contrary to what suggested by some, not even irregular combatants, moreover, may be characterized as unlawful combatants[1842]. As it emerges from the discipline created by the interplays of art. 4, *GC III* and arts. 43 and 44, *AP I*, "irregulars" are combatants that lose their status only in exceptional cases[1843], *i.e.* when they do not abide by the obligation to carry arms openly during each military engagement, *i.e.* when visible to the adversary or else in the midst of launching an attack. These combatants lose their right to be prisoners of war but they are nonetheless to be granted the same guarantees that other prisoners of war enjoy pursuant to *Geneva Convention III* and *AP I*[1844]. In any event, art. 75, *AP I*[1845] affording *ad minima* guarantees remains fully applicable also to those who do not fit the parameters specified above. In particular, this provision sets a minimum threshold of protection applicable to every person adversely affected by an armed conflict. Art. 75, *AP I* has attained the status of a customary rule of international law[1846]. Therefore, while it is expressly addressed to persons affected by a conflict falling within the purpose of *AP I* (*i.e.*, conflicts of an international character), its customary nature renders such provision applicable to any other kind of conflict[1847].

As commentators have rightly observed, the category of unlawful enemy combatants leads to a "dehumanization of a whole category of human beings"[1848]. Therefore, it could be concluded that legally speaking so called "unlawful

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1842 Ingrid Detter, *The Law of War*, *supra*, p. 149: "Any regular soldier who commits acts pertaining to belligerence in civilian clothes loses his privileges and is no longer a lawful combatant. 'Unlawful' or 'illegal' combatants may thus either be members of the regular forces or members of resistance, guerrilla movements, or […] terrorists, all of whom do not fulfil the conditions of lawful combatant". As correctly observed by a distinguished author, "unlawful combatancy" has indeed been used, in a rather confusing fashion, to describe either civilians taking part to hostilities (perhaps on a more or less continuous basis) and combatants feigning civilian status". To this end see Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 144.

1843 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, an Introduction to International Humanitarian Law*, *supra*, p. 89.

1844 Antonio Casssese and Paola Gaeta, *Le sfide attuali del diritto internazionale*, Bologna, 2008, p. 59.

1845 *AP I*, art. 75, (1): "1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons".

1846 Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, *supra*, pp. 387.

1847 Accordingly see also Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 41.

1848 L. N. Sadat, *A Presumption of Guilt: the Unlawful Enemy Combatant and the US War on Terror*, in *Denver Journal of International Law and Policy*, Denver, 2009, p. 541.

combatants" are but persons with civilian status[1849] who lose their immunity from attack while directly participating in hostilities[1850].

2.4. Civilians' Direct Participation in Hostilities

A fundamental corollary of the principle of distinction is that, whereas combatants as described above can legitimately take part in hostilities, civilians are forbidden to do so. Civilian immunity from attack, direct consequence of the principle of distinction[1851], is therefore subject to their abstention from hostile acts. At the same time, whereas a civilian that takes direct part in hostilities becomes for that reason alone a legitimate target, he does not become a combatant[1852]. As a consequence, if captured, he does not enjoy prisoner of war status and he may be prosecuted, tried and sanctioned for his direct participation in hostilities.

a) The Concept

Whereas this may seem sufficiently clear at first glance, the notion of direct participation is possibly one of the most contentious issues in the arena of international humanitarian law. In line with this assessment it has been noticed that "[t]he debate over the loss of civilian protection contains an impressively, and perhaps disconcertingly, wide margin of options"[1853]. This is an issue, moreover, that bears crucial importance, especially in light of last years' turn of events. Indeed, the sudden rise in conflicts not of an international character against non-state actors which do nothing to abide by the laws of armed conflicts, including appositely benefitting from the confusion between their members and the civilian population, has *de facto* blurred the lines between innocent civilians and those taking an active part in hostilities, even on a continuous or anyhow repeated basis[1854].

The concept of direct participation in hostilities is derived from art. 3 common to the *1949 Geneva Conventions* as well as 51 (3) *AP I*, but neither the former nor the latter actually define it. Thus, a number of practical difficulties in upholding (and respecting) the principle of distinction in these circumstances

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1849 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 144.

1850 Rommel J. Casis, *Predator Principles: Laws of Armed Conflict and Targeted Killings*, *supra,*, p. 353.

1851 Accordingly see *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 6, p. 19: "Civilians are protected against attack unless and for such time as they take a direct part in hostilities".

1852 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 102.

1853 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 146.

1854 Accordingly, Jim Serpless, *Targeted Killing in Modern Warfare*, *supra*, p. 88.

demands further clarification. Among them, first of all, the very notion of direct participation in hostilities and the temporal dimension of the ensuing loss of protection from direct attack proved to be in need of further clarification.

Already the ICRC *Commentary to the Additional Protocols* envisaged that troubles may arise in the interpretation of vague terms as "direct participation" (as opposed to indirect) and "hostilities". It therefore tried to provide some guidance to this end.

As far as the expression "hostilities" is concerned, hostile acts are those which "are intended to cause actual harm to the personnel and equipment of the armed forces"[1855]. This notion, according to the ICRC *Commentary to the Additional Protocols*, shall be construed as to embrace not only the time of active combat when civilians actually use weapons but also the time when they simply embrace them or carry out actions harming or endangering the other party to the conflict without however resorting to any weapon[1856]. Accordingly, the notion of hostilities is narrower than that of general war effort. If interpreted otherwise, any minimal contribution to conflict-related activities would in and by itself entail the forfeiture of the status of civilian and most part of the civilian population would thus become a legitimate military target[1857].

The notion of "direct participation" is perhaps more problematic. This concept should be narrowly interpreted, according to the *Commentary*, so as to afford civilians the maximum degree of protection. The ICRC *Commentary to the Additional Protocols* therefore specifies that civilian's behaviour must represent a direct and immediate threat for the enemy in order to be categorized as an act of directly participation[1858]. In line with this argument, for an act to amount to direct participation, there is no requirement for either use of armed force or causation of death, injury or destruction. As for its temporal scope, this *formula* implies that civilians lose their immunity, and therefore become legitimate targets, only for so long as the action amounting to direct participation lasts. This implies that once civilians cease to participate they regain their immunity and can no longer be attacked[1859]. Such reading is actually in line with the letter of the provision that reads "unless and for such time as they take a direct part in hostilities".

1855 *Commentary on the APs*, *supra*, para. 1942. Accordingly, see also Inter-American Commission on Human Rights, *Third Report on Human Rights in Colombia*, Doc. OEA/Ser.L/V/II.102, 26 February 1999, paras 53 and 56.

1856 *Commentary on the APs*, *supra*, para. 1943.

1857 *Ibidem*, para. 1945. See, accordingly, Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 42.

1858 *Commentary on the APs*, *supra*, para. 1944.

1859 *Ibidem*, *supra*, para. 1944. Note however that civilians who have taken direct part to hostilities may be captured at a later stage and accordingly tried and sanctioned.

This reading has however been criticized in these last years, in particular by commentators arguing that anyone who is affiliated with a party to a conflict is no longer a civilian by reason of that affiliation alone and regardless of his actual participation in actions aimed at harming the enemies[1860]. Similarly, some have argued that persons involved in so called revolving door activities lose civilian protection once and for all, even when engaged in doings unrelated to the conflict[1861]. At the other end of the spectrum, some authors maintained that a factual test should be followed in determining individual's participation in hostilities, whereby a civilian could only lose immunity when engaged in armed actions or carrying armed openly during a military deployment[1862].

Consequently, it has been noticed, there was "little agreement as to the level of participation" required to consider a civilian as losing his immunity from direct attack[1863]. In fact, before the ICRC's effort to define direct participation in hostilities academics, national military manuals and jurisprudence had consistently evoked in this regard a case-by-case analysis or resorted to explanatory lists of conducts which would fall within or without the notion of direct participation[1864].

b) The ICRC Clarification Process

It is because of these needs for clarification that in 2003 the ICRC launched a research on the notion of direct participation in hostilities, gathering academics, practitioners and State representatives. This effort culminated in the publication in 2009 of the *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*[1865].

Following a determination of direct participation in hostilities as "specific acts carried out by individuals as part of the conduct of hostilities between parties to

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1860 Affirmative, Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 43. On the "membership approach" to direct participation see *infra*, C. V, para. 2, sub-para. 2.5.

1861 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, p. 63.

1862 Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, pp. 7 and 8.

1863 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 103; Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, in *New York Journal of International Law and Politics*, New York, 2010, p. 710, acknowledging that no consensus could be found before the *ICRC Interpretive Guidance* on conducts falling in grey areas, such as that of civilians driving ammunition trucks in warzones.

1864 Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, *supra*, pp. 705-709.

1865 *ICRC Interpretive Guidance*, *supra*.

an armed conflict"[1866] the *Interpretive Guidance* identified the following constitutive elements of the relevant conduct:

i. Threshold of harm: the act must be likely to either affect the military capacity of a party to an armed conflict or cause injury, destruction or death against protected persons or objects protected;
ii. Direct causation: the harm caused (or likely to be caused) must be a direct result of the act or of a broader military operation of which that act constitutes an integral part;
iii. Belligerent nexus: the act must be designed to cause the relevant threshold of harm in support of one party to the conflict and to the detriment of another[1867].

The document further clarifies that preparation to the execution of an act of direct participation, deployment and return fall within the scope of direct participation since they are considered an integral part of the act[1868]. According to the interpretative guidance: 1) preparation to a specific hostile act falls within the notion of direct participation in hostilities but preparatory measures undertaken to build the general capacity to launch, perform or sustain the belligerent effort in general does not[1869]. 2) deployment entails the physical displacement needed to perform a specific operation; 3) return covers the phase of depart from the location where the act of direct participation has been undertaken and the entire phase of his physical separation from the scene. Thus, for instance, a withdrawal squarely falls within the notion of return and, as such, within the scope of direct participation[1870].

As for the temporal scope of loss of protection, the *Interpretive Guidance* maintains that civilians only lose protection for the duration of the acts amounting to direct participation[1871].

1866 *Ibidem*, Recommendation IV.

1867 *Ibidem*, Recommendation V.

1868 *Ibidem*, Recommendation VI.

1869 *Ibidem*, pp. 1031 and 1032. By this same token, the Interpretative guidance directly ties the notion of preparation relevant for direct participation in hostilities to that of military operations preparatory to an attack pursuant to Art. 44, para. 3, *AP I*. In this context, the Guidance cites as examples the ordnance of an aircraft in preparation for an attack, equipping, instructing, transporting personnel, gathering intelligence, and preparing, transporting and positioning weapons when done with the view of a specific hostile act. It further clarifies that neither geographical nor temporal proximity to the place and time of the hostile act matters in order to identify the preparatory nature of the operation and specifies that it is not necessary for the introductory deed to be indispensable to the hostile act in order for it to be classified as direct participation. To the contrary, the Guidance considers that the purchase, smuggling, production and hiding of weapons, recruitment and training of personnel, financial, political and administrative support to armed activities should be categorized as measures preparatory for the overall effort and therefore fall outside the notion of direct participation.

1870 *ICRC Interpretative Guidance*, *supra*, p. 1033.

1871 *Ibidem*, Recommendation VII. Notably, however, the second part of Recommendation VII reads: "members of organized armed groups belonging to a non-State party to an armed conflict cease to be

Whereas these assessments have received some critiques, it is submitted here that they should be considered undisputable[1872].

c) Critique to the identification of the constitutive elements

One of the most significant critiques to the concept of direct participation emerging from the *Interpretive Guidance* focuses on the constitutive elements of direct participation in hostilities[1873]. Notably even the critiques to the *Guidance* agree about the existence of the three constitutive elements of direct participation thereby identified[1874]. They disagree, however, as to their exact meaning.

Thus, insofar as the threshold-of-harm requirement is concerned, it has been observed that it is necessary to establish it because, absent such reference, civilians would lose protection from direct attack also for negligible conducts and such conclusion would be in contradiction with the principle of military necessity[1875]. However, the *Guidance*'s approach to the threshold of harm requirement has been referred to as overly restrictive. In this regard, it has been stressed, first of all, that harmful acts are not only those involving direct combat with the enemy or direct attacks, but also those which aim at hindering the adversary's military operations in other ways or build the capacity of the party in a way that would adversely affect the enemy. In other words, a harmful act for the purpose of direct participation should not need to have a violent nature, being it sufficient that it somehow hampers or disturb the adversary's military effort. This critique therefore concludes on this point: "As drafted, the constitutive element of threshold of harm appears under-inclusive in that it focuses solely on adverse effect on the enemy — harm is the determinative criterion"[1876]. In this regard, reference is done to the construction of improvised

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civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function". On Continuous combat function see *infra*, in this same paragraph.

1872 Agreeing with this assessment, at least as far as the constitutive elements of direct participation are concerned, see Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 142. Accordingly, see also Charles Garraway, *Direct Participation and the Principle of Distinction: Squaring the Circle*, in Caroline Harvey, James Summers and Nigel D. White, *Contemporary Challenges to the Laws of War*, *supra*, p. 177, arguing that the constitutive elements established by the *Interpretive Guidance* are for the most part uncontroversial.

1873 Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, *supra*.

1874 *Ibidem*, p. 712; Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, in *New York Journal of International Law and Politics*, New York, 2010, p. 658; Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, in *New York Journal of International Law and Policy*, 2010, p. 858.

1875 Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, in *New York Journal of International Law and Politics*, *supra*, p. 713.

1876 *Ibidem*, p. 718.

explosive devices in Iraq and it is suggested that also activities of this kind, *i.e.* activities that bring about an effective advantage for one of the parties would meet the threshold of harm, insofar as benefitting such party necessarily equates to weakening the other[1877]: "Clearly, limitation to harm renders the threshold element under-inclusive […] As these examples illustrate, restricting the threshold element to negative consequences for the enemy, when considered in light of the directness constitutive element, further risks an overly narrow interpretation of direct participation."[1878].

This first critique has rightly been rejected by the authors of the *Guidance*, suggesting in particular that it is based on a misreading of such document and noting that most of the practical examples mentioned in the critique to show the under-inclusive nature of the Guidance would indeed fall within its suggested notion of direct participation (insofar as the threshold of harm is concerned)[1879]. The reply to the critique moreover specifies that considerations of a threshold of death, injury or destruction of protected persons within the ambit of direct participation establishes an additional criterion which, in accordance with treaty law, makes relevant a kind of harm which is not necessarily military in nature[1880]. In this regard, the critique again upholds that the threshold thus established is under-inclusive as it would allegedly leave out of the range of relevant conducts actions such as forced displacement and hostage taking. Accordingly, it suggests that any harmful act against protected persons should be regarded as direct participation if part of a war strategy. It has however been correctly observed in this regard that "war strategy" may be interpreted so broadly as to include almost any act "occurring for reasons related to an armed conflict"[1881]. Thus, it argues, "The more fundamental problem with Schmitt's critique, however, is that it loses sight of the rationale underlying the rule on direct participation in hostilities. The object and purpose of attaching loss of protection to hostile activities is not to punish criminal conduct or to safeguard the civilian population against all forms of harm, but to enable parties to an armed conflict to react militarily against all persons taking up arms against them as enemies"[1882]. Therefore, the quantitative threshold of death, injury, or destruction only comes into play when military armed is excluded, its purpose being to trace a

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1877 *Ibidem*, p. 719.

1878 *Ibidem*, p. 719.

1879 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, in *New York Journal of International Law and Policy*, 2010, p. 860. One example mentioned by Schmitt that would not amount to direct participation, in Melzer's view, is the one referring to the rescue of wounded and sick, but, Melzer stresses, this is rightly so, pursuant to black-letter treaty law provisions.

1880 *Ibidem*, p. 860.

1881 *Ibidem*, p. 861.

1882 *Ibidem*, p. 862.

line between conducts adversely affecting the civilian population without however being part of the hostilities.

As to the second element (direct causation), two lines of critiques have been advanced: first, the analysis of direct causation conducted by the ICRC, it is suggested, is inevitably affected (adversely, in this opinion) by the abovementioned confinement of the relevant conducts to those harming the enemy, with the exclusion of those benefitting a party to the conflict; second, the adoption by the ICRC of a "single causal step" model is characterized as overly restrictive, even though it is conceded that this understanding is partly obviated by the relevance provided to actions integrated to coordinated military operations[1883]. With specific reference to the single causal step model adopted by the *ICRC Guidance*, it has been pointed out that this understanding is not supported by any legal justification and that the requirement remains in any case unclear: accordingly, it is alleged, gathering intelligence on the battlefield is an uncontroverted example of direct participation and yet it is not capable of harming the enemy directly in one causal step. Reinforcing this reading, this critique also points out that the Guidance itself does not require an act of direct participation to be indispensable for the causation of harm[1884]. Yet, when prizing the additional "integral part criterion" the critique itself notices that "This concept satisfactorily and sufficiently encompasses the essence of direct causation on the battlefield […] it is difficult to conceive of an indirect, yet integral act"[1885]. This test, if applied to the example of gathering intelligence on the battlefield may indeed prove useful to counter any criticism to the single causal step model, which is integrated and corrected through the inclusion of this additional standard.

Not even this test, however, seems wholly unproblematic, in the eyes of the critiques. To this end, reference is made to the example of training fighters, an act that according to the *Guidance* would fall within the notion of direct participation only if done as an integral part of a specific, coordinated operation, whereas, "only a broader interpretation is likely to satisfy States"[1886]. What is perhaps the salient part of this critique is indeed attached to this element: the critique specifies that the limitation of the ICRC-suggested model of causation unveils all its flaws with reference to the assembly and storage of improvised explosive devices: "According to the Guidance, the actions 'may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting or detonation of that device, do not cause that harm directly.' Despite this position, few States would

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1883 Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, in *New York Journal of International Law and Politics, supra*, p. 726.

1884 *Ibidem*, p. 728.

1885 *Ibidem*, p. 729.

1886 *Ibidem*, p. 730.

hesitate, on the basis that the action is not "direct enough," to attack those in the process of assembling IEDs"[1887].

Yet, this also may very well fall within the "integral part" test: in fact, if it satisfies the test (that is, the assembling and storing of IEDs is an integral part of a coordinated military operation) the operation meet the requirement of objective scrutiny (*i.e.* it is undeniably tied to a military operation) and therefore amounts to direct participation. When instead it is not knowingly part of a military operation, the production of IEDs is nothing but the preparation of a future and eventual preparatory act, incapable of satisfying either the single-step-model of causation or the integral part test and therefore actually insufficiently linked to the conflict to justify a qualification as direct participation. Contrary to what the critique suggests, in fact, in this second scenario it is impossible to trace a difference with the ammunition-factory-worker scenario he himself deems outside the scope of direct participation. In line with this analysis, an authoritative reply to these critiques points out that improvised explosive devices are may trigger direct participation when they are used, but not during the development and production chain, because the opposite conclusion would devoid of any significance the principle of distinction, considering involvement in the general war effort as direct participation and creating a disparity with the situation of people working in weapon industries in depriving of civilian status all those who work in weapon industries.

In this regard, the already mentioned reply to the critique notices at the outset that States often outsource these very same activities to civilian contractors[1888]. It then proceeds to comment that the "critique appears to be based on a near complete misunderstanding of how the one causal step and integral part components interact"[1889]. It reiterates that the one causal step and the integral part criteria complement each other, the former identifying which actions or operations are relevant inasmuch as causing direct harm to the adversary, the latter referring to relevant contributions for such operations which autonomously lead to loss of protection even in the absence of a one-step link to the likely harm. It therefore states: "In proposing to replace the "one causal step" criterion by that of "integral part" alone, therefore, Schmitt essentially confirms that any person whose conduct constitutes an integral part of a hostile act or operation may be regarded as directly participating in hostilities but, at the same time, declines to provide the criteria

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1887 *Ibidem*, p. 730. See accordingly Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, *supra*, pp. 658, pp. 680 and 681.

1888 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, p. 866.

1889 *Ibidem*, p. 866.

necessary for the practical identification of such acts or operations"[1890]. Thus, it shows that the critique fails to provide a counter-model of causation. Indeed, in what is defined as an "unlimited causal chain approach", the critique's main argument seemingly suggests to include within direct participation every person responsible for a causal contribution to the final outcome, no matter how far such causal contribution is located in the causal chain. Contrary to such approach, it has been suggested: "So far, there certainly is no evidence for a general *opinio juris* of States that would condone the targeting of all persons who, at some point, have causally contributed to a hostile act, no matter how far removed from the potential materialization of harm."[1891].

As for belligerent nexus, the third and final requirement, the only critique moved to the *Guidance* is that, in requiring an act simultaneously is "in support of a party to the conflict and to the detriment of another" it finally turns out, once more, to be under-inclusive. In this regard, the critique notices: "As has been illustrated, direct participation can also include acts that directly enhance the military capacity or operations of a party, without resulting in direct and immediate harm to the enemy" and suggests that the disjunctive "or" should have been employed instead of the conjunctive "and"[1892]. However, this reading could legitimize military attacks against persons who have really nothing to do with hostilities, such as organized criminals[1893]. In support to his argument, one may make reference to the meaning of hostilities under international humanitarian law (*i.e.* use of means and methods of warfare between the parties): this shows that, if either element of the conjunctive formula is missing, then the violence used is not part of the hostilities.

Finally, the critique concludes with a general reflection concerning the doubts left by the *Interpretive Guidance* as to the behaviour that belligerents should maintain when there is no certainty as to the qualification of an act as direct participation[1894]. According to the *Interpretive Guidance*, in this case a presumption against direct participation should apply, but the critique suggests a lack of "any basis in law for [this] position". Without offering any more basis in law himself, the critique however reasons that, in this scenario, "the civilian is by definition already

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1890 *Ibidem*, p. 867.

1891 *Ibidem*, p. 868.

1892 Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements, , supra*, p. 736.

1893 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities, supra*, p. 873.

1894 Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements, supra*, p. 737: "what of doubt as to whether *conduct* being engaged in by a civilian […] amounts to direct participation? As should be apparent from the disagreement surrounding the various particular examples cited earlier, many activities fall into a grey area where reasonable observers differ".

participating, on his or her own volition, in the conflict in a manner direct enough to raise questions. Therefore, it is reasonable for that individual to bear the burden of risk, rather than the combatant who will be harmed by the action"[1895].

This critique has been rightly countered arguing that in case of doubt a civilian's action should not be qualified as direct participation. In particular, a presumption of civilian status can be found in both treaty and customary law; by default, civilians are protected against attack; therefore, the critique's suggested "liberal interpretation" (*i.e.* in favor of finding direct participation) is flawed because in actual practice a number of typically civilian activities not only do not amount to direct participation but do not even show an indirect degree of participation may then legitimize military attacks[1896]. In this regard, it has been underlined, "In all of these situations, soldiers will be in doubt […] and they will need practical guidance […] Instructing them that they are justified in attacking any civilian whose conduct "raises questions" is not only unwise and unhelpful but, it is submitted, plainly unlawful. Not surprisingly, therefore, Schmitt's inversion of the presumption of protection finds no support in State practice and jurisprudence"[1897].

d) Critique to the Temporal Scope of Direct Participation

A second significant critique moved to the *Interpretive Guidance* is related to its interpretation of the beginning and end of loss of protection reconnected to direct participation attacking the *ICRC Guidance* understanding of the expression "for such time as" and offers an alternative reading. This critique argues, in particular, that the *ICRC Guidance* provides an overly restrictive interpretation of the concepts of preparation, deployment and return from hostilities, that it affords an unbalanced protection to those civilians who regularly participate in hostilities without however assuming a continuous combat function[1898], and that customary international law shows no such revolving door paradigm as the one that would stem from the ICRC's study[1899].

This analysis quotes as an historical precedent Francis Lieber's consideration that persons responsible for hostile acts without however being part to an organized

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1895 *Ibidem*, p. 739.

1896 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, p. 875.

1897 *Ibidem*, p. 876.

1898 On the notion of continuous combat function see *infra*, in this same paragraph.

1899 William Boothby, *"And For Such Time As": The Time Dimension to Direct Participation in Hostilities*, in *New York Journal of International Law and Politics*, New York, 2010, pp. 742 and 743.

army should be denied prisoner of war rights and their "intermitting return to their homes" or their "occasional assumption of the semblance of peaceful pursuits" would justify treating them "as highway robbers or pirates"[1900]. However, as it clearly appears, in this passage Lieber did not at all address the issue of civilian loss of immunity from attack. Even the less he justified their eventual "summary execution" or their "outlawry", conducts which the *Lieber Code* itself refuted and prohibited[1901]. He rather established that those persons had no right to participate in hostilities, that, as a consequence, they would not enjoy prisoner of war status and that, therefore, they could be prosecuted for their act, enjoying no immunity. In other words, he simply established that those persons were not combatants, a conclusion that nobody refutes, least of all the *Interpretive Guidance*.

Coming to the preparatory phase generating a direct participation in hostilities, the critique suggests that not only operations preparatory to an attack but also those "actions carried out with a view to combat" should qualify as direct participation to hostilities entailing loss of civilian immunity for all those involved[1902], as opposed to the ICRC understanding which restricts the preparatory phase relevant to direct participation to hostilities to acts preparatory of a specific act of direct participation[1903].

In order to criticize the examples of conducts falling outside the scope of direct participation enlisted in the *Guidance*, it makes the example of a "persistent participant in an armed conflict who is not a member of an organized armed group", arguing that the individual's activity of cleaning and concealing his weapon after each engagement should be considered as preparing for his next engagement and therefore targetable, whereas he would be considered as a protected civilian according to the *Guidance*'s stance[1904]. Thus, this critique maintains that the relevant criterion for the assessment of direct participation should not merely rest on acts preparatory to an attack but also embrace all those undertaken "with a view to combat". However, three downfalls, it is submitted here, affect this understanding.

First, the very expression "with a view to combat" is wholesale unclear. It may entail every action that may in the future lead to belligerent-related activities. But this would create an endless chain of relevant conducts that would ultimately lead to consider every single civilian as involved in the war effort and make it targetable. This surely cannot be the meaning of the *Commentary*. On the other end

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1900 *Lieber Code*, *supra*, Art. 82.

1901 See *supra*, Ch. I, para. 3.

1902 William Boothby, *"And For Such Time As": The Time Dimension to Direct Participation in Hostilities*, *supra*, p. 746.

1903 *ICRC Interpretative Guidance*, *supra*, pp. 1031 and 1032.

1904 William Boothby, *"And For Such Time As": The Time Dimension to Direct Participation in Hostilities*, *supra*, p. 748.

of the spectrum, this expression could not much differ at all from the linguistic construct it is supposed to clarify: "with a view to combat" may indeed simply amount to "preparatory to an attack". This reading surely seems closer to the letter and the spirit of the *Commentary to AP I*, insofar as a combat entails a specific phase of the war effort and not the war effort in general and doing something with a view to this specific phase presuppose having in mind what purpose such action will serve.

Second, the suggested reading overstretches the notion, as it would lead to consider as directly participating in hostilities every single individual who becomes involved in actions that could eventually, in the future, lead to belligerent related conducts, but could actually have very different outcomes. Third, most notably, these kind of assessments are typically the undertakings of judges in domestic criminal law systems: it is indeed one of the chief mandates of criminal law legislations to define the threshold criteria for punishable conducts, and that of judges to conduct a case by case analysis capable of determining whether a certain action may indeed amount to an attempted crime or to the contrary it has not yet reached the relevant level of extrinsic danger to display the sufficient culpability for punishment (*cogitationis poena nemo patitur*). Now, it would be absurd to posit that a conduct which could lead to several different scenarios may be labelled by the executive power only as one falling within the notion of direct participation in hostilities. Let us proceed from the following example: a civilian living in an area of active hostilities prepares and stores own-made explosive devices. In this case, it would be absolutely impossible to understand whether such building and storing is done "with a view to combat" or simply, for instance, because of the author's involvement in criminal activities or maybe even just because such person needs such explosive devices for his own work (let's think about someone who wants to exploit the existence of a conflict to sell more freely explosive devices, or someone working in the building industry, or again someone working in the mining field). Now, requiring to limit the conducts relevant for direct participation in hostilities to actions preparatory to specific attacks entails a dramatic reduction in the possibility to get the above all wrong: one thing is to deem targetable anyone falling within the exemplified category, with the consequence that the executive be left an exorbitant power in the determination of the subjective element of the targeted person; one completely different thing, in line with the spirit and objective of international humanitarian law, is instead to reduce the possibility to attack to those phases preparatory to specific military attacks, so self-evidently prone to a military action that they leave no doubts as to their nexus with the ongoing hostilities.

The critique in fact suggests: "Applying our API Commentary-derived criterion of "any action carried out with a view to combat," there can be little doubt that the person who assembles an IED [Improvised Explosive Device] with a view to its employment by himself or another on a particular occasion or mission is directly participating while assembling the device. On the other hand, the assembly of IEDs for possible use on unspecified future occasions during unspecified attacks merely

creates the capacity to undertake such operations and would not, on this interpretation, be "preparation"."[1905]. However, this final explanation is subjectable to two main critiques: first of all, it assumes that the military can conduct a determination as to the subjective element of the person assembling the device (*i.e.*, his intention to do it with a view to combat). Second, the final statement actually rather seems as a u-turn, which ends up to conflate this position with that suggested by the ICRC Interpretative Guidance, since "the view to combat" would then become a measure preparatory to a specific attack (in the critique's words "on a particular occasion or mission"). Notably, the critique reiterates this conflation and confusion of terms in its conclusion on the preparatory measures when he states[1906].

As far as preparatory measures are concerned the already mentioned reply underlines the misrepresentation at the roots of the critique's understanding that the only preparatory measures relevant for loss of protection according to the *Guidance* would be those prodromal to an attack within the meaning of IHL: the *Guidance* refers more broadly to any measure preparatory to an act of direct participation to hostilities[1907]. In accordance with the analysis suggested here, moreover, it further points out that the critique does not specify which would be the main difference between its suggested formula of "any action carried out with a view to combat" and ICRC's proposed "measures preparatory to the execution of a specific act of direct participation in hostilities" [1908].

As to the critique's criticism regarding the *Guidance*'s differentiation between measures preparatory to specific hostile acts and those establishing the general capacity to perform hostile acts, it has once more been noted that there is no difference from this criterion and that supported by the author of the critique, *i.e.* tracing the line between preparation for combat or hostilities on the one hand and the generation of a general capacity to undertake military activity on the other[1909].

1905 *Ibidem*, p. 749.

1906 William Boothby, *"And For Such Time As": The Time Dimension to Direct Participation in Hostilities*, in *New York Journal of International Law and Politics, supra*, p. 750: "To be preparation, combat must be in the contemplation of the actor at the time of the preparatory act. In this sense, the essential quality in the relevant act is its causal connection with combat. The ICRC is wrong to limit the notion to "military operations preparatory to an attack," and is also wrong to limit it to preparation for a particular attack. The distinction is finer than that. It is between the generation of a general capacity to undertake military activity and preparation for combat or hostilities".

1907 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, p. 879.

1908 *Ibidem*, p. 880.

1909 *Ibidem*, p. 881.

The critique then shifts its attention to the notions of deployment and return embraced by the ICRC's Guidance. First, it criticizes the notion of deployment as elucidated by the guidance insofar as direct participation should not be limited to a person's physical displacement to perform military acts but should embrace other preparatory acts and deployments towards the place where such preparatory acts will be undertaken: "It seems proper to regard deployment with the explicit purpose of doing something preparatory to an act that itself amounts to direct participation in hostilities as amounting to DP"[1910]. However, once more, by this token every action may become preparatory to another action considered direct participation, generating an endless causal chain. As for return, Boothby suggests that acts of laying down, storing or hiding the weapons used in the attack considered by the ICRC's Guideline as the conclusion of a direct participation should instead be regarded as acts preparatory to further attacks[1911]. Now, it seems evident that, if laying down a weapon could be considered as an act preparatory to an attack, then one would fail to see what would not fall within the notion of preparation: if we think about a person who has indeed taken part to an hostile act and after that guards his weapon without however intending to take part to an another attack ever again, how could we ever conceive of that guarding a weapon as a preparatory measure for the next involvement?

As far as the phases of deployment and return are concerned, the position of the critique does not really seem to differ from the standards advanced by the *Guidance* itself[1912].

As far as continuous loss of protection is concerned, it has been observed that the revolving door paradigm applies to civilians who sporadically take an active part to hostilities, not also to "members of organized armed forces, groups or units belonging to a State or non-State party to an armed conflict" who instead "cease to be civilians and lose protection against direct attack for the entire duration of their membership"[1913]. Significantly, contrary to reconstructions that would tend to cast doubts on this conclusion, the expression "unless and for such time" characterizing treaty law has attained customary status the *ICRC Study on Customary International Law*, the number of states signatory to AP I, as well as military manuals, domestic courts' decisions and other bodies of State practice show that the treaty law expression "unless and for such time" related to civilians' temporal loss of protection

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1910 William Boothby, *"And For Such Time As": The Time Dimension to Direct Participation in Hostilities*, *supra*, p. 751.

1911 *Ibidem*, p. 751.

1912 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, pp. 882 and 883.

1913 *Ibidem*, p. 884.

from direct attack has attained customary status and therefore it shall be considered that it is international humanitarian law itself to endorse the so called "revolving door paradigm", at the very least for those civilians who are not members of organized armed groups.

It is submitted that, as the lengthy analysis just conducted shows, the constitutive elements of direct participation in hostilities and the definition of its temporal scope *qua* civilian loss of protection from direct attack have been correctly identified by the *Guidance* in light of both treaty law and customary international rules. Admittedly, even following the adoption of the *Interpretive Guidance* doubts remain as to the exact qualifications of certain actions such as providing training and attack planning[1914]. Whereas, for instance training and planning would squarely fall within the notion of direct participation if they were an integral part of an operation, the problem would remain if those activities were undertaken in view of the general war effort[1915].

2.5. Continuous Combat Function and Organized armed groups

Nowadays the two categories of civilians and combatants are more likely to be permeable than ever before. There are numerous situations where a person who takes direct part to hostilities with the modalities just defined here-above for a part of the day comes back to his or her civilian life while at home. This shift from one category to another rises numerous problems related to the effective implementation of the principle of distinction. The higher involvement of civilians in hostilities through direct participation on the one hand and the increased practice of combatants to disguise as civilians with the aim to conceal themselves among the population foster a high risk of arbitrary attacks directed at innocent persons who have nothing to do with military operations. This peril picks in the "farmer by day/fighter by night" scenario as such behaviour amounts to the ultimate confusion between the two mutually exclusive categories. In addition, this kind of conduct actually heightens the dangers for regular combatants who actually distinguish themselves from the civilian

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1914 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 142.

1915 Notably, neither the reply to the critiques advanced to the Guidance nor the section of the ICRC website appositely dedicated to the direct participation in hostilities clarification process actually provide a solution to this doubt. To this end see Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, p. 867 and ICRC, *Direct Participation in Hostilities: Questions and Answers*, 2009, available at https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm.

population and run the risk of being attacked by persons they cannot distinguish[1916]. This is a prominent issue for current international humanitarian law, considering in particular that many ongoing armed conflicts are characterized by confrontations between States and non-state armed actors, often making up transnational networks operating with terrorist techniques[1917].

Problems in the interpretation of currently existing norms of international humanitarian law reach their pick in the context of non-international armed conflicts where no reference whatsoever is made to the status of combatancy and where, in particular, it remains fully unclear whether members of organized armed groups should be considered as combatants, as civilians, or as some other sort of fighters. Indeed, since non-international armed conflicts do not know a division in parties, even though they do enshrine a principle of distinction and the related principle of civilian immunity. Absent a proper status of combatancy, the traditional, negative definition of civilian loses its significance[1918].

There is no consensus on the existence of combatant status during non-international armed conflicts[1919]: "While State armed forces may be considered combatants […] practice is not clear as to the situation of members of armed opposition groups […] Practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians"[1920].

Thus, the ICRC has uphold in its study of customary international humanitarian law that "Combatant status […] exists only in international armed conflicts"[1921] but maintains that, regardless of the lack of formal recognition of combatant status certain persons *de facto* assume a combatant function and should

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1916 Accordingly, see *ICRC Interpretive Guidance*, p. 12.

1917 The influence of current conflicts characterized by the involvement of terrorist networks such as Al-Qaeda or Da'esh have led some authors to even suggest that "to deny that terrorists have entered the war theater as belligerent is to deny present realities. It is even terrorists who now are the main belligerents in armed conflicts". To this end see Ingrid Detter, *The Law of War*, *supra*, p. 146.

1918 Charles Garraway, *Direct Participation and the Principle of Distinction: Squaring the Circle*, *supra*, p. 172.

1919 Jum Serpless, *Targeted Killing in Modern Warfare*, *supra*, p. 85. Accordingly, it has been observed: "The principle of distinction is more easily suited to international armed conflicts fought between states, in which it is expected that the military forces fight each other and civilians do not take part. In the context of non-international armed conflicts where one of the parties is not a state military, some of the rules based on this principle become the object of controversial interpretations and debates […] the rules of non-international armed conflict are different in that they do not contain a definition of combatants". To this end see Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 136.

1920 *ICRC Study on Customary International Humanitarian Law*, *supra*, Rule 5.

1921 *Ibidem*.

therefore be treated as combatants for targeted purposes only[1922]. Some scholars suggest, on the other hand, that also in the framework of non-international armed conflicts there are combatants, including both members of State armed forces and members of organized armed groups who, albeit not recognized as such by States, can be legitimately targeted: accordingly, some authors maintain that, when organized armed groups not belonging to any party of an international armed conflict do engage in acts of hostility, their members may be considered combatants[1923] (*rectius*: fighters) if the armed violence has reached the threshold necessary to trigger a separate non-international armed conflict[1924].

These concerns are particularly problematic in consideration of the fact that nowadays armed conflicts, especially those non-international in nature (including those characterized by transnational components), feature States involved not against random civilians occasionally involved in hostile behaviors but against non-state armed actors characterized by a certain degree of organization and made up of members which assume fighting functions on regular basis[1925]. Two countering approaches were taken at the meetings leading to the draft of the *Interpretive Guidance*: on the one hand, some experts maintained that a person should by default fall within the status of civilian; on the other, however, it was stressed that members of armed groups are in fact the equivalent of regular State armed forces. Both approaches are problematic: the first one assumes that, in the absence of combatant status, everybody is a civilian (including members of regular armed forces) and, consequently, may only be targeted while taking a direct part in hostilities. The opposite view, however, results in a significant loss of protection, as it would consider all members of regular armed forces as well as members of organized armed groups as legitimate targets, thereby including religious and medical personnel as well as other non-armed components of non-state actors[1926].

Against this background, the crucial question becomes whether these persons (*i.e.* members of organized armed groups) are to be qualified as civilians, as combatants or as a sort of third, hybrid category. According to this last solution, members of armed opposition groups are somehow different from other civilians insofar as they after all factually form part of the armed forces of a non-state actor. Support for this theory comes from the fact that, concluding otherwise, the protections for civilians based on the principle of distinction would be misplaced in

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1922 *Ibidem.*

1923 The term does not however imply, in this case, any entitlement to prisoner of war status.

1924 David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, *supra*, pp. 197 and 198.

1925 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 147.

1926 Charles Garraway, *Direct Participation and the Principle of Distinction: Squaring the Circle*, *supra*, pp. 174 and 175.

non-international armed conflicts. Thus, the existence of such protections seems to suggest the existence of a category other than civilians. At the same time, moreover, this conclusion seems to comport with the intention of the drafters of AP II[1927]. The answer provided by the Interpretive Guidance seems to lean towards this third conclusion. As will be shown in the following section this conclusion is very problematic and there is absolutely no agreement about it in the international arena.

a) The Guidance's Take

The *ICRC Interpretive Guidance* establishes a parallel between traditional armed forces (that is the armed forces of a State) and so called "armed forces" of an organized armed group. In the first case, it underlines, membership in the armed forces ends, and civilian status is consequently re-instated, only with disengagement from active duty. This is not possible for members of an armed group, since neither engagement nor disengagement is in this case governed by national legal systems. As a consequence, the *Guidance* suggests, the only possible criterion to determine whether or not an individual belongs to such groups is through a functional approach[1928].

Considering armed groups as the military wing (or else the armed forces) of non-state actors, the *Guidance* suggests that in non-international armed conflicts "all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities"[1929]. Since the *Guidance* considers them as the armed forces of a non-state actors, organized armed group are deemed to be made up only by persons "whose continuous function it is to take a direct part in hostilities"[1930].

In the *Guidance*'s understanding, the notion of continuous combat function actually serves the purpose of limiting the pool of individuals subjected to direct attack to those members of an armed group whose activities are factually specular to those performed by regular armed forces. Thus, while this approach broadens the possibility to attack members of armed groups when compared with theories suggesting that such persons should be considered as civilians directly participating in hostilities, it is actually less permissive than other membership-approaches suggesting that every person making part of non-state groups may be targeted, regardless of the functions he performs.

1927 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 147.
1928 *ICRC Interpretative Guidance*, *supra,* p. 25.
1929 *ICRC Interpretative Guidance*, *supra,* Recommendation 2.
1930 *Ibid*.

In order to justify the separation traced between members of armed groups and other civilians, the *Guidance* suggests that "it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities", but rejects this possibility because such conclusion would arguably undermine the premises of the principle of distinction[1931], confusing "proper" civilians and members of organized armed groups. Thus, it suggests that the endorsement of a membership approach is in line with the dictate of Art. 3 common to the *Geneva Conventions*, arguing that this provision confirms the existence of armed forces on both sides of a non-international armed conflict and that members of armed groups involved in the conflict may be considered as not taking an active part to hostilities only after disengagement. In this respect, it is argued, they are different from civilians inasmuch as a mere suspension of combat would be insufficient to restore protection against direct attack[1932]. This reading would find further confirmation, according to the *Guidance*, in AP II, speaking of "armed forces", "dissident armed forces" and "other organized armed groups"[1933].

While these considerations are useful to justify the legal basis for an understanding of organized armed groups as other than a sum of civilians taking direct part to hostilities, thus triggering a status-based reasoning for targeting purposes, the *Guidance* then goes ahead to justify its restriction of targeting authority to functional fighters only. The rationale beneath the *Guidance*'s choice is that "As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense"[1934].

Through this elaboration, the *ICRC Interpretative Guidance* differentiate between civilians participating in hostilities on sporadic basis, who remain targetable under the rules of direct participation encapsulated in Recommendations 4 and 5, and members of organized armed groups, separately treated in Recommendation 7, who are liable to attack until they disengage, *i.e.* until they cease to assume a combat function (Recommendation 10). Notably, while being targetable as combatants belonging to State armed forces, members of organized armed groups do not enjoy the former's immunity from criminal prosecution for the fact itself of taking part to the conflict.

1931 *ICRC Interpretative Guidance*, *supra,* p. 28.
1932 *Ibidem,* p. 28.
1933 *Ibidem,* pp. 29-30.
1934 *ICRC Interpretative Guidance*, *supra,* p. 31.

The *Interpretive Guidance* provides organized armed groups with a unique status which is half way between that of civilian and that of combatants, being really neither one of them exactly: "Their membership is not established in the same manner as regular, state armed forces, and they are also not civilians"[1935]. This hard fact naturally became object of extreme controversy as the continuous combat function approach is not grounded in any treaty provision and it is therefore perceived by many as excessively restrictive. At the same time however, the notion of continuous combat function is used after all in the general framework of a membership approach. Whereas this surely is a kind of "limited" membership approach, the fact itself that a membership approach was endorsed in the first place by the ICRC has been considered by many as excessively enlarging the pool of individuals losing protection, the alternative idea being that also members of organized armed groups remain civilians only targetable while taking direct part to hostilities.

b) Membership Approaches and Criticism to the Continuous Combat Function Restriction

One of the harshest critiques to the *Interpretive Guidance* moves alongside five main lines of argument. First, it stresses that the notion of organized armed groups advanced in the *Guidance* finds no support in either treaty law or custom. Second, it observes that according to the *Guidance* persons belonging to armed groups and carrying out integrated support functions other than combat function should qualify as civilians while persons performing the same duties in traditional armed forces are combatants liable to attack. Furthermore, it argues that the notion of direct participation in hostilities embraced by the *Guidance* is overly restrictive and "does not match the realities of how warfare is conducted". It criticizes, in particular, the *Guidance*'s assumption that membership in armed groups may only be established through functional analysis. Finally, it advances a general criticism addressed to an alleged lack of clarity and precision allegedly affecting the ICRC analysis[1936].

The critique originates because, allegedly, the continuous combat function test elaborated by the ICRC would tend towards the adoption of a "limited membership approach". Indeed, some authors have considered that membership in organized armed group entails a sort of *status*, arguing that "for such time as a person

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[1935] Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, *supra*, p. 643. Accordingly, see also Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements,* in *New York Journal of International Law and Politics,* New York, 2010, p. 698 (in footnote).

[1936] Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, *supra*, pp. 643 and 644.

is a member of an organized insurgent group, he is directly participating in the hostilities"[1937], with the consequence that any such person should be considered liable to attack for the entire duration of his membership. In support of this argument, they recall the ICTY assessment that being unarmed or uninvolved in combat does not suffice to consider a member of an armed group as a civilian[1938].

The rationale allegedly justifying such a membership approach lies in the so called "equal application principle": thus, one of the suggested teleological readings of art. 51 (3), AP I stresses difficulties on the grounds as well as practical military considerations as relaxing factors leading to the adoption of a broader interpretation of the concept of direct participation. Thanks to an unrestrained "membership approach" state actors would to target "members" of armed groups regardless of whether they are involved in an act of direct participation at the moment of the attack[1939]. According to this view, a civilian does not need to undertake any action meeting the three criteria identified as constitutive elements of direct participation by the ICRC: to the contrary, it would suffice for a civilian to be somehow "affiliated" to a given armed group in order to become a legitimate target. Moreover, he would remain such not for so long as the civilian concerned is involved in a certain action or for so long as he assumes a continuous combat function, but until the very end of the conflict.

The membership approach, in turns, would imply the possibility to attack every person "affiliated" to a given party at any time. Of course, such approach would then raise one more hermeneutical doubt, that is, what does "affiliation" mean? Regardless of other considerations, such extension of the concept of direct participation brings about a high risk of arbitrariness and abuse in the conduct of hostilities as civilians who have nothing to do with hostilities may be considered targetable only on the basis of their sympathies for one party or the other. As it has been noticed, "this is an overly permissive interpretation of the concept, which demonstrates why the membership argument is so dangerous"[1940].

As a consequence an alternative, less radical version of this interpretation has been suggested by some: the so called "limited membership approach". This interpretation is narrower than the membership approach *ratione personae* because it only permits to target the "fighting members" of armed groups[1941]. These persons are

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1937 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, p. 61.

1938 ICTY, *Prosecutor v. Blaskic*, Appeals Chamber Judgment of 2004, para. 114.

1939 Accordingly see Valentina Azarov, *Who Is a Civilian in Gaza? The Dangers of Adoptin a Membership Approach to "Direct Participation in Hostilities",* available at www.internationallawobserver.eu.

1940 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 43.

1941 Harvard University Program on Humanitarian Policy and Conflict Research, *IHL and Civilian Participation in Hostilities in the OPT*, Harvard, 2007, p. 10.

considered targetable everywhere, at any time, also when they are not engaged in specific operations amounting to direct participation but they are considered as legitimate targets because of their previous involvement in such actions. As a consequence, this approach is narrower than the one mentioned above because it excludes the legitimacy of attacks directed at so called "support personnel", *i.e.*, persons who have never been involved in attacks, in their preparation or planning. On the other hand, it is broader than the approach that considers civilians as legitimate targets only for so long as they are engaged in a specific act of hostility.

The *ICRC Guidance*, in an attempt to maintain a full balance between practical military needs and humanitarian concerns, and considering that a membership approach which would lead to consider any member of the organized armed group as a legitimate target is too broad, allowing for attacks against persons who would never actually engage in hostile actions[1942], adopted a model of "limited membership approach".

Rejecting this balance, the main critique moved to the *Guidance* in this regard makes reference to the *ICRC Study on Customary International Law* to support the understanding that there is no longer any difference between regular and irregular armed forces and that "the armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates", thus concluding that "all persons who fight in the name of party to a conflict are […] combatants"[1943]. It thus suggests that this approach is better suited to the realities of nowadays armed conflict than the continuous combat function test proposed by the *Guidance*[1944].

Insofar as non-international armed conflicts are concerned, the main trouble identified by this critique is an alleged disparity between membership in organized armed groups and State armed forces, to the advantage of the former[1945]. Further criticism towards the continuous combat function erected by the ICRC to the role of key discriminatory factor between targetable and non-targetable individuals is motivated on the premises that the concept of continuous combat function is not expressed in treaty law and was artificially framed by the experts who participated to the meetings leading to the adoption of the *Guidance*[1946]. It further takes issues with the fact that the Guidance does not actually provide assistance in understanding

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1942 Tom Ruys, *License to Kill? State-sponsored Assassination under International Law*, *supra*, p. 35.

1943 Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, *supra*, p. 652, recalling *ICRC Study on Customary International Humanitarian Law*, *supra*, pp. 14-16.

1944 Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, *supra*, 2010, pp. 651 and 652.

1945 *Ibidem*, pp. 654 and 655.

1946 *Ibidem*, p. 655.

whether conducts such as the wearing of a uniform are "reflective of integration into the membership of an organized armed group" as it is for members of regular armed forces[1947]. Moreover, the critique laments a lack of reference to individuals who are involved in attack planning far from the area of operations, further noting in this regard a lack of exact conciliation between the direct participation in hostilities notion and the continuous combat function doctrine: to this end, it stresses that indications as to how many times a civilian directly participating in hostilities can get back to civilian status before assuming a continuous combat function is nowhere to be found within the *Guidance*[1948].

Suggesting a further shift towards an extensive membership approach, the critique further rejects the existence of the civilians/combatants dichotomy[1949] and therefore criticizes the *Interpretive Guidance* for allegedly placing organized armed groups under civilian status protection[1950]. According to this line of argument, "The reality that those participating in guerrilla warfare hide among the people does not justify creating criteria that in effect reward those who choose this means of warfare […] it is difficult to see how allowing those providing direct support within an organized armed group to be protected by civilian status will actually operate to limit the conflict"[1951]. Thus, according to the critique "Regular State armed forces are placed in a different and more disadvantageous position than other armed groups. The armed forces of the different parties have dramatically different rules regarding when their forces can be targeted"[1952]. In order to obviate to this allegedly "unbalanced approach"[1953], the critique suggests that a pure "membership approach" should be adopted, at least for armed groups fighting with a model similar to that of

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1947 *Ibidem*, pp. 656, 671 and 672.

1948 *Ibidem*, p. 661: "it is suggested [in the Guidance] that a civilian can go through the revolving door on a 'persistently recurring basis.' This must be compared to membership in an organized armed group, which begins when a civilian 'starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function.' It is not evident how easily the concepts of "continuous combat function" and a "persistently recurrent basis" can be reconciled".

1949 See *infra*, in this same paragraph.

1950 Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, *supra*, p. 666: "Such an approach has the potential to significantly erode the validity of civilian status as a means of protecting those not involved in the conflict. This is particularly evident in the context of "small" or guerrilla wars".

1951 *Ibidem*, p. 667. See, accordingly, Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, in *University of Pennsylvania Journal of International Law*, Philadelphia, 2012, p. 677, p. 692: "Persons who are members of an organized armed group are legitimate targets at all times—but dress the same as civilians either for a lack of uniforms or specifically to blend into the civilian population for protection. In such cases, the surveillance capability of drones plays an essential role in differentiating such persons from innocent civilians. A second category of legitimate target, as noted above, is the civilian directly participating in hostilities".

1952 Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, *supra*, pp. 671 and 672. Accordingly, Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, p. 62.

1953 *Ibidem*, p. 675.

armed forces and characterized by a similar level of organization, thus considering every member of the group as a legitimate target regardless of his function[1954].

In response to these critiques, Melzer acknowledges that "the Interpretive Guidance goes to great lengths to assimilate, as far as reasonably possible, all organized armed forces, groups, and units, regardless of whether they fight for a State or non-State party" [1955]. Quoting the *Commentary to the Geneva Conventions*, Melzer specifies in this regard: "The Guidance clearly reflects the understanding of the Commentary that non-international armed conflicts "are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war.""[1956]. He goes on to stress that, according to treaty law, it is formal integration into armed units that designate membership into regular armed forces. He stresses that even State armed forces are composed of combatants and non-combatants, the latter maintaining their status of civilians even when they are formally integrated in the army. He concludes that the formal approach is nothing more than the way States regulated the matter in treaty law. Shifting then his focus to irregular armed groups, he stresses that the formal approach cannot be transposed to them, since often there is no formality to refer to but membership depends on de facto integration into the group. He thus comes to the core of the matter, tackling the notion of continuous combat function[1957]. This is a notion central to the Guidance insofar it is only through reference to the function assumed by an individual that it is possible to assess his membership in an organized armed group. In order to be relevant, that function should correspond "to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a belligerent party". The rationale justifying this view, according to Melzer, is the following: "As treaty and customary law ties *temporary loss of civilian protection* to conduct amounting to direct participation in hostilities, it would be contradictory to attach an even more serious consequence, *continuous loss of protection*, to a function further removed from the conduct of hostilities […]just as with States, a conceptual distinction must be made between the non-State "party" to an armed conflict (i.e., the insurgency or rebellion as a whole) and its "armed or military wing", which is charged with the conduct of hostilities on its behalf (i.e., the "organized armed group" or "armed force" in a functional sense)."[1958].

1954 *Ibidem*, p. 678.

1955 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, p. 844.

1956 *Ibidem*.

1957 *Ibidem*, pp. 845 and 846.

1958 *Ibidem*, p. 846.

The main flaw of such theory, according to Melzer, is that it could only operate if it were possible to distinguish between non-combatant members undertaking support functions and civilians involved in essentially similar (when not identical) activities without however belonging to the armed group[1959].

Melzer points out that it is "practically impossible" as well as "conceptually meaningless" to trace a demarcation line between non-combatant components of armed groups and civilian supporters and underlines the following: "For example, in operational reality, soldiers may be confronted with men and women carrying weapons and supplies for insurgent forces, villagers serving as scouts, lookouts, and smugglers for an armed group operating in the area, local teenagers watching as an army unit walks into a mine field or booby-trap laid by them a few days earlier, inhabitants regularly providing food and shelter to insurgents, or skilled individuals assembling or maintaining weapons and equipment for an insurgent force. However, neither Mao Tse Tung's "Table of Organization" nor the formalized command and membership structures of contemporary State armed forces provide useful guidance as to whether such persons are to be regarded as "members" or merely as civilian "supporters" or "contractors."" [1960]. Consequently, Melzer concludes as follows: "As a consequence, there are essentially two solutions: First, the notion of "organized armed group" can be overextended to include *all persons accompanying or supporting that group* (i.e., regardless of their function); an excessively wide approach which would completely discard the distinction between "direct" and "indirect" participation in hostilities inherent in treaty and customary law. Alternatively, the notion of "organized armed group" can be limited to those persons who represent the *functional equivalent of "combatants"* in the regular armed forces."[1961].

Melzer then goes on to address Watkin's critique to the alleged bias against State armed forces. In this regard, Watkin suggests that the overly restrictive notion of direct participation adopted by the Guidance exclude from the range of legitimate targets persons who perform functions for which members of State armed forces may be subject to attack. In Melzer's view such critique is misplaced. He underlines first of all that members of State armed forces qualify as legitimate targets based on status and not on function. Moreover, he suggests that the same criterion centered on continuous combat function governs membership in irregularly constituted armed forces for both State and non-State actors. He points out, to this end: "The question is not whether an individual supports a State or a non-State belligerent, but whether his membership depends on formal *de jure* integration (regular forces) or, rather, on the

1959 *Ibidem*, pp. 848 and 849.
1960 *Ibidem*, p. 850.
1961 *Ibidem*, p. 850.

function *de facto* performed (irregular forces)."[1962]. His analysis thus appears to be more closely related to the relevant normative framework and the two different solutions suggested by the Guidance seem to be directly derived from well-established treaty and customary law provisions.

Focusing then on Watkin's critique to the distinction between members of organized armed groups assuming a continuous combat function and individual civilians who take direct part in hostilities on a persistently recurrent basis, Melzer comments: "In practice, of course, persons directly participating on a persistently recurrent basis will almost always be members of an organized armed group. Nevertheless, it is conceivable, for example, that teenagers living in an occupied territory might decide to throw "Molotov cocktails" at the occupation forces every time a military patrol or convoy passes through their village. According to Watkin, even though these teenagers are civilians and not members of an armed resistance group, they should remain legitimate military targets at all times until they affirmatively disengage through "concrete, objectively verifiable facts," whatever this may mean in practice." [1963].

All in all, one of the main problems with the critique's view seems to be the identification of the kind of "support" that should be considered relevant. The notion of direct participation is useful in this regard in two ways: first, it makes sure that persons are not subject to military attacks for their ideas. A mere sympathizer for an organized armed group could in fact be said to support such group. Should such a person be targetable on the basis of his sympathies? The answer cannot but be negative, as suggesting otherwise would lead to a total war where the principle of distinction no longer matters. Moreover, the approach adopted by the ICRC in the *Guidance* has the merit of making sure that persons subject to military attacks are actually those who take a part to hostilities alone and no other civilians: when a civilian takes part in hostilities he does so with an action so proximate to the causation of harm, under the *ICRC Guidance*, that his deployment in hostilities is self-evident. And it is exactly on self-evidence that the military operates. To concede otherwise would have the military do the role of the judiciary, assessing in advance who has ties to which group and how deep such ties are, with little if not absent transparency on the methods used to come to the final assessment and limitless potential abuses on part of the executives.

c) Criticism to the Continuous Combat Function Approach: Restrictive View

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1962 *Ibidem*, p. 851.
1963 *Ibidem*, p. 855.

It is widely accepted also by the authors of the *Guidance* that there is no consensus under international law on the notion of organized armed group[1964]. There is indeed a discrepancy between the stance taken by the *ICRC Guidance* and that uphold by the *ICRC Customary International Law study*, insofar as the Guidance considers civilians in non-international armed conflicts those persons who are neither members of the armed forces or members of organized armed groups whereas the *ICRC Study on Customary International Law* concluded that "practice is ambiguous as to whether members of armed opposition groups are considered to be members of armed forces or civilians"[1965].

Ironically enough, critiques arguing that the *Guidance*'s stance adopts an overly extensive approach take steps from the same starting point of those arguing that it is too restrictive: the *ad hoc* status recognized by the *Guidance* to members of organized armed groups. As the main author of the *Interpretive Guidance* himself clarifies: "members of organized armed groups cease to be civilians and therefore lose protection against direct attack for as long as their membership lasts"[1966].

The one, biggest problem with this argument is that it breaks down the very pillar of international humanitarian law, *i.e.* the civilian/combatant dichotomy. Thus, it has traditionally been assumed that in the context of non-international armed conflicts the principle of distinction would permit the use of lethal force only against those targets directly taking part in hostilities and only for so long as such participation would last[1967]. Accordingly, the continuous combat function approach would not actually restrict the circumstances permitting the use of lethal force but extend them to hypothesis traditionally not envisaged by the laws of war: indeed, the continuous combat function approach creates a sort of status-based rationale for the targeting of members of organized armed groups[1968] who before the adoption of the

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1964 *Ibidem*, pp. 838 and 839.

1965 *ICRC Study on Customary International Humanitarian Law*, *supra*, p. 17.

1966 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, p. 837-839, also specifying that the Guidance's view is that organized armed groups "constitute armed forces in a strictly functional sense in that they are de facto charged with the conduct of hostilities on behalf of a party to the conflict". Accordingly, Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, *supra*, p. 704; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 150, arguing that "According to this [ICRC's] interpretation, in non-international armed conflicts members of organized armed groups are non-civilians".

1967 Pardiss Kebriaei, *Al-Aulaqi v. Obama: Targeted Killing Goes to Court*, *supra*, p.197.

1968 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, 2010, p. 840: "just as with regular combatants, members of organized armed groups cease to be civilians and lose protection against direct attack for as long as they assume their continuous combat function".

interpretive guidance would have commonly be considered as civilians, thus targetable only during direct participation[1969].

The rationale to support the *Guidance*'s approach is that, allegedly, State practice widely confirms that armed forces direct their attacks at insurgents and members of organized armed groups also when they are not involved in military operations. As a consequence, under this view, considering members of organized armed groups as civilians would be "misconception of major proportions […] entail[ing] a distortion of the fundamental concepts of civilian, armed forces and direct participation in hostilities"[1970].

According to some, however, the endorsement of the continuous combat function approach is a symptom of the dramatic impact that U.S. practice is having on the international legal discourse, actually departing from the traditional understanding of international law on this issue[1971]. Indeed, the creation of a third hybrid category of persons who would neither enjoy immunity from prosecution as State armed forces do nor immunity from attack as civilians do closely resembles the theorization of the category of "unlawful combatants" so wholeheartedly rejected by the international community and actually faces many of the same problems[1972]. Thus, it has been alleged, the *Interpretive Guidance* "created a new category of persons who were neither members of the regular armed forces nor civilians. This ran counter to what had been achieved in international armed conflict"[1973].

As a matter of fact, the stance assumed by the ICRC in this regard remains a membership approach, even though limited by the introduction of the concept of continuous combat function, and as such it seems to "accommodate war rather than limiting it" [1974].

1969 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 148, arguing that the approach considering members of organized armed groups as fighters has gained traction following the latest ICRC study.

1970 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 316.

1971 Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan, The Legal and Socio-political Aspects*, *supra*, p. 177: "The efforts of the U.S. in reclassifying large segments of the civilian populations and objects as military to circumvent the rigid requirements of necessity have had unforeseen impacts – for instance the ICRC has come up with a new quasi-category of [Non State Actors] who can be targeted as combatants when they perform a continuous combat function".

1972 Accordingly see, *inter alia*, Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan*, *The Legal and Socio-political Aspects*, *supra*, p. 182.

1973 Charles Garraway, *Direct Participation and the Principle of Distinction: Squaring the Circle*, *supra*, p. 176.

1974 Anicee Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*, *supra*, p. 110

Accordingly, the section of the *Blaskic Appeals Judgment* often referred to by those who support the superiority of a membership approach[1975] is partially misleading. For starters, because it does not refer to the scope of civilians' loss of protection during direct participation in hostilities, but rather to the qualification of a person as member of an armed group for the purpose of establishing his qualification for the commission of certain war crimes. Secondly, and perhaps even more significantly, because in this case the ICTY was expressly referring to provisions valid for international armed conflicts only (namely Art. 50 AP I and Art. 4, A GC III) and was therefore referring to membership in armed forces, including groups *belonging to a party* to the conflict[1976]. Therefore such section holds no value at all for the analysis of membership in non-international armed conflicts, unless of course one were to suggest an analogical extension to non-international armed conflict of the standards governing armed groups in international armed conflict. But this should be thoroughly argued and, importantly, would ultimately lead to confer combatant status to members of organized armed groups, reaching the exact point that States have been trying to avoid for centuries, namely recognizing members of organized armed groups rights equivalent to those of combatants[1977].

Contrary to what some suggest, the ICTY has indeed averred the exact opposite, that is being a member of an armed group does not *per se* deprives a civilian of his or her immunity from direct attacks[1978]. By the same token, it has been observed that also members of organized armed groups should only be targeted while directly taking part in hostilities because they remain civilians and civilians may only be targeted pursuant to their individual conducts[1979]. In fact, in accordance with the in *Interpretive Guidance*, it should be noticed that mere allegiance with a group does not make of a person a fighter who takes active part to hostile actions. Differing greatly from the *Interpretive Guidance*, instead, under this approach the consideration just mentioned implies that mere membership cannot justify individual targeting and that therefore a person cannot but be attacked while directly engaged in hostilities.

1975 See *supra* in this same paragraph.

1976 ICTY, *Prosecutor v. Blaskic*, Appeals Chamber Judgment of 2004, para. 113.

1977 Indeed, according to some, the current system of international law privileges States as the only rightful holder of the right to wage war. To this end see Max Weber, *Legitimacy, Politics and the State*, in H. Gerth and C. W. Mills, *From Max Weber: Essays in Sociology*, New York, 1958, p. 77. This view is not shared by this author, who however needs to acknowledge the existence of this stance and the fact that it remains, at the end of the day, the most conservative reasons to deny recognition of status to organized armed groups involved in NIACs and their members.

1978 ICTY, *Prosecutor v. Halilovic*, Judgment, 16 November 2005, para. 34.

1979 David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, *supra*, p. 192.

Indeed, one of the problems related to any membership approach, including the one endorsed by the ICRC, is that, "there is a chronic problem of establishing that a person belongs to an insurgent armed group, which is not likely to issue membership cards"[1980]. In this regard, it has been pointed out that the creation of a continuous combat function test "creates a functional indeterminacy in designating a functional combatant"[1981] which leads to additional operative hurdles in terms of target selection. Thus "As such [the continuous combat function test], and without a published list of active armed members, it is ultimately an individual determination based on the individual's actions"[1982].

All in all, the point is that States simply cannot have "the best of both worlds"[1983]: it has been (and it continues to be) the choice of States not to recognize any status to insurgents and other organized armed groups in non-international armed conflicts. It has therefore been the choice of States to maintain that inequality between the parties that, as the current debate has shown, bothers them so much in terms of participation in hostilities. It is not the case that they can therefore pretend to benefit from status-based targeting rules while at the same time avoiding to afford any sort of combatant-like immunity to insurgents for their conflict-related conducts. If insurgents are mere criminals, than as mere criminals, *i.e.* civilians, they are to be treated: losing immunity only for so long as they take part in hostilities. This simply is the state of the law at the present stage: "Indeed, in a non-international armed conflict, insurgence always constitutes a crime under domestic law. Criminals should be dealt with by courts and may not be 'punished' by instant extrajudicial execution"[1984].

2.6. The Role of Assassination in the Direct Participation in Hostilities Debate

All the above is particularly relevant for the limitation to the use of force in armed conflicts. In particular, identifying who qualifies and who does not qualify as a legitimate target is and should continue to be a prominent need in the international

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1980 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, p. 62.

1981 Saby Ghoshray, *Targeted Killing in International Law: Searching for Rights in The Shadow of 9/11*, *supra*, p. 380.

1982 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 153.

1983 Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan, The Legal and Socio-political Aspects*, *supra*, p. 183.

1984 Marco Sassòli and Laura M. Olson, *The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, *supra*, p. 609.

agenda. Given the crucial importance of the principle of distinction, indeed, more precision as well as a way higher degree of certainty is necessary in this regard.

The killing of a person who does not qualify as a legitimate target, if intentional and pre-meditated, amounts to an assassination, insofar as the selectivity process is coupled with an unlawful use of lethal force. Thus, the premeditated intentional killing of a pre-selected civilian who is not participating in hostilities can certainly be characterized as an assassination. In this case, the relevant question revolves around which conducts meet the threshold for direct participation. In this regard, the parameters outlined before and thoroughly explained in the interpretive guidance serve as the guiding criteria to conduct an assessment of the victim's involvement (or lack thereof) in hostilities.

In this case, however, it is not the qualification of the act as an assassination that would make the act unlawful. It rather is the other way around: the act is unlawful because intentional lethal force is used at the detriment of a civilian not taking an active part in hostilities. It is this unlawfulness that makes of this example an instance of assassination.

How may therefore the traditional prohibition of assassination be of any relevance for the question of direct participation, other than in the relatively low-impacting modality just described?

It is submitted here that the prohibition of assassination is not only relevant but even crucial for this topic when the focus shifts from direct participation to the more contentious issue related to the targeting of members of organized armed groups. As noted *antes*, there is no agreement whatsoever as to the exact juridical qualification of members of organized armed groups. In other words, there is no *consensus* as to whether they should be considered as civilians taking a direct part in hostilities, as combatants or as some sort of fighters not enjoying the protection of either one of these two categories. As argued before, the first of these three solutions seems to be the most appropriate at the current state of the art, but no decisive element seems to result from the discussions reported above.

It is against this background that the traditional prohibition of assassination may play a crucial role as a limitation to the use of force that is not based on status but rather on method. It is has already been discussed at length how provisions on denial of quarter may be interpreted as entailing in and by themselves a prohibition on lethal attacks against persons who are defenceless or otherwise not taking a direct part in hostilities while targeted, regardless of their status[1985]. Whereas this could be impossible to argue in relation to large-scale confrontations or operations whose aim

[1985] See *supra*, Ch. III, para. III.

is to disrupt the enemy's infrastructure (think for instance to the bombing of military barracks by night when soldiers are sleeping inside), this conclusion, if referred to selective pre-planned killing comports with an understanding of assassination as a prohibition to the use of lethal force by design at the detriment of persons who are off guard, far removed from the battlefield, defenceless or simply undertaking functions other than that of a combatant. After all, some military manuals still expressly provide that "Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured" (emphasis added)[1986].

It is submitted here that this thesis finds further support in an appropriately construed human rights interpretation of the norms at hand and that, being this the case, it bears dramatically important consequences for the whole discourse regarding the permissibility of the use of premeditated lethal force against selected individuals *viz* direct participation in hostilities and membership in organized armed groups.

It is worth recalling in this regard that the *ICRC Interpretive Guidance* itself clarifies that "its conclusions remain without prejudice to additional restrictions on the use of force, which may arise under other applicable frameworks of international law such as, most notably, international human rights law"[1987].

The understanding just advanced regarding the limitations that the traditional ban on assassination would impose to the parties' authority to resort to targeting practices seems to perfectly comport with and be augmented by a human rights oriented interpretation.

Such hermeneutic path, arguably, is not only possible in this case, but even obliged. First, because in the field of non-international armed conflicts there is no combatancy and, therefore, it may be disputed whether the law of armed conflict paradigm may be viewed as *lex specialis vis-à-vis* international human rights law at all. Second because, even admitting *arguendo* that this is the case, there is widespread agreement among scholars and practitioners that there is no consensus whatsoever insofar as the status of members of organized armed groups is concerned. It has been rightly observed in this regard that "to the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law"[1988]. Finally, because as shown *antes* this lack of clarity does not pertain to the status of members of organized armed groups but also to underlying norms of

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1986 *Commander's Handbook on the Law of Naval Operations*, 1987, § 11.8

1987 *ICRC Interpretive Guidance*, *supra*, p. 82.

1988 *Alston Report*, *supra*, para. 29.

international humanitarian law that would seem to dramatically restrict the possibility to resort to premeditated lethal force against selected individuals who, combatants or fighters, are not directly involved in hostilities when targeted.

Thus, it has been underlined that "the ICRC's Guidance raises concern from a human rights perspective because of the "continuous combat function" (CCF) category of armed group members who may be targeted anywhere, at any time. In its general approach to DPH, the ICRC is correct to focus on function (the kind of act) rather than status (combatant vs. unprivileged belligerent), but the creation of CCF category is, *de facto,* a status determination that is questionable given the specific treaty language that limits direct participation to "for such time" as opposed to "all the time." Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function[1989].

Factoring in this discourse considerations related to the long-standing prohibition of assassination indeed fully comports with a human-rights oriented understanding.

It has been shown in the previous paragraphs that, traditionally, one of the understandings of the prohibition of assassination has viewed it as a ban on premeditated lethal attacks against pre-selected individuals through the employment of means and methods means leaving them no chances of survival. As also shown in previous paragraphs, it is based on this rationale that prohibitions still widely recognized, such as that on poison, made their entrance in the laws of armed conflicts. It is submitted here that that rationale and spirit still lingers upon the prohibition of assassination today.

If this is the case, then, not even combatants, regardless of their status, can be subjected to targeted lethal attacks while not engaged in hostilities directly. A fortiori, this applies to members of organized armed groups (regardless of their qualification as civilians, fighters or combatants). Thus, regardless of which is the correct stance on membership in organized armed groups, members of such groups could not be individually targeted for death while not engaged in hostilities.

This conclusion may play in two very different directions. On the one hand, it could be argued, this proves a further argument in favor of the most restrictive approach that discredits the validity of a status-based membership approaches in their entirety. On the other, it could be said that this conclusion represents an exception proper to targeted killings only and therefore does not play into the larger dynamics relevant for the definition of status. For the ends of the present research, however, it

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[1989] *Ibidem*, paras. 65 and 66.

is irrelevant which one of these two theories is the most accurate, since what matters is that, either way, a killing undertaken with these modalities amounts to an assassination and, as such, it is unlawful.

More than anything else, this understanding would perfectly suit that reciprocity that is so dear to States. One of the main arguments moved to rigid understanding of direct participation in hostilities, to the temporal scope of loss of protection, and to the notion of continuous combat function advanced by the ICRC, is indeed that restrictive approaches offer an advantage to members of organized armed groups over regular armed forces, insofar as the latter may be targeted on the mere basis of their status whereas the former can only be targeted while taking direct part in hostilities or else while preparing, deploying or returning from an act of direct participation or, again, when assuming a continuous combat function. Pursuant to this asymmetry, many have argued that restrictions to the use of lethal force against civilians taking a direct part to hostilities and against members of organized armed groups should be removed, so as to allow for a more extensive authority to attack. It is submitted that it is incomprehensible how, in the framework of a legal regime called "international *humanitarian* law" attempts to balance real or supposed asymmetries always end up proposing models which lessen the threshold protection for everybody, rather than leading to enhanced protections for all the actors involved. The proposed interpretation, contrary to the one that makes leverage on asymmetry in order to delete protections for civilians, tries to reinstate a balance enhancing protections for everybody who is not directly engaged in hostilities.

As a consequence, this approach would not serve to protect civilians the less but combatants the more. Insofar as civilians and combatants alike are and remain fundamentally human beings when they are not involved in public, fighting functions.

Notably, this does not entail an abandonment of the traditional status-based division between civilians and combatants, but aims at recognizing that also combatants (as well as, of course, civilians directly participating in hostilities and members of organized armed groups) are human beings and, as such, they do continue to enjoy their fundamental rights, the inherent sanctity and dignity of their life being as important and as those of everybody else. Thus, when a combatant is on a battlefield or else is taking a direct part in hostilities, nobody could ever possibly argue that he cannot be deprived intentionally of his life. But when he is disengaged, he is not within a military objective, is not taking an active part in hostilities as he is not actually exercising military functions, then why shouldn't he be protected from a use of pre-meditated lethal force which, in that very moment kills the man, rather than killing the combatant. It is true that members of organized armed groups are more likely to benefit from this position than combatants themselves, because in reality combatants deployed close to a theater of hostilities are less likely to disengage from one day to the next and so easily restore their role within the civil

society. However, this does not change the fact that a member of an organized armed group, when doing something like that, is indeed dropping off his fighting suit to wear his farming clothes. Targeting him in that moment would amount to an extrajudicial execution because in that moment his ties with the conflict (and any hostility related function) is cut.

This finds a twofold, strictly legal rationale. It is submitted here, in fact, that the "direct participation" formulation responds to two mutually reinforcing exigencies: a) to be sure the one targeted is indeed an enemy (Problem of Certainty); b) to justify the use of force by reference to the threat posed by the other party. The threat, to this end, need not be immediate (Problem of Justification). Since a conflict is a group activity, the very fact that members of a group are assembled and armed entails a danger that makes them targetable: there is a presumption of dangerousness in their being all together. Even while they are asleep, if in an area of active hostilities and in a guarded location.

As for the problem of certainty, it has been observed that "Almost all targeted killings are directed against non-State actors and […] they are generally carried out while the targeted person is not visibly engaged in active combat"[1990]. Thus, when a person is not directly involved in hostilities, then there is a need for a judgment that establishes his previous or future implications in hostile acts. Such a judgment, by definition, is proper to a court of law and cannot be left in the hands of the military. No matter what the convenient thing to do is from an operational standpoint. In a way, this first reason is rooted in the traditional need for protection of the civilian population against the abuses of State power, since in the absence of a judgment from the judiciary in full respect of due process guarantees, any decision to deliberately kill with premeditation a pre-selected person for actions or conducts which he is alleged to have undertaken (such as membership in an organized armed group) amounts to an execution which is, by definition, extrajudicial. It is in this vein that the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has time and again underlined: "Empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted" [1991].

As for the problem of justification, it is submitted that all too often the intimate rationale of the legal regimes discussed is sacrificed on the altar of a real or perceived "state practice" (often even disregarding *opinio juris* at all as if it were an irrelevant component).

1990 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 56.

1991 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2005*, UN Doc. E/CN.4/2005/7, 22 December 2004, para. 41.

It has been rightly observed to this end that "the object and purpose of international humanitarian law impose that in case of doubt the protection deriving from this body of law be as extensive as possible"[1992]. In this vein, it seems worth to underline that both international humanitarian law and international human rights law recognize an inherent dignity to the life of every person, including combatants and members of organized armed groups. Targeting and killing a person while he is not engaged in hostilities entails a consideration of that individual not as a person but as a fighting instrument belonging to a party to the conflict, thus by definition de-humanizing him. It amounts, in other words, to a utilitarian approach which sees in that person a means, rather than an end in himself. This understanding is *per se* sufficient to consider any killing conducted under this premises as an assassination in violation of the targeted person's right to life insofar as it deprives that person of any dignity as a human being. This holds true for each and any soldier as much as it does for each and any civilian who has taken part in hostilities or member of armed groups who is disengaged when targeted.

Notably, the same rationale just described for targeted assassinations does not necessarily apply for group-fighting: in the latter case, indeed, the fact itself that combatants remain surrounded by other combatants (and civilians taking part in hostilities by other civilians taking part in hostilities or members of organized armed groups) may under certain circumstances be viewed as establishing a presumption that they have not disengaged at all. If corroborated by other factual circumstances, such as the location of the units, their behavior and the like, then those persons are taking part in hostilities and as such they may be attacked, even with intentionally lethal force.

[1992] Antonio Cassese, *International Law*, *supra*, p. 420.

3. THE GEOGRAPHICAL DIMENSION OF ASSASSINATION

(1) Introduction: Geography of Armed Conflict and Use of Force; (2) The Intrinsic Link Between Assassination and the Boundaries of the Battlefield; (3) Expansive versus Restrictive Geographical Understandings. (3.a) Expansive Geographical Views; (3.b) Expansive views, remedial approaches: Neutrality Law; (3.c) Expansive views, remedial approaches: the doctrines of 'Hot Pursuit' on land and conflict spill-over; (3.d) Restrictive Geographical Understanding: autonomous intensity threshold for conflict Spill-over; (3.e) Interlocutory conclusions on the geographical scope of International Humanitarian Law; (4) Suggested Zone-related Division (5) Rationale Supporting a Zone Division; (5.a) International humanitarian law principles; (5.b) Denial of quarter repercussions; (5.c) Human rights oriented analysis; (6) Identification of the zone; (7) Conclusions.

3.1. Introduction: Geography of Armed Conflict and Use of Force.

That geographical considerations remain of the utmost importance for the scope of application of international humanitarian law has already been highlighted in one of the previous chapters of this research[1993]. In that context, it has been shown that, whereas the laws of armed conflict do not exclusively apply to areas where actual fighting takes place, it is seemingly untenable to posit the existence of a sort of global battlefield on the basis that one or more parties to the conflict actually are characterized by some transnational components[1994]. Thus, through reference to the most relevant treaty law provisions and jurisprudence in this field, it has been pointed out that the temporal as well as the geographical scope of armed conflicts extends well-beyond the exact time and place of hostilities but that, at the same time, it does know of some limitations[1995]. Accordingly, it has been argued, international humanitarian law finds application, in case of international armed conflicts, throughout the entire territories of the States involved in the confrontation. In case of conflicts not of an international character, instead, the scope of applicability of this legal regime is restricted to the territory under the control of the parties involved[1996]. It has additionally been stressed, however, that the reported conclusions do not hold

1993 See *supra*, Ch. II, para. 2.
1994 *Ibidem.*
1995 *Ibidem.*
1996 *Ibidem.*

true for the entire body of international humanitarian law. In fact, as shown by the relevant jurisprudence of the ICTY in particular, the rules of this legal paradigm that find extensive application (*i.e.* throughout the entire territories of the belligerent States or else throughout the entire territory under the control of a party to the conflict in case of non-international armed conflicts, and beyond) are only those which are protective in nature[1997]. This in turns implies that beyond the narrow geographical context of the actual theater of combat operations it would not be possible to invoke the applicability of international humanitarian law as a reason to advance the existence of more relaxed parameters related to the use of lethal force.

As will be further clarified throughout this paragraph, it is generally accepted that the scope of application of international humanitarian law is geographically restricted. The question that should therefore be answered is whether such geographical restrictions and, eventually, other territory-related considerations, may have some particular impact on the prohibition to resort to pre-meditated lethal force against selected individuals. In this case, one of the essential points to be addressed is therefore whether the mobility of persons belonging to an army or to an organized armed group involved in an armed conflict entails an extension of the battlefield: in other words, whether a fighter moving away from a hot battlefield brings the battlefield with himself, wherever he goes[1998].

This paragraph will show that a proper geographically-oriented taxonomy of the areas of combat may bear particular relevance for the identification of locations where the legal obligations governing (and restricting) the use of lethal force significantly vary, under both the law enforcement and the law of armed conflict paradigms.

In particular, it will be argued, the traditional prohibition of assassination plays a crucial role in the identification of such zones, at once confirming the existence of geographical restrictions to the scope of applicability of international humanitarian law itself and finding further confirmation in it.

1997 *Ibidem.* See accordingly Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, in *Georgia Journal of International and Comparative Law*, Athens (U.S.A), 2010, p. 14 ("the purpose of such a broad scope is to ensure the maximum protection for all persons engaged in or caught up in the conflict").

1998 Pilar Pozo Serrano, *Limites Geográficos del Campo de Batalla y Derecho Internacional*, in *Instituto Español de Estudios Estratégicos, Documento de Opinión*, Madrid, 16 January 2013, pp. 7 and 8.

3.2. The Intrinsic Link between Assassination and the Boundaries of the Battlefield.

Assassination has an inherent link with geographical concerns, a link which has historical, logical and normative roots. This is a link that may very well represent the real distinguishing feature of the conduct of assassination, capable of endowing it with a unique scope and justify an understanding of assassination as a self-sustaining, autonomous notion, which actually adds to the body of international humanitarian law rather than being merely based on other provisions belonging to this legal regime.

Historically speaking, indeed, the intentional, premeditated killing of pre-selected individuals has been characterized as assassination when taking place afar from the very theater of hostilities.

Thus, as highlighted in the first chapter of this work, Alberico Gentili qualified attacks conducted upon pre-selected persons as assassinations unless they were performed in close proximity to the battlefield, if not on the battlefield itself[1999]. The killing of Pepin (that Gentili recalls)[2000], is often quoted by those arguing that such author tended to justify practices of targeted killing. All to the contrary, Gentili reported such episode as one of legitimate war-fighting because Pepin was killed in his camp, surrounded by his soldiers, and was therefore well-defended as well as within an active combat zone, albeit being asleep when the deed took place. But he also underlined the difference between such killing and that of Marcellus, qualifying the latter as an assassination insofar as undertaken against a combatant that was defenseless at the time of his killing and not in close proximity to the battlefield[2001]. Emmerich De Vattel actually upheld the same view[2002].

As seen antes, the same understanding pervaded the Oxford Manual as well as the Hague Regulations[2003]. Thus, Johann Caspar Bluntschli's 1867 textbook of international law named *Das modern Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, underlined that combatants could be killed only in combat and that killing enemies not engaged in combat would amount to an unlawful murder[2004]. Similarly, at the beginning of the last century Westlake reiterated that it would be an assassination to kill "individuals, outside the cases of fighting or

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1999 See *supra*, Ch. I, para. 2, sub-para. 2.7(c). See, accordingly, Patricia Zengel, *Assassination and the Law of Armed Conflict*, *supra*, p. 15.

2000 See *supra*, Ch. I, para. 2, sub-para. 2.7(c).

2001 For a thorough recount of these episodes and associated analysis see *supra*, Ch. I, para. 2, sub-paras. 2.6-2.8.

2002 See *supra*, Ch. I, para. 2, sub-para. 2.7(e).

2003 See *supra*, Ch. I, para. III.

2004 Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *supra*, p. 538.

military punishment they have made themselves liable" since it would amount to kill "persons who have had no reason to put themselves on their guard"[2005].

This notion of assassination survived the dawn and subsequent developments of air-warfare as well as the introduction of widespread sniper-killings during the I and II world wars. Indeed, the *UK Manual of Military Law*, published in 1958, defined assassination as "the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans, and the killing or wounding by treachery of individuals belonging to the opposing nation or army"[2006]. It is true that the same manual provided that "It is not forbidden to send a detachment or individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces"[2007] but, chiefly, this further rule did not make any reference to war zones or any other consideration of the kind which could therefore be considered as additional parameters to be taken into account. Read jointly, these rules should be understood as permitting individualized, sudden lethal attacks, but only in cases not proscribed by former, *i.e.* not when the killing is to take place behind the line of battle. Notably, moreover, the use of the conjunctive "and" following a comma in the formulation of the provision makes clear that this prohibition cannot be construed as only referred to treacherous killings behind enemy lines. All to the contrary, the provision at hand clearly establishes two additional standard prohibitions: one referred to treacherous killing per se, the other one, autonomous and self-sustaining, to the killing of persons behind enemy lines. Also significant in this regard is that assassination defined in this fashion only pertains to the killing of selected individuals and does not embrace (and therefore the rule does not forbid) attacks behind enemy lines directed at other military objectives or entire units of the enemy forces.

As it appears, however, this characterization has been seriously challenged by more recent modalities of warfare: notably, the new *UK Manual of the Law of Armed Conflict* specifically provides that there is no explicit limitation to assassination under international humanitarian law[2008]. Most of all, the traditional understanding is

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2005 John Westlake, *International Law, Part II, War*, Cambridge, 1907, p.75.

2006 War Office, *The Law of War on Land, Part III of the Manual of Military Law*, 1958, § 115.

2007 War Office, *The Law of War on Land, Part III of the Manual of Military Law*, 1958, § 115.

2008 UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, , Oxford, 2004, § 5.13: "Whether or not the killing of a selected individual is lawful depends on the circumstances of the case. There is no rule dealing specifically with assassination, but the following rules would be applicable in such a case: a. attacks may not be directed against civilians […]; b. attacks must be limited to military objectives […]; only combatants have the right to participate directly in hostilities […]; enemy combatants may not be killed by resort to perfidy […]" . Most notably, this complete revision of the previous formula also overturns the last additional (and complementary) part of the rule already recalled, which imposed a further restriction related to third parties' involvement in conducts qualifying for assassination. The final sentence of § 115 of the Old military manual indeed read: "If

challenged now more than ever pursuant to the previously recalled U.S. stance that it is permissible to undertake targeted killing operations "beyond hot battlefields like Afghanistan"[2009], and that any person deemed to be an enemy fighter by the U.S. may be killed "outside of areas of active hostilities" such as in Yemen and Pakistan[2010].

The question therefore remains as to whether the turn of perspective endorsed by the new UK military manual and, especially, by the now-pubic and well-established U.S. policy of targeted killing of suspected terrorists is of such nature and strength as to indeed deprive of any significance the previously existing prohibition of assassination as a targeted killing whose unlawfulness was dictated by the contextual interplays of the selectivity process and geographical considerations.

3.3. Expansive versus Restrictive Geographical Understandings.

In light of this topical importance of geographical boundaries for the scope of assassination, it seems appropriate to treat in some higher detail the various theories advanced in relation to the geographical scope of international humanitarian law in general and targeting practices in particular. In this regard, it is widely recognized that one of the main problems posed by the advent of drone technology relates to geographical borders of armed conflicts[2011]. As it has been rightly observed, "determining the parameters of the contemporary battlefield or zone of combat becomes significantly more complicated" [2012] due to two main factors: a) the existence of transnational terrorist networks whose components may be involved in armed conflicts spanning on more the one State's territory[2013]; b) the introduction of new technologies which make it possible for those handling them to carry out lethal

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prior information of an intended assassination or other act of treachery should reach the government on whose behalf the act is to be committed, that government should endeavour to prevent its being carried out".

2009 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *Strenghtening Our Security by Adhering to Our Values and Laws, speech at the Harvard Law School Program on Law and Security*, 16 September 2011 and John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, *Speech at the Woodrow Wilston Center*, *supra*.

2010 Eric Holder, United States Attorney General, *Letter to Honorable Patrick J. Lehay*, 22 May 2013.

2011 Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, *supra*, p. 677.

2012 Laurie R. Blank, *Defining the Battlefield in Contemporary Confclit and Counterterrorism: Understanding the Parameters of the Zone of Combat*, *supra*, p. 14.

2013 This author does not share the stance that a terror network may be itself involved in an armed conflict. To the contrary, as it will emerge from the following analysis, it is submitted here that some components of this network, when sufficiently organized in an armed group in line with the relevant prescription of international humanitarian law, may indeed be involved in a non-international armed conflict against States or other non-state actors in certain locations.

operations against selected targets potentially all around the globe, without significant factual restrictions to their reach.

a) Expansive Geographical Views

Indeed, the idea of a "global war on terror"[2014] against specific persons wherever their location may be has been advanced by the U.S. administration ever since the 9/11 terrorists attacks. Thus, the Bush administration argued, "the battlefield in the global war on terror extends to every comer of the US itself"[2015]. This position has been described by commentators as one of "geographical expansiveness"[2016].

Discussions related to the idea of a global battlefield are not outdated. It is true, indeed, that the U.S. Obama administration has sought to put some distance between its doctrine and that of its predecessor, formally abolishing the notion of a "global war on terror"[2017]. Nonetheless, it has been noticed that some practices of the current U.S. administration rest on the same premises and build on the same notion of a global battlefield[2018]. Chiefly among them, drone strikes are a notable symptom of the U.S.'s understanding that it is involved in an armed conflict with Al-Qaeda which, geographically speaking, has no limitations[2019]. Indeed, the U.S. administration has come to consider that neither time, nor distance, nor the vagueness of the affiliation to Al-Qaeda may represent a deterrent to the application of international humanitarian law or a restriction to targeted killings allegedly

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2014 George W. Bush, *Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11*, 20 September 2001: "Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated".

2015 Warren Richey, *Appeals Court Weighs Who's an Enemy Combatant*, 31 October 2007, http://www.csmonitor.com/2007/103_1/p02s01-usju.html. On the lack of normative value of the phrase "war on terror" see, *inter alia*, Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, pp. 112 and 113.

2016 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, in *Denver Journal of International Law and Policy*, Denver, 2010, p. 109.

2017 White House, *National Strategy for Counterterrorism*, 2011, available at http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf: "The United States deliberately uses the word 'war' to describe our relentless campaign against al-Qa'ida. However, this Administration has made it clear that we are not at war with the tactic of terrorism or the religion of Islam. We are at war with a specific organization—al-Qa'ida".

2018 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 114. In the same vein see also Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, in *University of Pennsylvania Law Review*, Philadelphia, 2013, pp. 1177 and 1178.

2019 See accordingly, Pilar Pozo Serrano, *Limites Geográficos del Campo de Batalla y Derecho Internacional*, *supra*, p. 5.

conducted pursuant to and in compliance with that legal framework[2020]. Accordingly, it has been noticed that U.S. domestic legislation providing authority for the use of military force "contemplates a transnational, borderless war with al Qaeda and associated forces" [2021]. Notably, insistently asked whether or not a "little old lady in Switzerland" donating money to Al-Qaeda could be characterized as an enemy combatant, the United States Government responded in the affirmative[2022]. Also when the notion of "global war on terror" was downsized to that of a war against Al-Qaeda, the U.S. has moreover maintained the position that the opposing party to its conflict was formed also by "other international terrorists around the world, and those who support those terrorists"[2023]. As a matter of fact, as seen *antes*[2024], it is the position of the U.S. Department of Justice White Paper that persons allegedly belonging to Al-Qaeda and its "associated forces" may be targeted anywhere[2025].

With this position, the traditional concept of battlefield has been completely distorted: if according to long-standing appraisals of such notion the battlefield represented the area where confrontations among countering armed forces take place[2026], this newly envisaged version would have the potential to transform into a "battlefield" any area where one or more persons belonging to an organized armed group is located, including areas far away from any cognizable theater of hostilities, such as the territories of perfectly peaceful States[2027].

The absurdity of postulating the existence of a global battlefield or else of the possibility to target a person wherever he may be on the mere premise that some executive power of some State is persuaded (or alleges to be persuaded) of his allegiance with a group labelled as terrorist is further easily discarded in terms of simple logic: as a former CIA attorney notes, it would be indeed ironic to uphold that

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2020 Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War'*, Washington, 2011, available at http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf, p. 5.

2021 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, *supra*, p. 132.

2022 District Court for the District of Columbia, *In re Guantanamo Detainees Cases*, Judgment of 31 January 2005, pp. 443 and 475. Episode also reported in Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, *supra*, p. 109.

2023 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 117.

2024 See *supra*, Ch. IV, para. 4, sub-para. 4.1.

2025 U.S. Department of Justice, *White Paper*, *supra*, pp. 2 and 3.

2026 In higher detail on the notion of battlefield see *infra* in this same paragraph.

2027 Martin Shaw, *War and Genocide: Organized Killing in Modern Society*, Cambridge, 2003, p. 130: "the idea of the battlefield [has] been transformed into one of complex, multiple, overlapping spaces of violence […] it took the ever-ramifying social and physical spaces of industrial societies and made battlefields of them".

an executive branch may target a person for death with no formal due process while it would need judicial permission to bug his phone in order to listen to his calls[2028].

These oxymoronic results have led to the abandonment of the "global war" rhetoric as well as to the search for theories that could support the targeting of alleged Al-Qaeda (and, lately, Da'esh) members also outside well-recognized theaters of hostilities.

b) Expansive Views, Remedial Approaches: Neutrality Law.

In relation to targeting rules and transnational armed groups, authors have argued that a correct approach to avoid the creation of a global battlefield while retaining a right for targeting States to resort to lethal force outside traditional war zones would be to make reference to the law of neutrality.

The laws of neutrality operate only insofar as a State remains indifferent to an ongoing armed conflict, having no impact, be it by action or omission, on the ongoing confrontations: in exchange for their right not to be involved in an armed conflict between other belligerents, neutral States bear therefore a duty of non-participation and impartiality[2029]. As a consequence, as soon as a State loses its neutral stance, for instance by offering sanctuary to some of the belligerents, the laws of neutrality cease to apply, the once-neutral State loses his "neutral immunities"[2030] and the laws of war expand their scope over its territory[2031]. It has therefore been argued that "If a neutral [State] is unable or unwilling to prevent the use of its territory by a belligerent or groups which 'belong' to it, and the consequences of violation of neutral territory are serious, the opposing belligerent party may use force, in the absence of reasonably effective non-forceful measures, to put an end to the misuse of neutral territory to its detriment"[2032]. It has been even suggested that

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2028 Vicki Divoll, *Will We Kill One of Our Own?*, in *The Los Angeles Times*, 23 April 2010. See accordingly Lindsay Kwoka, *Trial by Sniper: The Legality of Targeted Killing in the War on Terror*, in *Journal of Constitutional Law*, Philadelphia, 2011, p. 301.

2029 Michael Bothe, *The Law of Neutrality*, in Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, 1995, p. 485; Antonio Casssese and Paola Gaeta, *Le sfide attuali del diritto internazionale*, *supra*, p. 53.

2030 Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, in *Texas International Law Journal*, Austin, 2011, p. 40.

2031 Yoram Dinstein, *War, Aggression and Self-Defence*, *supra*, p. 25.

2032 Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'*, in Michael N. Schmitt, Louise Arimatsu, T. McCormack, *Yearbook of International Humanitarian Law*, 2011, The Hague, p. 7.

the entire rationale at the basis of the geographical boundaries of armed conflicts should be traced back to neutrality law[2033].

These views represent a remedial approach to the theorization of a limitless-battlefield inasmuch as they suggest that the U.S. could target members of Al-Qaeda wherever they are but only when, albeit being outside hot battlefields, they are located in territories of States more or less willingly harboring them, thus losing their neutrality. Thus, neutrality is alleged to provide "an uncontestable framework for where and when hostilities can be conducted"[2034]. According to this understanding, the laws of neutrality would amount to the dividing line between the application of the laws of war and those of peace (*i.e*. human rights law proper). The battlefield could therefore be defined with a negative formula as anywhere outside the territory of neutral States[2035].

Moreover, as some authors maintain that the conflict between the U.S. and terrorist networks such as Al-Qaeda or Daesh are not properly defined by reference to the traditional laws of armed conflict understanding, they suggest that a hybrid category of armed conflict in between international and non-international armed conflicts exists and define it as one of transnational armed conflicts. They further argue that no geographical limitation should apply to this kind of armed conflict and that the only feasible restriction should be exactly the one imposed by neutrality law, concluding to this end: "The answer for how the boundaries of the battlefield and the scope of IHL's application can be properly determined is found in neutrality law. This is historically how geographical limitations have been imposed upon IHL's scope in international armed conflicts. It was applied in the aftermath of the 9/11 attacks, with at least tacit international approval, to the situation involving the United States, al-Qaeda, and Afghanistan"[2036].

It is submitted here that this understanding is severely flawed on both normative and logical grounds.

For starters, because it is not true that the geographical dimension of armed conflicts is owed to neutrality law alone. Rather, any battlefield-related dimension of

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2033 See, accordingly, Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, *supra*, p. 711: "Neutrality law thus led to a geographic-based framework in which belligerents can fight on belligerent territory or the commons, but must refrain from any operations on neutral territory".

2034 Laurie R. Blank, *Defining the Battlefield in Contemporary Confclit and Counterterrorism: Understanding the Parameters of the Zone of Combat*, *supra*, p. 9. See accordingly Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, *supra*, p. 304.

2035 See, accordingly, Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, *supra*, p. 711.

2036 Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, *supra*, pp. 307-314.

armed conflicts is first of all premised on the necessity that belligerent parties have to conduct their operations over a certain territory. Without this territorial factor, there would be no possibility to assess either the intensity or the protraction of a confrontation. In turns, this implies, especially for internal and other non-international armed conflicts, the impossibility to conduct an assessment as to the existence of an armed conflict in the first place[2037]. In fact, it has been rightly pointed out that neutrality law has over the time progressively lost importance as consistently ignored in State practice[2038].

It is in part due to this reason that neutrality law has a bearing in civil wars (following a recognition of belligerency) and international armed conflicts only, and not also in non-international ones[2039]. This is an assessment recognized also by some of those who argue for its application in relation to the U.S.-Al-Qaeda confrontation[2040]. This is a crucial point: neutrality law only applies to confrontations where opposing parties are belligerents, not mere insurgents or even one insurgent and one belligerent, simply because in the absence of a state of belligerency international law does not envisage the existence of neutrality[2041]. Thus, it has been stressed, "the law of neutrality does not apply to insurgencies; it applies only to international armed conflicts, whether between States or between a State and an insurgent group that has been recognized as a legitimate belligerent" [2042].

Finally, it would not be clear to what extent and in which way the application of neutrality law could help in the identification of combat zones. It would be obviously untenable to postulate that, if insurgents are located in one part of a State's territory, then the whole State should be considered as a theater of war, affording to third States authority to strike at their whim on its entire surface.

All in all, these considerations are sufficient to discard the law of neutrality as a possible relevant test to justify targeted attacks against selected individuals outside the territory characterized by the ongoing armed conflict.

2037 To this end see *infra*, in this same paragraph.

2038 Antonio Casssese and Paola Gaeta, *Le sfide attuali del diritto internazionale*, *supra*, p. 55.

2039 To this end see *1907 Hague Convention V*, Arts. 2, 4 and 5 and *1907 Hague Convention VIII*, Arts. 6 and 10.

2040 Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, *supra*, p. 306. Accordingly see also Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, in *Texas International Law Journal*, Austin, 2011, p. 87.

2041 Robert W. Tucker, *The Law of War and Neutrality at Sea*, Washington, 1955, p. 200. See accordingly Kevin John Eller, *The Use and Abuse of Analogy in International Humanitarian Law*, in Jens David Ohlin, *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge, 2016, p. 272.

2042 Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, in *Texas International Law Journal*, Austin, 2011, p. 141.

c) *Expansive Views, Remedial Approaches: the Doctrines of 'Hot Pursuit' on Land and Conflict Spill-over*

Albeit discarding the possibility that a borderless conflict may exist and acknowledging the importance of territorial considerations for the application of the laws of armed conflict, some authors thus suggest that conflicts may spill-over (or else cross) borders. They suggest that, consequently, targeting rules should apply to the targeting and killing of combatants and fighters who are not in the proximity of any hot battlefield.

Thus, even when the intra-state nature of non-international armed conflicts is recognized as immediately deriving from the treaty-wording "within the territory of one of the parties", even regarded as "self-explanatory"[2043], these authors maintain that such characterization does not in itself imply that "every act of hostilities, without any exception, must be contained within that territory"[2044]. In support to this argument it has been suggested that: a) hostile acts related to an ongoing conflict could be considered as part of such conflict even when waged on the high seas[2045]; b) a party's forces may pursue the other party's across an international border and all the actions thus taken inside the neighboring State would fall within the scope of the ongoing non-international armed conflict[2046]. In an attempt to reinforce this view explicit reference has been made to Arts. 1-7 of the 1994 Statute of the International Criminal Tribunal for Rwanda, mandating the Tribunal to prosecute crimes committed on the territory of neighboring States[2047].

In line with this theory, it has been argued that the laws of armed conflict may find application also in territories belonging to a third state bordering those where the actual conflict takes place, at least when they are used as hideouts by part of the armed forces or fighters of one of the parties involved[2048]. Those supporting this view maintain for instance that "thus, if it can be established that the United States is involved in an armed conflict against Al-Qaeda, the targeting of Osama bin Laden would be judged by reference to international humanitarian law"[2049].

2043 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, p. 24.

2044 *Ibidem*, p. 25.

2045 Natalino Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflict at Sea and the Need for Its Revision*, in Natalino Ronzitti, *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, 1988, p. 11.

2046 By the same token see also Kleffner, *Human Rights and International Humanitarian Law*, pp. 59 and 60.

2047 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, pp. 25-27.

2048 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, *supra*, pp. 250 and 251.

2049 *Ibidem*, p. 251.

It is submitted here that this view too is problematic as it raises two main concerns. First, under this reading it remains unclear what importance would be left for the territorial dimension of armed conflicts, if any at all. Second, it would be even more obscure where, under this view, it would be possible to trace a line between acts of war and acts governed by the law enforcement paradigm even in territories far removed from any battlefield: it would suffice for a State to maintain that a certain person belongs to an organized armed group involved in an armed conflict somewhere in the globe to legitimize a targeted strike against him, wherever he is.

It rather seems more appropriate to underline that, as suggested *antes*[2050], an act performed by belligerents and bearing a nexus with the conflict may amount to a war crime even when performed outside the territories where hostilities do take place. But the *esprit* of international humanitarian law and that of the statute of international criminal tribunals may not be turned onto its head so as to allow for acts of war to be performed outside theaters of hostilities. In this connection, it seems worth underlying that when the commentary to the II Additional Protocol to the 1949 Geneva Conventions suggests "the applicability of the Protocol follows from a criteria related to persons, and not to places"[2051], it does so in order to extend as far as possible the protection afforded by the Protocol itself and not in a view to stretch the possibility to resort to military force outside theaters of hostilities. Confirming this interpretation, it has been noticed that the ICRC Commentary to the 1973 Draft Protocol indeed read: "what is important is that persons affected by the armed conflict should be entitled to the protection of the Protocol, wherever they might be"[2052], placing under the spotlight the need to protect persons from the violence of war, not to extend the authority to conduct hostilities to an endless battlefield. Accordingly, the ICTR Trial Chamber has clarified: "Violations of these international instruments [i.e. Common Art. 3 and the II Additional Protocol] could be committed outside the theater of combat"[2053]. In this connection, therefore, the Tribunal resorts to both a location-based and a personal-nexus approach at the same time[2054], whereby what matters is that a certain war crime maintains a factual and causal nexus with the ongoing armed conflict, because indeed international humanitarian law continues to protect beyond geographically restricted areas. But one thing is to extend the protections offered by international humanitarian law, a whole different one is to uphold that, since *just in bello* protections remains

2050 See *supra*, Ch. II, para. 2.

2051 *Commentary on the Aps*, § 4490.

2052 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, *supra*, p. 251.

2053 ICTR, *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment of 21 May 1999, para. 176.

2054 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, *supra*, p. 252.

applicable beyond formal borders, then States involved in an armed conflict may as well resort to offensive actions under the guise of that protective legal framework[2055].

In accordance with this interpretation, any envisaged application of the doctrine of hot pursuit[2056] on land in connection to non-international armed conflicts characterized by transnational components has been rejected by the international community[2057].

A similar and yet different theory often mentioned when trying to expand the geographical scope of international humanitarian law and make it applicable to cross-border activities is that of conflict spill-over.

A non-international armed conflict, it is argued, can spill-over boundaries in terms of borders and maritime zones. Thus, it is possible that operations conducted within a state's territorial waters extend to the high seas[2058]. Even though this may be way more troublesome due to sovereignty considerations, conflicts may take place across land-borders. It has been noticed that in the 2000s, Colombian forces indeed conducted counter – FARC missions in Ecuadorian territory, where FARC fighters had gone in hiding. Analogously, hostilities carried out by the Lord's Resistance Army in Uganda were partly planned in South Sudan, where the LRA actually had a base. Again, the Armeé de Libération Nationale which triggered the Algerian war of

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2055 Accordingly, Noam Lubell and Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, in *Journal of International Criminal Justice*, Oxford, 2013, p. 10: "The broad territorial interpretation of the scope of IHL advanced by the ad-hoc tribunals is further calibrated by a 'nexus requirement' for the prosecution of war crimes. The function of the nexus requirement serves to distinguish war crimes from purely domestic crimes and occurrences not directly related to the armed conflict. In order for an act or omission to qualify as a war crime, it must have been "closely related to the hostilities." While the modalities governing the operation of the 'nexus requirement' are not instrumental to the discussion at hand, two points merit attention. First, it is clear that the nexus requirement does not demand a strict geographical or temporal proximity to the immediate sphere of hostilities. Second, the existence of a sufficient nexus is not everlasting but dependent upon the actions of an individual […] The advantage of the 'nexus approach' is that it is not territorially bound, but rather focuses on the link between an individual or conduct and an existing armed conflict. Such an approach to the scope of applicability of IHL is supported by the scope of conventional IHL applicable during NIAC".

2056 The doctrine of hot pursuit finds its origins and its proper field of application in the international law of the sea. To this end see *United Nations Convention on the Law Of the Sea*, Art. 111.

2057 Christian J. Tams, *The Use of Force against Terrorists*, in *European Journal of International Law*, Firenze, 2009, p. 371; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 72; and Robert Jennings and Arthur Watts, *Oppenheim's International Law Ninth Edition, vol. 1, Peace*, London, 1992, pp. 386 and 387. The applicability of the hot pursuit doctrine in the context of armed conflicts on land gained attention in the international agenda when South Africa and, later, Rhodesia uphold its validity to adopt military force against armed groups which systematically crossed borders to find sanctuary in neighboring States.

2058 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, p. 25.

independence had basis in Tunisia and it coordinated from there its attacks against French troops[2059]. None of these episodes have however led to a crisis of the international – non-international conflict dichotomy, all fairly falling within the notion of non-international armed conflicts[2060].

At first glance, there seems to be no difference between the reported episodes and the hot-pursuit theory rejected above. The two indeed partly overlap: if it were given for granted that every time a fighter involved in a non-international armed conflict rooted in a State could trigger a conflict spill-over (and the related extension of the application of the laws of war) just by crossing a border, there would be no difference at all between the two. Such a characterization would be affected by the shortcomings underlined above and, ultimately, the targeted person's location would cease to matter.

2059 For further State practice of the sort, even though sometimes more than controversial, see *inter alia*, *Nils Melzer, Targeted Killing in International Law*, *supra*, pp. 259 and 260.

2060 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, *supra*, p. 230.

d) Restrictive Geographical Understanding: Autonomous Intensity Threshold for Conflict Spill-over

There is actually an excellent historical precedent for the suggestion of a global war or else for a war on terrorist networks which would authorize the use of military force wherever an alleged terrorist would be found. A declassified secret memorandum concerning the infamous "Operation Condor" and authored by U.S. Assistant Secretary for Latin-America Harry W. Shlaudeman reports: "Uruguayan Foreign Minister Blanco – one of the brighter and normally steadier members of the group – was the first to describe the campaign against terrorists as a 'Third World War'. The description is interesting for two reasons: - It justifies harsh and sweeping 'wartime' measures. – It emphasizes that international and institutional aspect, thereby justifying the exercise of power beyond national borders"[2061].

It seems to this author that this exact same rationale is the one underlying today's campaigns of targeted killings. This is indeed the rationale that would prevail were geographical considerations restraining the applicability of international humanitarian law to be considered outdated and reformed at once. Indeed, in a further paragraph of the memo, the Assistant Secretary reports that Latin-American leaders were planning "counter-terror operations in Europe" expressly defining European States as potential "battlefields"[2062].

All to the contrary, it has been noticed, "it is clear that location matters when it comes to military operations. When a drone strike occurs within a recognized and accepted theater of active armed conflict, such as Afghanistan or Iraq, there is virtually no question that the attack is covered by the *lex specialis* of the law of armed conflict by virtue of geography. However, when such an attack occurs in areas outside the traditional, geographically limited "hot" battlefield, reasonable people disagree on whether the operation is or should be covered by the law of armed conflict"[2063].

The problem with this assessment is not only related to the dispute over the legitimacy of lethal force outside so called hot battlefields, but also concerns the identification of what an hot battlefield is. In this regard, it has been pointed out, "Beyond the obvious areas of Afghanistan, Iraq, and the border areas of Pakistan, there is, at present, little agreement on where the battlefield is—that is, where this

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2061 Harry W. Shlaudeman, U.S. Department of State, *ARA Monthly Report (July), The "Third World War" and South America*, in The National Security Archive (Unclassified), 3 August 1976, p. 3.

2062 *Ibid.*, p. 12: "We can picture South American activities on a comparable scale, again using the industrial democracies as a battlefield".

2063 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, *supra*, p. 130.

conflict is taking place—and an equal measure of uncertainty regarding when it started and how it might end"[2064].

It has been noted in this connection that conflicts may indeed spill-over borders[2065] but that such eventuality does not create an unrestrained option in favor of the targeting party to use military force whenever and wherever it deems appropriate. All to the contrary, "individuals do not carry the battlefield away with them whenever they relocate to a different territory, otherwise there would be no possibility to disengage from an armed conflict. Rather, it is a question of whether conflict activities themselves have also relocated. In other words, only if the individual or group are continuing to engage in the armed conflict from their new location, then operations taken against them could be considered part of the armed conflict"[2066].

Thus, the fact that units belonging to one of the parties involved in an ongoing armed conflict cross a border with a neighboring State is not sufficient to allow the other party to attack them across the border[2067]. A spill-over indeed triggers the applicability of international humanitarian law across the relevant border only when the intensity threshold for the existence of an armed conflict is indeed autonomously and additionally reached on the portion of territory of the neighboring State in question[2068].

In line with this view, postulating the existence of a conflict between a State and a "terror network" (even when labelling such network as Al-Qaeda) does not comport with international humanitarian law[2069]. Theories of hot pursuit and conflict spill-over do not help legitimizing this as an armed conflict. Nonetheless, it is indeed possible that certain, limited components of this confrontation may really qualify as an armed conflict under international humanitarian law, when a sufficiently structured armed group taking part to the conflict may be identified and when confrontations between such a group and the involved State(s) in a certain territory

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2064 Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, *supra*, p. 711.

2065 Accordingly see, in general, Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, in *Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series*, Harvard 2006, and Lindsay Moir, *It's a Bird! It's a Plane! It's a Non-International Armed Conflict!': Cross-Border Hostilities between States and Non-State Actors*, in Caroline Harvey, Hames Summers and Nigel D. White, *Contemporary Challenges to the Laws of War*, Cambridge, 2014.

2066 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 255.

2067 Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, in *Journal of Conflict and Security Law*, Oxford, 2010 p. 266.

2068 Mordechai Kremnitzer, *Praventives Toten* (*Preventive Killings)*, in Dieter Fleck, *Rechtsfragen der Terrorismusbekampfung durch Streitkrafte*, Baden Baden, 2004, p. 205.

2069 *Alston Report*, *supra*, paras. 53-56; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 10.

reaches the required intensity threshold for protracted armed violence. Thus, it seems hardly disputable that the U.S. is involved in an armed conflict against Al-Qaeda in Afghanistan[2070] as well as with Al-Qaeda until some years ago and now Daesh in Iraq.

Notably, this understanding finds punctual confirmation in state practice and *opinio juris*[2071]. Accordingly, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary executions has found that "violence by various organized armed groups against the same State can amount to separate non-international armed conflicts, but only where the intensity of violence between each group and the State individually crosses the intensity threshold. Isolated drone strikes alone are unlikely to meet this threshold of violence intensity"[2072].

Therefore, "it is of a different legal magnitude to suggest that 'territory' may be understood to mean that IHL – and its rules on the conduct of hostilities – will automatically extend to the use of lethal force against a person located outside the territory of the parties involved in an ongoing NIAC, i.e. to the territory of a non-belligerent State. This reading would lead to an acceptance of the legal concept of a 'global battlefield.' This, however, does not appear to be supported by the essentially territorial focus of IHL, which on the face of it seems to limit IHL applicability to the

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2070 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 121. See accordingly C. Bassiouni, *Legal Control of International Terrorism: A Policy Oriented Assessment*, in *Harvard International Law Journal*, 2002, p. 99; Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 Notre Dame Law Review. 1335, 1342, 1347 (2007)

2071 Thus, for instance, the Commissie Van Advies Inzake Volkenre Chtelijke Vraagstukken, *Main Conclusions of Advise on Armed Drones*, The Hague, July 2013, pp. 2 and 3, has established: "The Netherlands' Advisory Committee on Issues of Public International Law tasked to conduct a study on armed drones has come to the conclusion that "In situations of international armed conflict between states, the applicability of international humanitarian law (IHL) is limited to the territory of belligerent states […] In non-international armed conflicts […] IHL applies only to the territory of the state where to conflict is taking place. The applicability of IHL may be extended if the conflict spills over into another state in cases where some or all of the armed forces of one of the belligerent parties move into the territory of another […] state and continue hostilities from there. IHL does not apply to the territory of a third state simply because one or more members of the armed forces of a belligerent party are physically located on the territory of that third state. IHL only becomes applicable if hostilities are continued from the territory of a third state". In apparent accordance with this suggestion, three EU member states have agreed that "European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way". To this end see Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, The Hague, 2015, *Executive Summary*.

2072 *Heyns Report 2013*, *supra*, para. 63.

territories of the States involved in an armed conflict. A territorially unbounded approach would imply that a member of an armed group or an individual civilian directly participating in hostilities would be deemed to automatically 'carry' the 'original' NIAC wherever they go when moving around the world. Thus, based on IHL, they would remain targetable within a potentially geographically unlimited space. With very few exceptions, State practice and *opinio juris* do not seem to have accepted this legal approach and the great majority of States do not appear to have endorsed the notion of a 'global battlefield'"[2073].

e) Interlocutory Conclusions on the Geographical Scope of International Humanitarian Law

The geography of the battlefield embodies an international humanitarian law built-in limitation to the use of force. In this regard, it has been noted that the battlefield represents "a paradigmatic field in the sense of a space within which fighting can operate legitimately and beyond which it will be hard to meet conditions for respect of the laws of war"[2074]. In other words, "the battlefield is used to effectively define the scope of IHL's application"[2075].

It is true that some of its ramifications intermingle with other issues of international law. This is the case, for instance, of the doctrine of hot pursuit analyzed above[2076]: in discarding the possibility to apply the doctrine of hot pursuit to land-based contexts, it has been stressed that "this doctrine cannot be relied upon as legitimizing use of force on the territory of another state without its consent", leaving the door open for the possibility to resort to armed force in the presence of the territorial state's consent[2077]. Nonetheless, this is a consideration additional to the geographic limitations inherent to the body of international humanitarian law. Indeed, arguably, even with the consent of the territorial State, the pursuing party could not resort to military armed force in an area where armed groups find sanctuary in the absence of ongoing hostilities in such location. In this case, the consent of the territorial State could at best legitimize resort to law enforcement measures on that part of its territory where the armed groups are located. Indeed, the re-called author further specifies: "A state pursuing individuals into the territory of another state and using force in the other state, even if this only appears to be

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2073 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, *supra*, p. 15.

2074 Frederic Megret, *War and the Vanishing Battlefield*, in *Loyola University International Law Review*, Chicago 2012, p. 131.

2075 Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, *supra*, p. 299.

2076 See *supra*, this same paragraph.

2077 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 73.

analogous to a situation of hot pursuit, will be acting lawfully only if its actions conform to the requirements of self-defence"[2078].

In any event, at the end of the day, it is international humanitarian law itself that imposes geographically restrictive parameters[2079]. In this vein, the ICRC has observed that "any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention"[2080]. Moreover, it is international humanitarian law itself that further requires to restrict the fighting between States and armed groups "within limited zones, referred to as combat or conflict zones. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible"[2081]. This is, after all, in line with a textual as well as teleological reading of both Art. 3[2082] common to the *Geneva Conventions* and Art. 1, para. 1 of *Additional Protocol II*[2083]. As for the latter, Art. 1 makes clear that its scope of applicability is limited to armed conflicts taking place "in the territory of a High Contracting Party" between the armed forces of the territorial State and organized armed groups which, moreover, should exercise control over a part of the State's territory. Notably, the scope of application of Art. 3 Common to the *1949 Geneva Conventions* is not limited to conflicts between a State and a non-state armed group within the territory of such State but it does make reference to conflicts taking place within the confines of a single country. In this vein, the ICTR has found that "non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State"[2084]. Accordingly, the Sanremo Manual also establishes that non-international armed

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2078 *Ibidem.*

2079 Of course, some of the relevant geographical limitations are simultaneously established under *jus ad bellum* and sovereignty-related considerations. Thus, for instance, in the recalled example, the absence of the territorial State's consent rises serious issues under Art. 2 of the *U.N. Charter* and may arguably allow the territorial State to react in self-defense against the targeting State. It is not the topical interest of this research to go into details in the permissibility of inter-State use of force and it is therefore considered here that for present purposes nothing more on this issue needs to be added. For reference to *jus ad bellum* – based geographical restrictions to the theater of war see, *inter alia*, *Letter from Anthony D. Romero, Executive Director, American Civil Liberties Union, to President Barack Obama*, 28 April 2010, *available at* http://www.aclu.org/files/assets/2010-4-28-ACLULettertoPresidentObama.pdf, and Mary Ellen O'Connell, *Killing Awlaki was Illegal, Immoral and Dangerous*, in *CNN World*, 1 October 2011, http://globalpublicsquare.blogs.cnn.com/2011/10/01/killing-awlaki-was-illegal-immoral-and-dangerous.

2080 ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Geneva, 2008, p. 3.

2081 Mary Ellen O'Connell, *Lawful Use of Combat Drones, Hearing Before the Subcommittee on National Security and Foreign Affairs*, Washington, 28 April 2010, p. 4.

2082 *1949 Geneva Conventions*, Common Art. 3.

2083 AP II, Art. 1, para. 1.

2084 ICTR, *Musema Case*, Judgment of 27 January 2000, para. 248.

conflicts are "confrontations between a State authority and an armed group or among armed groups within the territory of a State"[2085]. It nonetheless remains fully applicable when hostilities are conducted by two parties on the territory of a third State[2086]. After all, were we to accept an opposite conclusion a gap of protection would remain between international armed conflict and non-international armed conflict understood as merely embracing internal hostilities[2087].

Notably, this conclusion does not contradict the understanding that conflicts may also spill over borders. In fact, what it suggests is that, when crossing international borders, armed forces do enter a different zone where, by default, no hostilities are taking place and therefore international humanitarian law finds no application. If and when armed confrontations across the border rise to the level of intensity necessary to characterize them, autonomously, as an armed conflict, then the default presumption is reverted and a new zone of active combat justifies the full-fledged applicability of the law of armed conflict paradigm[2088].

That the body of international humanitarian law itself is inextricably linked to, if not grounded on, a geographical dimension, finds further confirmation in the scope of applicability of, respectively, *Additional Protocol II* and Art. 3 Common to the *1949 Geneva Conventions*. The applicability threshold of *Additional Protocol II* explicitly requires the involved non-state actors to "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations"[2089]. On the contrary, Art. 3 does not openly provides for control over territory on part of the organized armed group in order to find application. Nonetheless, the *ICRC Commentary to the IV Geneva Convention* clarifies: "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respect similar to an international war, but take place within the confines of a single country. In many cases, each of the parties is in possession of a portion of the national territory, and there is often some sort of front"[2090].

2085 *Sanremo Manual on Non-International Armed Conflicts*, *supra*, para. 105.

2086 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 101 and Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 258.

2087 For a detailed account of the various theories elaborated on the point in the last years see *inter alia* Lindsay Moir, *'It's a Bird! It's a Plane! It's a Non-International Armed Conflict!': Cross-Border Hostilities between States and Non-State Actors*, *supra*, pp. 71-94. In accordance with the understanding embraced in the present work, the author concludes that "cross-border hostilities between states and non-state actors are non-international in nature" (*Ibidem*, p. 92).

2088 See *supra* in this same paragraph an analysis of conflict spill-over.

2089 *AP II*, Art. 1, para. I.

2090 Jean Pictet, *ICRC Commentary to the Geneva Conventions of 1949, Vol. IV*, *supra*, p. 36.

This assessment finds full confirmation in international jurisprudence. In this regard, the ICTY has found that, whereas a state of armed conflict "is not limited to areas of actual military combat" it is indeed subject to geographical limitations, as it exists "across the entire territory under the control of the warring parties"[2091]. Notably, coupled with the dictum of the already mentioned *Tadic Interlocutory Appeal Decision* that "international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there"[2092], this entails that international humanitarian law remains applicable to territories beyond the control of States which are nonetheless under the control of organized armed groups and thus implies that it is not applicable to territories which are not under the control of either party[2093].

A series of data indicate that, in practice, a zone-related subdivision of areas of war impacts targeting practices. Thus, the already mentioned Duch Advisory Committee opinion has underlined that a targeted strike "is lawful within the context of IHL if […] the attack is carried out within the area to which IHL applies", further specifying that "The fact that the persons targeted in many cases cannot defend themselves against such an attack does not detract from its lawfulness"[2094]. Notably, this reference to defenselessness is only made in relation to attacks conducted on the battlefield, since only in that framework the advisory opinion considers IHL applicable.

Furthermore, many States already consider such subdivision as a matter of policy. In this vein, the practice of the U.S. itself shows that, in reality, different approaches are adopted for targeted killings performed in traditional "hot battlefields" and those carried out outside such areas, confirming that a zone-related division of the conflict does retains full relevance. Indeed, whereas U.S. officials consistently maintain that the U.S. has full authority to conduct strikes and other air raids outside what they term as "hot battlefields" (referring with such expression to the whole territories of Afghanistan and Iraq), outside such areas targeted strikes are only conducted against "high value targets" or "specific senior operational leaders",

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2091 ICTY, *Prosecutor v. Kunarac and others*, Appeals Chamber Judgment, *supra*, para. 56.

2092 ICTY, *Prosecutor v. Tadic*, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, *supra*, para. 70.

2093 See accordingly Noam Lubell and Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, in *Journal of International Criminal Justice*, *supra*, p. 4: "At the same time however, it also suggests that any territory potentially outside the control of the Parties to the conflict might not be subject to the application of IHL", noting however that it would be rather paradoxical not to apply international humanitarian law in areas escaping the control of either party where nonetheless hostilities do occur.

2094 Commissie Van Advies Inzake Volkenre Chtelijke Vraagstukken, *Main Conclusions of Advise on Armed Drones*, The Hague, July 2013, p. 3.

i.e. persons whose death would cause a significant disruption to the terror networks they belong to[2095]. It thus clearly emerges that a distinction is made by the U.S. itself between "hot" battlefields and other zones in terms of both policy (that is, who can be struck where) and procedures (who among U.S. officials has the authority to approve of targeted strikes respectively on and outside hot battlefields)[2096].

This understanding seems to be more than a matter of mere policy when taking into account that Courts have based their rulings on a distinction between zones of active hostilities and other areas where theoretically international humanitarian law would be applicable but *de facto* no hostilities are ongoing. By this token, a U.S. court has averred that comparing the arrest of Yaser Hamdi following an encounter in Afghanistan to that of Jose Padilla, apprehended upon disembarking a plane in Chicago "is to compare apples and oranges"[2097]. Analogously, other U.S. courts have traced a difference between individuals apprehended in a theater of active military combat like Afghanistan and persons arrested in zones "far removed from any battlefield"[2098].

State practice shows that this geographical subdivision also directly concerns targeting practices and, in particular, practices aimed at delivering lethal force at the detriment of individuals designated for death away from the battlefield. Thus, a set of military manuals still establish, as the *1958 British Military Manual* used to do, that "Assassination, that is, the killing or wounding of a selected individual behind the line of battle by enemy agents or unlawful combatants is prohibited"[2099].

3.4. Suggested Zone Division

2095 Brennan, *Strenghtening Our Security by Adhering to Our Values and Laws, speech at the Harvard Law School Program on Law and Security*. Accordingly, Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, in *Journal of National Security Law and Policy*, Washington D.C., 2012, pp. 539 and 575; Karen deYoung, *Brennan Reshaped Anti-Terror Strategy*, in *Washington Post*, 25 October 2012; and Greg Miller, *U.S. Set to Keep Kill Lists for Years*, in *Washington* Post, 24 October 2012.

2096 Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, *supra*, p. 1202.

2097 J. Wilkinson, *Concurring Opinion* United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld, Denial of Rehearing en blanc*, 8 January 2003.

2098 District Court for the District of Columbia, *Case of Fadi Al Maqaleh and Ahmad Al Maqaleh v. Robert Gates and others*, Judgment of 2 April 2009.

2099 Australia, *Commander's Guide,* 1994; New Zealand, *Military Manual*, 1992. Notably, as already observed antes in relation to the old *British Military* Manual, in both cases prohibitions related to perfidy and treachery are autonomously established under separate sections and therefore this provision cannot be read as a subset of those conducts.

Also in times of armed conflict, the lawfulness of a targeted killing is to be evaluated against the backdrop of different legal parameters characterizing the applicable legal categories, which vary depending on factual scenarios. When a target is located outside such an area, the use of lethal force against pre-selected individuals is problematic because of two main reasons: first, it may be that the target is in the territory of a State different from the one targeting him, which could entail a violation of the former State's sovereignty. Second, and most notably for the *pro persona* angle taken in this study, the remoteness of the target from a recognized theater of active hostilities may hint at his disengagement from a functional membership to the parties actually involved in the ongoing confrontations, regardless of the State on whose territory the individual is located. In this regard, it has been suggested that the targeting State should verify whether the person has actually disengaged and, in case of a positive outcome of the verification process, the governing framework should be that of law enforcement, rather than the law of armed conflict paradigm[2100].

It is submitted here that this cannot be but the starting point of a thorough analysis of the geography of targeting. Thus, in case of non-international armed conflicts, it surely is true that "international humanitarian law continues to apply in […] the whole territory under the control of a party, whether or not actual combat takes place there"[2101]. However, does this also entail that the whole territory under the control of one of the parties is to be considered as an area of active hostilities, under the test suggested above? In turns, as far as the law of targeting is concerned, does this entails that any person alleged to be a fighter may be targeted and killed throughout that entire area?

The first question that needs to be addressed in this regard is when and where a person should be considered in an area of active hostilities. It is submitted here that, besides considerations that would restrain the applicability of international humanitarian law to certain territories, it could be useful to further subdivide wartime areas into more precise geographic zones so as to envisage a possible geographical limitation to targeted attacks *qua* reference to the precise location of the target.

International humanitarian law already knows of such further subdivision. Accordingly, the notion of battlefield relates to the exact location where a battle is (or more battles are) fought, whereas the notion of combat area refers to the territory

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2100 Saby Ghoshray, *Targeted Killing in International Law: Searching for Rights in The Shadow of 9/11*, *supra*, p. 365-368.

2101 ICTY, *Prosecutor v. Tadic*, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, *supra*, para. 70.

where combat forces conduct their operations[2102]. Broader than the battlefield and combat areas is the theater of operations (or else "zones of military operations"), which embraces the entire territory "where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations are located"[2103]. All-encompassing, then, is the definition of a theater of war, which includes "the entire land, sea, and air area that is or may become involved directly in war operations"[2104], insofar as such areas are within the territorial limitations where international humanitarian law does find application.

1	Battlefield	Location of the battle.
2	Combat Zone	Area where combat forces conduct operations.
3	Zones of Military Operations(or Theater of Operations)	Territory where forces of the parties involved in current military operations are located.
4	Theater of War	Areas involved or potentially involved in war operations.

Enlisted From the Areas Most Proximate to the Fight to the Broadest Relevant Zones.

This subdivision of the relevant wartime areas has been called into question lately due to the inherently scattered nature of asymmetric conflicts first and, then, in relation to the introduction of new technologies and weapon platforms which turned into reality the possibility to target persons more or less involved with hostilities even when located afar from any traditionally recognized battlefield or even from any cognizable theater of war. As a consequence, some authors have suggested the

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2102 Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms*, 2001, *available at* http://www.dtic.mildoctrine/new_pubs/pl_02.pdf. See accordingly Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, *supra*, p. 1203, arguing that, even though the Geneva Conventions do not provide an exact definition of the terms "battlefield" and "combat zone" (which they do however employ) the context indicates that battlefield is referred to "those areas where fighting is currently taking place or very likely to occur".

2103 *Commentary on the APs*, *supra*, § 617. In similar terms, the zone of military operation is defined as "areas, for example, where there are troop movements but not fighting, and even in those where there is no actual movement of troops but in which the High Command wishes to be able to move them at short notice". To this end see Jean Pictet, *ICRC Commentary to the Geneva Conventions of 1949, Vol. IV*, *supra*, p. 163.

2104 See accordingly, on these notions, Laurie R. Blank, *Defining the Battlefield in Contemporary Confclit and Counterterrorism: Understanding the Parameters of the Zone of Combat*, *supra*, p. 3.

introduction of a different and more vague notion, that of "zone of combat", which would include every area where military actions may actually be conducted[2105].

Differing greatly from the system described above, this notion is not functional to refine the definition of areas where the laws of armed conflict apply. It has instead a descriptive nature, flowing from a post-hoc assessment of where military force has been deployed. Accordingly, whereas the notions recalled *antes* would restrict to certain areas the possibility of belligerent parties to conduct hostilities, the notion of zone of combat actually assumes that a fighter brings the battlefield with himself wherever he goes, being posited on the assumption that a targeting strike may take place wherever the target is located and that, once it is performed, such area automatically becomes a new "zone of combat".

The notion of zone of combat has particular ties with the fight against terrorism and those theories suggesting that such struggle may be qualified as an actual war, positing that a zone of combat may extend well-beyond traditional theaters of war and reach to location where a terrorist attacks take place, are planned or even only financed[2106].

In line with this view, it has been argued that the traditional zone-related sub-division of the theater of war should be considered somewhat outdated, as not adequate for present war-effort purposes. This radical friction between the reported traditional subdivision of the theater of war and recent practices is well captured in the words of a commentator who has suggested: "Contemporary conflicts pitting states against terrorist groups […] significantly challenge traditional frameworks for understanding the parameters of the zone of combat. Simply superimposing the approach applicable in traditional armed conflict onto conflicts with terrorist groups does not provide any means for distinguishing between different conceptions of the battlefield"[2107]. Whereas such an assertion may seem sensible at first glance, it is built upon a logical inversion. It gives the idea, in other words, that it should be possible to design a legal parameter better suiting real or perceived changes in circumstances, rather than requiring new conducts and technologies to comply with existing norms. If this were the case, however, the law could not only be bended but even radically deformed, one-sidedly, by any State who, following a post hoc factual assessment, should determine that the law as it stands imposes certain limitations that do not favor its tactics and techniques. It is this line of thinking that ultimately leads

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2105 Amos N. Guiora, *Military Commissions and National Security Courts After Guantanamo,* in *Northwestern University Law Review Colloquy and Survey Methodology*, Chicago, 2008, pp. 199 and 200.

2106 Laurie R. Blank, *Defining the Battlefield in Contemporary Confclit and Counterterrorism: Understanding the Parameters of the Zone of Combat*, *supra,* pp. 4 and 5.

2107 *Ibidem*, p. 20.

to posit theories flatly rejected by the international community, such as that of a global battlefield where a state can strike at whim wherever it deems appropriate[2108].

Indeed, in relation to the conflict between the U.S. and Al-Qaeda, it has been stressed that the latter "is not an entity temporally or geographically tied to the prior de facto government of Afghanistan, but rather an independent force engaged in a private war"[2109]. Analyzing this phenomenon against the background of international humanitarian law, one should however conclude that it may not qualify as a war at all, rather than trying to stretch the applicability of targeting rules not only to areas traditionally considered outside hot battlefields but even to locations where international humanitarian law as a legal regime does not find application at all[2110]. First because since the creation of nation States the notion itself of "private war" finds no further place under international law; second, because an armed conflict properly so called cannot exist without a geographic tie: how else could one assess the existence of the intensity needed to trigger the applicability of international humanitarian law itself? The only way to qualify as an armed conflict confrontations with non-state entities which are scattered all around the globe and are not characterized by any specific location where hostilities are conducted is to resort to the logical inversion recalled above, pursuant to which a perverse interpretation of international humanitarian law would lead to retain feasible the existence of a global armed conflict. Thus, in line with the analysis conducted *antes*[2111], it should be stressed that conflicts between States and non-state actors may only take place within certain limited geographic areas within a State[2112]. They may spill-over borders and extend to other regions or States, but in order to do so there needs to be a showing that hostilities do take place in those countries, with an intensity and protraction sufficient to autonomously trigger the applicability of the laws of armed conflicts on those territories as well. In any event, the parties involved cannot be "terror networks" but should meet the minimum criteria necessary to qualify as organized armed groups, at least in their components allegedly involved in an armed conflict[2113]. As a consequence, the U.S. may actually have been engaged in an

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2108 See *supra*, this same paragraph.

2109 Lawrence Wright, *The Looming Tower: Al Qaeda and the Road to 9/*11, New York, 2006, p. 245.

2110 In support of this view see for instance Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, *supra*, p. 20: "'war on terror'-related 'hostilities' outside Afghanistan (and Iraq) are, mostly, not armed conflicts at all. If these engagements fulfill the threshold of armed conflicts, they could, as a maximum, be dealt with under the law of noninternational armed conflicts".

2111 See *supra*, this same paragraph for questions of conflict spill-over and autonomous jus ad bellum criteria.

2112 Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, *supra*, p. 3: "For international humanitarian law to be applicable to a transnational armed group, the latter must be involved in an armed conflict, or, as a minimum, an armed conflict between other parties must exist on the territory of the state where the armed group acts".

2113 *Ibidem*, pp. 13 and 14, stressing that whereas Art. 1, API requires armed groups to be "under a responsible command, exercise such control over territory as to enable [it] to carry out sustained and

armed conflict against some components of Al-Qaeda in Afghanistan, Iraq and even in North Waziristan (northern regions of Pakistan bordering Afghanistan)[2114], but this engagement would not be sufficient to extend their targeting authority outside such regions[2115].

Critiques to the traditional geographical delimitation of the zones of hostilities further argue that, if this approach were to be maintained, a person that is a legitimate target could be subjected to attack in a certain State while gaining complete immunity simply by crossing a border with a neighboring country[2116]. However, this seems a rather small price to pay considering what an alternative view would entail. It has been noticed, to this end, that "the implications of allowing the use of armed force to capture or kill enemies outside a country's own territory, and outside a theater of traditional armed conflict, may include spiraling violence, the erosion of territorial sovereignty, and a weakening of international cooperation"[2117].

It is submitted here that, even more significantly, allowing for direct attack against selected individuals removed from the theater of hostilities would lead to the targeting of persons who have no nexus with the conflict in the very moment military force is deployed at their detriment and, therefore, it would ultimately lead to a violation of their fundamental rights. This consideration holds true whether or not the individual in question crosses an international border. In particular, he could abandon the theater of hostilities simply removing himself from the actual battlefield, remaining however within the same State (for instance, moving to the Government-controlled area). Yet, also in this case, as will be shown shortly, the State could not lawfully target him for death.

3.5. Rationale Supporting a Zone Division.

concerted military operations and to implement this Protocol", Art. 3 common to the Geneva Conventions, more likely to apply to transnational armed groups, does not specifically spell out the organizational standards it requires but that, in any case it is preferable to require from an armed group the minimum degree of organization necessary to comply with all rules of IHL of noninternational armed conflicts". In higher detail on organized armed groups see *supra*, Ch. V, para 2.

2114 Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, *supra*, p. 42: "Some aspects of the fight against Al Qaeda, however, are genuine non-international armed conflicts".

2115 Mary Ellen O'Connell, *Combatants and the Combat Zone, supra*, pp. 845 and 858 and Mary Ellen O'Connell, *Lawful Use of Combat Drones*, *Hearing Before the Subcommittee on National Security and Foreign Affairs, supra*.

2116 Michael W. Lewis, *Rise of the Drones II: Examining the Legality of Unmanned Targeting, Hearing Before the Subcommittee on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform*, 2010.

2117 Gabriella Blum and Philip Heymann, *Law and Policy of Targeted Killing*, in *Harvard National Security Law Journal*, Harvard, 2010, p. 163.

Depriving another person of his or her life is never a right, not even in times of war. Accordingly, a "right to kill" is nowhere to be found in the entire body of the laws of war. Also in times of armed conflicts, as a consequence, killing needs a justification[2118]: combatants, indeed, are immune for the lawful acts of war they carry out. The notion of immunity itself implies the act or set of acts covered by it could not be otherwise performed in the exercise of a right. The entire rationale upon which killing the opposing party's combatants or fighters is generally justified during the conduct of hostilities stands is the presumption of the threat that such combatants and fighters pose. In line with this argument, it has been observed that even in times of hostilities "the state should not be permitted to kill absent a strong basis for believing that the individual poses an active, ongoing, and significant threat"[2119]. Therefore, "[i]n a zone of active hostilities, particularly when troops are on the ground and exposed to risk, the low-level foot soldier arguably poses such a threat. Outside that zone, lethal force is not justified simply on the basis that an individual once attended a training camp and may have fought alongside al Qaeda members in Afghanistan, unless there is an additional basis for believing that he poses a specific and imminent, or ongoing and significant, threat"[2120].

Therefore, in a battlefield-like situation, where the apprehension of the enemy is almost impossible and members of the opposing armed forces indeed pose the threat they are presumed to embody, resort to force, even intentional lethal force is necessarily justified[2121]. Thus, "In an armed conflict, in the zone of hostilities, combatants may be targeted without warning or detained without trial. […] Killing combatants or detaining them without trial until the end of hostilities is consistent with the principles of necessity and proportionality, as well as general human rights, when related to a zone of actual armed hostilities"[2122].

2118 In this regard, it has been pointed out that "the killing of combatants is, hence, justified by considering soldiers on both sides not as individuals, but as agents of their respective polities". To this end see Stefanie Schmal, *Targeted Killings – A Challenge for International Law?*, *supra*, p. 254.

2119 Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, *supra*, p. 1214.

2120 *Ibidem.*

2121 Marco Sassòli and Laura M. Olson, *The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, *supra*, 2008, p. 613.

2122 Mary Ellen O'Connell, *Combatants and the Combat Zone*, *supra*, p. 119. Accordingly, Jordan J. Paust, *Human Rights on the Battlefield*, in *George Washington International Law Review*, Washington D.C, 2015, p. 532: "With respect to battlefield killings of enemy combatants that are permissible under the laws of war, such forms of deprivation of life would not be arbitrary, irrational, capricious, or unreasonable. Similarly, the lawful targeting under the laws of war of civilians who are directly participating in international hostilities would not be arbitrary, irrational, capricious, or unreasonable".

It is therefore the existence of intense fighting and of the threat that comes with it that justifies resort to expedient wartime rules[2123]. However, as much as that threat justifies a deprivation of life, the lack of that threat should and does impose restrictions to the use of lethal force. Consequently, as the concept of armed conflict is inextricably linked to territory because only on a certain physical space belligerents (and insurgents) may conduct "intense, protracted, armed exchanges"[2124], the notions of theater of operations, zones of combat or conflict zones are inextricably related to the geographical area(s) where that threat is present, even just at potential stages. By this token, it is to these areas that, geographically speaking, the use of lethal force is restricted[2125].

Accordingly, a distinguished scholar has noted: "Military operations will not normally be conducted throughout the area of war. The area in which operations are actually taking place at any given time is known as the 'area of operations' or 'theatre of war.' The extent to which a belligerent today is justified in expanding the area of operations will depend upon whether it is necessary for him to do so in order to exercise his right of self-defence. While a state cannot be expected always to defend itself solely on ground of the aggressor's choosing, any expansion of the area of operations may not go beyond what constitutes a necessary and proportionate measure of self-defence. In particular, it cannot be assumed—as in the past—that a state engaged in armed conflict is free to attack its adversary anywhere in the area of war"[2126]. In this vein, it should be considered that, at least in case of non-international armed conflicts characterized by hostilities taking place in certain, restricted areas, it would be meaningless and counter-productive to consider international humanitarian law applicable to the entire territory of the parties involved[2127].

2123 Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, *supra*, p. 1194.

2124 Mary Ellen O'Connell, *Combatants and the Combat Zone*, *supra*, p. 114. See accordingly Kevin Jon Heller, *Rebuttal: Judge Bates' Infernal Machine*, in *University of Pennsylvania Law Review*, Philadelphia, 2011, p. 183, available at http://www.pennumbra.com/debates/pdfs/Targeted_Killing.pdf arguing that in the absence of combat that is "sufficiently protracted or intense" IHL cannot apply to authorize targeted killings and that, instead, IHRL governs".

2125 Mary Ellen O'Connell, *Combatants and the Combat Zone*, *supra*, p. 116 and Mary Ellen O'Connell, *Lawful Use of Combat Drones*, *Hearing Before the Subcommittee on National Security and Foreign Affairs*, *supra*, p. 5. See accordingly John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, in *Hastings International and Comparative Law Review*, San Francisco, 2004, p. 276: "Wars often have a geographic limitation, so that we might employ such terms as 'theatres of war,' or 'regions of warfare".

2126 Christopher Greenwood, *Scope of Application of Humanitarian Law*, *supra*, p. 53.

2127 See accordingly Noam Lubell and Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, *supra*, p. 7.

It has been correctly suggested that recent practice actually supports this understanding[2128]. Thus, for instance, in 2012 the ICRC itself considered that international humanitarian law was applicable to a certain region of Syria (Baba Amr in Homs)[2129] but that the criteria of intensity, duration and organization were lacking in other parts of the country and that, therefore, in those regions the laws of armed conflict would not find application[2130].

Notably, this holds true for both international and non-international armed conflicts alike[2131].

a) IHL Principles

These considerations do not stand in a vacuum but find further strength in that an attack against a person removed from the battlefield is *per se* in contradiction with basic principles of international humanitarian law.

Both the principle of necessity in its restrictive dimension[2132] and the principle of humanity, autonomously and additionally, prevent the premeditated killing of a preselected individual when the latter is not in an area of hostilities, as he does not take part, in that very moment, to that group activity that war making is, and therefore does not represent, in that very moment, the threat that the presumption justifying killings in battlefield-like situations would assume him to be. In line with this reading, it has been uphold that arguing otherwise "could […] lead one to

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2128 *Ibidem*, p. 8.

2129 S. Nebehay, *Some Syria Violence Amounts to Civil War: Red Cross*, in *Reuters*, Geneva, 8 May 2012.

2130 S. Nebehay, *Exclusive: Red Cross ruling raises questions of Syrian war crimes*, in *Reuters*, Geneva, 14 July 2012.

2131 Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, *supra*, pp. 4 and 5, arguing that "A transnational armed group, such as Al Qaeda in 2001 in Afghanistan, may well be under the direction and control of a state […] If IHL of international armed conflicts applies somewhere to a transnational armed group [because it is under the direction and control of a State], it does not ensue that it applies to that group everywhere […] Under consistent state practice, a conflict had to be divided into components". In support to this argument see Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Leiden, 1989, p. 277: "Portugal did not react to India's seizure of Goa in 1961 by seizing Indian shipping in European waters where Portugal enjoyed naval superiority. Similarly, had a British warship encountered an Argentine warship in an area of the Pacific, far removed from the Falkland Islands, at the time of the Argentine invasion, it would not have been a lawful measure of self-defence for one ship to engage the other un-less there was clear evidence that the other ship was about to launch an attack". By the same token, Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, *supra*, pp. 343 and 361 arguing that, by today's standards, the World War II shooting of Admiral Yamamoto would be unlawful due to its remoteness from any cognizable battlefield).

2132 See *antes*, Ch. II, para. 3.

conclude that a large portion of the world falls within the zone of combat, by dint of terrorist groups having a presence in many countries and terrorist attacks taking place in many countries […] Thus, the principle of humanity more rationally supports a narrow view of the zone of combat's parameters, one that seeks to protect the most people by keeping conflict, and the battlefield, away from their countries altogether. Because the risk of mistake increases dramatically as we move farther away from the conventional battlefield, humanity and its accompanying limitations on the use of force are ever more critical"[2133].

Moreover, some authors have suggested that "targeted killing may have some direct implications for the overall morality of armed conflict and combat as such: the evolving drone technology removes the soldier from the actual battlefield and with it the closeness and 'intimacy' of war. UAV technology has created a mechanical and factual distance between operator and his 'target', which acts like a moral distance: targeting killings may have removed any remnants of 'humanity of combat' and produced the factual dehumanization of the enemy"[2134].

This reference to morality actually finds its direct normative correspondent in the dictum of the *1868 Saint Petersburg Declaration*, which has attained customary status, and establishes that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy […] this object would be exceeded by the employment of armed which uselessly aggravate the sufferings of disabled men, or render their death inevitable"[2135].

Arguing that these considerations alone should not suffice to set restraints on the use of force, some authors have advanced a parallelism between targeted killings and sniper fire. Thus, for instance, a commentator suggests: "An early example of 'targeted killing' in the history of armed conflict can be found in the military tactics applied mainly by snipers. Prominent and well documented examples of sniper warfare can be found in the annals of the Eastern Front during World War II: German and Soviet forces used snipers to annihilate systematically the enemy's mid-level military leadership: German losses to Soviet snipers were so severe during the battle for Stalingrad in autumn of 1942 that officers as well as non-commissioned officers had to adapt means of camouflage to blend in with their (enlisted) men and in order to avoid being targeted by enemy snipers"[2136].

[2133] Laurie R. Blank, *Defining the Battlefield in Contemporary Confclit and Counterterrorism: Understanding the Parameters of the Zone of Combat*, *supra,* p. 30.

[2134] Sascha-Dominik Bachmann, *Targeted Killings: Contemporary Challenges, Risks and Opportunities*, in *Journal of Conflict and Security Law*, *supra,* p. 26.

[2135] *1868 Saint Petersburg Declaration*.

[2136] Sascha-Dominik Bachmann, *Targeted Killings: Contemporary Challenges, Risks and Opportunities*, *supra*, p. 6.

Another one argues that "low-level militants in an armed conflict do not receive special human rights protections against targeted killing. Indeed, that would be like saying that an Axis soldier in World War II could not be killed by an Allied sniper on the field of battle"[2137].

The crucial point of this latter assessment in relation to the present analysis is however that during World War II those soldiers were: a) legitimate military targets pursuant to a status based assessment; b) actively and directly involved in military operations on a factual as well as *de jure* basis; c) notably, on the field of battle. Under these very same conditions a targeted killing would not appear today to be either in breach of the laws of armed conflicts nor of human rights law parameters. Problems rise, however, exactly when one or more of the recalled conditions are lacking. Thus, for instance, when a person, even a combatant, is not on the field of battle at all.

What is more, the principle established by the recalled *Saint Petersburg Declaration* lives on in other provisions of international humanitarian law, and informs them of its rationale. Chiefly among them is the prohibition of poison which, as we have had occasion to underline, is rooted in its irremediably deadly effects[2138]. In fact, it would otherwise make no sense to forbid on the one hand poison, traditionally banned for its potential to kill a person afar from the battlefield when involved in activities bearing no linkages with ongoing hostilities, and allow at the very same time resort to methods of killings which could achieve the exact same results. This is all the more true in consideration of the fast-growing lethal technologies which may deprive a person of his life wherever he is not only through missions of special commando units or unmanned aerial vehicles-delivered missile strikes, but also by resort to micro-combat drones designed to deliver lethal injections. In particular in this last case, it would be particularly troublesome to identify actual differences with poisoning[2139].

b) Denial of Quarter Repercussions

2137 Mark V. Vlasic, *Assassination and Targeted Killing, A Historical and Post-Bin Laden Legal Analysis*, *supra*, p. 298.

2138 See *supra*, Ch. III, para. 4, subpara. 4.5.

2139 It is worth stressing that lethal micro-drones are not science fiction. For instance, the U.S. Defense Advanced Research Projects Agency has already developed the "Nano Hummingbird" for reconnaissance missions. As suggested by the U.K. Ministry of Defence, this kind of micro-drones can be easily weaponized and even further miniaturized. To this end see Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, *supra*, p. 9.

Some commentators have further suggested that the denial of quarter prohibition entails in and by itself an absolute ban on targeted killings: "A policy of targeted killing seems intractable under any circumstance, even if applied to regular combatants. There is a more than subtle distinction between situational fighting, where combatants have the opportunity to abdicate or to waive a white flag ostentatiously, and a willful plan to carry out an assassination without providing the human target the opportunity to surrender"[2140].

It is submitted here that, on the basis of the previously conducted analysis of the prohibition of denial of quarter under international humanitarian law[2141], this conclusion seems accurate, especially if referred to targeted killings occurring outside zones of active hostilities, *i.e.* in areas characterized by situational fighting. As made clear above, indeed, the existence of linkages between denial of quarter and considerations related to the physical location of the combatant or fighter is accurately established in Israel's 1998 *Manual on the Laws War*, which clarifies that it is unlawful to harm combatants (and therefore, all the more so, fighters) "outside the frame of hostilities"[2142]. A literal reading of the provision seems to coincide with the teleological understanding advanced here. In addition, Israel's *Manual on the Rules of Warfare* confirms that the rationale for exempting from attack persons *hosrs de combat* is that a combatant knowingly risks his life while participating in the military effort[2143]. He does not do so, however, when he is behind the lines of battle or outside the combat zone and therefore there would be no justification to deprive him of his life in such situation. Indeed, as the *Manual* itself clarifies, the relevant test to understand whether a combatant is "outside the frame of hostilities" is to verify whether he "take[s] an active part in fighting"[2144]. It seems worth to recall here that numerous other national military manuals share the same reference to active involvement in hostilities as a determinative factor to assess whether a person may or may not be considered *hors de combat*, and this assessment is not limited to civilians directly participating in hostilities but also refers to combatants properly so called (and, *a fortiori*, to members of organized armed groups, however qualified)[2145].

In line with this assessment, it has been argued, "a target cannot be decoupled from the theater of hostilities, as the characteristics of the physical location grants the

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2140 Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, in *Hastings International and Comparative Law Review*, San Francisco, 2004, p. 884.

2141 See *supra*, Ch. III, para. 3.

2142 *1998 Israel's Manual on the Laws of War*.

2143 *2006 Israel's Manual on the Rules of Warfare*.

2144 *Ibidem.*

2145 See *supra*, Ch. III, para. 3.

target certain rights based on the nature of hostilities, a framework that can be recognized as regionalizing a functional combatant"[2146].

[2146] Saby Ghoshray, *Targeted Killing in International Law: Searching for Rights in The Shadow of 9/11*, *supra*, p. 379.

c) Human rights oriented analysis.

As explained at length *antes*[2147], when rules of international humanitarian law themselves are not entirely clear as to their scope, the interrelation of this legal regime with that of human rights law may lead to interpret the former in light of the latter, when not even to an entire re-surface and full application of human rights law standards. In line with this assessment, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has found that "to the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law"[2148].

Thus, also in relation to the geographical dimension of armed conflict, it has been noted that human rights law may find application, be it as an interpretive tool or as a normative framework directly applicable, when international humanitarian law does not provide full regulations or comprises unclear rules: "in such a situation, human rights law shall be treated as a guideline and complementary system that influences humanitarian law. Human rights law and humanitarian law may thus reinforce one another"[2149].

The traditional debate concerning zones of armed conflict moves along the lines of applicability or non-applicability of international humanitarian law to a certain area. This, in turns, tends to lead to the conclusion that IHL applies to the entire territory of the States involved in an international armed conflict and to the territory under the control of the involved parties in case of non-international armed conflicts (if not, once more, to the entire territory where such conflicts take place). The ultimate consequence of this approach is twofold, depending on the position that one assumes on the exact meaning of the *lex specialis* criterion: those arguing that the *lex specialis* is international humanitarian law as a whole, and that, in fact, it *derogat legi generali* (that is human rights law), conclude that this geographical understanding turns entire territories of states involved in armed conflicts into battlefields. In this case, targeting would have no restrictions other than those properly pertaining to the body of international humanitarian law. Those instead that argue for a contemporary application of the two legal paradigms conclude that a law enforcement regime continues to be applicable also in times of armed conflict and

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2147 See *supra*, Ch. II, para. 6.

2148 *Alston Report*, *supra*, para. 29.

2149 Adam Bodnar and Irmina Pacho, *Targeted Killings (Drone Strikes) and the European Convention on Human Rights*, in *Polish Yearbook of International Law*, Warszawa, 2012, p. 206. See accordingly *Alston Report*, *supra*, p. 10 and Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, *supra*, pp. 343 and 344.

that therefore in certain circumstances, depending on the context of a specific case, this body would somehow prevail over the low of hostilities paradigm.

It is submitted here that the question should not be related to where exactly one of the two legal regimes ceases to apply consequently triggering the applicability of the latter. Indeed, this reading would ultimately lead not to a complementary and mutually reinforcing application of the relevant legal regimes but to exclude any possibility of their contemporary applicability, contrary to well-established principles of international law governing the matter and already explored above in the present research. The question should instead focus on how exactly the relevant rules of international humanitarian law and international human rights law interact.

The problem in this regard is that an extended applicability of international humanitarian law extends the scope of application of international criminal law whereas at the same time limiting the scope of application of international human rights law. As an author notes, "at issue here is that international criminal lawyers and international human rights lawyers have exactly opposite interests with regard to the scope of IHL. For international criminal lawyers, the expansion of IHL is a good and necessary development. The more conduct that is governed by IHL, the more conduct can be described as war crimes and prosecuted in a court of law. […] On the other hand, the international human rights lawyers have the opposite interest. International human rights law applies chiefly in situations where IHL does not apply"[2150].

It is submitted here that it is not necessary to tie these considerations to the scope of application of the entire body of international humanitarian law but that, to the contrary, even when international humanitarian law remains fully applicable, there are geographical areas and contextual situations where it is a law enforcement paradigm that prevails over the paradigm of hostilities. In other words, even though international humanitarian law remains fully applicable to the entire territory under the control of the parties to an armed conflict, this does not mean that these parties may use force in line with the hostilities paradigm wherever they want. It merely means that an act characterized by a nexus with the ongoing armed conflict, if in breach of the rules of international humanitarian law, may be characterized as a war crime (if it does amount to one) even when it is performed outside zones of active hostilities. In this way, the geography of international humanitarian law is to be interpreted in the broadest possible terms. On the other hand, however, a restrictive approach is to be chosen over an extensive to limit the possibility of the parties to resort to the more relaxed standards on the use of force characterizing the law of hostilities. In this framework, it is not international human rights law alone that takes

[2150] Jens David Ohlin, *The Duty to Capture*, *supra*, pp. 20 and 21.

over international humanitarian law. However, depending on the exact circumstances, the latter may relax the stringent standards of the former and, *vice versa*, the former may be used to limit the principles governing the use of force under the latter.

Notably, this line of argument is the only one that comports with the ICTY's Tadic decision. This judgment is often recalled in support of the argument opposing the one that is being upheld here because it indeed states that international humanitarian law remains applicable to the entire territory of the parties involved in an armed conflict. However, and most notably, it also avers that "the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. *Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited* (emphasis added). Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited"[2151].

Any reading other than that suggested above would make no sense of the Tadic-suggested formula. Since the general principles of human rights law "should serve as an authoritative source of inspiration" [2152], a human rights oriented approach to the geography of armed conflicts is not merely among possible interpretive choices but is the one choice that should direct the use of lethal force in areas short of hostilities.

Thus, first and foremost, the inherently territorial dimension of international humanitarian law entails a limitation to the territories of the parties involved in the armed conflict. Outside such areas, international humanitarian law does not find application. But this should merely be a starting point. Within the territories where international humanitarian law finds full application (i.e. the entire territory of the states involved in case of international armed conflict and that under the control of the parties in case of non-international armed conflict), the parties to the conflict can resort to selective lethal force without restrictions (other than those imposed by specific rules of international humanitarian law) in zones of active hostilities. Outside those zones, however, the law of war paradigm should necessarily be tempered by the law enforcement paradigm. Accordingly, "international law certainly does not support attacking individuals or small groups far from armed conflict hostilities occurring or that once occurred on the territory of the responsible state"[2153].

2151 See ICTY, *Prosecutor v. D. Tadić*, *supra*, paras. 68-69.

2152 Antonio Cassese, *The Human Dimension of International Law*, Oxford, 2008, p. 445.

2153 Mary Ellen O'Connell, *Lawful Use of Combat Drones, Hearing Before the Subcommittee on National Security and Foreign Affairs, supra*, p. 6.

In a similar vein, it has been suggested that where the two normative paradigms overlap, such as in situations of belligerent occupation, "the degree of control the occupying power had over the circumstances surrounding a military operation, as well as its control over the place where that operation would take place, could be useful criteria for determining whether the rules pertaining to law enforcement or those governing the conduct of hostilities would apply as a matter of *lex specialis*. Control over the circumstances of the operation and over the areas in question would trigger application of the law enforcement model. Therefore, when the occupying forces conducting a specific operation are not excessively concerned about having to deal with other members of the organized armed group, meaning that additional military means would not be required to make the operation a success, the law enforcement model would become applicable. On the other hand, when the occupying forces expect to be militarily challenged by fighters from organized armed groups, then the operation should be carried out within the framework of the 'conduct-of hostilities' model"[2154]. The same test remains is fully applicable in the context of non-international armed conflicts. Accordingly, it has been suggested that "the state of the law as one in which both IHL and human rights law apply in parallel in situations of occupation, non-international armed conflict and with respect to targeted killings. Given the parallel applicability of IHL and human rights law in these contexts, according to this expert, human rights law and the law-enforcement model constitute the default legal regime. Where this model becomes unworkable in these situations, given the level of organised violence and lack of control exercised by the State in the relevant territory, the IHL rules on conduct of hostilities govern"[2155].

Most importantly, this stance is in perfect line with the assessment conducted by international human rights bodies invested with the matter in cases of non-international armed conflicts. Thus, in the well-known *Tablada case* the IACmHR has maintained that those responsible for the attack conducted at the Tablada base were subjected to individualized attack as much as combatants were and therefore applied an international humanitarian law test properly so called[2156]. In that case, indeed, those responsible for the attack at the Tablada base were persons directly involved in an act of hostility directed against a military objective that they made with their own actions become an area of active hostility. It would be impossible, under such circumstances to burden state agents with a more pressing parameter

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2154 ICRC, *Occupation and Other Forms of Administration of Foreign Territory, Third Meeting of Experts: The Use of Force in Occupied Territory*, Geneva, 2012, p. 129.

2155 The University Centre for International Humanitarian Law, Report of an Expert Meeting, *The Right to life in armed conflicts and situations of occupation*, Geneva, Switzerland, 1-2 September 2005, p. 19. Available at: http://www.genevaacademy.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf

2156 IACmHR, *Abella v. Argentina*, *supra*, para. 178.

restraining their right to use force. On the contrary, the Human Rights Committee excluded that persons suspected of membership in an organized armed groups could be lawfully subjected to direct lethal attacks when State authorities had control over a certain area and henceforth the possibility to apprehend them[2157].

In the same vein, in a context of an internal armed conflict, the Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions has deemed unlawful the killing of a suspected Maoist perpetrated by Nepali security forces in an ambush while the former was buying supplies in a town where no hostilities were taking place[2158]. The Nepali Human Rights Commission, moreover, has come to the conclusion that government forces were responsible for the extrajudicial execution of six Maoists who were armed but located outside an area of active hostilities and could have been captured[2159].

3.6. Identification of the Zone

Thus discarded once and for all the misconceived idea that the existence of an armed conflict in a certain area could justify resort to pre-meditated lethal force against selected individuals outside the territories where international humanitarian law applies, it remains to elucidate the parameters that may lead to the identification of the relevant zones of hostilities where targeted killing operations could actually be conducted without breaching international humanitarian law.

It has been noted in this regard that any zone division of the area of war could open up more problems than it solves. Thus, for instance, an expert meeting gathered under the auspices of the ICRC found the conflict zone division too volatile: "Who decides what is the immediate theatre of operations? Would that imply that an encampment of fighters outside the conflict zone could not be targeted? Would that not constitute an incitement for fighters to operate from outside the conflict zone? If a fighter is targeted in a zone where there are no hostilities, does that zone become a conflict zone? What if a civilian is directly participating in hostilities in an area where there are no confrontations at all? Would this area be considered as a conflict zone?"[2160].

2157 HRC, *Suarez de Guerrero v. Colombia*, *supra*.

2158 Asma Jahanhir, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2003, Addendum*, UN Doc. E/CN.4/2003/3/Add.1, 12 February 2003, para. 389.

2159 Kedar Prasad Poudyal, *The role of national human rights institutions in armed conflict situations, with special reference to NHRC–Nepal*, Kobenhavn, 2006, pp. 87–8.

2160 Gloria Gaggioli, *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and the Law Enforcement Paradigms*, Geneva, 2013, p. 22.

Indeed, it has been noted that the identification of a conflict zone may be extremely arbitrary. Thus, for instance, it has been observed in relation to the U.S. opinio viewing the entire world as a battlefield, that "delineating the lines between battlefield and non-battlefield is based more on arbitrary decision-making than on a process stemming from traditional law based conceptions of the theater of hostilities"[2161].

However, it is submitted here that the parameters elucidated above to reject the idea of a global battlefield may indeed be resorted to in order to further identify sub-sets of zones of active hostilities and limit the possibility to target and kill individuals to those locations. As seen above, indeed, most of these questions depend on factual assessments which do not much differ from those traditionally characterizing international humanitarian law choices, if not its very applicability (e.g., who decides when violent confrontations have reached the proper level of intensity to be characterized as hostilities?). As for other concerns, they surely do not seem insurmountable. It is well-accepted that, as seen before, a combatant (or a fighter) does not bring the battlefield with him wherever he goes. It is therefore not the case that States targeting persons located in the territories of other States expand with those actions only the scope of hostilities, creating new battlefields on the territory of other States. By analogy, if a single attack on a single fighter outside a zone of hostilities would not render such zone a new battlefield. As for persons directly participating in hostilities, the applicable framework would highly depend on his exact location. If this person were in a portion of territory under governmental control, then no, he could not be directly targeted for death, as the law of hostilities paradigm would be tempered by a concurrent applicability of the law enforcement regime. If, on the other hand, he were in the rear areas of the territory controlled by the non-state actors involved in the armed conflicts, then he could be lawfully targeted, insofar as he is taking a direct part to hostilities when he is targeted.

Thus, actual determination of the existence, location and dimension of a zone of active hostilities is a factual assessment that may vary in time and depends on factual circumstances on the ground[2162]. Factors that may be taken into account for

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[2161] Laurie R. Blank, *Defining the Battlefield in Contemporary Confclit and Counterterrorism: Understanding the Parameters of the Zone of Combat*, *supra* 10, p. 22, further specifying: "The temporal scope of the conflict with al Qaeda is equally, if not more, perplexing. Terrorism is a phenomenon, not an enemy party".

[2162] *Ibidem*, pp. 36-38, arguing that "some terrorist attacks and activities fall closer to the traditional conception of hostilities as understood within LOAC. Areas where these types of attacks occur naturally have a stronger link to a battlefield. […] Areas where the state uses military force, particularly multiple facets of military power, on a regular or recurring basis, should fall within the zone of combat. In contrast, those areas where the state chooses diplomatic or law enforcement measures, or relies on such efforts by another state, do not demonstrate the characteristics of the

the identification of the relevant zone are the intensity and duration of the fighting (according to the *Tadic Formula*); the exchange of violence between more parties to the conflict[2163]; the presence of troops on the ground (for one party or the other); the recognition of the existence of a hot battlefield by the involved parties (either State or non-state actors), by the international community, or UN agencies.

This is not to say that it is not possible that in certain times entire state territories may not fall within the notion of zone of active hostilities. Thus, when according to the parameters outlined above armed violence is used in a widespread and systematic fashion by the two or more parties to the conflict throughout an entire state territory, the zone of active hostilities will stretch to the that entire area. When, on the contrary, the relevant intensity is reached only in certain restricted zones, then those will be considered the zones of active hostilities and no targeted killing could take place in other areas[2164]. This test should be alternative to the *Tadic formula*, actually suggesting that it should replace it, it is submitted here that it should be additional to that criterion. In other words, the *Tadic formula* should remain fully applicable as to the identification of the scope of applicability of international humanitarian law. The suggested criterion for the identification of more specific zones of hostilities, therefore, should be applicable only in territories where international humanitarian law as a whole already applies pursuant to the *Tadic formula*, and should serve to identify the geographic boundaries of the battlefield and the zone of operations where targeted killings should be deemed permissible. In other words, it could be a formula that leads to the identification of the "frontline" where a targeting process would not violate the geographical requirements inherent to the prohibition of assassination.

3.7. Conclusion: Assassination and the Geography

It has been suggested that, due to their profound consequences, targeted killings should be a means of last resort, even when permitted under international

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battlefield. […] territory can be a contributing factor to a paradigm defining the zone of combat nonetheless. Looking at territory from a new angle, we can see that terrorists use certain areas for safe havens and training camps and identify certain areas as prime targets for repeated attacks. Those territorial areas must therefore have a stronger connection to the zone of combat than others, both geographically and temporally, because the way terrorists use particular areas will naturally change over time".

2163 Mary Ellen O'Connell, *Combatants and the Combat Zone*, *supra*, pp. 845-858.

2164 Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, *supra*, p. 1208.

humanitarian law (when, therefore, they do not amount to assassination)[2165]. In terms of geographical-related restrictions to the battlefield, this implies, as pointed out by some commentators, that "limiting the circumstances in which targeted killing is lawful, even in war, is a valid trade-off when the alternative is a permanent, global free-fire zone against an amorphous enemy"[2166].

Notably, even some authors who maintain that the scope of applicability of international humanitarian law extends to territories outside the countries directly involved in the armed confrontations suggest that "as a matter of *lex ferenda*, the specificities of the law should be tailored to take into account the fact that the individuals in question are far removed from the geographic site of the conflict"[2167].

In line with the suggested zone-division, it has been held that: wherever a State holds effective territorial control, then the law enforcement model applies; when the State is in partial control, then the law enforcement paradigm should be the one prevailing, albeit not the only applicable model, as it should still be possible to engage in military attacks whenever no less harmful course of action is available[2168]. Similarly, it has been hold that outside zones of active combat targeted killing should be solely governed by human rights standards[2169].

Some authors have traced a demarcation between the notion of hostilities and that of armed conflict, positing that the two are not the same and suggesting instead that in a conflict situation both the hostility paradigm and the law enforcement paradigm continue to apply. The former is only triggered (thus superseding the latter) when States act "with the aim of harming an opposing party to the conflict by directly inflicting death, injury or destruction on protected persons or objects outside their custody or control" and relates to the choice of means and methods of injuring the enemy[2170]. Against this background, so the argument goes, "[t]argeted killing

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2165 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. XIII. See accordingly Rommel J. Casis, *Predator Principles: Laws of Armed Conflict and Targeted Killings*, *supra*, p. 376. For a more detailed analysis of a least harmful means approach and its repercussions on targeted killings and assassination see infra, Ch. V, para. 4.

2166 Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventor of Existing Tools,* in *Chicago Journal of International Law*, Chicago, 2005, p. 505.

2167 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, *supra*, p. 251.

2168 Mordechai Kremnitzer, *Praventives Toten* (*Preventive Killings)*, *supra*, p. 203.

2169 Philip Heymann and Juliette Kayyem, *Long-Term Legal Strategy*, p. 63, suggesting that "outside a zone of active combat any targeted killing may be authorized only [when there is] evidence that the killing was necessary to prevent a greater, reasonably imminent danger to U.S. lives, and there was no reasonable alternative [and] the action would not unreasonably endanger innocent individuals".

2170 Nils Melzer, *Targeted Killing in International Law*, *supra*, pp. 395 and 269. As opposed to what he terms "law of hostilities", the law enforcement paradigm in the framework of international humanitarian law should be understood, according to this author, as the standard applicable to restrain

carried out by US State agents in the framework of this counter-terrorism campaign can only be governed by the paradigm of hostilities if they are part of the conduct of hostilities taking place in a separate situation of armed conflict to which the United States is a party, such as the former international and current non-international armed conflicts in Afghanistan and Iraq"[2171]. It is submitted here that this assessment is fundamentally right. However, it has not been brought to its extreme consequences. In particular, it is suggested that it fails to offer a standard able to establish when and where the hostilities paradigm should be the governing one as opposed to those situations where a law enforcement criterion should prevail. It would seem in fact that any time a party to the conflict "act with the aim of harming an opposing party" the hostility paradigm is automatically triggered. But this cannot be the solution since the applicability of the "law of hostilities" cannot obviously be left to the one-sided choice of the targeting party. To the contrary, this should be assessed *a priori* (that is before a military action is conducted), and therefore with reference to where hostilities are already ongoing. In other words, for the purpose of premeditated individualized killings the law of hostilities does apply only in areas of territory (and periods of time) where there is already an active confrontation, and only when the targeted persons is directly participating in those hostilities. All in all, this understanding leads to a contextual as well as a geographical reading of the armed conflicts, whereby what is termed by the recalled author as the "hostilities paradigm" ends up to be applicable only on the hot battlefield or else in a combat zone. But not in the broader theater of war.

Read through this prism, the division between the hostilities paradigm and the law enforcement paradigm is in line with an understanding that prevents the undertaking of premeditated uses of lethal force against selected individuals in areas under the control of the attacking party, as well as in those areas outside the control of either of the parties involved when the targeted person is not directly involved in hostilities. Indeed, it has been observed: "for a governmental or occupying authority, armed confrontations with insurgents or organized resistance groups will generally not only constitute a military threat, but at the same time also a threat to law and order under domestic or promulgated criminal law. Similarly, an operation of State agents aiming at the arrest of a person suspected of belonging of an armed insurgent group constitutes a law enforcement operation against a suspected criminal and, at the same time, also a military operation directed against a potential military objective […] Overall, the guiding principle of interaction of the two normative paradigms must be that , whenever armed confrontations of any kind amount to 'hostilities' within the meaning of IHL and where, additionally, force is directed against a

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the power and authority that belligerent parties can legitimately use *vis-à-vis* protected persons and objectives (*Ibid.*, p. 140).

[2171] Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 396.

legitimate military target, the normative paradigm of hostilities will take precedence over the normative paradigm of law enforcement"[2172].

It has been held that the quintessential example of a friction between the standards set by the laws of armed conflict and those established under human rights law "is that of a guerrilla leader shopping in a supermarket in the government-controlled capital of the country. Many interpret humanitarian law as permitting authorities to shoot to kill, since he is a fighter, but this is controversial. Human rights law would clearly say that he must be arrested" [2173]. It is submitted, however, that a due consideration of the traditional prohibition of assassination offer a solution to this supposed friction. Indeed, the very function of the prohibition on assassination may very well be to bridge the gap between these two paradigms restraining the resort to lethal force in exactly those areas that would be left in a grey zone by a formalistic approach to the protective and the permissive souls of international humanitarian law. And that it does so, in particular, allowing for the targeting and killing of only those persons who are directly engaged in hostilities when deprived of their lives, within a strict geographically-selected area. What is suggested here is that the prohibition of assassination at once reinforces and adds upon the traditional "legal geography of war"[2174].

This would, *inter alia*, permit a thorough assessment of the kind and degree of force to be used in occupied territories when the opposition forces are scattered and armed confrontations themselves sometimes occur in urban areas. Applying a functional and contextual approach, this implies that the paradigm of hostilities, and targeted killing with it, remains inapplicable in areas under full governmental control (or full control by occupying forces). In all other cases, where therefore there is no real control on the territory, targeted killings may only be resorted to against legitimate military targets when and for so long as they are engaged in hostilities. Otherwise, the law enforcement paradigm would re-apply and any premeditated killing of pre-selected individuals, even of those who have participated in hostile act on a recurrent basis, would amount to assassination. The ban on assassination would not however prevent the targeted killing of persons belonging to armed groups in hot battlefield, that is in area where hostilities are already undergoing.

2172 *Ibidem*, p. 277.

2173 Marco Sassòli and Laura M. Olson, *The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, *supra*, p. 613.

2174 Kenneth Anderson, *Targeted Killing and Drone Warfare*, *supra*, pp.2 and 3. Professor Anderson argues that the introduction of drone technology has brought about a crisis of the historically "implied geography of war" which, traditionally, has served to limit the scope of applicability of targeting rules to locations "where hostilities took place".

4. LEAST HARMFUL MEANS AND OBLIGATION TO CAPTURE RATHER THAN KILL

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(1) Introduction: Identifying the Controversy; (2) The ICRC's Stance; (3) Criticism towards the Existence of an Obligation to Capture Rather than Kill; (3.a) Direct Criticism to the Interpretive Guidance: a Conservative Approach; (3.b) Direct Criticism to the Interpretive Guidance: a Progressive Approach; (4) The Genesis of a Least Harmful Means Approach; (5) The Role of Military Necessity for the Determination of Least Harmful Means Obligations; (6) Current State Practice; (6.a) Preliminary Considerations over the Role of State Practice for a Least Harmful Means Approach; (6.b) The Case of Israel: Jurisprudence Confirmed; (6.c) The Endorsement of a Least Harmful Means Test by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; (6.d) U.S. Policy; (7) International Humanitarian Law Built-in Limitations Supporting a Least Harmful Means Approach; (8) Least Harmful Means and the Prohibition of Assassination: Effects of a Human-Rights-Oriented Interpretation.

4.1. Introduction: Identifying the Controversy

Once established who may be made object of direct attack in times of armed conflicts, the question remains as to which degree and kind of force may be rightfully deployed. As outlined above, indeed, under the rules of international humanitarian law the choice of belligerents as to the means of methods of warfare is not unlimited.

It has been argued in this regard that provisions of the laws of armed conflict specifically devoted to means and methods of warfare would not be the only existing parameters limiting the authority of belligerents to choose the degree and kind of force to employ. In this vein, it has been suggested that principles of military necessity (in its protective dimension) and the principle of humanity would place additional restrictions to those involved in armed confrontations. In particular, these principles would operate in such a way as to impose limitations also on means and methods *per se* lawful.

These apparently theoretical concerns gained practical momentum when *indicia* emerged that the international community stark reaction to U.S. detention methods of suspected terrorists actually fostered resort to drone strikes aimed at leaving no survivor and, therefore, eliminating the need to take prisoners at all[2175].

Thus, some commentators have suggested that the restrictive dimension of military necessity would in and by itself suffice to forbid the targeted killing of a person (be him a combatant or a mere fighter) when apprehension is possible or for whatever other reason the killing does not offer a definite military advantage[2176]. In the past, however, contrary to this position, it had been suggested that "an individual combatant's vulnerability to lawful targeting (as opposed to assassination) is not dependent upon his or her military duties, or proximity to combat as such" and that, consequently, combatant could have been made the object of direct attack whenever and wherever they were located, no further restrictions existing to the use of force besides those expressly codified under the laws of war[2177].

The problem in this regard is that "humanitarian law neither provides an express 'right to kill', nor does it impose a general obligation to 'capture rather than kill'"[2178].

It did not therefore come as a surprise that the suggestion of a least harmful means approach would meet with high criticism and has sparked a significant debate among academics as well as among practitioners. Fostering these controversies rather than solving them, the already recalled *Interpretive Guidance on Direct Participation in Hostilities* has dedicated an entire section of its work to this matter, endorsing a least harmful means approach[2179]. Reacting to this stance, commentators have argued that it is an inherent characteristic of war that combatants may be targeted insofar as they are legitimate military objectives[2180].

2175 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, *supra*, p. 128: "A growing chorus of critics is claiming (perhaps a little ironically, due to their criticism of the United States' detention policy and practices) that drone strikes are taking the place of the more humanitarian option with regard to engaging belligerents – capture and detention". See accordingly Daniel Klaidman, Kill or Capture: The War on Terror and the Soul of the Obama Presidency, 2012, p. 126.

2176 Nils Melzer, *Targeted Killing in International Law*, *supra*, p. 57; Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, *supra*, pp. 640-644; and Wedgwood, The Legality of Targeted Assassination, supra, p. 4.

2177 W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, *supra*, p. 3.

2178 Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, *supra*, p. 28.

2179 *ICRC Interpretive Guidance*, *supra*, Section IX.

2180 Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, *supra*, p. 139.

One of the main problems with the least harmful means approach is that there is no black-latter provision in the realm of the laws of armed conflict explicitly imposing an obligation to capture rather than kill[2181]. In line with this assessment, some authors have rejected the ICRC's view alleging that it is does not find support in either positive or customary rules pertaining to the realm of the laws of armed conflict[2182].

The question characterizing this (ongoing) debate is therefore whether, in the absence of a specific provision to this end, combatants (and fighters alike) may nonetheless be under an obligation to capture rather than killing when there is a possibility to do so and, if affirmative, under which conditions. In other words, to which degree of risk should combatants expose themselves in order to capture rather than kill? As noted by practitioners, this "is a highly relevant—and contentious—question for today's military commanders and lawyers and has the potential to alter important practices of western-led coalition partners"[2183].

4.2. The ICRC's Stance

Since most of the criticism towards the least harmful means approach emerged after its endorsement in the *ICRC Interpretive Guidance*, the arguments presented in that document will be hereby briefly recalled so as to thoroughly understand the wave of criticism it generated.

Recommendation IX adopted by the ICRC Interpretive Guidance reads: "In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances"[2184].

According to the commentary to this recommendation, it relies on the well-known maxim that the right of belligerents to adopt means of injuring the enemy is not unlimited, deeply rooted in the laws of war and mirrored in Art. 35, para I *AP I*

2181 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 7.

2182 Geoffrey Corn and Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, in *University of Pennsylvania Journal of International Law*, Philadelphia, 2012, p. 348.

2183 Richard S. Taylor, *The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who Are Directly Participating in Hostilities?*, in *The Army Lawyer Journal*, Charlottesville, 2011, pp. 103 and 104.

2184 *ICRC Interpretive Guidance*, *supra*, Section IX.

and Art. 22 *Hague Convention IV*. Thus, albeit acknowledging that international humanitarian law does not expressly regulate the intensity of force that may lawfully employed against legitimate targets[2185], the commentary specify that the position expressed in the Guidance is based on rock-solid premises: international law forbids means and methods of warfare causing superfluous injuries or unnecessary suffering.

Absent a precise norm to this end, the Guidance infers the existence of a least harmful means approach from the principles of necessity, in its restraining mode, and humanity which, it suggest, "constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters" established by specific provisions of international humanitarian law"[2186]. Thus, elaborates the guidance, "the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances"[2187].

The *Guidance* infers from these principles that, in general terms, absent a military necessity to do so, any use of lethal force against an adversary when he could be captured would be unlawful. Notably, this position does not imply the existence of an obligation to capture rather than kill enemies under in every context, but only when this course of action is feasible under "the prevailing circumstances".

This has two main repercussions: first of all, according to the *Guidance*, the attacking party is not required to assume any risk to undertake a capture rather than kill operation. This means that, were the attacking party to envisage any minimum, even potential risk for its forces ensuing from the capture operation, then killing the enemy would not be unlawful. Accordingly, it has been noted "The Interpretive Guidance maintains that there is no obligation on the part of the attacking party to assume even a modicum of risk to its own forces. The Interpretive Guidance is not simply conservative in this regard. The Guidance is on the far end of the spectrum. That is, the Guidance countenances no balancing whatsoever"[2188].

Moreover, the evaluation of the feasibility of capturing the enemy rather than killing him is made dependent upon factual circumstance on the ground. Thus, the *Guidance* makes clear that "In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity

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2185 *Ibidem*, pp. 77 and 78.
2186 *Ibidem*, p. 79.
2187 *Ibidem*, supra, p. 80.
2188 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 12.

and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL"[2189]. As a consequence, the adoption of a least harmful means approach would remain confined to circumstances where the attacking party exercises an effective control over territory[2190].

4.3. Criticism towards the Existence of an Obligation to Capture Rather than Kill

Most of the critiques directed towards Section IX of the Interpretive Guidance are not related to the specific model of least harmful means endorsed by that document as they are to the least harmful means approach in general.

Thus, the main critiques to a least harmful means approach maintain that it conflates the laws of armed conflict with the human rights law paradigm; that there is no rule limiting the kind and degree of force which may be used against legitimate targets, including civilians who have lost protection from direct attack following their choice to take a direct part in hostilities; that neither State practice nor the history and tradition of the laws of warfare support the existence of restrictions to the kind and degree of violence that may be deployed against legitimate targets; and that the principle of military necessity does not add restrictions to already codified, punctual provisions related to means and methods of warfare since it has already been taken into account in drafting such rules.

In this regard, the stance assumed by the *ICRC Interpretive Guidance* has been described as an "exceedingly controversial position [which] confuses NIACs with the law enforcement paradigm governing below-the-threshold violence"[2191]. Moreover, it has been argued, "under LONIAC [the law of non-international armed conflict] as it stands, losing civilian protection means full exposure to the risks of hostilities in which a person chooses to engage"[2192]. Accordingly, many have observed that "state practice and the lessons of history suggest that [least harmful

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2189 *ICRC Interpretive Guidance, supra*, p. 80.

2190 *Ibidem*, p. 80: "[the obligation to capture rather than kill] may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts. For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably have to be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means".

2191 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, *supra*, p. 59.

2192 *Ibidem*, p. 59.

means approaches] are misconceived"[2193], that only a thorough analysis of state practice and *opinio juris* related to humanity and necessity may lead to conclude that there is an obligation to capture rather than kill and that the ICRC has not conducted such an analysis[2194], and that "there seems to be no practice of States in which it is contended that the targeting of individuals who are members of armed forces or civilians taking a direct part in hostilities are nevertheless unlawful because such targeting was not necessary in the particular case"[2195]. Others have not argued in negative but in positive terms on state practice, maintaining that it shows the validity of the exact opposite view: State practice shows that when deciding upon attacks and conducting targeting decision-making during an armed conflict, States recognize no requirement to use minimum force, nor is there any obligation to capture rather than kill those whom it is permissible to target in accordance with the law of armed conflict"[2196]. Finally, it has been alleged that the interpretation of military necessity at the basis of the least harmful means approach is flawed insofar as States have already endorsed considerations of military necessity in existing rules of international humanitarian law and therefore they have already determined that persons who have no immunity or who have lost immunity from direct attack may be targeted on the basis of their status alone[2197].

In support of all the above, it has been observed that the former legal adviser to the US Army Special Forces Jeffrey Addicott, has expressed the following view: "We can kill them when they're eating, we can kill them when they're sleeping. They are enemy combatants, and as long as they're not surrendering, we can kill them"[2198].

2193 William Boothby, *The Law of Targeting*, *supra*, p. 526.

2194 Van Der Toorn, *'Direct Participation in Hostilities': A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan*, in *Australian Journal of International Law*, Sydney, 2010, p. 27.

2195 Dapo Akande, *Clearing the 'Fog of War'? The ICRC's Interpretive Guidance in Direct Participation in Hostilities*, in *International and Comparative Law Quarterly*, Cambridge, 2010, pp. 191-192.

2196 William Boothby, *The Law of Targeting*, *supra*, p. 526.

2197 Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: a critical analysis*, *supra*, pp. 5 and 39-43 and Michael N. Schmitt, M*ilitary Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, *supra*, pp. 795 and 835.

2198 Adam Entous, *Special Report: How the White House Learned to Love the Drone*, *supra*.

a) Direct Criticism to the Interpretive Guidance: a Conservative Approach

Some of the arguments just recalled have been at the core of one of the most direct critiques to Section IX of the *ICRC Interpretive Guidance*[2199].

Thus, it has been argued that the *Guidance*'s reliance on the suggestion of a least harmful means approach advanced by Jean Pictet is misplaced because, allegedly, his arguments have never "received serious consideration, much less support, from government delegations"[2200]. In order to substantiate this stance, the critique goes on to underline that "[a]pplication of Pictet's theoretical use-of-force continuum to civilians taking a direct part in hostilities ignored a fundamental rationale for the law of war: to protect innocent civilians, that is, to protect the endangered from the dangerous" [2201]. The critique seems to ignore, in this regard, that if this is the rationale, then a defenceless combatant as well as a defenceless fighter should be entitled to the exact same protections civilians are shielded with, all the more so when he is in a location where no active hostilities are taking place or when he is not personally involved in hostilities at all.

The critique also questions the Guidance's reference to the case law of the Israeli Supreme Court in this regard, on the basis that the judgment bears little value outside the Israeli context (*i.e.* military occupation) and that arguing that the Court's judgment is based in Israeli law rather than stemming from international law[2202].

Insofar as the requirement of military necessity is concerned, the critique rejects the view that "targeting an enemy combatant (or a civilian taking a direct part in hostilities) requires a soldier to proceed through the multiple-part test or evaluation for attack of a military objective contained in Article 52, paragraph 2 of

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2199 W. Hays Parks, *Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise and Legally Incorrect*, in *New York Journal of International Law and Policy*, 2010: it is not the scope of this research to go into detail over the various critiques advanced by Col. W. Hays Parks to the proceedings and modalities that led to the formulation of Section IX of the ICRC Interpretive Guidance. The present research will therefore focus on the substantive issues risen by his analysis only. For a thorough reply to Col. W. Hays Parks harsh criticism of the ICRC clarification process see Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, in *New York Journal of International Law and Policy*, 2010, pp. 892 - 896.

2200 W. Hays Parks, *Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise and Legally Incorrect*, *supra*, p. 787.

2201 *Ibidem*, p. 799.

2202 *Ibidem*, pp. 788 – 793: "the Court did not extend its ruling to international armed conflict, belligerent occupation, or noninternational armed conflict, but rather, limiting its holding to its military operations […] As the court stated, the Israeli requirement for capture or apprehension of a civilian taking a direct part in hostilities is based on Israeli internal law rather than a law of war obligation".

Additional Protocol I [because] that definition is limited to objects […] Article 43 (Armed forces) defines armed forces and provides that members of such forces are combatants, that is to say, they have the right to participate directly in hostilities; the corollary is that they may be the object of hostile acts"[2203]. Notably, in this regard, the critique quotes also the *Saint Petersburg Declaration* in order to make the point that combatants may be object of hostile acts, failing to see however that a thorough reading of the Declaration actually points to the opposite conclusion: indeed, the quoted paragraph shows uncontrovertibly that while it is true that combatants may be the object of hostile acts, the intensity and degree of such acts are limited by the principles embodied by the *Saint Petersburg Declaration.*

The critique then passes on to a cursory evaluation of State practice, arguing that the use-of-force-continuum approach is rejected by domestic courts in peacetime, then a-fortiori it should be discarded in times of war[2204].

In order to reach this conclusion, the critique notably takes into account exclusively jurisprudence coming from the domestic systems of the U.S. and the U.K. It maintains that U.S federal courts have allegedly consistently rejected the standard advanced by Pictet and, in general, a least harmful means approach. "Thus U.S. federal court decisions do not support Pictet's argument even in peacetime law enforcement situations"[2205].

This is a rather hedonistic, self-centered approach which elevates the U.S. to a sort of international law standard-setter: what this approach does not seem to grasp is that U.S. federal courts case law are highly irrelevant for international human rights law and may themselves indeed amount to a violation of U.S. international obligations. Thus, it is vastly irrelevant that "Pictet's use-of-force continuum theory is the antithesis of the Supreme Court's decision to decline to draw a line or lines or endorse a continuum approach that suggests a legal requirement for a sequential approach to use of force, with deadly force legally permissible only as a last resort"[2206]. Even more importantly, some of the cases recounted by the Critique - among which the one and only U.K. judicial precedent it mentions - would actually meet the requirement of absolute necessity even under the strictest human rights law standard and of course in those cases it would be impossible to require the involved agents to use an escalation of force approach[2207].

2203 *Ibidem*, pp. 807 and 808.

2204 *Ibidem*, pp. 812 - 827.

2205 *Ibidem*, p. 813.

2206 *Ibidem*, p. 816.

2207 Notably, others would not: for these cases, what stated above would hold true. Think for instance to the *Amato v. United States* case reported by Parks at p. 819. In this author's view, in international fora such case would lead to conclusions greatly differing from those reached by the U.S. Supreme Court, if only because of a flawed operational planning on part of State agents. W. Hays Parks uses such

The reason why this would be impossible is exactly the fact that in those circumstances it would be absolutely necessary for the involved agents to resort to potentially lethal force, either in self-defence or in defence of others. Importantly, Pictet's formula does not oppose this approach. All to the contrary, it supports it. What it states, instead, is that in the absence of necessity, that is a scenario opposite to that characterizing the examples reported by Parks, killing would be unlawful. Of course, necessity must be evaluated in a contextual framework and must be understood with flexibility, so as to allow for the consideration of every parameter characterizing a specific situation. This does not mean, as the critique would like to suggest, that necessity should not be taken into account at all and the mere fact that there is a situation of armed conflict may legitimize any resort to force not specifically prohibited under the laws of war.

In order to further prove its point, the critique recalls one case ruled upon by the ECmHR first and by the ECtHR later. Notably, this is the only reference it makes to international case law on the use of lethal force. Astonishingly enough, according to the critique the ECtHR ruling in *McCann* supports its view, failing to see that the very passages it quotes from the decision actually speak of an absolute necessity test and, what is even more alarming, ignoring completely what is perhaps the biggest inheritance of *McCann* for the jurisprudence of the ECtHR: the fact that death may only lawfully result as an unintended outcome of the use of force and may never be the goal of law enforcement agents. In the words of the ECtHR, indeed, "Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no greater than 'absolutely necessary' for the achievement of one of the purposes set out in that Article"[2208].

Notably, the case just recalled deals with the use of lethal force in a law enforcement environment. It could have been more useful to rely to other jurisprudence of the ECtHR, such as the judgments issued in relation to the use of lethal force exercised by Turkish authorities at the detriment of members of the Kurdistan Workers' Party (PKK). Also in these cases the ECtHR only resorted to the law enforcement paradigm as Turkey never recognized the existence of an ongoing internal armed conflict with the PKK. Nonetheless, the factual situation at the end of the 1990s was characterized by an intensity and protraction of armed violence probably meeting the threshold of a non-international armed conflict.

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example to contest the ICRC Interpretive Guidance view without realizing that it indeed serves the argument offered by the party he is criticizing.

[2208] ECtHR, *McCann and Others v. The United Kingdom*, *supra*, paras. 148 and 149. To this end see in higher detail supra, Ch. II, para. 4.

Against this background, the ECtHR has consistently found that the use of lethal force against persons who were not in that moment involved in hostilities and could have been apprehended amounted to a violation of the victim's right to life[2209]. In other contexts, the ECtHR even concluded for a finding against Turkey when armed members of the PKK were killed in an operation conducted by the security forces without being equipped with non-lethal weapons[2210].

For the purposes of the present study, this brief analysis of this critique seems sufficient to discard the arguments it makes that no "use-of-force-continuum" requirement exists under international humanitarian law[2211].

b) Direct Criticism to the Interpretive Guidance: a Progressive Approach

Notably, the stance defended by the *Interpretive Guidance* has been object of criticism also from the other "end of the spectrum". In other words, whereas the critique reported above alleged that the laws of armed conflict do not know of limitations to the use of force other than those expressly proscribed by the relevant instruments, this critique alleges that the stance assumed by the *Interpretive Guidance* is too restrictive in its understanding of a least harmful means approach as it concedes that there is an obligation to capture rather than kill only when the target's apprehension poses zero risks for the attacking party and only when this happens within areas where the attacking party keeps full territorial control: The Interpretive Guidance maintains that there is no obligation on the part of the attacking party to assume even a modicum of risk to its own forces. The Interpretive Guidance is not simply conservative in this regard. The Guidance is on the far end of the spectrum. That is, the Guidance countenances no balancing whatsoever"[2212].

Moreover, so the argument goes, the evaluation of the feasibility of capturing the enemy rather than killing him is made dependent upon factual circumstance on the ground. Thus, the *Guidance* makes clear that "In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by

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2209 ECtHR, *Gül v. Turkey*, Judgment of 14 December 2000, para.82 and ECtHR, *Oğur v. Turkey*, Judgment of 20 May 1999.

2210 ECtHR, *Hamiyet Kaplan and others v. Turkey*, *supr*a; ECtHR, *Ergi v. Turkey*, *supra*, para. 85; and ECtHR, *Kaya v. Turkey*, Judgment of 19 February 1998, para. 91.

2211 For a thorough reply to the critique, also related to the methods and reasons leading the ICRC to endorse Section IX in the Interpretive Guidance see Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, 2010.

2212 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 12.

specific provisions of IHL"[2213]. As a consequence, the adoption of a least harmful means approach would remain confined to circumstances where the attacking party exercises an effective control over territory[2214].

Accordingly, this critique concludes, "RUF may be limited to circumstances in which the attacking force possesses effective territorial control. Our discussion […] finds no substantial precedent for this constraint. However, this concept is introduced explicitly by the ICRC in the Interpretive Guidance".

It is submitted here that this is a reasonable line of argument. However, the theory advanced by the *Interpretive Guidance* may in fact be more suited to the practicalities of warfare. It seems therefore important to further explore this subject, first of all in order to demonstrate whether or not international humanitarian law does know of limitations to the use of force of the kind hereby suggested. In addition because, if affirmative, it becomes crucial to understand which kind of limitations it imposes on the force that belligerents may employ, especially in relation to the pre-meditated killing of pre-selected persons.

4.4. The Genesis of a Least Harmful Means Approach

A least harmful means approach may be defined, in general, in the following terms: "if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed; and if they can be put out of action by light injury, grave injury should be avoided"[2215]. Therefore, according to this approach, the attacking party shall first of all assess whether an alternative solution to the deployment of lethal force exists which may lead to a comparable outcome in terms of military necessity[2216]. It should be also stressed at the outcome that the principle should be binding upon all those involved in hostilities. Therefore, it does not impose an un-balanced responsibility on States, since also combatants may benefit from it. In other words, "It applies to all who are 'not entitled to protection against direct attack', which includes combatants in international armed conflicts"[2217].

2213 *ICRC Interpretive Guidance*, *supra*, p. 80.

2214 See, accordingly, Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 13.

2215 *Ibidem*, p. 2.

2216 Saby Ghoshray, *Targeted Killing in International Law: Searching for Rights in The Shadow of 9/11*, *supra*, p. 387.

2217 Charles Garraway, *Direct Participation and the Principle of Distinction: Squaring the Circle*, *supra*, p. 183.

Notably, the commentary to the *ICRC Interpretive Guidance* clarifies that this principle is based on existing law[2218]. Traditionally, this understanding is traced back to the position expressed by the author of the *Commentary to the 1949 Geneva Conventions* Jean Picket who held: "[I]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil"[2219]. Notably, and contrary to what uphold in some of the critiques reported *antes*, this reading of military necessity was shared by other experts of the time. Thus, the record of a conference held in 1974 in Lucern under the auspices of the ICRC shows that "According to some experts, the element of military necessity consisted solely in the capacity of a weapon to put an enemy *hors* de combat, this in conformity with the preamble to the St. Petersburg Declaration of 1868", before relating about Pictet's example that "if two or more weapons would be available which would offer equal capacity to overcome (rather than "disable") an adversary, the weapon which could be expected to inflict the least injury ought to be employed"[2220]. It is therefore to be discredited as flawed and misleading the idea that "Pictet's arguments [did not] receive serious consideration, much less support, from government delegations"[2221] or that it "has never gained traction"[2222].

Indeed, some authors have relied on the following assertions, advanced a distinguished colleague of Pictet's, in order to make the point that his proposed model never found support by other experts: "It seems fairly evident that Pictet's statement, taken literally, was untenable. A combatant simply cannot be equipped with a wide array of weapons for all kinds of situations, as the golf player is with his bag of golf clubs"[2223]. However, this assertion is two-pronged, and the second part is no less important than the first one. Thus, its author went on to clarify: "taken less literally, Pictet's argument appears to carry full weight; that is, if it is understood as addressed to the authorities who decide on the armament of the armed forces and, eve, those military commanders who actually have a choice of

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2218 *ICRC Interpretive Guidance*, p. 1040.

2219 Jean Pictet, *Development and Principles of International Humanitarian Law*, Geneva, 1985, p. 75.

2220 ICRC, *Report of the 1974 Conference of Government Experts on the Use of Certain Conventional Weapons*, Lucerne, 1975, para. 25.

2221 W. Hays Parks, *Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise and Legally Incorrect*, *supra*, p. 787. In higher detail on the historical process that led to Pictet's view and its endorsement by the Lucern Conference, as well as on the significant flaws underlying the position that tends to underestimate the value of Pictet's proposition see Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, pp. 31-41.

2222 Charles Garraway, *Direct Participation and the Principle of Distinction: Squaring the Circle*, *supra*, p. 182.

2223 Frits Kalshoven, *The Soldier and his Golf Clubs*, in Frits Kalshoven, *Reflections on the Law of War, Collected Essays*, *supra*, p. 375.

weapons at their disposal. Considerations of military efficacy will again tend to rank high in the deliberations of these authorities; at the same time, they will fail in their duty if they totally lose sight of the humanitarian requirement of minimization of human suffering"[2224]. It seems apparent that this stance endorses a least harmful means approach rather than rejecting it. What it rejects is the practical applicability of Pictet's example about the soldier's choice of weapon, but not its underlying rationale. Especially, it should be noticed, also this position considers the principle of humanity ("humanitarian requirement of human suffering") as a criterion that plays a role additional to specific provisions on means and methods of warfare already endorsed by relevant rules of international humanitarian law, thus imposing a further restriction on the violence that may lawfully be delivered even when otherwise lawful means and methods are employed.

That Pictet's view was not isolated is also demonstrated by international instruments and records of other international conferences dating back to the 1970s. Thus, the UN Secretary-General's *Report on Respect for Human Rights in Armed Conflict* expressly stated: **"**It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied"[2225].

Moreover, it has been shown that an accurate analysis of understandings expressed from the 70s onwards mirror the existence of a least harmful means approach[2226]. In this vein, the ICRC expressed the view that even in times of armed conflicts "recourse to force must never be an end in itself. It will consist in employing the constraint necessary to obtain that result. Any violence reaching beyond this aim would prove useless and cruel. The principle of humanity enjoins that capture is to be preferred to wounding, and wounding to killing; that the wounding should be effectuated in the least serious manner – so that the wounded person may be treated and may recover -- and in the least painful manner; that the captivity should be as bearable as possible, etc"[2227]. In yet another expert meeting, the ICRC again came to endorse a least harmful means approach in the following terms: "What suffering must be deemed "unnecessary" or what injury must be deemed "superfluous" is not easy to define. Clearly the authors of the ban on dum-dum bullets felt that the hit of an ordinary rifle bullet was enough to put a man out

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2224 *Ibidem*, p. 375.

2225 UN Secretary-General, *Report on Respect for Human Rights in Armed Conflict*, UN Doc. A/8052, 18 September 1970, para. 107.

2226 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, pp. 31 - 40.

2227 ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. IV, Rules Relative to Behaviour of Combatants*, Geneva, 1971, p. 6.

of action and that infliction of a more severe wound by a bullet which flattened would be to cause "unnecessary suffering" or "superfluous injury". The circumstance that a more severe wound is likely to put a soldier out of action for a longer period was evidently not considered a justification for permitting the use of bullets achieving such results. The concepts discussed must be taken to cover at any rate all weapons that do not offer greater military advantages than other available weapons while causing greater suffering/injury. This interpretation is in line with the philosophy that if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided"[2228]. By the same token, the Ad Hoc Committee on Conventional Weapons of the Diplomatic Conference of 1974 stated: "if the choice was between killing the adversary or injuring him; then he should be injured; and a light injury should be preferred to a grave one"[2229].

4.5. The Role of Military Necessity for the Determination of Least Harmful Means Obligations

What is perhaps most disconcerting (and disorienting) when approaching the question of whether there is an obligation to capture rather than kill whenever it is possible to do so even in times of armed conflicts, even under international humanitarian law, is the fact that those who answer to this question in the affirmative and those who conclude in the negative do so building their arguments on the same premises: both groups take steps from military necessity. This means that at the bottom of it, the disagreement remains really about this fundamental principle of the laws of war, the question of least harmful means approaches being a simple symptom of a way deeper disagreement.

One of the harshest critiques to the *ICRC Interpretive Guidance* has therefore tried to corroborate its position going to the roots of the problem and making reference to historical sources. In so doing it relied Grotius's statement that "In general, killing is a right in war" and "according to the law of nations, anyone who is an enemy may be attacked anywhere". The critique infers from this statement that military necessity cannot further limit belligerents' authority to kill.

[2228] ICRC, *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts*, Geneva, 1973, para. 23.

[2229] *Report of the Ad Hoc Committee on Conventional Weapons, 1st Session*, in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, para. 27.

However, this understanding is overly simplistic as well as misleading: as already underlined at length[2230], the writings of Grotius (or of any other author for that matters) cannot be tore apart and then quoted sentence by sentence without any reference to the general meaning or context of his work. Contrary to what upheld by these authors, Grotius strongly supported both geographical restrictions to what he did postulate as a right to kill and, more to the point, he supported a least harmful means approach: as far as geographical limitations are concerned, those reported by Grotius mainly related to the law of neutrality[2231]. But, as far as the least harmful means approach is concerned, Grotius geared his whole argument around the principle of military necessity in its restraining mode, also making reference to the principle of humanity. Thus, he maintained: "By way of conclusion to this subject it may be observed, that all actions no way conducive to obtain a contested right, or to bring the war to a termination, but calculated merely to display the strength of either side are totally repugnant to the duties of a Christian and to the principles of humanity. So that it behoves Christian princes to prohibit all unnecessary effusion of blood, as they must render an account of their sovereign commission to him, by whose authority, and in whose stead, they bear the sword."[2232]. In a perhaps even more compelling passage, Grotius then explicitly set the following limitations to the right to kill during wartime: "No one can be justly killed by design, except by way of legal punishment, or to defend our lives, and preserve our property, when it cannot be effected without his destruction"[2233]. As self-evident from the quoted passages, Grotius did indeed envisage a whole lot of restrictions upon the right to kill enemies, even during war time, based on principles of necessity and humanity. Most notably, the paragraphs just quoted are, respectively, the last and the first of a chapter specifically devoted by Grotius to *The Right of Killing Enemies, in Just War, to be Tempered With Moderation and Humanity*[2234]. As it appears, it seems feasible to postulate that "the historic consequence of combat is that combatants lawfully may kill their enemies". What is utterly wrong is to suggest, as those critiques to the least harmful means approach do, that there are no limitations to the authority to kill, as the principle of necessity is in and by itself more than sufficient to impose such restrictions and is, moreover, augmented by a whole set of limitations built-in international humanitarian law which cannot be ignored, as already Grotius made clear.

This reading finds confirmation in the first codifications of the laws of war. Thus for instance, it is true that, as some have underlined, the *Liber Code* read "Military necessity admits of all direct destruction of life or limb" but it merely

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2230 See *supra*, Ch. I, para. 2, sub-para. 2.7(d).

2231 *Ibidem.*

2232 Hugo Grotius, *De Jure Belli ac Pacis, supra*, L. III, Cap. XI, para. XIX.

2233 *Ibidem*, L. III, Cap. XI, paras. I and II.

2234 *Ibidem*, L. III, Cap. XI

referred that sentence to "armed enemies"[2235]. And, in yet another provision it established that "Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, *nor of maiming or wounding except in fight*"[2236].

Thus, when the Commentary *to the 1949 Geneva Conventions* states that "if we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil"[2237], it does not indeed introduce a new parameter for the laws of war vitiated by Jean Pictet's view. It rather follows suit in a path that has been traced for centuries. This therefore holds true also for statement contained in the *Commentary to AP I* that "the object of combat is to disarm the enemy. Therefore it is prohibited to use any means or methods which exceed what is necessary for rendering the enemy *hors de combat*"[2238].

In support of this view the ICJ has authoritatively averred that, as it stands today, international law proscribes the employment of methods and means of warfare of a nature to cause "a harm greater than that unavoidable to achieve legitimate military targets"[2239].

A least harmful means approach seems therefore to perfectly suit the exigencies of military necessity, not imposing on such principle any undue restriction and rather directly stemming from it: if during war time it is allowed to do whatever is necessary to achieve a military target, provided that all the other rules and principles of the laws of armed conflict are respected, it derives that what is not necessary is automatically not allowed. In perfect harmony with this observation it has been observed that "Section IX [of the interpretive guidance] does not, of course, interpret IHL to impose a use-of-force continuum or, more generally, a law enforcement paradigm on attacks against legitimate military targets. Nor does it, as suggested by Parks, interpret IHL as prohibiting the multiple shooting or wounding of an enemy who is not *hors de combat*, or the direct application of deadly force without prior attempt to resort to non-lethal means. Instead, […] Section IX simply interprets IHL governing the conduct of hostilities as restricting the kind and degree of force that can lawfully be used against

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2235 *Lieber Code, supra*, Art. 15: "Military necessity admits of all direct destruction of life or limb of armed enemies […] it allows of the capturing of every armed enemy, and every enemy of importance to the hostile overnment, or of peculiar danger to the capture" (emphasis added).

2236 *Lieber Code, supra*, Art. 16. Emphasis added.

2237 Jean S. Pictet, Commentary to the 1949 Geneva *Conventions*, *supra*, § 75.

2238 *Commentary on the APs*, *supra*, § 1411.

2239 ICJ, *Nuclear Weapons Advisory Opinion, supra*, para. 78. Accordingly, Rain Liivoja, *Chivalry Without a Horse: Military Honour and the Modern Law of Armed Conflict*, *supra*, p. 87.

legitimate military targets to "what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances"[2240].

In line with this reading it has been observed that "the principle "prohibits the targeted killing of an individual combatant (or civilian directly participating in the hostilities) in a situation where such killing is militarily unnecessary, either because it offers no military advantage or because the targeted person could have been captured without unreasonable risk to the operating forces […] If military operations are conducted simply because the military can and not because it must, if soldiers kill because they enjoy it and not because it is necessary, if homes of militants are bombed to set an example and not because it is a military objective, then how can this be not terrorism?"[2241].

4.6. Current State Practice

a) Preliminary Considerations over the Role of State Practice for a Least Harmful Means Approach

One of the most common features of almost every critique to a least harmful means approach is the allegation that there is no state practice supporting the view that an obligation to capture rather than kill exists whenever the deprivation of the enemy's life is not necessary.

At the outset, it should be pointed out that whereas critique allege a lack of state practice in support of a least harmful means test, they actually fail to report the existence of a consistent state practice in favour of their own thesis, which is that there should be no restrictions to the use of lethal force a part from those specifically designed under black-letter norms of international humanitarian law[2242].

2240 Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, pp. 899 and 900.

2241 Rommel J. Casis, *Predator Principles: Laws of Armed Conflict and Targeted Killings*, *supra,*, p. 368. See accordingly Sascha-Dominik Bachman, *Targeted Killings: Contemporary Challenges, Risks and Opportunities, supra*, p. 9, arguing that "acts of targeted killing, which are carried out of vengeance or other heinous motives, or as part of an assassination strategy or which are conducted outside the conduct of hostilities or those executed within the context of hostilities but outside military necessity, may constitute crimes committed under the veil of war—and may qualify as crimes under national as well as international law".

2242 See, accordingly, *Nils Melzer, Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation*

As a matter of fact, one could perhaps argue to this end that, as established pursuant to a well-known principle of law, whatever is not expressly forbidden is allowed. This line of argument, however, seems to present two problems in the matters that more closely related to the present work: a) it rests on the (shaky) presumption that there is no rule (other than one which may be inferred from state practice) which forbids the use of lethal force when capture is feasible; b) it does not take into account that not even the existence of a state of war makes intentional killing the default position. Moreover, it has been rightly observed in this regard that, in times of armed conflict, this principle does not hold completely true: "it has long been recognized that matters not expressly regulated in treaty IHL should not, 'for want of a written provision, be left to the arbitrary judgment of the military commanders' (Preamble H[ague] II ; Preamble H[ague] IV) but that, in the words of the famous Martens Clause, 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience' (Art. 1 [2] AP I). […] the Martens Clause continues to serve as a constant reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law"[2243].

Therefore, it is submitted here that those who criticize the existence of a least harmful means approach on the basis of poor State practice in this regard should first of all demonstrate that the burden to relinquish State practice rests on those who uphold the validity of such approach and not, instead, exactly on those who claim that no such a thing as a capture rather than kill obligation exists.

Moreover, as the following subparagraph will show, the endorsement of a least harmful means approach by the *ICRC Interpretive Guidance* has prompted (or at least) accelerated the creation of relevant and consistent State practice in this regard.

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in Hostilities, *supra*, p. 909, arguing that in his critique to the Interpretive Guidance W. Hays Parks "fails to provide any evidence of contrary practice or jurisprudence, which would imply the permissibility of manifestly excessive force in attack against combatants or civilians directly participating in hostilities".

[2243] *ICRC Interpretive Guidance*, *supra*, p. 80.

b) The Case of Israel: Jurisprudence Confirmed

In the well-known and already thoroughly analyzed *Targeted Killing Case*[2244], the Israeli Supreme Court recognized that a targeted killing is unlawful if the target may be apprehended: thus, if a person taking direct part to hostilities can be arrested, interrogated and tried it is compulsory for the targeting state to follow this course of action[2245]. Notably, the test thus established holds that apprehension should be deem possible even when the attacking party needs to undertake some risk in order to capture the target, thus framing an obligation which is even more compelling for States than that envisaged by the ICRC Interpretive Guidance[2246]: "Arrest, investigation, and trial are not means which can always be used. […] at times it involves a risk so great to the lives of the soldiers, that it is not required. However, it is a possibility which should be considered"[2247].

Admittedly, the jurisprudence of the Supreme Court of Israel in the *Targeted Killing case* has been one of the elements on which the *ICRC Interpretive Guidance* has relied upon to come to its conclusion on the capture/kill question.

This has been identified as one of the weak points of the *Guidance* on the basis that this judgment would hold no value whatsoever outside the Israeli context and that "As the court stated, the Israeli requirement for capture or apprehension of a civilian taking a direct part in hostilities is based on Israeli internal law rather than a law of war obligation" [2248]. These assessments are simply, patently wrong. Indeed, whereas the Court recalls its internal law it solely relies on international law parameters in order to come to its conclusion, as the Court itself clarifies. Moreover, in its argument, the Court heavily relies on international case law, recalling for instance the *McCann case* decided upon by the ECtHR[2249]. Moreover, one cannot see why a test working in a situation of occupation such as that of Israel

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2244 See *supra*, Ch. IV, para. 5, sub-para. 5.1(j).

2245 Supreme Court of Israel, *The Public Committee Against Torture in Israel v. Israel*, *supra*, para. 40: "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed […]. Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force". In accordance with this reading of the Targeted Killing Case judgment see Adam Bodnar and Irmina Pacho, Targeted Killings (Drone Strikes) and the European Convention on Human Rights, in Polish Yearbook of International Law, 2012, p. 195.

2246 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 12.

2247 *Ibidem*, para. 40.

2248 W. Hays Parks, *Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise and Legally Incorrect*, *supra*, pp. 788 - 793.

2249 Supreme Court of Israel, *The Public Committee Against Torture in Israel v. Israel*, *supra*, para. 40.

could not work, at the very lists, in similar situations of occupation or in situations characterized by an analogous degree of control over territory, such as in many non-international armed conflicts.

Furthermore, neither the Guidance nor the critiques to the Guidance take into account the fact that the Israeli Supreme Court's endorsement of a least harmful means approach is not the only relevant Israeli State Practice to this end. In particular, Israel made clear that even well-known terrorists belonging to organized armed groups engaged in an armed conflict against it would be deemed as legitimate targets for lethal force only insofar as no less harmful means would be available to prevent the threat they pose in at least two occasions: a Government's statement to the Human Rights Committee in 2003[2250] and the reliance on that standard made by the Government again in 2006 in its reply to the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions[2251]. It is worth recalling, in this regard, that the report confirmed the trend towards a consolidation of the orientation adopted by this State since the turn of the century[2252]: official endorsement of the practice of targeting and killing suspected terrorists, declared intention to continue such killings, reference to the laws of armed conflict as the only applicable legal regime, qualification of the persons targeted as legitimate military targets, Israeli actions' compliance with the laws of war alleging, in particular, that legitimate methods of warfare are employed by Israel in carrying out these killings. Israel also maintained that even well-known terrorists would be legitimate targets only insofar as they are directly involved in a hostile act, only in the presence of an urgent military necessity and only when no less harmful means would be available to prevent the occurrence of such threat. It also clarified, however, that in areas where arrest would not be practically feasible or else would present some hurdles, such as in the Gaza strip, then arresting the target would not be an option and a targeted killing should be performed instead[2253].

2250 Government of Israel, *Statement to the Human Rights Committee*, 25 July 2003, UN Doc. CCPR/C/SR.2118, para. 40.

2251 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2006, Addendum 1*, UN Doc. E/CN.4/2006/53/Add.1, 27 March 2006, pp. 130 and 131.

2252 Government of Israel, *Statement to the Human Rights Committee*, *supra*, para. 40.

2253 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2006, Addendum 1*, *supra*, pp. 130 and 131.

c) The Endorsement of a Least Harmful Means Test by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

As already pointed out above[2254], the stance on least harmful means expressed by the Israeli Supreme Court in its targeted killing case has been endorsed, most notably, by the Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions: "A civilian taking a direct part in hostilities may be the object an attack, for such time, only if no less harmful means, such as arrest, can be used. This has been the interpretation adopted by the Israeli Supreme Court" [2255]. Thus, the Special Rapporteur came to the conclusion that "Less-than-lethal measures are especially appropriate when a State has control over the area in which a military operation is taking place, when 'armed forces operate against selected individuals in situations comparable to peacetime policing', and in the context of non-international armed conflict, in which rules are less clear. In these situations, States should use graduated force and, where possible, capture rather than kill"[2256].

d) U.S. Policy

Most notably, States commonly resorting to targeted killings have often uphold that, as a matter of policy, they would capture rather than kill opposing forces when the opportunity presents itself.

In particular, as already underlined *antes*[2257], the U.S. has repeatedly maintained that, as a matter of policy, it does have a preference for capture rather than killing operations[2258]. Accordingly, the US administration has stressed that "Lethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively"[2259].

2254 See *supra*, Ch. IV, Para. II, para. 6, sub-para. 6.2.

2255 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2009, Addendum*, UN Doc. A/HRC/11/2/Add.1, 29 May 2009, p. 245.

2256 *Alston Report*, *supra*, para. 77.

2257 See *supra*, Ch. IV, 4, sub-para. 4.1(f).

2258 The White House Office of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, *supra*, p. 1: " The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect". See accordingly John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilston Center*, *supra*, suggesting that "It is our preference to capture suspected terrorists whenever and wherever feasible. For one reason, this allows us to gather valuable intelligence that we might not be able to obtain any other way".

2259 The White House Office of the Press Secretary, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, *supra*, pp. 1 and 2. To this end see also John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*,

It is generally argued that this is a policy stance and not a legal obligation. However, as noted by one of the leading authors on this issue, "it is an important concession that much state practice is consistent with the proposed LOAC rule"[2260].

Moreover, even though some argue that based on its characterization as a policy this stance cannot contribute to the sedimentation of a new legal norm of customary international law, it should be noticed that avoiding killing rather than capturing at the same time prevents the genesis of a general rule of opposite sign.

e) Other States

Notably, other states have expressly endorsed a least harmful means test. Thus, whereas with reference to the practice of Colombia the *Manual de Derecho Operacional*[2261] alone is mentioned in the *Interpretive Guidance*[2262], such instrument actually moves in the same direction already undertaken at the judicial level by the Constitutional Court of Colombia[2263].

Moreover, the UK seems to have recently endorsed what could exactly be defined as a least harmful means approach when stating that, the use of intentional lethal force represents in any case a last resort, only feasible when it would be otherwise impossible to detain the targeted person or else to disrupt and prevent the attack[2264].

In line with this endorsement, it has been pointed out that some EU member states have also agreed that "the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way"[2265].

Speech at the Woodrow Wilston Center, *supra*; Eric Holder, *Attorney General's Letter to the United States Senate Committee on the Judiciary*, *supra*; and Eric Holder, *Attorney General's Speech at Northwestern University Law School*, *supra*.

2260 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 10.

2261 Colombia, *Manual de Derecho Operacional*, 7 December 2009.

2262 Nils Melzer, Ke*eping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, p. 909.

2263 Colombian Constitutional Court, *Case T-409*, Judgment of 8 June 1992. Accordingly, Colombian Constitutional Court, *Case C-225/95*, Judgment of 18 May 1995; Colombian Constitutional Court, *Case C-578*, Judgment of 4 December 1995. To this end see in particular Corte Constitucional de Colombia, *Sentencia No. 225-95*, paras. 28-33.

2264 UK Government, *Memorandum to the JCHR*, *supra*, p. 1.

2265 Jessica Dorsey and Christophe Paulussen, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, *supra*, Executive Summary.

4.7. International Humanitarian Law Built-In Limitations Supporting a Least Harmful Means Approach

It has been argued, in accordance with the thesis advanced here, that a number of laws of armed conflicts sub-sets are based upon limitations to the use of legitimate force against combatants[2266].

In this regard, explicit reference is generally made to the rationale of provisions related to limitations of unnecessary suffering "either as a result of a general principle of necessity or as a more specific prohibition on *unnecessary* suffering"; to "the definition and protection of persons *hors de combat*", underlying that the crucial point in this regard is "how expansively the definition of *hors de combat* is drawn"[2267].

Whereas the first one of these two allegations may better be treated under the heading of the principle of military necessity as the rationale underlying norms preventing unnecessary suffering is indeed the protective dimension of necessity couple with humanity[2268], it is submitted here that the latter statement is of particular relevance. It has indeed already been revealed in the course of the present study that rules concerning denial of quarter extend their protection well beyond what traditionally understood[2269]. In particular, it has been stressed in that context that those rules do not simply refer to persons already deprived of their liberty by the opposing party. Thus, on the one hand, the protection offered to persons *hors de combat* is to be understood to cover persons who are unable to defend themselves as well as persons "no longer taking part in combat". On the other, the general prohibition to deny quarter actually ban orders that no survivors be left and is in this regard *per se* sufficient to entail an obligation to capture whenever it is possible to do so[2270].

In full agreement with this assessment it has been further observed that a person ma "fall in the power of the enemy by means other than capture"[2271]. Moreover, the 1977 Additional Protocol has avoided to use the expression "fallen

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2266 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, pp. 17 - 20, making reference, respectively, to: prohibition on assassination, perfidy, treachery and denial of quarter; law on reprisals; "release on the spot" rule; limitations to the use of force against escaping prisoners of war.

2267 *Ibidem*, p. 20.

2268 See in higher detail *supra* in this paragraph.

2269 To this end see *supra*, Ch. III, para. 3.

2270 *Ibidem*. See, accordingly, Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977*, in *International Review of the Red Corss*, Geneva, 1994, pp. 98 and 116.

2271 Howard S. Levie, *Prisoners of War in International Armed conflict*, Cambridge, 1978, p. 35.

into the power" replacing it with "is in the power" thus unequivocally extending the scope of protection of the norm at hand[2272]. Actually, the *Commentary to AP I* deposes in favour of this understanding[2273] and the same holds true for the leading treatise on Protocol I: "under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless"[2274]. That finds full support in legal literature[2275].

Thoroughly confirming this reading, it has been correctly pointed out in this regard that, albeit "no treaty rule lays down in express terms that an enemy cannot be killed if they could be taken prisoner instead […] neither is there solid ground for the assertion that an enemy 'has surrendered' (and, hence, can no longer be killed) only from the moment their capture has been formally completed. If not against the terms, the argument goes against the spirit of Article 23(cd) and, indeed, against the very notion of humanitarian law as the body of law aiming to protect human life and ward off unnecessary human suffering; or, in terms of the Martens clause, against the notion of 'the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'"[2276].

Most notably, whereas any reference to unnecessary suffering is necessarily affected by the fact that nowhere in the entire body of international humanitarian law is spelled out that such notion also embraces unnecessary killings, references to the protection deriving from the norms against denial of quarter are unquestionably referred to exemption from attack without suffering from any limitation deriving status-related considerations or "suffering" itself.

Nonetheless, additional support for a least harmful means approach may be found in other sub-sets of norms of international humanitarian law referring to the prohibition of unnecessary injuries and suffering. Thus the ICJ, referring to the *1868 Saint Petersburg Declaration* and to Art. 22 *Hague Regulations*, has already

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2272 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, pp. 22 - 26.

2273 *Commentary on the APs*, *supra*, §§ 1612 and 1614.

2274 Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, *supra*, § 219.

2275 See, accordingly, Knud Dormann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Geneva, 2003, p. 190; Antonio Cassese, *International Law*, *supra*, p. 422: "When it proves impossible to capture the suspected terrorists, belligerents may use lethal force against them only when it is absolutely sure that civilians are taking active part in hostilities and as an extrema ratio, when any other method has proved or may reasonably prove pointless".

2276 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War, an Introduction to International Humanitarian Law*, *supra*, p. 98.

had occasion to stress that belligerents cannot employ means and methods "which uselessly aggravate the suffering of disabled men or make their death inevitable" and that "it is prohibited to use weapons causing them such harm or uselessly aggravate their suffering"[2277]. Accordingly, it has been noted by reference to those same instruments that international humanitarian law does not create an unrestrained right to kill[2278].

Finally, some authors have pointed out that the laws of armed conflict may indeed be interpreted so as to embrace a law-enforcement-like proportionality test, allegedly deriving from a joint reading of rules prohibiting superfluous injuries and unnecessary sufferings[2279].

4.8. Least Harmful Means and the Prohibition of Assassination: Effects of a Human-Rights-Oriented Interpretation

It is considered that all that has been provided above would be *per se* sufficient to demonstrate beyond doubt that international humanitarian law imposes in and by itself an obligation to capture rather than kill whenever possible, *i.e.* international humanitarian law favours a least harmful means approach.

Indeed, norms are regulated first and foremost by logic. There need not be either black letter rule or consistent practice on this specific issue: it descends directly by the principle of military necessity that, when there is a choice to capture rather than killing a fighter (be him a proper combatant, a so called "fighter" or a civilian taking direct part to hostilities), and, in practice, there is no downfall in choosing one option over the other, *i.e.* they are totally equivalent as for the risks undergone by the soldiers that are confronted with the choice of killing or apprehending, then the attacking party has an obligation to capture. Doing otherwise would amount to doing something that is not military necessary and therefore, by definition, unlawful. There need not be any black-letter rule to clarify this concept: it is more than sufficient to logically apply the principle of necessity to its full extension. It is true that, in practice, it may be way more expedient to kill an adversary rather than capturing him, if only because apprehension entails an extraction of the captive which may be difficult and endanger the unit proceeding to this operation. However, expediency does not equate to military necessity. And

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2277 ICJ, *Nuclear Weapons Advisory Opinion*, *supra*, paras. 77 and 78.

2278 *Alston Report*, *supra*, para. 75: "Although IHL does not expressly regulate the kind and degree of force that may be used against legitimate targets, it does envisage the use of less-than-lethal measures: in armed conflict, the 'right of belligerents to adopt means of injuring the enemy is not unlimited' and States must not inflict "harm greater that that unavoidable to achieve legitimate military objectives".

2279 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 28.

international humanitarian law is clear in this case: when extraction is not possible, the person apprehended is to be released.

It is posited here that the prohibition of assassination may also in this regard play a crucial role. First, because it provides thorough confirmation for the existence of the rule at hand. Second, because it places the obligation of capturing rather than killing into context.

Assuming in fact, *arguendo*, that all the above may leave some doubt as to the existence of an obligation to capture rather than kill, one cannot fail to see that, up until this moment, no consideration whatsoever has been dedicated to how international human rights law might impact on this assessment. In this regard, the *ICRC Interpretive Guidance* specifies that "although this Interpretive Guidance concerns the analysis and interpretation of IHL only, its conclusions remain without prejudice to additional restrictions on the use of force, which may arise under other applicable frameworks of international law such as, most notably, international human rights law or the law governing the use of interstate force (*jus ad bellum*)"[2280].

It has been demonstrated at length in the previous chapters[2281] that absent a specific rule of international humanitarian law or in the presence of unclear rules belonging to such legal regime, guidance may be drawn from human rights law[2282].

The inter-American Court of Human Rights has found that "regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends"[2283]. Accordingly, in all the already mentioned "Turkish cases" the ECtHR has indeed found a violation of the right to life of members of the

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2280 *ICRC Interpretive Guidance*, *supra*, p. 82. Notably, in this regard, Parks's critique to the Interpretive Guidance alleges that the Guidance's non-prejudice clause runs contrary to the qualification of international humanitarian law as lex specialis in times of war, thus wrongfully leaving the door open for international human rights law to come back into the picture. Melzer underlines that the clause has no bearing on the applicable legal framework and instead its aimed at underlying that the use of force in times of armed conflict may not only comply with international humanitarian law parameters but, depending on the prevailing circumstances, may also depend by other legal regimes. Thus, Melzer specifies, "the Interpretive Guidance clearly states that its interpretation of the standards governing the use of force in the conduct of hostilities is based exclusively on IHL", while leaving untouched the question of interaction with other competing legal regimes. To this end see *Nils Melzer, Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *supra*, pp. 898 and 899.

2281 See supra, Ch. II, para. 6.

2282 *Alston Report*, *supra*, para. 29.

2283 IACtHR, *Velasquez Rodriguez*, *supra*, para. 154; *Godinez Cruz*, *supra*, para. 162; *Neira Alegria*, *supra*, para. 75.

PKK, both when the victims were in their private houses and when they were actually armed, for a failure on part of Turkish authorities to resort to means other than lethal force[2284]. In the already recalled *Guerrero case* the UN HRC has found that security forces were responsible for the extrajudicial execution of suspected members of the *guerrilla* because, having the chance to resort to least harmful means and, in particular, to apprehend them, they instead deprived them of their life[2285]. Moreover, in its *Concluding Observations on Israel*, the UN HRC has defined as extrajudicial executions the killing of 184 persons selectively targeted in the Gaza strip between 2003 and 2010[2286] following Israel's failure to comply with the least harmful means approach endorsed by the HRC itself in its already mentioned 2003 *Concluding Observations on Israel*[2287]. In line with this assessments, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has, with regard to the situation in Israel, wholly endorsed a least harmful means approach[2288].

Recently, the ACmHPRs has accordingly established: "Where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option"[2289].

It is worth pointing out in this regard that in 2013 the ICRC convened an expert meeting on the use of force in armed conflicts with the aim of clarifying the exact interplays between the law enforcement paradigm and the conduct of hostilities2290. Among the many important and interesting issues touched upon by the meeting, the study of the use of force against legitimate targets during armed conflicts is of particular relevance for the present discussion. More specifically, the ICRC presented to the committee of experts a fictional scenario, featuring an

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2284 ECtHR, *Gül v. Turkey*, *supra*, para.82 and ECtHR, *Oğur v. Turkey*, *supra*. ECtHR, *Ergi v. Turkey*, *supra*, para. 85; and ECtHR, *Kaya v. Turkey*, *supra*, para. 91. It should be noted however that in all these cases the ECtHR actually resorted to its classical "absolute necessity" test, provided that Turkey never derogated from the European Convention of Human Rights pursuant to the faculty predisposed under Art. 15.

2285 HRC, *Suarez de Guerrero v. Colombia*, *supra*.

2286 HRC, *Concluding Observations: Israel*, 29 July 2010, UN Doc. CCPR/C/ISR/CO/3, para. 10.

2287 HRC, *Concluding Observations: Israel*, 21 August 2003, UN Doc. CCPR/CO/78/ISR, para. 15, stating "before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted".

2288 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2009, Addendum*, UN Doc. A/HRC/11/2/Add.1, 29 May 2009, pp. 244 and 245.

2289 ACmHPRs, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, Banjul, 2015, para. 34.

2290 Gloria Gaggioli, *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and the Law Enforcement Paradigms*, *supra*.

isolated sleeping fighter, i.e. a person belonging to an organized armed group involved in a non-international armed conflict who is sleeping with his family in a location under the control of government forces. In this connection, the experts were asked whether there could have been in the fictional scenario an obligation to capture rather than killing the sleeping fighter[2291]. Whereas the experts, by a slight majority maintained that attacking the isolated sleeping fighter would be lawful, it is significant that they did so considering that international humanitarian law would be in this case *lex specialis*, superseding international human rights law. Notably, those who did not referred to the *lex specialis* principle in these terms found instead that the fighter could not, under these circumstances, be targeted. Provided that, in accordance with the thorough analysis conducted in the present study the applicability of the *lex specialis* principles in these terms should be rejected[2292], it is submitted here that this results bear particular significance as to the scope of a least restrictive means approach. Also notable is the fact that most of the experts that took into account the relevant human rights case law dealing with analogous scenarios "would come to the conclusion that the fighter […] should be arrested under a law enforcement paradigm. Targeting and killing such a fighter would be considered as an arbitrary deprivation of life of the fighter (and of the other potential collateral victims of the use of force) since an arrest would appear feasible given the control exercised by the Government over the territory and area"[2293].

The inter-applicability of human rights law and international humanitarian law, as a consequence, confirms the existence of a least harmful means test regulating the use of lethal force also in the framework of armed conflicts. Notably, as far as targeting practices are concerned, this is the exact same conclusion that would be reached through an application of the prohibition of assassination understood as a ban on premeditated lethal killing outside battlefield contexts.

Indeed, supporters of a least harmful means approach have observed that depending on how expansively the prohibition of denial of quarter is interpreted, the protection it affords "could even place more limits on the use of force than RUF [*i.e.* a least restrictive means approach]"[2294]. As underlined in previous paragraphs, it is also through reference to the rationale of prohibitions such as that on denial of quarter that the prohibition of assassination has lived on, and through their interaction with human rights paradigms that it has ultimately been reinforced[2295].

2291 Gloria Gaggioli, *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and the Law Enforcement Paradigms*, *supra*, p. 13.

2292 See supra, Ch. II, para. 6.

2293 Gloria Gaggioli, *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and the Law Enforcement Paradigms*, *supra*, p. 22.

2294 Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, *supra*, p. 20.

2295 To this end see supra, Ch. III, para. 5.

Therefore, putting the least harmful means test into context, through reference to the prohibition of assassination it is finally possible to understand that the involved parties are not really "burdened" with an obligation to capture rather than kill. The context of hostilities and the general applicability of international humanitarian law standards together with human rights standards rather afford them a right to capture in the prevailing circumstances. That is, provided that in the prevailing circumstances there is already an obligation not to resort to lethal force pursuant to the prohibition of assassination, which ultimately finds confirmation in the analysis conducted above, that of apprehension is not an option limiting the gamut of choices available to the warring parties but rather enlarging it, since in the absence of applicability of international humanitarian law they could not even resort to a deprivation of liberty.

Significantly, this does not impose on the warring parties un-realistic duties. Indeed, as the *Interpretive Guidance* suggests, "operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive". Notably, however, in the absence of due consideration to the norm against assassination this may turn into an incentive for targeted killing operations. Thus, it is definitely true that in operational reality forces on the ground cannot be asked to take additional risks. But, after all, the prohibition of assassination has little to do with the context of situational fighting. Therefore, the military unit randomly bumping into a few enemies while engaged in an operation deep into the territory controlled by the adverse party cannot be required to capture them when this would entail an additional risk for their lives and their operations. Nonetheless, the prohibition of assassination operates at a different level: what it forbids is the pre-planned use of lethal force against a pre-selected individual. It therefore entails a killing by design which has little to do with either operational reality on the ground or situational fighting. Thus, avoiding additional risks for operating forces cannot equate be to simply avoid using them and resort to killing by design instead. Without the prohibition of assassination, this would indeed be the case and the least harmful means approach would finally become an incentive for lethal operations where the involved parties accurately avoid circumstances where capture would be a feasible option not to incur into the limitation it sets. Therefore, it is only the joint applicability of the prohibition of assassination that may grant to a least harmful means approach its full significance.

It is significant to this end to note that, when confronted with the possibility that the death of Osama Bin Laden would be qualified as an assassination, U.S. Attorney General Eric Holder stated: "It was not an assassination. If we could have captured him – if we could have taken him alive – that is something that we would

have done"[2296], thus suggesting the conclusion that, if it had not been so, *i.e.* if it had been possible to capture him rather than kill him but they had killed him nonetheless, that would have qualified as an assassination.

[2296] BBC News, *Bin Laden Death 'Not an Assassination'- Eric Holder*, 12 May 2011, available at http://www.bbc.co.uk/news/world-us-canada-13370919. Notably, the exact same characterization was given by Jhon Brennan, U.S. President's Chief Counter-Terrorism Adviser. To this end see Huffington Post, *John Brennan: We Would Have Taken Osama Bin Laden Alive*, 2 May 2011, available at http://www.huffingtonPostcom/2011/05/02/brennan-we-would-have-taken-binladen-alive_n_856541.html.

5. CONCLUSIONS

The present chapter has tackled three of the most contentious issues of the present times in light of existing rules applicable to armed conflicts, including both the laws of armed conflicts and international human rights law.

It has been shown in this framework that the longstanding prohibition of assassination plays in this regard a crucial role, partly confirming existing limitations to the use of lethal force and partly enhancing them.

In particular, it has been shown that, if only for premeditated use of lethal force against targeted individuals, a human rights oriented interpretation of principles and norms of international humanitarian law confirms the existence and the continuously relevant role of the prohibition of assassination as well as it confirms that, among the various possible meanings attributable to such prohibition, the most accurate one is that which relates assassination to killings by design of persons not involved in hostilities when attacked insofar as defenceless or otherwise outside the frame of combat, to be understood in a contextual as well as in a geographical fashion. This comports perfectly with the observation that, in undertaking a human rights law oriented interpretation of a rule pertaining to the realm of the laws of armed conflicts, one should expect to follow suit in the path of a progressively ongoing "humanization of international law"[2297].

This criterion, applied to the ongoing debate on the status of members of organized armed groups is disruptive insofar as it shows that, regardless of status related considerations, humanitarian law as it stands forbids to direct attacks explicitly finalized at the deprivation of life of pre-selected enemy combatants or fighters when they are not directly engaged in hostilities: if not even combatants can be subjected to targeted lethal attacks while not engaged in hostilities directly then, *a fortiori*, this applies to members of organized armed groups. This, of course, does not preclude attacks at lawful military objectives, at persons who are within such objectives, at enemy units not engaged in combat. The rationale behind assassination is indeed that killing an individually selected person is different from attacking a unit, a facility or an infrastructure of the enemy since in this latter scenario the aim of the action is to affect the adversary's war capabilities whereas in the former the final aim is the deprivation of a person's life. It is exactly because of the rationale that in war it is permitted to undertake actions affecting the adversary's capability that it remains permissible, also under the prohibition of assassination, to target and kill a pre-selected person while this is engaged in fighting, as in that case the person at hand forms part of that group activity that warfare is. However, based on this very

[2297] Theodor Meron, *The Humanization of International Law*, Leiden, Boston, 2006.

same rationale, when the person in question is defenseless, is factually, contextually, of geographically disengaged from ongoing hostilities remains entitled to the full extent of protection of his right to life: a killing by design would in this case not be addressed at the enemy capability, it would be deployed against a person, depriving him of his life. As shown above, these considerations hold true also in the determination of the territories and geographic areas to which belligerents must limit their resort to targeted killing.

Finally, as shown at length throughout paragraph 3 of this Chapter, these considerations have a twofold effect with reference to the ongoing debate on least harmful means approaches to warfare. First, they confirm the existence of an obligation to capture rather than kill whenever capture this option is feasible. Moreover they impose a further limitation: when capture is not an option, it does not directly derive that killing is allowed. With reference to premeditated lethal attacks at selected individuals, the prohibition of assassination (as well as a proper human rights oriented approach to the laws of war) only allows to kill a person when such a person is not directly engaged in hostilities. Therefore, if a fighter is shopping in a mall located in an area under the control of governmental forces, those forces will be under an obligation to arrest, rather than kill. If the fighter is directly participating in hostilities in areas of active hostilities, then he may be targeted and killed. When the fighter is in areas under neither governmental nor insurgents' control, i.e. in areas where capturing him is not an option and yet there are no ongoing hostilities, he cannot be lawfully deprived of his life.

CONCLUSIONS

Unthought Known

> *"Il diritto dei conflitti armati è sempre meno orientato verso la tutela di esigenze di carattere militare, preoccupandosi maggiormente della tutela dei diritti umani"*[2298].

The last years have witnessed an exorbitant growth of operations whose final aim is to deprive designated persons of their lives. In brief, to annihilate them.

The present study is motivated by the unease provoked by the thought that States may be allowed to select individuals, hunt them down and kill them, simply by placing names on lists, without the persons involved having any saying on the selection process, which is usually shrouded in secrecy, or any right at all to defend themselves from such a State-sanctioned death.

This kind of practices is undoubtedly prohibited in times of peace by relevant parameters set forth under international human rights law. Also the law of armed conflict knows of a limitation to selective, premeditated killings: the prohibition of assassination.

The present research has gone at great lengths in order to grasp the essence of this prohibition, his historical, social, philosophical and, ultimately, normative rationale. In doing so, it has unveiled a secularly-long process leading to an absolute ban on assassination; it has demonstrated that at the beginning of the XX century this ban was deeply entrenched in customary international law; it has shown that the scope of the ban when first formed was intended to cover, even in times of war, the adoption of methods and means that would not leave to the enemy any chance of survival (Ch. I).

No black letter provision of international humanitarian law, however, establishes this prohibition in such terms. Hence, the perplexity towards its current status and value. It is, after all, exactly this uncertainty that prompted this research, ultimately making it so necessary at this stage. It is moreover exactly because of this uncertainty that the present work has undertaken an in-depth analysis of the rules governing the use of force applicable in times of armed conflict. These rules, as amply shown (Ch. II), are not only those that have been specifically created to govern the conduct of warfare but also those deriving from human rights law, a legal regime that continues to apply in times of armed conflict and interact with those pertaining to the body of international humanitarian law. Whereas this legal regime is

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[2298] Antonio Casssese and Paola Gaeta, *Le sfide attuali del diritto internazionale*, *supra*, p. 56.

unquestionably prominent when it comes to the regulation of lethal force in times of armed conflicts, it has been demonstrated that human rights law, applicable extraterritorially for the purposes of state actions abroad (Ch. II), may cover a decisive role also in this arena. In particular, norms of international human rights law may become either a useful tool of interpretation, where international humanitarian law rules are unclear, or may re-surface and become fully applicable as a default regime when humanitarian law rules are at all absent (Ch. II).

Thus, this research has shown that that rules of international humanitarian law traditionally and logically related to the prohibition of assassination may be interpreted so as to suggest that the scope of such ban is, in line with its historical lineage, to forbid killings by design of persons who are "outside the framework of hostilities" or "in the power of" the attacking party (Ch. III). Most significantly, this understanding is reinforced and augmented by a human rights oriented interpretation of those provisions.

Some argue, however, that events occurred during the XX century have induced a metamorphosis in the field of the laws of war. So much so that, allegedly, the prohibition of assassination would have been rendered wholly outdated and therefore would bear no value in the regulation of today's practices. It is for this reason that the present study has endorsed a section appositely devoted to State practice, showing that throughout the entire XX century the prohibition of assassination has indeed been vivid and in force, regardless of the great changes that the laws of armed conflict have undergone (Ch. IV). This result finds further thorough confirmation in the practice maintained as well as in the *opinio juris* advanced by States in relation to specific sub-sets of rules of international humanitarian law already considered under the previous chapter (IV).

Momentously enough, it is with the turn of the new century that the approach of some States to targeting practices has become more aggressive (Ch. IV)[2299]. Thus, it has been observed, "decapitation strategies, traditionally controversial, seem to be acquiring greater legitimacy"[2300]. However, as correctly underlined in this context, "government officials are obliged to obey the well-considered rule of domestic and international law found in Hague Regulation article 23(b), prohibiting assassinations

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[2299] See accordingly Antonio Cassese, *The Human Dimension of International Law*, *supra*, p. 453: "Things become even more complicated as regards the means to be used […] it would seem that now some states tend to legitimize any kind of resort to violence, including a cast range of means and methods that would even encompass extra-judicial assassination of terrorists".

[2300] Michael N. Schmitt, *Fault Lines in the Law of Attack*, in Michael N. Schmitt, *Essays on Law and War at the Fault Lines*, *supra*, p. 184.

until further notice from both Congress and the international community, on pain of criminal prosecution"[2301].

This study shows that such a notice from the international community has not yet come into being since the only relevant, affirmative practice so far is that of a handful of States, all significantly bearing the same one-sided interests (IV) [2302]. It is however imperative to point out that "international law is faced with the same paradigm shift that occurred with the introduction of aerial warfare in the First World War"[2303]. This observation bears the highest significance insofar as only through this realization may the international community consciously react, either endorsing or rejecting the proposed normative shift.

It is on these basis that the study shifts its focus to the impact that the longstanding prohibition of assassination has on some of the most controversial issues of our time, namely questions of direct participation in hostilities and the status of members organized armed groups, geographical and contextual limitations to the authority to employ premeditated lethal force against preselected persons and, finally, least harmful means approaches to the laws of war (Ch. V).

In this connection, a three-pronged assessment should be conducted. First: does international humanitarian law apply to a certain geographical area? If not, then any deployment of military force would be in and by itself unlawful. If such a deployment is a targeted strike, it is inherently arbitrary and may therefore amount to an assassination insofar as it maintains an objective as well as a subjective nexus with an ongoing armed conflict: in other words, if it is motivated by that conflict and its undertaking forms part of it, albeit being performed far from any cognizable battlefield. Second: an assessment on the status of the target should be conducted. Considerations related to the principle of distinction thus kick in. Any determination in this regard heavily depends upon the interpretation adopted (membership status, continuous combat function or "pure" direct participation in hostilities). Whenever the pre-selected targeted person is a civilian not directly participating in hostilities, then his pre-planned killing would amount to assassination. Thirdly, and finally: the

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2301 Francis A. Boyle, *What's Still Wrong With Political Assassination*, in *New York Times*, 27 January 1989, available at http://www.nytimes.com/1989/02/09/opinion/l-what-s-still-wrong-with-political-assassination-law-of-the-land-899289.html.

2302 Jum Serpless, *Targeted Killing in Modern Warfare*, *supra*, p. 79: "Under the classical doctrine of customary international law, for a norm to be binding upon a state, there must exist extensive and uniform state practice carried out so as to show a general recognition that a rule of law or legal obligation is involved.' 6 Such extensive and uniform state practice is nonexistent. Although there exists an increasing trend in the use of targeted killing programs by states, a reasonable observer would certainly conclude that practice is by no means extensive and uniform".

2303 Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan*, *The Legal and Socio-political Aspects*, *supra*, p. 182.

means and methods of warfare used must be in compliance with the rules of international law.

The most classical, widely accepted case of assassination is that of lethal use of force deployed in the context of an ongoing armed conflict against a legitimate military target performed through treacherous means. As shown *antes*, however, treachery is not the only relevant factor to be considered.

In particular, this study has shown that throughout an intra-systemic interpretation of the relevant rules governing the use of force under the law of hostilities and the law enforcement paradigms, the authority to conduct premeditated killings of pre-selected persons is dramatically reduced to contexts of situational fighting.

Remarkably, the analysis unveils an "unthought known": for direct participation in hostilities as well as for geographic restraints and for least harmful means theories, a human rights oriented interpretation of the relevant rules of international humanitarian law ultimately leads to a confirmation of the existence of the prohibition of assassination understood as a prohibition to resort to premeditated, intentional lethal force against pre-selected persons who are not taking direct part in hostilities when deprived of their lives. As a consequence, the traditional prohibition of assassination finds support and at the same time augments this understanding.

Applying a human rights oriented interpretation to these notions entails holding in the maximum regard the dignity inherent to any human being also in times of armed conflict, recognizing that a combatant (or a fighter) does not cease to be first and foremost a human being and does not cease by the determination of his status to be entitled to his supreme, fundamental right to life. Therefore, this implies that no person may be targeted for death when not being in areas of active hostilities, while being defenseless or occupied with activities which have no bearing for the ongoing conflict or no connection with it at all.

The same rationale, then, imposes to construe the faculty to use lethal force under international humanitarian law as restricted by a least harmful means approach. Namely, when factual circumstances permit the apprehension of a person, even of a legitimate military target, then such person should be captured, rather than killed. Even in this case the norm against assassination plays a fundamental role, insofar as it directly stems from the consideration that methods and means of warfare leaving the enemy no chances of survival are simply not allowed, even in times of armed conflict, at least when deployed against subjects that are not directly involved in hostile activities when deliberately killed.

Being this the founding reason for the prohibition of assassination, a deliberate, premeditated killing of a person who is not posing a direct threat to the

targeting party should in and by itself be outlawed. After all, the least harmful means doctrine and the prohibition of assassination stand upon the very same assumption: that even when a person assumes a general combatant function he should not be deprived of his life by design while he is not actually performing that function. This, on the one hand, casts a further limitation on the possibility to resort to lethal force, even when the targeted person is located within a geographical zone where it would be otherwise permissible to kill him: it in fact imposes an obligation to capture him whenever possible. On the other hand, it entails that when there is no possibility to capture the target because, for instance, he is not in a portion of territory under the control of the engaging party, this does not make it possible to kill him, if the target is not directly involved in functions pertaining to the ongoing hostilities.

Contrary to the arguments exposed above, some authors have suggested that in the case of U.S. targeted killing policy in Yemen, if it were accepted that international humanitarian law applies to such operations, the legality of the attack would mainly depend on the status of the targeted individual. If he fell within the category of civilians directly participating in hostilities, provided that the targeted killing is not conducted in breach of international humanitarian rules governing means and methods of warfare, then the operation would arguably be lawful[2304].

However, it is exactly those methods and means that impose a further stringent limitation on the permissibility of targeted killings. And they do so, as seen, because both the possibility to resort to less harmful means and the geographic location of the target would bring a certain targeted killing operation within the realm of assassination, even in the remote possibility that the targeted person may in the abstract be qualified as a civilian directly participating in hostilities while being so far removed from any cognizable battlefield.

An integrative approach to international human rights law and international humanitarian law should lead to appraise as their shared underlying rationales the sanctity of human dignity, the protection of physical integrity and the limitation to human suffering[2305]. As a consequence, targeted killings should be regarded as a permissible method of warfare in combat situations, absent any additional violation

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2304 Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra*, p. 257. Notably, the author actually excludes the possibility that international humanitarian law is applicable in this context and therefore suggests: "The answer may lie in determining the inapplicability of IHL to small scale operations, that cannot readily be claimed to be part of a larger and definable armed conflict, whilst simultaneously accepting that in extreme circumstances international human rights law might allow for resort to lethal force".

2305 Orna Ben-Naftali and Keren R. Michaeli, *We Must Not Make a Scarecrow of the Law, A Legal Analysis of the Israeli Policy of Targeted Killing*, in *Cornell Journal of International Law*, 2003, Ithaca (U.S.A), p. 287.

of targeting rules[2306]. The ultimate consequence of this approach is that, outside such context, combatants and other fighters may only be legitimately targeted for death when they are posing an imminent threat to life and there is no other way to avoid such threat or else other means that may reach the same result without however causing their death[2307], in line with the absolute necessity test governing the use of force under human rights law.

It has indeed been observed in this regard that the "personalization and individualization of military aims could cause the collapse of the conventional view of war and the justification for killing in this context"[2308].

Significantly, this does not equate to granting combatants the same immunity from attacks that is granted to civilians. "Targeting members of the opposing forces is an integral part of waging war […] Combatants are, of course, subject to being targeted as legitimate military objectives"[2309]. Whereas this assertion is undebated and unobjectionable, it conflates targeted attacks and intentional killing. In general terms, when speaking of the laws of armed conflicts, such conflation is more than correct. It is not, however, when speaking about selective lethal targeting, because, as we have seen above[2310], in this case targeting entails, besides intentionality, deliberation and premeditation. In a targeted killing the *mens rea* must embrace these three elements and project all of them onto the deprivation of a pre-selected person's life. Thus, it is not contested here that a legitimate military target is a person that may lawfully be subjected to attack. But the permissibility of targeting somebody for attack does not equate to the permissibility of targeting him for death, simply because attack does not equate with deadly attack.

Whereas targeting entails aiming at a military objective, targeted killing as currently understood relates to the final outcome of targeting practices. In a way, in this kind of practice, targeting is not restrained to the aiming/selection phase, it also refers to the deadly outcome of the attack, which is the real target of the whole operation. Arguably, such a deadly outcome is something additional to the targeting/selection phase, as it does not pertain to targeting itself but also entails a specific method of targeting, a method which leaves to those attacked no possibility to survive. It is therefore submitted here that whereas it may be permissible to target somebody for an attack, conducting such an attack with the view of leaving the target's no chances of survival infringes upon the prohibition of assassination

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2306 *Ibidem*.

2307 *Ibidem*, p. 290.

2308 Mordechai Kremnitzer, *Praventives Toten* (*Preventive Killings)*, *supra*, p. 205.

2309 Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, *supra*, p. 139.

2310 See *supra*, Ch. I, para. 3.

understood as a restriction to legitimate means and methods of warfare when done outside situational fighting.

Some authors have spoken about the "progressive humanization of IHL"[2311], an expression also used by the ICTY: "the absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called 'humanization' of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century […] in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; *they were primarily designed to benefit individuals* qua *human beings* […] This trend marks the translation into legal norms of the 'categorical imperative' formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it"[2312].

It is submitted here that, allowing for practices of targeted killing to be performed outside the recalled restrictions (*i.e.* outside zones of active hostilities, at the detriment of people not taking part in hostilities when targeted or in violation of the duty to capture rather than kill whenever possible) would run-counter this understanding and the underlying trend towards a humanization of international humanitarian law. All to the contrary, it would provide military expediency with precedence over humanitarian considerations, bringing back into the picture the long-abandoned idea of the superiority of State interests over individual rights. In particular, assassination is a technique inherently characterized by an understanding of human life as a means to an end. This very conception runs counter the notion of human dignity[2313], inherent to every human being and not forfeited even by the decision to take part to armed confrontations and hostilities. That of human dignity is a basic and foundational value to uphold, in the same manner as well as in the same terms, in both peace and war times. This is the reason why such value remains common to both international humanitarian law[2314] and international human rights law. Returning to means and methods of warfare that leave to the enemy no chances of survival, and allowing such techniques a place in nowadays laws of armed conflict even when the persons targeted are attending functions that have nothing to do with

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2311 Robert Kolb, *The Main Epochs of Modern IHL since 1864*, in Kjetil M. Larsen, Camilla G. Cooper and Gro Nystuen, *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge, 2012, p. 52.

2312 ICTY, *Prosecutor v. Kupreskic*, *supra*, para. 518 (emphasis added).

2313 Antonio Cassese, *I Diritti Umani Oggi*, Roma, 2005, pp. 54-59.

2314 James M. Spaight, *War Rights on Land*, *supra*, pp. 74-75: "The military commander, intent on victory, seeks to employ such instruments as will best achieve the end of war—the disabling of the greatest possible number of the enemy. Death, agony, mutilation these he would avoid if he could: *they are not ends in themselves*" (emphasis added).

the ongoing confrontations leads to an absolute de-humanization of the conduct of hostilities and, with it, of the law governing armed conflicts, representing a setback of decades, if not of centuries. “Practices of assassination relapse into barbarism”, is an expression recalled many times within this writing. It dates back to the XIX century. Are we really ready to so easily admit that, by 2016, while supposedly walking a path towards the “humanization of international law”, we are indeed more barbaric than we were two centuries ago? This author, for one, is not.

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* This bibliography does not include all the resources investigated to produce the current document or support the author's thesis, however it does include all the resources cited in the final version of the document.

** For the ease of the reader all the resources that were available online during the years 2012 – 2016 have been cited with the dedicated link under the caption [available at www.].

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ACKNOWLEDGMENTS

My deepest gratitude goes to my tutor, Professor Irini Papanicolopulu, who augmented my work from its very first to its very last phases: I thank her for her immense commitment and availability at any stage of this work, for her strict but fair and valuable criticism, for her comments and corrections, for her inspiring insights and ideas. All in all, I thank her for having contributed greatly to the final outcome of this research.

My heartfelts thanks to my family, especially mum, dad, Giuly, Mario, granny Lucia, Giorgio and Aldo, Marina and Giuliano, who have supported me and walked by my side at any pace of the path leading to the finalization of this study, as well as to my dearest friends, for standing for years countless changes of plans, bitter moods and last-minutes stood-ups on my part at any moment of anxiety, and for sharing with me every moment of joy.

I would also like to express my gratefulness to the entire department of International Law of the University of Milano Bicocca, in particular to Professors Tullio Scovazzi, Maurizio Arcari, Matteo Fornari, Gabriella Citroni, to research fellow Alessandro Bufalini and to my dear colleague Elena Carpanelli, for the confrontations entertained with them during these years and for their valuable suggestions.

At last, I would like to sincerely thank the Fondazione Fratelli Confalonieri, not only for its economic support to the present work but also and most notably for having believed in the soundness of this project since its very beginning.